



# The importance of Judicial Review in Protecting Rights in the UK:

## BIHR's response to the call for evidence by the Independent Review of Administrative Law

October 2020

"We cannot lose any part of the mechanisms that allow our human rights to be upheld and rights abuses to be remedied."

Staff member working in health, care or social work

### Summary

Judicial Review is a crucial mechanism for protecting and respecting the human rights of people in the UK. Judicial Review protects not only the people that are directly affected by a decision that is made by public bodies but all of us, by helping to ensure there is a human rights culture in the UK. Our evidence, gathered from both decision makers (staff working in health, care and social work) and people who access services (and the family members, advocates and community groups that support them) shows that **across the board there is strong support for Judicial Review in its current form.**

### BIHR's Key Findings

Of the people who access services, community and advocacy groups and staff who responded to our survey:

- 100% of people who access services who had experienced judicial review influencing decision making felt that the process had a positive impact on decision making and protecting human rights and would be worried if the judicial review process was diluted or changed.
- 100% of all those surveyed felt that the judicial review process is important to ensure rights are upheld in decision making.
- 80% of staff who had experienced judicial review influencing decision making felt that the process had a positive impact.
- 85% of staff would be worried if the judicial review process was diluted or changed (the remaining 15% said they did not know).
- 100% of community and advocacy groups who had experienced judicial review influencing decision making felt that the process had a positive impact on decision making and protecting human rights and would be worried if the judicial review process was diluted or changed.

## About BIHR

The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through human rights. We work to support people with the information they need to benefit from their rights; with community groups to advocate for better protections in their areas or interest groups; and with staff across public services to support them to make rights-respecting decisions. This enables us to call for the development of national law and policy which truly understands people's experiences of their human rights. We work with over 2,000 people using public services, community groups and the staff members delivering them; our recommendations are directly informed by people's real-life experiences of the issues.

## The role of Judicial Review in securing human rights

Judicial Review enables people to ensure their legal protected human rights are upheld (often as a last resort) via court action. Judicial Review is a fundamental legal process for ensuring national and local government and bodies do not exceed the limits of law set by parliament, including respect for human rights protections. It is therefore clearly in line with upholding our constitutional principles of ensuring both respect for the rule of law and parliamentary sovereignty.

Judicial Review is integral to the Human Rights Act (HRA), along with many other important laws that impact the lives of people across the country, laws passed by parliament premised on the use of this accountability process. It should be noted that changes to the Judicial Review process may have a number of impacts (intended and unintended) which could compromise a range of legal rights and duties passed by parliament. In doing so, the system of checks and balances on power in our constitutional system – which does not divest unrestrained power in governmental bodies/services - are undermined.

Judicial Review provides a number of means for ensuring compliance with law, including:

- Significant landmark court decisions on key constitutional cases (e.g. the 2019 Supreme Court case on the suspension of parliament (*R (Miller) v The Prime Minister and Cherry and others v Advocate General for Scotland*))
- Everyday court decisions to ensure policies and decisions comply with the law, or are applied to people in compliance with the law
- Securing changes to decisions or policies without the case having to reach the courts - the potential of action being enough to secure compliance with the law.

For BIHR, this latter point on the power of Judicial Review without going to litigation in the courts is a positive and powerful accountability mechanism we see in our work every day, with both those whose rights may be at risk, and the authorities who are charged with upholding these legal rights. Our evidence focuses on this particular issue; we are very concerned that the technical review being undertaken by the IRAL is being conducted

without consideration of this wider picture about the value of Judicial Review beyond litigation itself.

## Our evidence to the IRAL<sup>1</sup>

BIHR's expertise derives from both our legal knowledge and experience, and our work directly with people on the law and legal processes as they impact people in everyday life. To ensure that the views of those we work with are represented, we conducted a short and sharp survey with the three groups of people we work with everyday to share with us their views on Judicial Review, as a process for protecting human rights. The views and evidence included below, which have informed our submission, come directly from:

1. **People:** People accessing (or trying to) access public services, their family members and people who care about them.
2. **Advocacy and Community Groups:** Formal advocates (e.g. IMCA, IMHA<sup>2</sup> etc.), self-advocates, and other community, campaigning, and advocacy groups.
3. **Staff:** People with legal duties to respect and protect rights. This includes those working in public services and in private, charitable, or voluntary bodies delivering public services.

Of those who shared their experiences with us, **100% felt that the Judicial Review process is important to ensure rights are upheld in decision making.** Although, our findings showed a desire for the current process to be made more accessible, across the board there was support for Judicial Review and strong concern about any change or and resulting dilution (whether deliberate or inadvertent) of the process.

### Evidence from people\*

\*People accessing (or trying to) access services, their family members and people who care about them.

It is important to say that Judicial Review is not easy, the time limits are tight and it can be expensive with limited access to legal aid and therefore justice for many people (particularly those who may be at risk of rights abuses and who lack the means to independently pay for legal advice and representation). We note that many previous reforms of Judicial Review have impacted these issues, particularly those which have restricted access to legal aid and put further time limits in place. As a process, Judicial Review is used where there are no better ways of challenging a decision, such as a separate right of appeal against the decision. When facing a decision which has risked a person's human rights, Judicial Review is central to ensuring that these rights are protected. This is because a Judicial Review case itself is needed to either challenge a particular policy or law, or the application of that policy or law for an individual where legally protected human rights are at risk. It is important to note that the fact that a Judicial Review case can be started at all is often enough secure compliance with human rights law; i.e. the possibility of legal accountability for abuses of human rights, serves as an important mechanism for preventing or stopping those breaches of the law.

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<sup>1</sup> Independent Review of Administrative Law (IRAL)

<sup>2</sup> Independent Mental Capacity Advocate (IMCA). Independent Mental Health Advocate (IMHHA)

Of the people who are accessing (or trying to access) services who shared their views with BIHR:

- 100% of those who had experienced judicial review influencing decision making felt that the process had a positive impact on decision making and protecting human rights.
- 100% of people said they would be worried if the judicial review process was changed or diluted.

#### Experiences and views people shared with BIHR:

“Many reforms in social security have eroded human rights leaving people living diminished lives, in poverty or dead. There are countless examples of cruel or nonsensical rules being overturned by judicial review.”

“My local council and mental health services ignored me and left me to deteriorate until I got a solicitor on board to write to them threatening to bring judicial review proceedings. It's only then that they started to take my needs seriously.”

## Evidence from staff\* in public services and bodies

\*Those working in public services or private, charitable, or voluntary bodies delivering public services.

Through our work at BIHR, each year we support hundreds of staff members in frontline, management and leadership roles to better understand and to uphold their legal duties to respect, protect and fulfil human rights under the Human Rights Act. The legal duties contained within the HRA, and their enforcement through the Judicial Review process, set out clear limits to the actions of public authorities. Our experience over the last 20 years, and our feedback from people working and leading public services and bodies across the UK tells us that **this creates a framework which enables better, lawful, decision making.**

The potential that a person can bring a Judicial Review case encourages public authorities to use good decision-making processes in the first place. As noted above, this means **the value of Judicial Review is not only about the legal cases** that are taken but is also about preventing (or changing) bad decisions to avoid Judicial Review. This is a vital part of creating a culture of respect for human rights here in the UK, the enforceability of human rights law in courts is vital to the power of use in everyday life. Importantly, for the staff we support, the potential of a legal case being taken is not a negative; it is an important reminder that human rights have legal teeth, and this is a lever for change internally. Importantly, for those public bodies and services where there are cultures of risking legally protected human rights, raising the possibility of Judicial Review supports staff who are challenging poor policy, decision-making and practices, enabling them to articulate their concerns as a matter of law and potential legal accountability.

Of the staff working in public services and bodies who shared their views with BIHR:

- 80% of those who had experienced Judicial Review influencing decision making felt that the process had a positive impact on decision making.

- 85% of staff said they would be worried if the judicial review process was changed or diluted; the remaining 15% said they didn't know.

### Experiences and views staff shared with BIHR:

“We cannot lose any part of the mechanisms that allow our human rights to be upheld and rights abuses to be remedied.”

## Evidence from community and advocacy groups\*

\*Formal advocates (e.g. IMCA, IMHA, etc.), self-advocates, and other community, campaigning, and advocacy groups.

Often the potential of Judicial Review is enough to support advocacy calling for improved decision making that does not breach human rights. When this is not successful **the courts are a vital part of our constitutional arrangements to redress situations where rights have been put at risk.**

In this situation we are referring to non-legal advocacy which supports people to express their views and wishes, and helps them to stand up for their rights, in everyday situations and discussions with public services and bodies. This includes formal advocacy such as advocates provided under Mental Health, Mental Capacity and Care laws, Advocates for Sexual and Domestic Violence survivors, and self-advocates such as people with learning disabilities supporting each other in formal meetings with staff. For these groups, either the prospect of, or having to support the taking of full Judicial Review cases, provides legal teeth to secure changes to public body/service decisions and policy which would otherwise risk the rights of people in vulnerable situations.

Of the representatives from community and advocacy groups who shared their views with BIHR:

- 100% of those who had experienced judicial review influencing decision making felt that the process had a positive impact on decision making and protecting human rights.
- 100% of people who responded said they would be worried if the judicial review process was changed or diluted;

### One respondent highlighted the increased importance of these mechanisms in the current climate of Covid-19:

“It's so important especially at time of easements, and Local Authorities taking guidance about statutory issues. We are, as a sector, finding decisions such as side stepping of the Mental Capacity Act, rule 1.2<sup>(1)</sup> cases being last minute, not instructing 39A IMCA<sup>(2)</sup>, Serious Medical Treatment Decisions<sup>(3)</sup>, DNAR's<sup>(4)</sup> etc all being done without advocacy.”

(1) Rule 1.2 refers to the appointment of advocates/others as litigant friends for people with mental capacity issues in the Court of Protections

(2) 39A Independent Mental Capacity Advocates represent people who are subject to a Deprivation of Liberty Safeguard Order in a hospital or care home.

(3) The Mental Capacity Act requires doctors to involve advocates in SMT decision for people with mental capacity issues

(4) These are Do Not Attempt Resuscitate orders; evidence from our work shows a disproportionate, and often potentially unlawful use of DNARs for disabled people and older people.

## Judicial Review: helping ensure a human rights culture in the UK

At BIHR we have over 50 years' experience working to ensure the realisation of rights in the UK, with a focus on the implementation of the Human Rights Act over the last 20 years. The process of Judicial Review is fundamental to our work ensuring rights are respected, protected and fulfilled every day.

In our experience, Judicial Review is central to protecting our human rights because it provides a vital mechanism which makes rights legally enforceable. The process is fundamental to ensuring that public authorities make decisions in a lawful way and holds them to account when they do not act lawfully. For example, in Commissioner of Police of the Metropolis v DSD and another (2018), the Supreme Court ruled that the police have a duty to investigate properly reported crimes of serious violence. In this case, two victims of John Worboys (the black cab driver responsible for a large number of sexual offences) reported their attacks to the police in 2003 and 2007. However, the police did not investigate the attacks properly and Worboys was able to continue attacking women until 2009. By failing to undertake a proper investigation, the women were exposed to inhuman and degrading treatment (Article 3). This decision changed the lives of many people, showing that even when crimes are committed by a private citizen, the state can still be held to account. It is not enough to simply have the right processes and policies in place, failures in investigations can also breach the law.

However, as our evidence above, which echoes our experience, shows, the value of Judicial Review is not only about the legal cases that are taken but is also about preventing (or changing) bad decisions to avoid Judicial Review. For example, in March 2020, a proposed judicial review challenge to the National Institute for Health and Care Excellence ('NICE') COVID-19 guideline for clinical care secured important changes to protect the rights of Autistic people, people with learning disabilities, and/or mental health issues from discrimination when accessing critical care. This protected the right to life (Article 2, HRA), and the right not to be discriminated against (Article 14, HRA) of potentially thousands of people across the UK. This also shows how the Judicial Review process can ensure that the law is a living tool which responds to people's needs through application to the current context and/or emerging areas.

The potential that a person can bring a Judicial Review case encourages public authorities to use good decision-making processes in the first place. By providing this framework for decision making, i.e. that decision making must be lawful (including complying with human rights laws), this allows both the executive and local authorities to carry on the business of government efficiently and lawfully from the outset. The legal enforceability of human rights through Judicial Review is one of the mechanisms that move us towards a culture of respecting human rights in the UK, where rights are respected, protected and fulfilled every day.

The Joint Committee on Human Rights has made clear, that a culture of respect for human rights **requires both court action and everyday accountability**:

### Parliament's Joint Committee on Human Rights:

“A human rights culture is one that fosters basic respect for human rights and created a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities... in which all our institutional policies and practices are influenced by these ideas... The building of a human rights culture... [depends] not just on courts awarding remedies for violations of individual rights, but on decision-makers internalising the requirements of human rights law, integrating to standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields is fully informed by human rights considerations.”

Sixth Report of Session 2002-03, The Case for a Human Rights Commission, HL Paper 67-I/HC 489-I, at para. 2.

It is clear from the responses to our survey that both decision makers (staff working in health, care and social work) and people who access services (and the family members, advocates and community groups that support them) agree in the importance of the judicial review process as a mechanism for protecting human rights, and furthering the creation of a culture of human rights in the UK. We urge the IRAL to be mindful of the wider importance of Judicial Review in our constitutional arrangements, and particularly for people in their everyday lives. An over focus on changing the technical procedures around Judicial Review, absent of this context, risks undermining this important accountability mechanism, which helps ensure people's rights are upheld in every day decision making across the country.