The Rt. Hon. Lord Reed
President of the Supreme Court of the United Kingdom

Response to a call for evidence

produced by the Independent Review of Administrative Law Panel

Introduction

1. I welcome the opportunity to respond to the Call for Evidence. In summary, the key points that I wish to make are as follows:

a. The constitutional principle of the rule of law, recognised by section 1 of the Constitutional Reform Act 2005, requires that every person should be bound by and entitled to the benefit of laws administered openly and transparently in the courts. In particular, all public bodies are bound to comply with the law, and recourse to the courts must be possible when they do not. These are essential characteristics of a healthy democracy and a fundamental part of our constitution.

b. In accordance with the principle of Parliamentary sovereignty, the Government and other public bodies can only exercise powers given to them by Parliamentary legislation, with some limited exceptions recognised by the common law. The courts can only decide the disputes before them, including disputes relating to the exercise of Government and other public power, in accordance with the law. All three principal branches of government (Parliament, the Government and the courts) share a common commitment to the law enacted by Parliament and the common law developed over the course of our history by the courts. The role of the courts in applying the law is an

essential part of the machinery of democracy, and should be considered in that wider context.

c. Judicial review proceedings are challenges to the lawfulness of the exercise of power by public bodies, and as such sometimes require the courts to review decisions that are politically controversial. However, as the courts themselves have emphasised, "judicial review is not, and should not be regarded as, politics by another means."[1] Judges endeavour in good faith to arrive at the correct legal solution to the dispute before them.

General comments

2. Before addressing the questions, I wish to say something about the wider context in which they arise. That context includes two long-established constitutional principles of fundamental importance. The first is that governmental power in this country, whether exercised by the Government, local government, regulatory bodies or other public authorities, must be exercised in accordance with the law. The second is that ultimate sovereign power resides in the Queen in Parliament. The Government and other public authorities therefore require authority conferred by Parliamentary legislation for the powers that they exercise, with the limited exception of certain common law or prerogative powers.

3. The courts perform the vital function of deciding disputes as to whether the Government and other public authorities have exercised their powers, and fulfilled their duties, in accordance with the law.

4. This function does not set the courts in opposition to the Government. They share a common commitment to the maintenance of the law. Ministers and their officials do not set out to break the law. Judgments upholding challenges to governmental action do not normally criticise the Ministers or officials involved. The pressures under which decisions have to be taken are understood.

[1] *R (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [326] and *R (Wilson) v The Prime Minister* [2019] EWCA Civ 304 at [56].

5. Nor does the courts' performance of this function involve their trespassing on the domain of Parliament. On the contrary, this function of the courts is an essential component of Parliamentary democracy, since the courts ensure that public bodies comply with the legislation enacted by Parliament. The role of the courts is entirely separate from the political accountability of the Government to Parliament. It is a much less prominent element of our constitution, but it is nonetheless of vital importance.

6. It is a mistake to view the court's function of resolving disputes over the legality of the exercise of a power as something which needs to be balanced against the requirements of effective government. Parliamentary sovereignty, and the rule of law, are not to be balanced against other values with which they may conflict. Unlawful conduct by government cannot be justified in a democracy.

7. On the other hand, the rules and procedures under which the courts perform this function should not interfere with good administration to any greater extent than is necessary. The current rules and procedures are intended to meet that objective, but may be capable of improvement. In that event, it is of crucial importance that proposals for improvement should not prejudice the courts' ability to perform the vital constitutional function which I have described.

8. Most disputes over the legality of the exercise of public power come before the courts (including specialist tribunals) under appeal procedures laid down by Parliament. The relevant provisions may require the courts to reconsider all aspects of the decision in question, including its merits. Where no appeal procedure is laid down, the default procedure is an application for judicial review. That form of procedure is a modernised version of much older common law procedures, and was given statutory effect by Parliament in 1981.

9. Judicial review proceedings can concern any area of public administration, but in practice normally concern the exercise of powers conferred by Parliament. The proceedings may concern issues arising under a number of areas of the law, such as tort and human rights, but in practice are usually concerned with issues arising in administrative law.

10. Administrative law is concerned with two central questions. The first is whether the power has been exercised in a manner which meets legal standards of procedural fairness. The second is whether the power has been exercised for the purpose intended by Parliament, taking account of all the considerations which are legally relevant to its exercise and leaving out of account considerations which are legally irrelevant. That also involves considering whether the decision falls within the range of decisions which the decision-maker might reasonably have made if he or she was exercising the power for its intended purpose and taking all the relevant considerations, and only those considerations, into account. The latter element of the test covers cases where the decision does not on its face disclose an improper purpose or a failure to take account of all relevant considerations or to leave out of account irrelevant considerations, but is otherwise rationally inexplicable. In short, judicial review on the basis of administrative law is therefore concerned with errors of law.

11. Since judicial review proceedings are challenges to the lawfulness of the exercise of power by public bodies, it is inevitable that some proceedings will involve the courts in reviewing decisions which are politically controversial. In such a case, the outcome of the proceedings may have political consequences. It is important to understand that the courts are not concerned with the political issues or the political consequences. Those must be resolved in the political arena.

12. At the last General Election, the Conservative manifesto stated that "judicial review is not, and should not be regarded as, politics by another means". I entirely agree. The statement in the manifesto was a direct quotation from judgments given in 2019 by the Divisional Court and the Court of Appeal, in which they dismissed challenges which were considered to be political rather than legal.[2] Judges are well aware of this risk, and avoid straying into matters that are political and not legal.

13. The 2019 judgment of this court on prorogation was no exception. The case had a political context, of a wholly exceptional nature, and the court's decision had political consequences. But the question the court had to decide was one of constitutional law: whether the Government is legally entitled to prorogue Parliament

[2] See footnote 1.

whenever and for as long as it pleases,[3] without its decision being susceptible to legal challenge. The court unanimously decided that the Government was not so entitled, as such a power would be inconsistent with the fundamental principles of our constitution as a Parliamentary democracy.[4] Its decision was not influenced by political considerations.

14. Judicial independence and impartiality are vital elements of our democracy, so that those who appear before the courts, and the wider public, can have confidence that disputes will be decided fairly and in accordance with the law. British judges do not bring their political views on to the bench or give judgments reflecting their political opinions. They endeavour in good faith to arrive at the correct legal solution to the problem before them. Their commitment to judicial independence and impartiality is reflected in the oath that all judges are required to swear when they take up their office.[5] The Justices of the Supreme Court are appointed to the court because they have been independently assessed by a statutory selection commission as possessing outstanding ability as judges. There is no parallel with the political dimension of the US Supreme Court.

15. Consideration of reform of administrative or constitutional law should not, therefore, start from the premise that judges pronounce on political issues. The position is quite the contrary. Where the Government or other public authorities have acted unlawfully, the courts must not be deterred from saying so by the political context in which the unlawful behaviour occurred, or by the political consequences of their holding that the behaviour was unlawful. This is a vital part of the constitutional system of checks and balances in our democracy.

16. It can sometimes be difficult in administrative law to draw a clear dividing line between the question of law which the court has to answer and the question of policy which the decision-maker has to decide. As in other areas of the law, some of the relevant standards are broadly expressed and require the courts to exercise judgement. The key, in the context of administrative law, lies in the exercise of an appropriate

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[3] Subject to the constraint imposed by the need for annual financial legislation and the annual authorisation of the armed forces.

[4] That is to say, the legislative supremacy of Parliament, and the political accountability of the Government to Parliament.

[5] The judicial oath is available at: https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/oaths/

degree of restraint by the courts in the intensity of their scrutiny of the decision in question, based on respect for the expertise of the decision-maker and for democratic mechanisms of political accountability. I have made clear in my own judgments the importance of such restraint, for example when dealing with challenges to decisions on matters of social or economic policy, and matters of national security.

17. Since the suggestion is sometimes made that the establishment of the Supreme Court has resulted in the judges of the highest court becoming less inclined to exercise restraint than their predecessors in the House of Lords, I should add that that is not borne out by my experience.

18. Finally, by way of introduction, it may be helpful to provide a few statistics illustrating what the reality of judicial review proceedings in the Supreme Court amounts to. During 2020 the court is expected to hear fifty-two appeals, of which eight concern judicial review proceedings. Three out of those eight involve central government: one, in which the Government is not participating, concerns a decision taken by the Department for Transport, and the other two concern decisions taken by the Home Office. The other five appeals concern decisions taken by a local authority, a coroner, the Crown Prosecution Service, the Serious Fraud Office and the Parole Board.

19. In the year to the end of October 2020 the court is expected to hand down fifty-two judgments, of which eleven concern judicial review proceedings. Six out of those eleven involve central government: one concerns a decision taken by the Department for Housing and Local Government, one concerns a decision taken by the Department for the Environment, and the other three concern decisions taken by the Home Office. The other five judgments concern decisions taken by local authorities, the Crown Prosecution Service and the Northern Ireland Prisons Service.

Section 1 – Questionnaire to Government Departments

20. The questionnaire poses questions concerning the experience of government departments and their views on matters of policy. These are not matters on which I can comment.

Section 2 – Codification and Clarity

21. The terms of reference ask the Independent Review of Administrative Law (IRAL) to consider, among other things, the questions of codification of the grounds of judicial review, the clarity of justiciability and non-justiciability, the law of standing, and possible amendments to procedure. These are reflected in questions 3, 4, 5 and 13 of the questionnaire. These are matters on which I can usefully make some observations to assist the IRAL.

22. In relation to question 3, I do not think that any significant advantage would be obtained by a statutory codification of the law relating to judicial review. The grounds are well-established and are accessibly stated in the leading textbooks. If, however, codification were to take place, it would be important that it should not be so prescriptive as to remove from the law the degree of flexibility which it requires in order to work well in practice. From time to time, cases raise novel issues which require judicial clarification or incremental development of the law based on established legal principles. That is unavoidable, whether the law has been codified or not.

23. In Australia and Canada,[6] both the jurisdiction to conduct judicial review and the grounds of such review are stated in statute, although in each case the jurisdiction stems from the codified or partially codified constitution. Of the leading Caribbean countries which give appellate jurisdiction to the Judicial Committee of the Privy Council (JCPC), appeals to which are decided by the Justices of the Supreme Court, Trinidad and Tobago has a statute codifying judicial review, including the grounds of judicial review.[7] In each of these jurisdictions the grounds of review are stated in general terms. I doubt whether such general statements add to the clarity which already exists in the United Kingdom. Experience in these jurisdictions has been that the general formulation of the grounds of judicial review in statute has not significantly altered the approach of the courts. The statute has proved to be compatible with the sensitive development of the law of judicial review in its application to novel factual situations.

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[6] In Australia, the Administrative Decisions (Judicial Review) Act 1977 and in Canada, the Federal Courts Act RCS 1985.
[7] Judicial Review Act 2000.

24. It is however important to emphasise that judicial review forms part of a wider constitutional system of checks and balances, as I explained earlier. The approach taken to judicial review in Australia or Canada, for example, differs in some respects from that taken in the United Kingdom, as a result of the influence of their respective constitutions. It is therefore difficult to read across from experience in those countries to the United Kingdom, without considering the wider constitutional landscape.

25. In relation to question 4, in modern administrative law it is not the source of a power but its subject matter that controls whether the exercise of a power is justiciable.[8] For example, the doctrine of Crown Act of State recognises that foreign policy falls exclusively within the sphere of the executive. Similarly, the doctrine of Foreign Act of State leads the courts to decline to review the legality of a foreign state's executive and legislative acts in relation to its own territory. The courts recognise other matters that are, as a general rule, inappropriate for them to address, such as dealings between states, and the interpretation of international treaties or conventions which have not been incorporated into domestic law. Article 9 of the Bill of Rights 1689 is another example of a general exclusion of the jurisdiction of the courts, based on the separation of powers. But most if not all of these examples are subject to exceptions or qualifications. It is inherently difficult to define the precise boundaries of those doctrines. This is an unavoidable aspect of the law, whether statutory or common law. It cannot be more precise than the nature of its subject-matter allows.

26. In most circumstances, preventing citizens from challenging the lawfulness of the exercise of power by a public body would call into question the rule of law, unless there were another means of legal regulation of the exercise of such a power. If, therefore, the IRAL were to recommend that legislation should identify areas in which the exercise of a legal power or function was not to be justiciable by the courts, great care would have to be taken to ensure that the principle of the rule of law was adequately protected.

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[8] *CCSU v Minister for the Civil Service* [1985] AC 374, 407.

27. In relation to question 5, I am not aware of any lack of clarity as to the procedures applicable in appeals to the Supreme Court. They are clearly set out in our Rules and Practice Directions, which are readily accessible on our website. Our Registry staff are also ready to assist, for example in cases involving unrepresented parties, and contact details are provided on our website. We welcome feedback formally through our User Group, which comprises professional users of both the Supreme Court and the JCPC, including solicitors, members of the Bars from across the UK, and agents who practice in the JCPC.

Section 3 – Process and Procedure

28. In each of the jurisdictions of the United Kingdom a claimant can proceed with a judicial review challenge only with the permission of the court. This is an important safeguard against challenges which lack legal merit. Many applications for judicial review are resolved before or at the permission stage. For example, in 2019, 1,100 judicial review applications were lodged against the Ministry of Justice, which was the department/public body which received the highest number of judicial review applications. Only 124 of those applications (less than 12%) were granted permission to proceed to the final hearing stage, and only 20 applications (less than 2%) were successful.[9] The requirement for permission, and the relatively tight time limits on the raising of proceedings, therefore enable the courts to uphold the rule of law in a way that promotes good administration.

29. Appeals to the Supreme Court normally occur in cases which have already been the subject of a hearing at first instance and a further hearing on appeal to a lower court, with the result that the legal issues have been focused in the earlier hearings. As appears from the statistics set out at paras 18-20 above, only a tiny proportion of judicial review cases proceed as far as the Supreme Court, and when they do, it is often on an appeal by the Government or other public authority involved. In 2019, for example, there were 3,400 judicial review applications in total.[10] However, as described above, only 11 of the cases decided by the Supreme Court in

[9] These figures are taken from the Ministry of Justice Civil Justice Statistics Quarterly: January to March 2020, available at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020

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the year to the end of October 2020 concern judicial review proceedings. These figures suggest that less than 0.4% of judicial review claims are heard by the Supreme Court. This is, in part, because appeals can proceed only with the permission of the lower appellate court or of the Supreme Court itself. Such permission is granted only if the proposed appeal raises an arguable question of law of general public importance which needs to be determined.[11] The courts have been careful to ensure that parties should not be able to use the courts to re-fight political battles which they have lost in the political arena,[12] and the requirement for permission prevents a party from bringing a case to the Supreme Court in the absence of an arguable legal question of general importance.

30. In relation to question 13, the issue of standing is rarely contested in judicial review proceedings. By comparison with the past, it has become relatively common for non-governmental organisations with a special interest in the subject area to mount legal challenges by means of judicial review or to intervene in such challenges. In this regard, the United Kingdom is in line with other major common law jurisdictions, including Australia, Canada, India and New Zealand. This approach is most obviously necessary in the area of environmental law. An animal cannot bring proceedings to protect its habitat, and the owner of the habitat is unlikely to do so either, since he is usually the person who wishes to develop it. The application of environmental law consequently depends in many cases on the efforts of non-governmental organisations. The same is true in some other areas of the law. For example, representative organisations such as trade unions may have the resources to bring proceedings to protect the rights of their members which their members could not themselves have afforded to bring.

31. In the Supreme Court, interventions are allowed only if the court gives permission. Permission is only granted where the court considers that the intervention is likely to assist the court, for example because the intervener's knowledge or particular point of view will provide the court with a more rounded picture than it would otherwise obtain. In practice, the Government and other public authorities

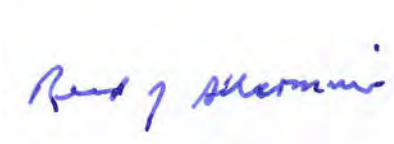
[11] The test for permission to appeal is set out in Supreme Court Practice Direction 3.3.3, available at: https://www.supremecourt.uk/procedures/practice-direction-03.html

[12] See for example *R (SG and Others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, paras 92-95 (Lord Reed).

themselves intervene in proceedings in the Supreme Court, for example where proceedings brought against a local authority raise a question of national importance.

Conclusion

32. I wish the IRAL panel well in their consideration of these matters and look forward to reading the panel's report in due course. If I can be of any further assistance to the panel, please do not hesitate to let me know.



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