Bar Council 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?

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Independent Review of Administrative Law Call for Evidence.[1] The following Specialist Bar Associations have contributed to and endorsed the response:

- Bar Association for Commerce, Finance & Industry
- Bar European Group
- Chancery Bar Association
- Criminal Bar Association
- Family Law Bar Association
- Professional Negligence Bar Association
- Revenue Bar Association

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

[1] Call for Evidence

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talent from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Summary

4. The subject matter of the Terms of Reference for the Independent Review of Administrative Law and of the subsequent Call for Evidence is of the highest constitutional and practical importance. The ability of the court to examine the legality of executive decision-making is a cornerstone of democracy and the rule of law. Constitutional arrangements that enable citizens to challenge the legality of executive action affecting them are a necessity in any democracy.

- This response seeks to address the rhetoric around judicial review by providing an accurate reflection of the position based on Government data.
- The number of judicial reviews in all areas has been falling over recent years – including immigration judicial reviews in the Upper Tribunal.
- Ineffective decision-making in the first instance all too often results in litigation which is heard in the tribunals. Decision-making must be improved.
- There is no basis for changing the rules on standing or justiciability.
- We support the recommendations put forward in The Bingham Centre report *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* regarding disclosure and the duty of candour in judicial review proceedings, particularly regarding the change to the N462 form.

Introduction

5. The Bar Council regards it as imperative to make an obvious observation at the beginning of this response. The Call for Evidence lists in Section 1 a number of aspects of judicial review and asks central and local government respondents about whether any of them *"seriously impede the proper or effective discharge"* of their functions. The list includes, at (a) to (f), the classic grounds for judicial review such as mistake of law, procedural impropriety, Wednesbury unreasonableness, and taking into account an irrelevant consideration.

6. Any properly developed system of public law has to afford citizens a remedy against executive action which is based on an error of law; or is unreasonable; or procedurally flawed; or based on an irrelevant consideration. It is accordingly a given that the ability to challenge on this type of basis remains in play. It is a constitutional necessity.

7. In any event, the Bar Council rejects the apparent suggestion that there is a conflict between judicial review and "*proper and effective discharge of* [government] *functions*".[2] On the contrary, judicial review is a critical mechanism for securing the "*proper and effective discharge of* [government] *functions*". Review on procedural/fairness grounds ensures that decisions with important effects on people's lives are taken only after they have been properly heard: decisions not based on fair procedures will be worse decisions and will command less public acceptance. Review on grounds of actual or apparent bias is a safeguard against favouritism and corruption, and helps maintain public confidence that decisions with major financial impacts are taken without bias. Review on rationality grounds ensures that decision makers take their decisions on the basis of, and supported by, relevant evidence: that leads to better decision-making. Review on vires grounds ensures that decision-makers respect the limits on their powers placed by Parliament, and helps protect our democracy – a safeguard of particular importance in the area of statutory instruments, where huge volumes of legislation, making profoundly important policy changes, go virtually unscrutinised by Parliament. And review on human rights grounds helps protect those whose fundamental interests may, for various reasons, not have been properly considered in the decision-making process, while ultimately allowing Parliament the final say (a point which is, again, of particular importance in relation to virtually unscrutinised statutory instruments). In all these respects, judicial review – and wide access to judicial review – assists in ensuring "*effective*" and "*proper*" discharge of government functions (reading "*proper*" here – as it should be read – as including "*accountable*" and "*democratic*").[3]

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[2] See further Sunkin, Platt and Calvo, *The Positive Effect of Judicial Review on the Quality of Local Government* J.R. 2010, 15(4), 337-342.

[3] The Bar Council is grateful to Charlotte Pope-Williams who reviewed this response on behalf of the Bar Association for Commerce, Finance & Industry ('BACFI'). BACFI highlight the importance and utility of judicial review in the context of professional discipline, drawing attention to examples in corporate finance, solicitors' regulation, and the regulation of pharmacists. They also stress the critical importance of judicial review as an avenue of redress against certain public bodies who benefit from statutory immunity from civil suit. For example, pursuant to paragraph 33 of Schedule 1ZB and paragraph 25(1) of Schedule 1ZA of the Financial Services and Markets Act 2000 the Prudential

8. Paragraph 2 of the Terms of Reference asks whether the legal principle of non-justiciability requires clarification. This question is no doubt related to the view expressed in political circles that the judges have been guilty of judicial over-reach in the exercise of this jurisdiction; that is to say that they have been guilty of trespassing into policy matters which should be the sole preserve of politicians. The most high profile and recent example is the second *Miller* case, in which the prorogation of parliament was held to be unlawful; and which has of course been the subject of criticism both by politicians and in the media.

9. The Bar Council regards this criticism as misplaced. *Miller 2* was a highly unusual case. The Bar Council does not consider that the controversy the decision created should have any implications for the more routine, but constitutionally vital, exercise of judicial review with which the bulk of this response is concerned. Moreover, and fundamentally, examination of the judgment shows that the members of a unanimous Supreme Court were acutely aware that they were exercising a judicial, not political role and the judgment is a compelling example of a piece of close legal reasoning. Precise demarcation of the limits of the role of the court is impossible in our unwritten constitution; the exercise of the jurisdiction in the particular circumstances of the prorogation does not evidence judicial over-reach.

10. Neither the Terms of Reference nor the Call for Evidence contain any concrete proposals for reform. However, it is possible to discern two separate areas of interest. First, there is a sense that the courts may have taken a wrong turning both conceptually and practically over (at least) the last forty years (addressed at paragraphs 13 to 20 below). Second, there are a variety of issues of a more limited but important focus, such as the rules on standing (paragraphs 44 to 46 below); costs (paragraphs 50 to 52 below); and the duty of candour (paragraphs 61 to 64 below).

Regulation Authority and the Financial Conduct Authority are not *"liable in damages for anything done or omitted in the discharge, or purported discharge"* of their functions where they are acting in good faith. In *R (C) v the FSA* [2012] EWHC 1417 (Admin) Silber J acknowledged that penalties imposed by such authorities may have "*a profound effect on a person's ability to obtain employment in the financial services industry"*. Further, improper use of these regulators' powers could impact adversely on the very statutory aims that they were created to protect e.g. securing protection for consumers or ensuring financial stability. Absent the ability to bring a civil claim, judicial review is often the only means by which a person can challenge the exercise of such powers. By way of further example, in *R (Ford) v FSA* [2011] EWHC 2583 (Admin) the Claimant succeeded where the Court held that the FSA (as was) could not rely on privileged communications in regulatory proceedings against him.

11. The explanation of the first area of interest is short. Footnote E to the Terms of Reference contains the observation that *"Historically there was a distinction between the scope of a power….and the manner of exercise of a power within the permitted scope."* The footnote goes on to say that over the course of the last forty years (at least) the distinction has arguably been blurred so that now "*the grounds for challenge go from lack of legality at one end ('scope') to all the conventional [JR] grounds and proportionality at the other ('exercise')"*, with the result that any unlawful exercise of the power is considered a nullity. It asks whether this is the right approach.

12. The Bar Council, as explained below, rejects the perspective that the courts have taken a wrong turning and undesirably blurred the distinction between scope and exercise. In academic writing, and in judgments over the years, it is possible to discern different theories about the basis for the court providing a remedy against executive action based on, say, error of law or Wednesbury unreasonableness. However, the need to provide a remedy remains central. The jurisdictional basis for the court's role is of little practical importance save in areas such as the construction and effectiveness of ouster clauses. These issues are important; but they are far removed from the day to day operation of judicial review which is said to create burdens on central and local administration. The second area of interest is more closely concerned with this day to day operation.

The distinction between "*scope*" and "*exercise*"

13. This response now turns to the alleged blurring of the distinction between "*scope*" and "*exercise*".

14. The Bar Council does not agree with Footnote E if it is intended to suggest that there was a time, forty or more years ago, when the basis for, and consequences of, the courts' control of executive action was uncomplicated and limited to actions clearly outside the scope of the relevant power as the layman would understand that concept. Examination both of the caselaw and legal text books such as *De Smith's Judicial Review 8th Edition* (2018) demonstrates this.

15. The potential for misunderstanding arises from the way in which the courts have described the basis on which they were intervening. Take the classic case of *Associated Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. On one view, the statement by Lord Greene of the principles on which the courts would interfere is an

assertion of a power to control the manner of the exercise of the power of the Corporation to impose the relevant condition. However, the explanation of the court's power is couched in terms of the limits of the Corporation's power. As Lord Greene put it, *"When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. The exercise of the discretion must be a real exercise of the discretion…..the authority must disregard those irrelevant collateral matters."* This statement can be viewed as a statement that the authority would act outside the scope of its powers if it imposed a condition that was unreasonable in the relevant sense.

16. Returning to the list of judicial review grounds in Section One of the Call for Evidence, there is no doubt that the classic grounds have existed for a very substantial period of time. The historical evolution of the public law regime which has contained them is not capable of description in simple terms of a dichotomy between the "*scope*" and the "*exercise*" of the relevant power.

17. Footnote E goes on to deal with a possible consequence of the alleged blurring, i.e. that any illegality in the exercise of the power creates a nullity. Once again, the position is considerably more nuanced than can be catered for within the parameters of a short footnote. It is of course true that distinctions between decisions that were void, decisions that were a nullity, and decisions that were voidable have been made. However, all these distinctions carried their own very sizeable difficulties. *De Smith* 4-058 to 4-061 (under the heading *"The position in the past"*) opens with the statement that *"Behind the simple dichotomy of void acts ……and voidable acts lurk terminological and conceptual problems of excruciating complexity,"* providing references to academic writings at dates between 1931 and 1968. A simple return to the position as it was at the time of these commentaries would be highly undesirable.

18. *De Smith* at 4-062 to 4–065 describes "*The situation today"*. This starts with the proposition that *"The Courts have become increasingly impatient with the distinction"* between void and voidable decisions. The passage refers to issues such as the presumption of validity; the time-limits on judicial review; and the ability of the court to refuse relief in the exercise of its discretion. It is obvious that all these matters need to be considered as part of the description of the present position. It is far too simple to comment that any judicially reviewable error creates a nullity.

19. The lessons the Bar Council draws from this are two-fold. First, no case is presented within either the Terms of Reference or the Call for Evidence on the practical need to reverse the alleged wrong turning. Equally importantly, there is no indication of an approach that might be thought suitable for the future. There is no analysis beyond that contained in a footnote. There is no analysis of the matters referred to in *De Smith's* description of the present position.

20. Second, and importantly, any move towards restoring the void/voidable distinction, or otherwise providing for different consequences of a judicially reviewable error, would be a major law reform project. It presumably involves the statutory reversal of *Anisminic*.[4] It would be wrong to embark on changes to the law in such a complex area without a full analysis of the problem said to exist; consultation on draft solutions (including a draft bill); detailed examination of the "knock-on" consequences for other areas of law; and an analysis of the position in other common law jurisdictions. The present IRAL exercise is an inadequate basis for taking Footnote E further.

Wider implications of changes to the grounds for and consequences of judicial review

21. The point made above about the Call for Evidence embracing a potential major law reform project is reinforced by the considerations immediately below.

22. The substantive law governing judicial review (*e.g.* grounds, relief) is not limited to judicial review.[5] For example, there are various statutory schemes which provide a citizen with a right of appeal "*on a point of law*" against a public law decision of a public body. The best known is s.204, Housing Act 1996, which provides for a homeless person to appeal a decision of the local authority as to what (if any) duty is owed under the homelessness legislation. The appeal is to the county court "*on a point of law*".[6] It has been held that this means that appeals are limited to the grounds which could be raised by way of judicial review: *Runa Begum v Tower Hamlets LBC* [2003]

[4] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147. Any such step would have its own constitutional implications.

[5] The Bar Council is grateful to Justin Bates of Landmark Chambers for his work on paragraphs 22 and 23 of this response.

[6] In this context, BACFI also draw attention to the fact that litigants that are the subject of regulatory action by the Bank of England, the Prudential Regulatory Authority and the Financial Conduct Authority can appeal on a point of law to the Upper Tribunal (Tax and Chancery Chamber), an important check on those bodies' exercise of their statutory powers.

UKHL 5. A change to the grounds of judicial review would, therefore, appear to also change the rights of the homeless to challenge decisions in the county court. Statutes such as the Housing Act 1996 will have been enacted on the basis that judicial review grounds encompassed within an appeal "*on a point of law*" covered the range of judicial review grounds with which the Call for Evidence is concerned.

23. Further:-

a. A significant number of judicial review claims involve one public authority challenging the decision of another public authority. This is particularly so in social welfare law. For example:

i. duties usually fall on the local authority for the area where the person is "*ordinarily resident*" (*e.g.* Care Act 2020). Two local authorities can legitimately dispute which of them is responsible for a particular individual where that individual moves between their areas and, often, the only way to resolve that dispute is by judicial review;

ii. some legislative schemes provide for the decision of one local authority to bind another authority (*e.g.* homelessness duties under the Housing Act 1996, where authority A determines what duty is owed, but that the duty should be discharged by authority B, because B is the authority with whom the applicant has the "*local connection*"). If the second authority is dissatisfied with the decision of the first authority as to what duty is owed, then its only remedy is to seek to quash the decision of the first authority by judicial review (*e.g. R (Ealing LBC) v RBKC* [2017] EWHC 24 (Admin)).

b. Not all public law decisions taken by a local authority are capable of being withdrawn or remade, even where the authority considers that it has made an error of law in the original decision. In such cases, the only remedy is for the authority to seek judicial review against itself (in practice, the Leader of the Council would usually bring the claim, see *e.g. R v Bassetlaw DC, ex p. Oxby* [1998] PCLR 283 (CA)).

c. Finally, where a public authority brings residential possession proceedings against an occupier (whether a tenant, licensee or even someone with no contractual or statutory security of tenure), that person is entitled as of right to defend the claim for possession on the basis of any domestic public law ground: *Lambeth LBC v Kay* [2006] UKHL 10; *Wandsworth LBC v. Winder* [1985] A.C. 461. This is of marginal importance for most tenants with statutory security of tenure but is of central importance for those who have no security of tenure. One striking example is canal boat occupiers. A canal boat occupier has no security of tenure and cannot ordinarily resist an attempt by the Canal and River Trust to remove the boat from the canal; the only kinds of defence that are likely to succeed are those based on public law grounds (see, by analogy, *Jones v Canal & River Trust* [2017] EWCA Civ 135).[7]

Codification

24. Question 3 of the Call for Evidence asks whether there is a case for statutory intervention in the judicial review process; and whether a statute would add certainty and clarity to judicial review.

25. The Bar Council draws the conclusion from the discussion above that any attempt to put the thinking behind Footnote E into effect would constitute (and necessitate) a major law reform project. The risks of unintended consequences are very great. The practicality of any proposed reform needs to be considered on the basis of full availability of the detail of what is being proposed. At the moment there is no proposal; and it is impossible to say anything sensible about the nature of unintended consequences save that they would inevitably follow.

26. The same point can be made about the use of statute to expand or contract the individual grounds of judicial review. The consequences of the inclusion or omission of any particular ground would need to be identified and thought through; and it would be right to be extremely sceptical about the proposition that a statute could be drafted in terms that would produce any greater certainty than the present position.

[7] On a related issue, the Revenue Bar Association observe that there should be no undue concern that this principle can be used to circumvent the normal avenue for challenge (i.e judicial review) and its merits hurdle, where the statutory scheme makes clear that the only mechanism of challenge to a decision is by JR; see *Beadle v HMRC* [2020] EWCA Civ 562, at [44]-[48]. The exclusivity principle has also recently upheld in a tax context in *Knibbs and others v HMRC* [2019] EWCA 1719.

27. This perspective is borne out by the Australian experience. The broad position is as follows:[8]

28. In Australia, there is a blend of codified and largely common law systems. Even where there is a statutory regime, it largely picks up and replicates common law principles.

29. At the Federal level, there are three pathways for judicial review of commonwealth actions. First, constitutional protected judicial review in the original jurisdiction of the High Court under 75(v) of the Constitution. Second, a statutory vesting of this jurisdiction in the Federal Courts under s36B of the Judiciary Act 1903 (Cth); and, third, of most immediate relevance to codification (as opposed to the constitutional importance of judicial review) a purely statutory regime in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("*ADJR*" Act).

30. Section 5 of the ADJR Act provides:-

> **5 Applications for review of decisions**
>
> (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:
>
> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
>
> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
>
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
>
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
>
> (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
>
> (g) that the decision was induced or affected by fraud;
>
> (h) that there was no evidence or other material to justify the making of the decision;
>
> (j) that the decision was otherwise contrary to law.

[8] The Bar Council is indebted to Dr Joe McIntyre for the provision of this material; and has also drawn on the description of the Australian position in De Smith at 4 – 075 to 4 – 081

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

31. It will be seen that these replicate the common law. Further, s5(1)(j) (*"the decision was otherwise contrary to law"*) provides a continuing ability to reflect common law developments over time. The ADJR Act has not attempted to provide a code that provides a permanent, comprehensive definition of judicial review grounds.

32. *De Smith* at 4 – 076 draws attention to ss5(1)(c) and (d) and comments *"These latter grounds are the closest that ADJR comes to the terminology of 'jurisdictional error', and the High Court used them to outflank a legislative attempt to withdraw the Wednesbury unreasonableness ground from the Federal Court's migration jurisdiction"* citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 C.L.R. 323. It adds that "*ADJR's 'error of law' ground draws no distinction between jurisdictional and non-jurisdictional errors.*"

33. Any belief that conceptual complexity has been removed in Australia will be displaced by reading *Yusuf*. This is unsurprising given the fact that the statutory code

requires the same exercise as the common law in deciding whether the decision in question was beyond the power of the decision-maker or not authorised by the statute.

34. Accordingly, it is considered that the Australian example provides no support for a statutory intervention concerned with the distinction between the scope and exercise of a power or for an attempt to produce precise definition of the grounds on which judicial review will lie. An attempt at codification on the Australian model would simply leave us in the present position.

Cases and outcomes

35. To place the discussion of the discrete issues raised in the Terms of Reference and the Call for Evidence in context, this paper first considers statistics on the use of judicial review over the past two decades. These statistics undoubtedly contribute to some degree to an understanding of the nature, impact and value of judicial review, but their utility should not be overstated. The subject matter, complexity and costs involved in judicial review claims vary enormously, as does the potential impact on the public body whose decision is being challenged. It is not possible in the time available, and with the resources available, to descend into the sort of granular detail that may prove more illuminating for the Panel. In this regard, the Bar Council commends to the Panel two very detailed pieces of research: Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project, 2009)[9] and Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, 2015).[10]

36. Figures from the Ministry of Justice for the years 2000 to 2019[11] show that the number of cases lodged in the Administrative Court has declined quite markedly in recent years. The years 2000 to 2005 saw annual applications ranging from 4,200 to 5,938, with no obvious year-on-year growth. From 2006 to 2013 there was a steady increase in the number of cases lodged from 6,421 to 15,592. Footnotes to Table 2.1

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[9] https://publiclawproject.org.uk/wp-content/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf.

[10] https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Value-and-Effects-of-Judicial-Review.pdf

[11] See Civil Justice Statistics Quarterly: January to March 2020 and Civil Justice Statistics Quarterly: January to March 2020 Tables at https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020. The Bar Council is grateful to the Public Law Project for its assistance in identifying the relevant statistics.

within the MoJ tables explain that, from 17 October 2011, Judicial Review Human Rights and Asylum Fresh Claim applications were transferred to the Upper Tribunal ('UT'), and from November 2013 the UT took over assessing applications for the vast majority of Immigration and Asylum Judicial Reviews. This shift was reflected in a significant drop in claims lodged in the Administrative Court from 2014, with 4,065 claims lodged that year. In 2015, 2016 and 2017, the number of claims lodged in the Administrative Court remained broadly steady at 4,681, 4,301, and 4,196 respectively. A further drop in the number of claims lodged was seen in 2018 (3,595) and 2019 (3,384).

37. In terms of outcomes in the Administrative Court, the following broad points can be noted from the statistics and the broader research:

a. First, for obvious reasons, the MoJ figures do not capture those cases which are compromised before proceedings are issued. Bondy and Sunkin estimate that over 60% of claims are resolved at the pre-action stage whether as a result of settling or because they are abandoned.[12] This aspect of judicial review practice is easily overlooked in a big-picture analysis, but is critical. The system of judicial review provides a framework within which a significant proportion of disputes can be resolved without litigation (see *Settlement*, below at paragraphs 65 to 70).

b. Second, a significant number of claims are resolved between the commencement of proceedings and the permission stage. In 2000, 85% of cases reached the permission stage.[13] There was some annual fluctuation, but a broadly downward trend in that figure is seen to 2013, when only 54% of cases lodged reached the permission stage. Between 2014 and 2019 the percentage was broadly stable, at between 73% and 79%. MoJ figures do not record the reasons for claims not reaching the permission stage, but it is reasonable to infer that in the vast majority of cases it is because the dispute has been resolved, whether as a result of the Claimant obtaining a remedy or being convinced of the weakness of their case. This is consistent with Bondy and Sunkin's analysis. They state: "*defendants may fail to pay sufficient attention to meritorious claims* [at the pre-action stage] *or are unable to respond in time to avert proceedings.*

[12] *The Dynamics of Judicial Review Litigation*, section 2.6, 3.1.
[13] Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2

Consequently, proceedings are often commenced while dialogue continues and are then settled shortly afterwards. In other matters, commencement itself acts as a catalyst for dialogue and early settlement. Either way, in our sample, 34 per cent of issued cases ended before reaching the permission stage."[14]

c. Third, a significant number of cases are held to be arguable at the paper permission stage. The proportion of cases in which permission was granted on the papers ranged from a high of 29% of all cases lodged in 2000 to lows of 8% in 2011 and 9% in 2012 and 2013.[15] Between 2014 (following the transfer of the majority of immigration cases to the UT) and 2019 this remained in the range 13% to 17%. Looked at as a proportion of cases that proceeded to the paper permission stage, these figures equate to a grant rate of between 13% and 34%, with the grant rate between 2014 and 2019 ranging between 17% and 23%.[16] It is also of note that a number of cases that reach the permission stage are recorded as "*Withdrawn or outcome not known*." This could include cases which are withdrawn at the hearing.

d. Fourth, of those cases in which permission is refused on the papers, a significant proportion are not renewed to an oral hearing. The proportion of cases in which permission was refused at the paper stage that proceeded to the oral renewal stage varied from a high of 46% in 2001 to a low of 17% in 2013 and 2015, with the proportion between 2014 and 2019 ranging from 17% to 24%.[17] This figure will have been impacted by the introduction of the "*totally without merit*" mechanism (as to which, see paragraph 42(b) below).[18]

e. Fifth, the grant rate at the oral permission stage is high. Of those cases in which permission was reconsidered at an oral hearing, permission was granted in between 16% of cases (2007 and 2008) and 32% of cases

[14] *The Dynamics of Judicial Review Litigation*, section 3.1.
[15] Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2
[16] Calculated by reference to the figures in Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2
[17] Calculated by reference to the figures in Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2
[18] MoJ figures confirm that in 2013, 2014, 2015, 2016, 2017, 2018 and 2019, the number of cases classed as totally without merit at the paper stage (so precluding an oral renewal) were, respectively, 2,406 (15%), 706 (17%), 744 (16%), 632 (15%), 568 (14%), 346 (10%), and 306 (9%).

(2015).[19] Between 2014 and 2019 the percentage remained relatively constant, at between 28% and 32%.

f. Sixth, only a very small proportion of the claims issued proceeded to a substantive final hearing. The proportion was 12% in 2000 and 7% in 2001 but, after that point, did not exceed 4%, with the figure as low as 1% or 2% in some years.[20] It must be stressed, as is hopefully self-evident, that this figure does not reflect a lack of merit in the vast majority of claims brought, but a combination of meritorious claims settling, weak claims being appropriately caught by the filter stages, and arguable cases which, for whatever reason, are incapable of settlement being given the scrutiny they require.[21]

g. Seventh, of those cases which proceeded to a substantive hearing, the success rate for claimants ranged from a low of 31% in 2013 to a high of 45% in 2001. The percentage figure between 2014 and 2019 ranged from 39% to 44%.[22]

38. MoJ figures[23] show that, after the Immigration and Asylum Chamber of the UT became the designated venue for the vast majority of immigration judicial reviews in late 2013, a high number of applications were lodged with the UT initially, but that figure has fallen very significantly.

39. Statistics for the UT are recorded by financial year rather than calendar year, as is the case for the Administrative Court, so direct comparison is not possible without recalculation. However, the broad trends in the UT are readily apparent from the

[19] Calculated by reference to the figures in Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2

[20] Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2

[21] On this issue, see further Tom Hickman and Maurice Sunkin: *Success in Judicial Review: The Current Position*, UK Constitutional Law Association, March 2015, https://ukconstitutionallaw.org/2015/03/20/tom-hickman-and-maurice-sunkin-success-in-judicial-review-the-current-position/

[22] Calculated by reference to the figures in Civil Justice Statistics Quarterly: January to March 2020 Tables, Table 2.2

[23] See Tribunal Statistics Quarterly: January to March 2020 and Main Tables (January to March 2020) at https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2020.

headline figures. The number of judicial review cases received in each financial year from 2013/14 to 2019/20 was as follows:[24]

- 2013/14 (Q3 and Q4 only): 7,841
- 2014/15: 15,179
- 2015/16: 15,727
- 2016/17: 13,372
- 2017/18: 10,011
- 2018/19: 7,850
- 2019/20: 5,679

40. As to outcomes, the headline figures were as follows:[25]

- 2013/14 (Q3 and Q4 only): 7% of the 2,924 claims considered at the paper permission stage were granted permission (with 693, 24%, categorised as totally without merit), 16% of the 310 claims considered on oral renewal were granted permission. No claims are recorded as having reached a substantive hearing.

- 2014/15: 7% of the 8,297 claims considered at the paper permission stage were granted permission (with 1,920, 23%, categorised as totally without merit), 19% of the 1,695 claims considered on oral renewal were granted permission. Of the 91 claims that proceeded to a substantive hearing, 29% were allowed and 71% dismissed.

- 2015/16: 5% of the 14,575 claims considered at the paper permission stage were granted permission (with 6,318, 43%, categorised as totally without merit), 23% of the 2,057 claims considered on oral renewal were granted permission. Of the 160 claims that proceeded to a substantive hearing, 19% were allowed and 81% dismissed.

- 2016/17: 8% of the 10,191 claims considered at the paper permission stage were granted permission (with 2,214, 22%, categorised as totally without

[24] Tribunal Statistics Quarterly: January to March 2020, Main Tables (January to March 2020), Table UIA_1

[25] Tribunal Statistics Quarterly: January to March 2020, Main Tables (January to March 2020), Table UIA_1 (or calculated by reference to the figures therein)

merit), 22% of the 2,693 claims considered on oral renewal were granted permission. Of the 267 claims that proceeded to a substantive hearing, 28% were allowed and 72% dismissed.

- 2017/18: 8% of the 8,119 claims considered at the paper permission stage were granted permission (with 1,091, 13%, categorised as totally without merit), 26% of the 2,803 claims considered on oral renewal were granted permission. Of the 223 claims that proceeded to a substantive hearing, 35% were allowed and 65% dismissed.

- 2018/19: 9% of the 6,628 claims considered at the paper permission stage were granted permission (with 1,179, 18%, categorised as totally without merit), 27% of the 2,267 claims considered on oral renewal were granted permission. Of the 127 claims that proceeded to a substantive hearing, 38% were allowed and 62% dismissed.

- 2019/20: 10% of the 5,405 claims considered at the paper permission stage were granted permission (with 825, 15%, categorised as totally without merit), 31% of the 1,825 claims considered on oral renewal were granted permission. Of the 102 claims that proceeded to a substantive hearing, 29% were allowed and 71% dismissed.

41. In the view of the Bar Council, the figures set out above in relation to cases in the Administrative Court and in the UT suggest that the system is functioning as would be hoped:

a. It is clear that only cases that are properly arguable are reaching a substantive hearing;

b. It does not appear that cases which lack merit are being permitted to proceed; such cases are appropriately caught by the filter mechanism;

c. The proportion of cases which are granted permission at the oral renewal stage, both in the Administrative Court and in the UT, clearly demonstrates that this stage is a necessary safeguard;

d. These figures do not suggest any pattern of abuse. Insofar as abusive conduct is found to exist, the Bar Council's position (addressed elsewhere in this response) is that this can be, and is, addressed robustly

by the court and UT, and that existing powers are sufficient in this regard (see paragraphs 56 and 57 below).

Section 3: Process & Procedure

42. Judicial review process and procedure have developed significantly over the past 15 years. In particular:

a. The Tribunals Courts and Enforcement Act 2007 empowered the UT to hear judicial review claims, and the UT now deals with a significant volume of judicial review work. In particular, the direction of the Lord Chief Justice of 21 August 2013 required that the majority of immigration judicial review claims be heard by the UT, with a marked effect on the caseload of the Administrative Court from November 2013.

b. The filter mechanism was given additional force with provision for particularly weak claims to be excluded from the oral permission stage. On 1 July 2013 a new paragraph 7 was inserted into CPR 54.12, which provided that "*Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing*." Similar provision was subsequently made in Rule 30(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.[26] To the extent there was a problem with public authority defendants (and/or the Court and UT) being troubled with wholly unmeritorious cases, this was addressed through procedural mechanisms, as borne out by the figures set out above in footnote 18 and at paragraph 40. These show that the mechanism is routinely deployed, but also a fall in the overall numbers of cases recorded as totally without merit in the Administrative Court[27] and the UT,[28] *and* in the percentage of cases so designated in both venues.[29]

[26] Added by the Tribunal Procedure (Amendment No. 4) Rules 2013/2067 rule 13(b), in force from 1 November 2013

[27] From 2,406 in 2013 to 306 in 2019

[28] From a high of 6,318 in 2015/16 to a low of 825 in 2019/20

[29] From a high of 17% in 2014 to a low of 9% in 2019 in the Administrative Court, and from a high of 43% in 2015/16 to figure of 15% in 2019/20 (slightly higher than 2017/18 but still far below the high of 43%).

c. Part 4 of the Criminal Justice and Courts Act 2015 introduced major changes in three areas.[30] In briefest outline:

   i. First, by section 84, it amended section 31 of the Senior Courts Act 1981 and sections 15 and 16 of the Tribunals, Courts and Enforcement Act 2007, such that the High Court and UT are now required[31] to refuse relief if it is "*highly likely that the outcome for the applicant would not have been substantially different*" if the conduct complained of had not occurred, and made broadly similar provision in relation to the permission stage (subject to the point being taken by a Defendant or the Court or Tribunal of its own motion).

   ii. Second, by section 87, it made significant changes to the costs position for parties who intervene in judicial review proceedings, and

   iii. Third, it put the framework for costs protection in public interest judicial review claims on a statutory basis (see further below at paragraph 51).

43. The Bar Council does not consider that there is a case for further significant intervention in judicial review practice and procedure at this time.

Process and Procedure: Specific Issues

Standing (Terms of Reference, paragraph 4(c), Question 13)

44. This has been recently addressed. The correct approach to standing was a major component of the consultation process that took place prior to the introduction of the Criminal Justice and Courts Bill in February 2014. The Bar Council's view then was that there was no basis for changing the rules on standing, and this remains its view. The relevant passages from its October 2013 response to the consultation paper *Judicial Review: proposals for further reform* are appended to this paper as Annex 1 and are adopted in full for the purposes of this response.

[30] NB: Sections 85 and 86, which provide for claimants to be subject to financial disclosure obligations are not yet in force.

[31] Subject to a discretionary power to depart from the requirement in cases of "*exceptional public interest*".

45. The October 2013 response drew attention to the *dicta* of Lord Diplock in *ex parte IRC* [1984] AC 617 where he said *"It would be a grave lacuna in our public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped*," and pointed out that this approach to standing had enabled challenges to be brought in a large number of contexts from a wide variety of different social and political perspectives, by, for example Lord Rees-Mogg, Mrs Gillick, and Mr Blackburn.

46. The facts behind the various cases referred to in the October 2013 response provide concrete evidence of the utility of the present approach to standing. This is true, for example of the "*disappearing claimant*" examples that led to judicial reviews brought by the Child Poverty Action Group and reported at [1990] 2QB 540 and [2011] 2AC 15. Another example of the continuing utility of the approach is demonstrated by environmental litigation: for example the various applications concerning air quality brought by ClientEarth, including *R(on the application of ClientEarth) v Secretary of State for Food, Environmental and Rural Affairs (No3)* 2018 Env LR 21.

Time limits (Terms of Reference, paragraph 4(d))

47. Claims for judicial review must be brought promptly and in any event not later than 3 months after the grounds to make the claim first arose (CPR 54.5(1)), with some narrow exceptions, including planning judicial reviews, where the time limit is six weeks (CPR 54.5(5)), and procurement judicial reviews, where the time limit is 30 days (CPR 54.5(5), and Regulation 92(2) of the Public Contracts Regulations 2015).

48. The three month long-stop time limit for ordinary judicial review claims is very significantly shorter than time limits in Part 7 proceedings under the Human Rights Act 1998 (one year[32]), and in general tort and contract claims (six years, or three years where personal injury is alleged[33]).

49. Whilst it is recognised that judicial review proceedings inevitably have an impact upon the work of the public authorities whose decisions or conduct is challenged, the Bar Council's view is that there is no warrant for further shortening the time limits within which claims can be brought. For judicial review to fulfil its constitutional role, the right of access to the courts must be a practical reality. Very

[32] Section 7(5)

[33] Limitation Act 1980, ss. 2, 5 and 11.

many judicial review claims in areas including, but not limited to, education, healthcare, prisons, community care, mental health and immigration involve vulnerable individuals who may also have limited means and may not speak English as a first language, or at all. There are multiple practical hurdles involved in bringing a claim for judicial review. These may include locating a solicitor who can advise on and act in the claim, meeting with and giving instructions to the solicitor (particularly if the prospective claimant is detained, homeless or seriously unwell), securing public funding if available (or attempting to secure funding through other routes if it is not), and obtaining the relevant documents, before formulating the claim. Further, the Pre-Action Protocol for Judicial Review requires a claimant to write a letter before claim, giving the public authority time to respond (normally 14 days). There is nothing to be gained from imposing time limits which would preclude the use of or limit the efficacy of the Pre-Action Protocol or significantly restrict the possibility of a dispute being resolved before proceedings are issued. The Call for Evidence does not make a positive case that problems are caused by the current time limit. Any shortening of the time limit would both restrict access to justice and have the potentially unintended consequence of fewer cases settling pre-action, with a knock-on impact on both the level of costs incurred and the level of disruption caused by potential claims.

Are the rules regarding costs too lenient on unsuccessful parties or applied too leniently? Are costs proportionate? (Terms of Reference, paragraph 4(g), Questions 7 and 8)

50. Recoverable costs are not too lenient on unsuccessful parties. The starting point in judicial review litigation in the Administrative Court is CPR Part 44. The general rule is that costs follow the event (44.2(a)) but, as in all civil litigation, the Court has a broad discretion (44.2(1)).[34] As a matter of practicality, costs will not be recoverable from legally aided claimants, but that is a facet of the legal aid regime, not a consequence of the system of judicial review. A successful defendant can recover its costs of preparing the Acknowledgment of Service and Summary Grounds of Defence, but cannot ordinarily recover the costs of appearing at an oral permission hearing (although the Court has a discretion to depart from this general rule and will do so where appropriate).[35] The higher courts have developed a fair and pragmatic approach to costs in cases that are compromised, as to which see *M v Croydon* [2012]

[34] The Upper Tribunal has jurisdiction to make costs awards in judicial review claims: Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 10(3).

[35] For a detailed account of the position, see *The Administrative Court Judicial Review Guide 2020*, Section 23.4, *Costs orders at the permission stage*

EWCA Civ 595 at [59]-[63] and *The Administrative Court Judicial Review Guide 2020* at section 23.5 (*Costs when a claim has been settled*) and Annex 5 (*ACO Costs Guidance April 2016*).

51. The concept of protective costs orders ('PCOs') developed in the courts, with guidance given in cases such as *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600. PCOs were put on a statutory footing (now termed Costs Capping Orders, 'CCOs') by sections 88 to 90 of the Criminal Justice and Courts Act 2015, following consultation. The general effect of the codified CCO scheme is to define the circumstances in which an order will be made and to limit the costs that a party in whose favour a CCO is made can recover from its opponent. Section 88(3) of the 2015 Act imposes a significant limit on the potential scope of a CCO, providing that the court may make a Costs Capping Order only if leave to apply for judicial review has been granted.[36] In the view of the Bar Council, a mechanism for PCOs / CCOs is essential to ensure the right of citizens to hold the executive to account in the public interest. It is a proportionate mechanism to that end, and there are no grounds for further limiting or removing this important safeguard to the constitutional right of access to the Court.

52. As to proportionality more broadly, in the general run of cases in the Administrative Court a successful defendant will recover its costs, with those costs to be assessed on the standard basis. By CPR 44.3(2)(a), where the amount of costs is to be assessed on the standard basis, the court will "*only allow costs which are proportionate to the matters in issue.*" Proportionality is baked into the costs regime in the CPR so far as the payment of costs between parties is concerned.

How are unmeritorious claims currently treated? (Question 8)

53. This question is addressed both as a matter of generality, and specifically in relation to costs. It is assumed that "*unmeritorious*" in this context means claims which are wholly lacking in merit, misconceived and/or abusive, and not merely claims which do not ultimately prosper.

54. The starting point, of course, is that there is a filter mechanism in the form of the permission stage: a claim will only be allowed to proceed to a substantive hearing if the court is satisfied that it is arguable. In this way, unmeritorious claims are stopped

[36] This means that claimants litigate at risk until permission is granted, with potentially significant costs exposure if permission is refused. The risk is particularly acute if a rolled-up hearing is ordered, because the full costs of the substantive claim will be incurred on both sides before it is known whether permission will be given.

in their tracks at a relatively early stage. Where a claim is recorded as being "*totally without merit*" the application for permission cannot be renewed to an oral hearing,[37] giving further teeth to the filter mechanism. In recent years, of those cases in which permission was refused on the papers in the Administrative Court and the application was renewed to an oral hearing, around 30% were granted permission to proceed. The grant rate at oral renewal in the UT has recently reached a similar level (see paragraph 40 above). This does not suggest a process that is subject to systemic abuse, or an unduly lax approach to unmeritorious cases.

55. There is a right of appeal to the Court of Appeal against a refusal of permission at an oral hearing (CPR 52.8(1)), and against a refusal of permission on the papers where a case is recorded as being totally without merit (CPR 52.8(2)). Such an application must be made within seven days (CPR 52.8(3), (4)). There is a right of appeal to the Court of Appeal against the refusal of permission to apply for judicial review in the Upper Tribunal.[38]

56. Where a claim is not merely unmeritorious but abusive, the Court and the Tribunal have a number of weapons in their arsenal. There is the general discretion in CPR Part 44 in relation to costs, permitting costs sanctions in an appropriate case (an order for costs to be paid on the indemnity basis, for example). The broad discretion afforded by Rule 10(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 clearly permits conduct to be taken into account in the Tribunal's approach to costs. Beyond that, there is scope for wasted costs orders to be made against representatives who behave improperly, unreasonably or negligently,[39] and for representatives who behave improperly to be reported to the relevant regulator. Given the perception which exists in some quarters about the prevalence of abusive last minute judicial review claims and the disruption they cause in the field of immigration law in particular, the Administrative Court's own guidance on this, as set out in *The Administrative Court Judicial Review Guide 2020*, section 16 warrants citation (footnotes omitted):

> **16. Abuse of the Procedures for Urgent Consideration**

[37] CPR 54.12(7); Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 30 (in relation to immigration judicial review proceedings). See further *R (Grace) v Secretary of State for the Home Department* [2014] WLR 3432 at [13] – [15] and [19].

[38] Tribunals, Courts and Enforcement Act 2007, section 13, Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 44 and CPR 52.9

[39] CPR 46.8 and PD 46; Tribunals, Courts and Enforcement Act 2007, section 29(4).

> 16.1. Where an application for urgent consideration or an out of hours application is made which does not comply with this Guide and/or it is manifestly inappropriate, the Court may make a wasted costs order or some other adverse costs order … Professional representatives may be referred to the relevant professional regulator for consideration of disciplinary action for failure to comply with their professional obligations.
>
> 16.2. In *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) the Court held that where urgent applications are made improperly the Court may summon the legal representative to Court to explain his or her actions and would consider referring that person, or their supervising partner (if different) to the relevant regulator. Although concerns about the behaviour of legal representatives most often arise in the context of last-minute attempts to prevent a client's removal from the UK, the *Hamid* jurisdiction is not confined to that situation, nor is it confined to the situation in which the underlying claim is utterly without merit. It extends to all cases, not just immigration cases.
>
> […]
>
> 16.4. In *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin), the Divisional Court reminded legal practitioners of the relevant standard of professional and ethical behaviour required of those conducting proceedings on behalf of clients in the field of immigration and asylum law:
>
> (a) The duty owed by legal practitioners to the court is paramount.
>
> (b) This duty includes an obligation on legal representatives to ensure that they are fully equipped with all relevant documentation before commencing proceedings or making applications.
>
> (c) They must make real efforts to obtain documents from previously instructed solicitors.
>
> (d) They must act candidly and bring to the attention of the court or tribunal gaps in the evidence.

57. The *Hamid* jurisdiction extends to the UT. That it operates as intended and has real force is amply demonstrated by the decision of Mr Justice Lane, President of the Immigration and Asylum Chamber of the UT, in *R (on the application of Shrestha and others) v Secretary of State for the Home Department (Hamid jurisdiction: nature and purposes)* [2018] UKUT 242 (IAC). In that case, a referral was made to the SRA for a full investigation. The referral in due course resulted in disciplinary action being taken by the SRA and a fine of £60,000 being imposed by the SDT (Case 12075-2020).

58. In short, it is the view of the Bar Council that the mechanisms which exist, from preventing unmeritorious claims from proceeding past the permission stage, at one end of the spectrum, to dealing firmly and proactively with abusive claims at the other, are fit for purpose. The right of appeal to the Court of Appeal is an important

safeguard in this context. There is no case for imposing further barriers to substantive consideration of a claim on merits grounds and/or the limitation of appeal rights.

Remedies too inflexible (Terms of Reference, paragraph 4(e), Question 9)

59. The remedies available to the Court and the UT where an application for judicial review succeeds reflect the basic constitutional principle that it is for the decision maker to decide and for the court to audit the lawfulness of the decision but not to step into the shoes of the decision maker. Remedies in judicial review are discretionary and the innovations of section 84 of the Criminal Justice and Court Act 2015 ordinarily preclude the grant of a remedy where the outcome "*would not have been substantially different if the conduct complained of had not occurred*." The Courts have sufficient flexibility in relation to remedies. In the Bar Council's view there is no need for further innovation in this area.

60. Beyond those basic propositions, there is, as Bondy, Platt and Sunkin observe, "*a widely held and influential assumption that JR is unlikely to provide claimants with an effective route to tangible benefits even when their claim succeeds in court*."[40] The limited nature of the remedies at the Court's disposal leads to the view that success in judicial review proceedings is a victory of form and not substance. The evidence discussed by Bondy, et al, strongly suggests that this assumption is misplaced. It is beyond the scope of this response to consider their analysis and the supporting evidence in detail, but we note that, from the sample of cases they were examining,[41] of those in which the claimant succeeded, 79% of claimants identified one or more "*tangible benefits*" flowing from the proceedings.[42] Interestingly, 40% of those whose claims were *dismissed* identified one or more tangible benefits. The paper analyses the nature of the benefits across various types of claim in detail. Their data did not support the view that, where a decision was quashed, it would be re-taken with the same result in the majority of cases.[43]

Disclosure / Candour (Terms of Reference, paragraph 4(a) and (b))

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[40] *The Value and Effects of Judicial Review*, Section 4, *The consequences of judicial review*.

[41] The conclusions referred to in this paragraph were based on a dataset of 198 cases that had proceeded to a full hearing, where the solicitors acting for the claimants had completed questionnaires sent as part of the research; see the description of the "*claimant solicitor dataset*" in Section 1, under *Methods*.

[42] Defined as Provision / retention of service, Grant / retention of licence, Conferment / retention of status, Conferment / retention of state benefit, Compensation, Getting decision, Preventing closure of facility, Apology, or "Other"

[43] See Section 4, under *Tangible benefits when public bodies are required to reconsider their decisions or actions*, at page 33 and following.

61. In *R. (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin)[44], the basis for the duty of candour was described in the following terms (with emphasis supplied):

> The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack". It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal put it at the hearing before us, to identify "the good, the bad and the ugly". This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.

62. For this reason, to the extent that the Terms of Reference suggest that obligations of disclosure or candour (absent specific orders from the Court, effectively the same thing in the present context) represent an inappropriate burden on public bodies in general and central government in particular, the Bar Council respectfully but firmly disagrees. No case for a specific carve out from these obligations in the context of challenges to "*policy decisions*" is advanced, and in the view of the Bar Council, there is no case for adopting a different approach in such cases. Moreover, any dilution or restriction of the duty of candour could, and very likely would, have potentially deleterious unintended consequences, including an increase in formal disclosure applications and, potentially, a decrease in cases settling or delaying the point at which settlement is achieved.

63. In *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*[45] a 2014 publication of the Bingham Centre for the Rule of Law, two authors of which (Fordham J and Chamberlain J) are now on the High Court Bench, the following is said regarding disclosure and the duty of candour in judicial review proceedings:

> As Sir John Donaldson MR famously explained, judicial review is "a process which falls to be conducted with all the cards facing upwards on the table." [*R v Lancashire County Council*, *ex p Huddleston* [1986] 2 All ER 941 at 945.] The [Treasury Solicitor] Guidance describes that the duty of candour entails a duty of due diligence in searching for relevant documents. ["Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings", 2010, at section 3] Early candid disclosure of relevant documents respects the integrity of the legal process, allows an informed assessment of legal merits, promotes settlement, and avoids unnecessary costs. We think Form N462 could require legal representatives of defendants and interested parties – wherever resisting permission for judicial review – to certify compliance with the duty of candour, including the duty of due diligence. Where it is the case that the AOS

[44] Cited in De Smith, at 16-027

[45] M Fordham, M Chamberlain, I Steele & Z Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre Report 2014/01) , Bingham Centre for the Rule of Law, BIICL, London, February 2014.

> is identifying some 'knock-out blow' which does not engage with questions of fact, so that evidential matters are not relevant, this could be explained in the summary grounds (permission points document) so that the basis for certification (or declining to provide it) is understood. Moreover, where evidence is disclosed with the Form N462 but could and should have been disclosed at the pre-action stage, courts could in an appropriate case in the exercise of their discretion and judgment disallow the costs of Form N462 even though permission is refused.

64. In the Bar Council's view, these are pragmatic and workable suggestions, and we commend them to the Panel.

Settlement (Questions 10 and 11)

65. A significant proportion of judicial review claims settle prior to trial. How close to the date of trial varies significantly.

66. A public law QC practising across a range of areas states: "*JR cases of all kinds very often settle at all stages; (a) A significant number of cases which result in a PAP letter settle at that stage (albeit that varies according to the area – e..g the Home Office never settle JRs at that state); (b) A significant [number] of cases settle once the claim is lodge[d], pre-permission; (c) A significant number of cases settle in the run up to an oral renewal hearing; [and] (d) A significant number of cases settle [once] permission is granted. I don't think the phenomenon of 'at the doors of the court' settlement is particularly common in JR generally, although it does happen. I think it is more common specifically in immigration detention, including both civil claims and JRs. I think it is generally a reflection of an intransigent defendant*." The same barrister observed that "*Almost all the cases which settle at the doors of the court involve the Home Office, a lot of them detention*."

67. A barrister with a predominantly planning practice said they had "*many examples of planning judicial reviews settling shortly after permission has been granted and often before, although not usually at the door of the substantive hearing*." Another barrister with a broad-based public law practice (including planning and environmental work) noted that settlement "*doesn't happen much in my practice in the courts outside of immigration*." A barrister practicing in revenue law said: "*In my own experience, many unmeritorious JR claims fail at the permission stage (in the context of which I have usually been acting for HMRC). Acting for taxpayers, in my experience, only the most egregious decisions have been challenged by JR (where there is no other remedy) and generally, HMRC have conceded the claim at the pre-action stage: which makes the case for JR and its pre-action protocol to help prevent the kind of bad decision making it is designed to stop*."

68. A QC with a broad public law practice, formerly on the Attorney General's panel of counsel, said: "*Most claims which settle at the door of the court do so because of*

recalcitrance. A significant issue is that public authorities and government departments, because the issue of 'costs' is not as live and because of concerns about conceding, often only do so at the door of the court. If prompt and careful advice were both taken and accepted, then fewer cases would fight." Or, indeed, settle at the door of the court.

69. These observations, which broadly reflect the experience of the public law barristers on the Bar Council's Law Reform Committee, suggest that, in many cases, focussed engagement by a defendant public body at the pre-action stage or, at the very least, pre-permission, is the key to avoiding the need for a judicial review claim to proceed. Claimants can, of course, endeavour to comply fully with the Pre-Action Protocol to maximise a defendant's opportunity to do this but, ultimately, assuming a meritorious claim, if a case is to settle, the onus is on the defendant to make the necessary concessions. Even in the case of an unmeritorious claim, a defendant that engages thoroughly at an early stage has better prospects of persuading a claimant to abandon a prospective claim before significant work has been done and costs incurred.

70. These are ultimately questions of institutional culture rather than of substantive or procedural law. The critical point that emerges from experience in practice is that early engagement with the substance of a (potential) claim by a defendant public body, including taking early legal advice, is key to the swift resolution of disputes and minimising the costs of judicial review litigation.

ADR (Question 12)

71. Given the issues at play in judicial review litigation, ADR has a less obvious role than in other areas of practice. The issues are very often binary – the conduct or decision in issue is either lawful or it is not – such that the scope for parties to reach a compromise position is limited. The QC whose comments on settlement are noted at paragraph 66 above observed, "*I doubt whether ADR would achieve a great deal. It is only likely to be much use, given the timescales, between permission and full hearing, and … a significant number of cases already settle at that stage*."

72. Nevertheless, ADR can be effective in some judicial review contexts and its use in appropriate cases should be encouraged. Anecdotally, ADR appears to be fruitful where the claim arises in the context of a broader dispute or ongoing relationship, such that there is room for compromise and negotiation on matters going beyond the immediate subject matter of the claim. Thus:

a. The QC whose comments on settlement are noted at paragraph 68 above said: "*I did a mediation three weeks ago about a community care JR which*

managed to settle. I have done a few of these, and find that they are useful for cases where (a) there is a continuing relationship required (b) there are a number of issues - some legal, some not[, and] (c) there is some wriggle room on both sides for compromise. The vast majority of public law work related to health, [community] care, incapacity etc settles at pre action or just after issue - it is very rare to get to a final hearing. The courts have sought to use mediation in a number of these sorts of [JRs] over the years, and they can and do work. Usually this is because the real problem is not the law, but the dysfunctional relationship between client and organisation. JRs in these cases are always the last resort after usually, many years of complaints and concerns, so by the time you get to issuing, relationships are usually fairly toxic. I've been paid by the LAA to act as a mediator in these cases: it is not necessarily cheaper than a day in court - in fact it can cost more, but it usually means you get a settlement that has some prospect of sticking - and as there are usually apologies, grovelling etc it can make things better (sometimes)."

b. The second of the barristers whose comments are noted in paragraph 67 above stated: "*I have a planning case currently which is on its 4th or perhaps 5th extension of time as productive discussions continue between principals. I am not a principal in those discussions but I believe it is likely that will resolve to an application for planning permission on a different scheme to the LPA*." The same barrister referred to another case in which a mediator had been engaged: "*ADR was successfully used to engage the claimants in the complexity of what it was they were challenging and why the short term outcome they strongly disliked, really was the best short term solution; and that if they continued with their challenge the short term outcome they objected too would simply have to continue for longer, whereas by engaging towards a better long term outcome constructively the likely long term outcome would be acceptable to them, they would be more involved in the process, and it would be delivered sooner; and … in due course they withdrew their claim*." They also noted that they had never had a request for a pause in proceedings for ADR refused, suggesting a supportive position on the part of the courts.

c. Another barrister referred to having been instructed by a local authority some years ago "*to 'mediate' away a proposed JR claim to be brought by a group who wanted to be designated a neighbourhood forum in the Neighbourhood Plan process. It worked to get everyone around the table and*

smooth out the reasons why the LPA weren't keen on the particular personnel who were going to have certain roles."

73. This evidence, albeit anecdotal and from a small sample, suggests that there is clearly a role for ADR in judicial review, but that the circumstances in which it is effective are very fact sensitive. It also suggests that practitioners are alive to the possibilities of using ADR where appropriate and that the courts will not put barriers in its way. The Bar Council would support steps taken to encourage the use of ADR in judicial review but would caution against an approach whereby, for example, costs sanctions flowed from failing to do so, given that in many cases ADR will not be a realistic option.

Bar Council

26 October 2020

The following Specialist Bar Associations have contributed to and endorsed the response:

- Bar Association for Commerce, Finance & Industry
- Bar European Group
- Chancery Bar Association
- Criminal Bar Association
- Family Law Bar Association
- Professional Negligence Bar Association
- Revenue Bar Association

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