

RE: 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?

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Submitted to: Ministry of Justice: IRAL Secretariat

Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.¹

I. Introduction

1. Christian Legal Centre is a leading legal advocacy group in the United Kingdom dedicated to the protection of religious liberty. We acted as counsel of record for several of the applicants in the seminal case of *Ewedia and Others v. the United Kingdom*, and have taken part in many of the precedent setting cases involving freedom of thought, conscience, and religion in the United Kingdom. Christian Legal Centre's cases are frequently covered by British print and broadcast media.
2. In 2019 alone, the Christian Legal Centre gave advice to 895 Christians who felt that they had suffered some level of detriment because of their Christian faith. The Centre is currently supporting more than 30 court cases involving Christian freedoms, several of those being by way of judicial review.
3. Arguably mainstream, Bible-based, 'traditional' Christianity represents both the core of Christianity in the UK and that area of most rapid growth. The issues important to Bible-based Christians include freedom of religious exercise, the right to life from conception until natural death, and concerns relating to the definition of marriage and family, including parental rights and education policy and law.

¹ Bingham, Tom, *The Rule of Law*, Allen Lane, 2010, p. 60.

4. Many of these issues are decided by public authorities and currently subject to judicial scrutiny vis-à-vis judicial review. Often, judicial review is the only refuge for the ordinary citizen seeking to check the power of either parliament or a public actor. As such, judicial review provides an important safeguard between the citizen and government. It is also an important tool for campaigning organisations to be able to effectively fulfil their important function in the democratic process.

II. JR Provides a Right to an Effective Remedy

5. For the rule of law to have actual meaning in a democratic society, the right of access to court must be both practical and effective.² Article 6 of the European Convention on Human Rights, as transposed into our domestic law by the Human Rights Act 1998, is premised on the principle that an individual must have a clear, practical opportunity to challenge an act that has interfered with their rights.³ Each case should be assessed in the light of the special features of the proceedings in question.⁴
6. While the United Kingdom has not ratified Article 13 of the Convention, restricting access to judicial review does raise serious questions about both a right to an effective remedy and due process. A remedy is only effective if it is available and sufficient. It must also be sufficiently certain not only in theory but also in practice.⁵ The essence of the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having their case determined on the merits by the competent court.⁶ While this right is not absolute and may be subject to limitations, access to a fair and full hearing cannot be reduced or restricted in such a way, or to such an extent, that the very essence of the right is impaired as it is being proposed here.⁷

² *Bellet v. France*, Application no. Application no. 23805, Judgment of 04 December 2005, § 38.

³ *Ibid.*, § 36.

⁴ *Kurşun v. Turkey*, Application no. 22677/10, Judgment of 30 October 2018, §§103-104.

⁵ *McFarlane v. Ireland*, App. No. 31333/06, 10 September 2010, para. 114; *Riccardi Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment of 29 March 2006, para. 38.

⁶ *Zubac v. Croatia*[GC], Application no. 40160/12, Judgement of 5 April 2018, § 98.

⁷ *Stanev v. Bulgaria* [GC], Application no.36760/06. Judgment of 17 January 2012, § 229.

7. Given that the United Kingdom is not subject to Europe's supervisory authority over the issue of effective remedies being available, it is all the more paramount at the domestic level to afford individuals and organisations a meaningful way to challenge measures which directly affect their interests.
8. The words of Lord Neuberger speak directly to this point:

The courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or other public bodies. With the ever-increasing power of Government, which now commands almost half the country's GDP, this function of calling the executive to account could not more important. I am not suggesting that we have a dysfunctional or ill-intentioned executive, but the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens, and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly.⁸

9. Rigid constraints on judicial review take away from the fundamental right of having access to a fair trial. The European Court has always emphasized the prominent place held in a democratic society by the right to a fair trial.⁹ This guarantee "is one of the fundamental principles of any democratic society, within the meaning of the Convention"¹⁰ There can therefore be no justification for interpreting Article 6§ 1 restrictively¹¹, which would include limiting access to judicial review.
10. Ultimately, the right of judicial review, rather than being a cumbersome check on government authority, plays a vital role in enforcing the will of Parliament.¹² When public authorities act *ultra vires* to the law, they are acting in excess of

⁸ Lord Neuberger, Tom Sargent Memorial Lecture (2013), para. 37. Found at: <https://www.supremecourt.uk/docs/speech-131015.pdf>.

⁹ ECHR, *Airey v. Ireland*, application no. 6289/73, judgment of 09 October 1979, § 24.

¹⁰ ECHR, *Pretto and Others v. Italy*, application no. 7984/77, judgment of 08 December 1983, § 21.

¹¹ ECHR, *Moreira de Azevedo v. Portugal*, application no. 11296/84, judgment of 23 October 1990, § 66.

¹² See e.g.: Amy Street, *Judicial Review and the Rule of Law: Who is in Control?*, The Constitution Society (2013), p. 17.

their parliamentary mandate. By limiting judicial review, you limit the power of the judiciary to act as effect balance against government overreach.

11. Furthermore, the rule of law enforces minimum standards of fairness, both substantive and procedural.¹³ This requires that public bodies be on the same footing as the average citizen, making challenging a government action accessible and fair.
12. This requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle as much to civil and administrative matters as it does to criminal cases.¹⁴ Equality of arms implies that each party must be afforded a reasonable opportunity to present their case – including their evidence – under conditions that do not place them at a substantial disadvantage *vis-à-vis* the other party or the State.¹⁵
13. Lord Hoffman captures the substance of equality of arms well, by correlating the rule of law with the judicial review procedure:

*There is however another relevant principle which must exist in a democratic society. That is the rule of law... The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament...*¹⁶

III. The Effect on Campaigning Organisations

14. The law stands for the fundamental principle that “*a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*” Campaigning organisations often play a crucial role in

¹³ *Regina v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539, 591F per Lord Steyn.

¹⁴ ECHR, *Case of Feldbrugge v. the Netherlands*, application no. 8562/79, judgment of 29 May 1986, § 44.

¹⁵ ECHR, *Case of Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, judgment of 27 October 1993, § 33.

¹⁶ *Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paragraph 73 per Lord Hoffmann.

informing citizens of their rights and providing them a platform to have their day in court when they otherwise could not have.

15. The important role of campaigning organisations to the democratic process has been highlighted by the European Court of Human Rights in *Steel and Morris v the United Kingdom*¹⁷. The Court there pointed to the legitimate and important role played by campaigning groups in stimulating public discussion on matters that are crucial to fundamental rights and freedoms.¹⁸ It highlighted that: “*in a democratic society even small and informal campaign groups ... must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate...*”¹⁹
16. Campaigning organisations which specialise in legal advocacy, such as Christian Legal Centre, rely on judicial review, as many times no other legal remedies are available to would-be litigants. Often these cases set important legal precedents.
17. In the recent judgment in *The Queen (on the application of Ngole) and the University of Sheffield*²⁰, a judicial review case supported by the Christian Legal Centre, the Court of Appeal delivered a significant ruling that the right to hold and share a deeply held religious belief is different from discrimination, as the former does not necessitate the latter. The importance of this judicial review cannot be understated. First, had the procedure not been available to Mr Ngole, he would have essentially been unjustly barred from the profession of his choice because of his expressed religious beliefs. As such, the procedure was important to him as an individual citizen. Second, and in a broader sense, had no actionable defence of Mr Ngole’s rights been available to him against the decision of the University of Sheffield to remove him from his Social Work Master’s course because of his expressed Christian beliefs, it could have easily led to a situation where universities across the country could remove students with unfettered discretion because of the position they took on certain sensitive moral issues.

¹⁷ Application no. 68416/01, judgment of 15 February 2005.

¹⁸ *Id.*, para. 95.

¹⁹ *Id.*, para. 88.

²⁰ [2019] EWCA Civ 1127.

18. Legal advocacy groups across the country can undoubtedly point to their own '*Ngole*' case, where because of judicial review, they were able to enable citizen's rights and further the democratic process.

Conclusion

19. Judicial review is one of the few tools the ordinary citizen has to counter the power of public authorities. As many leading commentators have said, judicial review is the very working out of the rule of law itself. Organisations like Christian Legal Centre rely on judicial reviews to defend the rights of many of those we support, with no other effective remedies available to them when public authorities exceed their authority. Eroding the scope and availability of judicial review procedure hurts the average citizen, weakens his rights vis-à-vis the government, and tears at the very fabric of organisations like Christian Legal Centre and their ability to defend fundamental freedoms. For these reasons, the Christian Legal Centre strongly opposes any measure to diminish the scope of the existing judicial review procedure.