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## The ‘Exceptionality’ of Legal Aid: Affordable Access to Justice in Judicial Review

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### ABSTRACT

*This article discusses the role of costs as a limitation on access to judicial review in the UK. Part I assesses the series of financial hurdles to access currently faced by would-be judicial review claimants, looking in particular at the impact of recent changes to the availability of legal aid funding. Part II argues that affordable access to justice in general is necessary in order to ensure that citizens’ rights will be properly respected by governments. Furthermore, access to justice in the judicial review context is fundamental because judicial review offers citizens a way to stand up to the State to protect themselves and functions as a ‘remedy of last resort’ when all other avenues for relief have been exhausted. Part III looks at the case law of the European Court of Human Rights regarding the extent to which the availability of legal aid funding is essential to the safeguarding of human rights, as well as domestic case law concerning the affordability of access to court, and applies this in the judicial review context. The article argues that the right approach to the granting of legal aid funding is that explained in *Airey v Ireland*, but that later interpretations, particularly in UK law, have wrongly sought to narrow the principle stated in this case in order to maintain that legal aid is only necessary for claimants in rare, ‘exceptional’ cases.*

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## INTRODUCTION

Much has already been written about the cuts to legal aid funding in the UK and about the detrimental impact this has had on citizens' access to justice. Although this article will discuss why access to justice is important in general, most of the piece will focus more specifically on why it is so significant in the context of judicial review, an area in which access has been severely reduced in recent years through funding cuts and other changes. I will explore the current financial position of would-be judicial review claimants in Part I in order to provide the necessary context for the arguments made later on.

In Part II, I will ask: what is it that makes access to justice so fundamental? I will argue that it is the fact that access to justice is necessary in order to protect the enjoyment of citizens' other rights and entitlements under the law; rather than the fact that it is a right that serves an innate end or good in itself. This does not mean that it can itself be treated as secondary, however. In fact, quite the opposite is true. Access to justice is essential for the safeguarding of all other rights: rights which are unenforceable in practice are merely illusory, and so the right which protects enforceability must be of paramount importance. More specifically, in the judicial review context, the role of access to justice as a safeguard is particularly clear, given that judicial review, as the 'remedy of last resort', functions as the ultimate safety net to protect citizens against abuses by the State.

From this conclusion, Part III moves on to the next logical question: when access to justice is so important, how can it have been allowed to suffer the extreme attenuation discussed in Part I? I answer this by arguing that *true* access to justice is far more comprehensive than is recognised in the hollow approach preferred by recent UK governments. I will argue that enabling a satisfactory degree of access to justice goes beyond the mere existence of courts and legal procedures which citizens can only realistically and fairly use if they can afford a lawyer or have a law degree of their own. Rather, the right of access to justice encompasses a right to legal advice and representation, including the grant of funding to this end, where it is unreasonable to expect an individual to be able to pursue a claim on their own; a common state of affairs in modern judicial review. I will examine some of the most significant case law concerning access to justice,

including access to legal aid, and argue that the best approach largely coheres with the view of the European Court of Human Rights ('ECtHR') as stated in *Airey v Ireland*,<sup>1</sup> but not with the way in which later interpretations of this case have sought to narrow the right to legal aid such that it is only available in rare, 'exceptional' cases. The idea that cases requiring legal aid are exceptional takes insufficient account both of the complexity of the legal processes that citizens are expected to navigate and the cost of retaining a professional to do it for them. Furthermore, in the context of judicial review, I argue that even the overly narrow tests offered for such 'exceptional' cases actually apply far more frequently than the government wishes to recognise because of the extent of the financial barriers to access.

## I. THE ATTENUATION OF ACCESS TO JUDICIAL REVIEW

Judicial review offers a means by which citizens can challenge government decisions. It is, therefore, unsurprising that governments tend to regard it as a thorn in their side and often seek to restrict its availability.<sup>2</sup> Of course, some restrictions on access to judicial review are justifiable – inevitably, court time and resources are not infinite, and must be preserved for those with meritorious cases. However, when this is taken too far, the barriers can become insurmountable even to those with worthwhile claims. I argue that this is what has happened throughout the last decade.

There exist several widely recognised limitations on access to judicial review. Most of these, for example the time limits for bringing a claim and the rules on standing, are formal limitations imposed by statute or common law to act as filters to keep out those with hopeless claims or those viewed as 'time wasters' by the

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<sup>1</sup>*Airey v Ireland* (1979) 2 EHRR 305.

<sup>2</sup>This perception has been growing in the decades since the advent of the Human Rights Act 1998: see 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, October 2015) 1, 4.

government.<sup>3</sup> However, the informal limitation, yet by far the most significant by far in practice, is the cost of bringing a judicial review claim.<sup>4</sup>

The ordinary costs rule in English law, just as applicable in judicial review cases as in contract or tort disputes, is that the loser will pay the winner's legal costs as well as their own, the rationale being that the winning party has proven that they were right and the loser was wrong, and no one should be charged for going through the process necessary to vindicate their rights. However, this rule does not account for the fact that parties to judicial review proceedings often occupy grossly unequal positions – both in terms of their financial situation and their experience with the law – and that judicial review claims must generally go before the High Court.<sup>5</sup> This means that the cheaper small-claims routes, often available in private law, are not an option.

In judicial review, the defendant will generally be a government department, a Secretary of State, or other form of public authority, and therefore will have far greater resources than an ordinary claimant, who is usually a private individual.<sup>6</sup> In contrast to the defendant, the majority of citizens simply do not have the kind of money needed to pursue a judicial review claim, especially when faced with the prospect of an adverse costs order if they lose, leaving them liable to pay the

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<sup>3</sup>The idea that judicial review claimants are a drain on public resources and government time is one to which media conversations around the subject have frequently returned in the last decade. See e.g. the rhetoric used by David Cameron during his time in power: BBC News, 'PM to crack down on "time-wasting" appeals' (19 November 2012) <<https://www.bbc.co.uk/news/uk-politics-20389297>> accessed 26 December 2020.

<sup>4</sup>Tom Hickman, 'Public Law's Disgrace' (*UK Constitutional Law Blog*, 9 February 2017) <<https://ukconstitutionalallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>> accessed 23 December 2020.

<sup>5</sup>I say 'generally' because since the reform of the UK tribunal system (in the Tribunals, Courts and Enforcement Act 2007) certain areas of judicial review, such as immigration and asylum claims, have been transferred to the Upper Tribunal. It was hoped that this would make them more accessible and affordable, as the more inquisitorial style of tribunals would be better suited to unrepresented litigants. However, this change has come with its own problems: see for example the extensive work of Robert Thomas and Joe Tomlinson in this area.

<sup>6</sup>Although public interest claims brought by campaign groups can and do happen, recent research shows that they make up a very small proportion of total judicial review claims. see Joanna Bell and Elizabeth Fisher, 'Exploring A Year of Administrative Law Adjudication in the Administrative Court' (Working Paper, 21 September 2020 – forthcoming in *Public Law*).

government's costs in an amount which they have little hope of anticipating at the start of the claim. Although he notes that it is difficult to estimate exactly how much any one judicial review is likely to cost, Tom Hickman writes:

For a very simple two hour judicial review against a government department the costs of losing at trial would probably be in the region of £8-12,000. This is the cheapest end of the spectrum [...] A moderately complex claim lasting a day and not brought against a central government department – say, a regulatory body – using external solicitors would be expected to cost in excess of £40,000 (plus VAT) and potentially over £100,000. For a substantial two day judicial review the cost range is probably between £80,000 and £200,000.<sup>7</sup>

Even the figure he names for the very cheapest end of the scale amounts to approximately one third of the median annual income for UK citizens<sup>8</sup> – this is not an amount of money that can comfortably be risked, even if the claimant believes that they have a good chance of winning.

The cost of making a claim had previously been mitigated by the availability of legal aid funding and costs protection measures. However, there have been two significant Acts of Parliament passed in the last decade which have greatly reduced the accessibility of judicial review through changes to funding rules. Firstly, the Legal Aid, Sentencing, and Punishment of Offenders Act 2012 ('LASPO'), combined with its attendant regulations,<sup>9</sup> made massive cuts to the legal aid budget and now restricts the availability of funding for judicial review to only the poorest members of society, despite the fact that the class of people who cannot reasonably afford it themselves is far broader. Secondly, the Criminal Justice and

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<sup>7</sup>Hickman (n 4).

<sup>8</sup>The median disposable income (after taxes and benefits) of UK households for the financial year ending 2020 was £29,900: Office for National Statistics, 'Average Household Income, UK: Financial Year 2020' (*Office for National Statistics*, 21 January 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddisposableincomeandinequality/financialyear2020>> accessed 25 January 2021.

<sup>9</sup>Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013; Civil Legal Aid (Remuneration) (Amendment) Regulations 2015.

Courts Act 2015 ('CJCA') greatly limits the possibility of reducing the claimant's financial burden through Costs Capping Orders ('CCOs'), which limit the extent to which a claimant can be liable to pay their opponent's costs if they lose.<sup>10</sup> One of the most significant means by which these legislative changes have introduced financial disincentives to judicial review is by providing that CCOs<sup>11</sup> and legal aid funding for judicial review may not be granted until after the claim has passed the permission stage.<sup>12</sup> This is despite the fact that claimants must compile a substantial case prior to this point and, therefore, may incur the bulk of their costs before permission is granted or refused.<sup>13</sup>

The cuts to legal aid funding arising from LASPO have impacted numerous areas of legal practice in the UK. One of the most worrying results has been the rise of litigants in person – claimants who represent themselves because they cannot afford to pay for the expertise of a solicitor. This increases the costs of cases by requiring more court time, as such litigants are unfamiliar with legal procedure, thus their cases cannot proceed as quickly or effectively as when both sides are properly represented. However, especially in judicial review cases, it will likely stack the odds even further against individual claimants as they must take on the might of a well-funded and experienced governmental legal team without any legal expertise of their own.<sup>14</sup> This, in turn, increases the probability that the claimant will lose their case and be subject to an adverse costs order, leaving them liable to pay the expenses of an opponent who will not have scrimped and saved on legal fees as they have.

Although the argument has been successfully made, that the unavailability of legal aid to claimants facing powerful defendants can constitute an infringement of the right to a fair trial due to the inequality of arms between the parties, proving this on a given set of facts will be far from simple. In *Steel and*

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<sup>10</sup>Criminal Justice and Courts Act 2015 (CJCA 2015) s 88.

<sup>11</sup>*ibid.*

<sup>12</sup>Civil Legal Aid (Remuneration) (Amendment) Regulations 2015.

<sup>13</sup>Noted in 'The Public Law Project's submission to the Ministry of Justice's consultation, 'Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals' (Public Law Project, June 2019) 1, 10 (PLP Submission).

<sup>14</sup>See e.g. Hazel Genn and Yvette Genn, 'The Effectiveness of Representation in Tribunals' (Lord Chancellor's department 1989); see also Andrew Leggat, *Tribunals for users: One System, One Service: Report of the Review of Tribunals* (Stationery Office 2001) (Leggatt Report) para 4.21.

*Morris*,<sup>15</sup> an Art 6 European Convention of Human Rights ('ECHR')<sup>16</sup> challenge arising out of the so-called *McLibel*<sup>17</sup> case (a defamation suit by McDonald's against two Greenpeace activists which had lasted ten years), the European Court of Human Rights held that:

[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.<sup>18</sup>

This hardly offers a secure case for anyone seeking judicial review funding; rather, it only invites participation in an additional legal procedure in order to determine whether the individual's case satisfies the nebulous requirements of the Strasbourg jurisprudence. This is not ideal when the problem at hand is that the claimant cannot secure sufficient funding for their present lawsuit. The uncertainties resulting from the current case law will be further discussed in Part III.

Despite sustained argument in favour of introducing new measures to lessen the financial barriers to public access to judicial review, successive governments have resisted the calls for change. Suggestions for improvement, which have been so far all been rejected,<sup>19</sup> have included the introduction of Qualified One-Way Costs Shifting, which would ensure that claimants would never have to pay any more than 'the amount (if any) which is a reasonable one...to pay having regard to all the circumstances'<sup>20</sup> and the extension of the Aarhus Rules (a costs protection regime currently only applicable in environmental litigation) to cover

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<sup>15</sup>*Steel and Morris v UK* (2005) 41 EHRR 22.

<sup>16</sup>Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.

<sup>17</sup>*McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366.

<sup>18</sup>*Steel and Morris* (n 15) [61].

<sup>19</sup>Ministry of Justice, 'Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals' (Consultation Paper 2019).

<sup>20</sup>Sir Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (December 2009) 1, Chapter 30.

all types of judicial review.<sup>21</sup> Notably, the Aarhus Rules were introduced after the European Court of Justice found that environmental justice in the UK was ‘prohibitively expensive’.<sup>22</sup> It is unlikely that the costs barrier was significantly higher in environmental law cases at this time than in any other area of judicial review, yet the (limited) improvements to the new rules have been restricted to this field alone.

We may soon see changes to judicial review procedure and funding position as a result of the Independent Review of Administrative Law (‘IRAL’), launched by the Government in July 2020. IRAL covers an extremely wide range of both procedural and substantive issues and will naturally have ramifications for the affordability and accessibility of judicial review. However, since the launch of the Review, concerns have been raised about the extremely short time period in which the panel has been allocated to conduct this very broad review,<sup>23</sup> as well as the perceived pro-Government slant of the Terms of Reference.<sup>24</sup> It may, therefore, be naïve to hope that the review will lead to improvements in the near future.

## II. THE SIGNIFICANCE OF ACCESS TO JUSTICE AND THE IMPORTANCE OF JUDICIAL REVIEW

Having set out the current position regarding the affordability of judicial review in the UK, I will now explain why we should be so concerned about it – why access to justice matters, and why access to judicial review in particular is so important.

At first, the right of access to justice might appear to be less important than many other human rights: after all, many people will never need to enter a

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<sup>21</sup>Sir Rupert Jackson, ‘Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs’ (July 2017) 1, Chapter 10.

<sup>22</sup>In breach of Article 9, paragraph 4 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

<sup>23</sup>The Independent Review of Administrative Law – Call for Evidence: Submissions from a group of Oxford University public lawyers’ (25 October 2020) para 14.

<sup>24</sup>For further discussion of IRAL, as well as more detailed coverage of the issues discussed in this section, see Amy Hemsworth, ‘“Streamlining” Judicial Review – The Independent Review of Administrative Law’ (Oxford University Undergraduate Law Journal Blog, 3 September 2020) <<https://www.law.ox.ac.uk/ouulj/blog/2020/09/streamlining-judicial-review-independent-review-administrative-law>> (6 February 2021).

courtroom, whereas rights like freedom of speech or access to healthcare are far more universally enjoyed. However, such an argument misses the essential role of access to justice in protecting the enjoyment of those other rights and in upholding a law-abiding society more generally. Without some form of dispute resolution system which can be relied upon to vindicate individuals' rights, those rights become merely illusory, and the rule of law is not upheld.<sup>25</sup> Respect for individuals' rights will consequently decline due to the knowledge that unacceptable behaviour will not be penalised. This is equally so in a society where such a system exists, but no one can realistically afford to use it.

Moreover, the significance of access to justice also extends beyond enabling protection of what we would conventionally term 'rights'. This is particularly important in the administrative law context, and especially in judicial review, where the aim of bringing a claim is to have the court evaluate the lawfulness of a government decision. We would not ordinarily say that an individual has the 'right' that a public body make its decisions lawfully; nevertheless, where they will be affected by those decisions, they have an interest, and that interest is worthy of protection.<sup>26</sup> Meaningful and affordable access to justice is the means by which that protection is secured.

The next question to address is that of the significance of judicial review. It is certainly not the only means of redress available in administrative law; indeed, it is used in only a small fraction of all administrative cases. Judicial review is the 'remedy of last resort', not only in practice, but by law: one of the formal limitations on access to judicial review is that claimants must have exhausted all alternative means of obtaining relief before bringing a claim.<sup>27</sup> Nevertheless, it is extremely important. As the final procedure to which citizens can resort, it can function as a kind of safety net which 'catches' any claims which do not fit easily into established processes or statutory frameworks but have merit nonetheless. One essential justification for a judicial system is that the legislator cannot hope

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<sup>25</sup>According to Lord Bingham, one of the eight 'sub-rules' of the rule of law is the provision of affordable and accessible means for resolving legal disputes: Lord Bingham, 'The Rule of Law' [2007] 66 CLJ 67.

<sup>26</sup>'Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power,' *R v Somerset CC, ex parte Dixon* [1998] Env LR 111 [121] (Sedley J).

<sup>27</sup>See e.g. *R (Glencore Energy UK Ltd.) v HMRC Revenue and Customs* [2017] EWCA Civ 1716; *Oyekan v Secretary of State for the Home Department* [2016] EWCA Civ 1352.

to think of everything: Parliament cannot predict every possible factual matrix to which its Acts might someday be applied, and as a result, we need courts to work out how to deal with new situations. Judicial review is an important part of this because it allows citizens to raise questions which may never have been asked before and which Parliament did not anticipate. Furthermore, judicial review was developed by the courts themselves as an inherent competence rather than a power conferred on them by Parliament, and there have been strong suggestions in the case law that the courts regard it as far more enduring than remedies developed via legislation, which can be taken away just as easily as they were introduced:

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.<sup>28</sup>

Meaningful access to judicial review before properly resourced courts is also essential because of the complexity of the subject matter. The question of whether a government decision in a particular context was made lawfully invites consideration of a whole host of different factors and potential grounds of challenge – it is not a simple inquiry to make. Moreover, it is not an inquiry which can appropriately be carried out and concluded by just anyone. A ruling that a public authority decision is unlawful sends the message to the members of the executive that they are being observed and that they are not above the law; it can also signal to the public that the government has been misbehaving. Citizens have a clear interest in the government being bound by the rule of law and the powers conferred on it by Parliament. If executive decisions are being made unlawfully, it is in all of our interests for this to be identified and dealt with. When a meritorious judicial review claim is raised before a court and appropriately vindicated, this serves the public as a whole, even if the substantive issue under discussion is not one which directly affects everyone. More generally, we have an interest in having a functioning legal system where our rights will be protected as we expect. As the Supreme Court stated in *UNISON*:<sup>29</sup>

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<sup>28</sup>R (*Jackson*) v *Attorney-General* [2005] UKHL 56 [102] (Lord Steyn).

<sup>29</sup>R (*UNISON*) v *Lord Chancellor* [2017] UKSC 51.

[...] the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable'.<sup>30</sup>

Furthermore, in the judicial review context, claimants' ability to bring their disputes to the courts' attention is often beneficial to the administration itself, contrary to popular belief. In their 2015 study, 'The Value and Effects of Judicial Review', authors Bondy, Platt, and Sunkin identify the perceived negative impact of judicial review on public bodies as one of three 'untested assumptions' which have driven governments (in particular, the 2010-15 coalition government) to become increasingly hostile to judicial review. However, the study shows that although judicial review does, of course, impose costs on public bodies, it also leads to improvements in government decision-making where the public body takes on board the opinion of the court and re-examines its processes so that it can improve in the future.<sup>31</sup>

The other key assumptions investigated by this study were 'that growth in the use of [judicial review] has been largely driven by claimants abusing the system, either deliberately or otherwise'<sup>32</sup> and that '[judicial review] litigation tends to be an expensive and time consuming detour concerned with technical matters of procedure that rarely alters decisions of public bodies'.<sup>33</sup> All three arguments have

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<sup>30</sup>ibid 51 [71] (Lord Reed).

<sup>31</sup>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 Report, October 2015) 1, 45-6.

<sup>32</sup>ibid 1.

<sup>33</sup>ibid.

frequently been relied upon in government rhetoric around the subject of judicial review, most recently in the press release accompanying the launch of IRAL:

The review [...] will consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for *effective* and *efficient* government.

The move delivers on a manifesto commitment to ensure the judicial review process is not open to *abuse* and *delay*.<sup>34</sup> [all emphasis added]

However, the report shows that the empirical evidence does not support such claims; on the contrary, the evidence furnished by the study ‘shows them to be at best misleading and at worst false’.<sup>35</sup> The same is true of the fear, also frequently voiced by government officials, that judicial review is being increasingly co-opted by campaign organisations who are using it as a way of pursuing ‘politics by other means’ and ‘single-issue activism’:<sup>36</sup> both the 2015 study and a more recent investigation by Joanna Bell and Elizabeth Fisher have shown that public interest litigants make up a very small proportion of all judicial review claimants.<sup>37</sup>

Judicial review is a tool which can be employed not only to protect individuals, but to improve society as a whole. The reduction of access to judicial review, on the basis of arguments without empirical foundation and to the point where only a small minority of citizens can hope to pursue a claim, is therefore extremely concerning. The fact that the costs limitation is informal and has been largely brought about indirectly, for example through legal aid cuts, which make judicial review officially still possible but in reality unavailable for most people, is very telling. It shows that governments have not (thus far) been bold enough to make the financial barriers to judicial review explicit because they recognise that

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<sup>34</sup>Ministry of Justice, ‘Government launches independent panel to look at judicial review’ (31 July 2020) <<https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>> accessed 6 February 2021.

<sup>35</sup>Bondy, Platt and Sunkin (n 30) 1.

<sup>36</sup>Chris Grayling, ‘Judicial review is not a promotional tool for countless Left-wing campaigners’ *Daily Mail* (6 September 2013) <<https://www.dailymail.co.uk/news/article-2413135/chris-grayling-judicial-review-promotional-tool-left-wing-campaigners.html>> accessed 6 February 2021.

<sup>37</sup>Bell and Fisher (n 6).

the significance of this right is simply incompatible with the scale of the cutting back of access.

### III. THE REQUIREMENTS OF GENUINE ACCESS TO JUSTICE

UK law currently recognises the right of access to justice in two central ways: through Art 6(1) of the ECHR, as first elucidated in *Golder v UK*,<sup>38</sup> and as a common law constitutional right, as identified by Laws J in *R v The Lord Chancellor ex p Witham*.<sup>39</sup> In this section, I will explore the significance of these cases and argue that neither go far enough in their protection of access to justice. *Witham*<sup>40</sup> in particular fails to recognise the importance of access to legal aid in enabling individuals to put their case effectively to a court, while *Golder* is mostly silent on that subject.<sup>41</sup> The better approach, I argue, is closer to that taken by the ECtHR in *Airey v Ireland*,<sup>42</sup> where it was recognised that in many cases meaningful access to justice requires access to appropriate legal representation, which in turn will often require the grant of legal aid. I disagree with the way in which later interpretations have sought to restrict the impact of *Airey*<sup>43</sup> by limiting the right to legal aid to ‘exceptional’ cases only, and I will argue here that the truly ‘exceptional’ scenario is not when a legal claim is complicated enough for the prospective claimant to need a lawyer, but rather when it is simple enough for them reasonably to do without. This is especially true in fields such as administrative law, which are not particularly well understood by those without a legal background and are, therefore, already inaccessible to the public. Although the cases discussed in this section do not directly concern access specifically to judicial review, they address the costs of access to justice more generally and I argue that many of the points raised are equally appropriate (and in some cases more so) in the judicial review context.

In *Golder*,<sup>44</sup> the claimant was a prisoner who argued before the ECtHR that his rights under Art 6(1) ECHR had been breached by the prison authorities, who had restricted his access to his lawyer. He had sought to institute proceedings for

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<sup>38</sup>*Golder v UK* (1975) 1 EHRR 524.

<sup>39</sup>*R v The Lord Chancellor ex p Witham* [1998] QB 575.

<sup>40</sup>*ibid.*

<sup>41</sup>*Golder* (n 37).

<sup>42</sup>*Airey* (n 1).

<sup>43</sup>*ibid.*

<sup>44</sup>*Golder* (n 37).

libel but was unable to do so because of the authorities' actions, even though what they had done was not considered a direct or formal hindrance of his ability to go to a court. The question was whether Art 6, which provides for the 'right to a fair trial', guarantees only the fairness of proceedings to which an individual already happens to be a party, or whether it also guarantees their own right to institute proceedings in the first place. The Court held by a majority that the latter interpretation was correct. It considered that, although Art 6 does not explicitly state the right of initial access to a court, the right is inherent in the guarantee of a fair trial:

[Article 6(1)] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by [Article 6(1)] as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.<sup>45</sup>

The majority emphasised the importance of the rule of law to the framers of the ECHR, discussing its treatment in the Preamble as a founding principle of the agreement between the Contracting States. The judges considered that it would be 'inconceivable'<sup>46</sup> for Art 6 to give procedural guarantees about the fairness of legal proceedings without also protecting 'that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings'.<sup>47</sup>

*Witham*<sup>48</sup> was a domestic judicial review challenge to the Supreme Court Fees (Amendment) Order 1996, in which the Lord Chancellor had decided to increase the fees for bringing certain types of legal proceedings and to remove the exemption from court fees which was in place to ensure that those who could not

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<sup>45</sup>*Golder* (n 37) [36].

<sup>46</sup>*ibid.*

<sup>47</sup>*ibid.*

<sup>48</sup>*Witham* (n 38).

afford them would still be able to access a court. The claimant had wished to bring a defamation suit, but because such claims fell outside the scope of legal aid, he was unable to afford the new fees and could no longer claim exemption as a result of the Lord Chancellor's order.

The ECHR jurisprudence, including *Golder*,<sup>49</sup> was relied upon in argument and recognised in the judgment as offering an alternative basis for finding an infringement of the claimant's rights, but the Court based its decision primarily on the violation of a common law 'constitutional right of access to the courts'.<sup>50</sup> Laws J defined a constitutional right in English law as one which 'cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate'.<sup>51</sup> The Court held that such specific provisions were not present in the relevant statute, and thus the Order was *ultra vires* due to its unauthorised contravention of the constitutional right.

The ECtHR had stated in *Golder* that,<sup>52</sup> although Art 6(1) encompasses the right of access to a court, this right was nevertheless not unlimited: the Court recognised several examples of grounds for introducing restrictions, including in cases of prisoners (though not to the extent which had been the case in *Golder* itself)<sup>53</sup> and 'regulations relating to minors and persons of unsound mind'.<sup>54</sup> In *Witham*,<sup>55</sup> though, the domestic court seemed less open to the possibility of limitations on the right. Although there was no suggestion that Parliament could not abridge or even remove the right of access to a court altogether (provided it chose to do so by explicit words), Laws J nevertheless said that 'the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage'.<sup>56</sup> He compared it to the right of freedom of expression, saying that 'the circumstances in which free speech might justifiably be curtailed in my view run wider than any in which the citizen might properly be prevented by the state from seeking redress from the Queen's

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<sup>49</sup>*Golder* (n 37).

<sup>50</sup>*Witham* (n 38) 580A.

<sup>51</sup>*ibid* 580E.

<sup>52</sup>*Golder* (n 37).

<sup>53</sup>*ibid*.

<sup>54</sup>*ibid* [39].

<sup>55</sup>*Witham* (n 38).

<sup>56</sup>*ibid* 585F.

courts'.<sup>57</sup> This case therefore supports the view of access to justice, or access to a court, as a paramount right, deserving of the highest protection.

Interestingly, however, Laws J then went on to draw a distinction between the different financial hurdles faced by would-be claimants:

[Counsel for the Lord Chancellor] submitted that it was for the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money and what should not. As regards the expenses of legal representation, I am sure that is right. Payment out of legal aid of lawyer's fees to conduct litigation is a subsidy by the state which is in general well within the power of the executive, subject to the relevant main legislation, to regulate. But the impost of court fees, is, to my mind, subject to wholly different considerations. They are the cost of going to the court at all, lawyers or no lawyers. They are not at the choice of the litigant, who may by contrast choose how much to spend on his lawyers.<sup>58</sup>

It is at this point that I disagree with the views expressed in *Witham*,<sup>59</sup> because Laws J is suggesting that a claimant's access to a lawyer is significantly less fundamental to their right to a fair trial than is their ability to get through the doors of the courtroom. The idea that all that is necessary for a meritorious claim to be properly vindicated is for the claimant to raise it to a court's attention is undoubtedly pleasant, but it is simply not grounded in reality. As already noted,<sup>60</sup> extensive studies have shown that represented litigants are more likely to win, even before tribunals, which many had hoped would be friendlier to those without representation. Although a well-off claimant may be able to choose between many different lawyers according to the rates they charge, for many people there is no choice at all because they cannot afford even the cheapest services on offer – a particular problem faced in judicial review.

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<sup>57</sup>ibid

<sup>58</sup>ibid 586D-E.

<sup>59</sup>*Witham* (n 38).

<sup>60</sup>PLP Submission (n 13) 5.

The comparison between *Golder*<sup>61</sup> and *Witham*<sup>62</sup> on this point is interesting; although in *Golder*<sup>63</sup> the concern of the ECtHR seems primarily to have been with the State preventing the claimant from getting to court (which would align with the distinction drawn in *Witham*),<sup>64</sup> on the facts of the case, the conduct complained of by the claimant was that the authorities had prevented him from seeing and corresponding with his lawyer. His access to legal representation seems to be identified with his ability to bring legal proceedings:

Golder had made it most clear that he intended ‘taking civil action for libel’; it was for this purpose that he wished to contact a solicitor, which was a normal preliminary step in itself and in Golder’s case probably essential on account of his imprisonment. *By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action [emphasis added].* Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time.<sup>65</sup>

Admittedly, the Court seems to suggest that Golder’s imprisonment meant that he would have a greater need for a lawyer in bringing his claim than would an ordinary citizen, so this case cannot be taken as putting access to legal representation on equal footing to access to the Court itself. However, the Court does recognise that contacting a solicitor is a ‘normal preliminary step’ in instituting proceedings, something that is reasonably to be expected of a would-be claimant rather than a luxury only really required in exceptional cases.

The importance of legal representation, and therefore, of legal aid for those unable to afford representation by their own means, continued to draw the attention of the Strasbourg court. In *Airey v Ireland*,<sup>66</sup> the applicant was challenging the unavailability of legal aid for a petition for judicial separation from her

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<sup>61</sup>*Golder* (n 37).

<sup>62</sup>*Witham* (n 38).

<sup>63</sup>*Golder* (n 37).

<sup>64</sup>*Witham* (n 38).

<sup>65</sup>*Golder* (n 37) [531].

<sup>66</sup>*Airey* (n 1).

husband according to Irish family law, contending that because she could not afford to pay a solicitor to act for her in the proceedings, the lack of legal aid constituted an effective denial of her right to a fair trial under Art 6(1) as elucidated in *Golder*.<sup>67</sup> The Irish government contested her application on the basis that she could still access the court because she could bring her petition before it herself, without legal representation. However, the ECtHR held:

The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.<sup>68</sup>

The Court here recognised that the mere ability to go to a court as a litigant in person is not necessarily on its own sufficient to meet the requirements of the right of access to justice. Rather, the right may in some cases entail a right to legal representation, and consequently a right to legal aid for the purpose of securing such representation where the claimant cannot afford it themselves. *Airey*<sup>69</sup> was held to be one such case, and the Court found that the applicant's rights under Art 6(1) had been violated.<sup>70</sup>

In reaching this decision, the Court relied upon several factors present in the case which marked it as one where legal aid was necessary for full satisfaction of Art 6(1). In particular, it was noted that under Irish law, the decree of judicial separation the applicant sought was only available in the High Court, which according to expert evidence was the 'least accessible court' due to the complexity of its procedures and the high fees payable for representation before it.<sup>71</sup>

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<sup>67</sup>*Golder* (n 37).

<sup>68</sup>*Airey* (n 1) [24].

<sup>69</sup>*ibid*.

<sup>70</sup>*ibid* [28].

<sup>71</sup>*ibid* [24].

Importantly, these arguments are also applicable in the context of UK judicial review: as previously discussed, judicial review claims must generally go before the High Court and the judicial review procedure is very complex. The court also stated that ‘it seems certain...that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not’<sup>72</sup> – this is *a fortiori* the case when a judicial review claimant goes unrepresented, given that their opponent is the State itself.

The court also rejected the Irish government’s argument that *Airey*<sup>73</sup> was to be distinguished from *Golder*,<sup>74</sup> upon which the applicant relied in her Art 6 claim. The government sought to draw this distinction on the basis that unlike in *Golder*,<sup>75</sup> ‘the alleged lack of access to court stems not from any act on the part of the authorities but solely from Mrs. Airey’s personal circumstances’.<sup>76</sup> However, the court found that, the basis for the application being the government’s omission to help Mrs Airey afford representation, rather than an ‘active’ attempt to impede her access to the court, was irrelevant: the State was under a positive obligation to secure the ECHR rights of its citizens. The Court held that ‘the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way’.<sup>77</sup> Again, this argument is clearly transferable to the UK judicial review context, where ‘present-day conditions’, as set out in Part I of this piece, clearly demonstrate that most citizens need financial support in order to afford a claim.

Although *Airey*<sup>78</sup> did not by any means secure a right to unlimited legal aid in civil matters across the board – it made clear that Art 6(1) can in some cases be satisfied by the possibility of appearing as a litigant in person, with much depending on the complexity of the matter at hand and the attendant circumstances<sup>79</sup> – its significance lies in its recognition that legal representation is generally not an optional extra, but in many cases a requirement for a claimant to have meaningful and effective access to justice. One difficulty with the approach

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<sup>72</sup>*ibid.*

<sup>73</sup>*Airey* (n 1).

<sup>74</sup>*Golder* (n 37).

<sup>75</sup>*Airey* (n 1).

<sup>76</sup>*ibid* [25].

<sup>77</sup>*ibid* [26].

<sup>78</sup>*Airey* (n 1).

<sup>79</sup>*ibid* [26].

taken, however, as noted in Part I in the discussion of *Steel and Morris*<sup>80</sup> (which was decided after *Airey*),<sup>81</sup> is that the court has frequently stated that the question of whether Art 6 requires the grant of legal aid is highly context dependent. Although, as I have shown in my discussion of *Airey*,<sup>82</sup> it is possible to identify the factors on which the court relies in an individual decision in order to see how they apply to new cases, authoritative rulings will require more case law, which in turn requires more applications to Strasbourg. Again, this leads us to the paradoxical position that would-be claimants may be required to pay for lawyers in order to argue that they should be granted funding to afford lawyers.

Another difficulty is that the Strasbourg position has not been entirely consistent. Although cases such as *Steel and Morris*<sup>83</sup> have been more faithful to the original approach in *Airey*,<sup>84</sup> in later cases, the Court seems to have taken a more restricted position. In *X v United Kingdom*,<sup>85</sup> the applicant's contention that the refusal to provide him with legal aid constituted an infringement of his right under Art 6(1) was rejected as inadmissible, with the Court stating that this would only be the case 'in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings'.<sup>86</sup> *Airey*<sup>87</sup> was cited in support of this proposition despite the fact that the court in that case had made no mention of any need for 'exceptionality'.<sup>88</sup>

This idea of exceptionality was then taken up in the UK context during the cuts to legal aid under the coalition government.<sup>89</sup> Under s10 of LASPO, it is possible for those excluded from the ordinary scope of the new civil legal aid rules

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<sup>80</sup>*Steel and Morris* (n 15).

<sup>81</sup>*Airey* (n 1).

<sup>82</sup>*ibid.*

<sup>83</sup>*Steel and Morris* (n 15).

<sup>84</sup>*Airey* (n 1).

<sup>85</sup>*X v United Kingdom* (1984) 6 EHRR 136.

<sup>86</sup>*ibid* [3].

<sup>87</sup>*Airey* (n 1).

<sup>88</sup>The UK domestic courts have since followed suit, for example in *Pine v Law Society* [2001] EWCA Civ 1574.

<sup>89</sup>The connection between *X v UK* and the funding cuts was identified by Carol Storer and Tom Royston in their 2014 paper: Carol Storer and Tom Royston 'Obtaining Exceptional Funding Under LASPO – Is It Worth Applying?' (The Public Law and Judicial Review North Conference 2014: The Future of Judicial Review, Oxford, July 2014).

to apply for ‘exceptional case funding’.<sup>90</sup> This section was accompanied by Guidance furnished by the Lord Chancellor on when the funding was to be granted, which initially set a ‘very high threshold’,<sup>91</sup> following the wording of *X v UK*<sup>92</sup> rather than *Airey*<sup>93</sup> (again using the language of ‘practically impossible’ and ‘obvious unfairness’).<sup>94</sup> However, in 2014, this Guidance was successfully challenged in the *Gudanaviciene* case,<sup>95</sup> where the Court of Appeal ruled that it was inconsistent with the wording of the primary legislation – as s10 LASPO itself had never indicated that the funding would only be available in very rare cases or when failure to grant it would undoubtedly constitute a breach of Art 6 ECHR – as well as incompatible with several Convention rights.

*Gudanaviciene*<sup>96</sup> highlighted that the bulk of the Strasbourg jurisprudence did not support a narrow interpretation of *Airey*.<sup>97,98</sup> However, I would further argue that even the version of the *Airey*<sup>99</sup> principle as expressed in *X v UK*<sup>100</sup> is not actually as narrow as its language would first suggest; although certain phrases used (‘exceptional’, ‘practically impossible’) give the impression that legal aid will only rarely be required, actually applying the criteria in contemporary reality tells a different story, especially in the judicial review context. When we consider the developments outlined in Part I, which have led to judicial review claims being practically unaffordable for the majority of the population, we have a clear basis

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<sup>90</sup>Legal Aid, Sentencing and Punishment of Offenders Act 2012, s10.

<sup>91</sup>The Lord Chancellor’s Exceptional Case Funding Guidance (Non-Inquests). As originally published, this Guidance stated, ‘the overarching question to consider is whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings. This is a very high threshold’. The new version of the Guidance, revised after *Gudanaviciene*, can be accessed at <<https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>>.

<sup>92</sup>*X v UK* (n 84).

<sup>93</sup>*Airey* (n 1).

<sup>94</sup>*X v UK* (n 84) [3]; Lord Chancellor’s Guidance on Exceptional Case Funding (n 91).

<sup>95</sup>*R (on the application of Gudanaviciene and others) v The Director of Legal Aid Casework and others* [2014] EWCA Civ 1622.

<sup>96</sup>*ibid.*

<sup>97</sup>*Airey* (n 1).

<sup>98</sup>Rosalind English, ‘Exceptional legal aid funding should not be limited to extreme cases – Court of Appeal’ (*UK Human Rights Blog*, 17 December 2014) <<https://ukhumanrightsblog.com/2014/12/17/exceptional-legal-aid-funding-should-not-be-limited-to-extreme-cases-court-of-appeal/>> accessed 6 February 2021.

<sup>99</sup>*Airey* (n 1).

<sup>100</sup>*X v UK* (n 84).

for arguing that the requirements of even this test have been met. The closure of early legal advice centres and the lack of any kind of widespread legal education to give people a basic understanding of how they might go about exercising their rights further reduces the likelihood that citizens will be capable of going to court themselves. This has been further highlighted by problems caused by the increased frequency of litigants in person coming to court – cases are put less effectively and end up costing even more of the court’s time and resources. Finally, the test asked whether the lack of representation would lead to ‘obvious unfairness’ in the proceedings. I would argue that obvious unfairness is present in any situation in which an unrepresented litigant, without legal education or advice, is expected to go up against an experienced government legal team. This is especially true when we consider that, given that the majority of judicial review cases are brought by individual litigants rather than campaign organisations *and* that judicial review is the remedy of last resort, it is likely that whatever government action the claimant is challenging, and whatever other legal proceedings they have already been through, may have already had a negative impact on their life which may further lessen their capacity to present their case effectively. Remember that, in *Steel and Morris*,<sup>101</sup> the Court held that individual litigants defending against a defamation claim from a big corporation had suffered from such inequality of arms as to render the proceedings unfair – surely this is even more clearly the case when a litigant not only faces the State itself, but does so as the claimant, meaning that they bear the burden of proving their case.

The *Gudanaviciene* case represents a positive step forward in recognising the significance of legal aid funding in the face of recent government hostility.<sup>102</sup> However, even before this decision was handed down and the narrow Guidance rejected, the idea that cases where ‘the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings’<sup>103</sup> were *exceptional*, as opposed to a common state of affairs, was ludicrous, particularly in the judicial review context.

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<sup>101</sup>*Steel and Morris* (n 15).

<sup>102</sup>*Gudanaviciene* (n 92).

<sup>103</sup>*X v United Kingdom* (n 84) [3].

## CONCLUSION

The celebrated barrister Geoffrey Robertson once wrote, ‘The most fundamental right of all is the right to challenge the State, under a legal system which allows the possibility, occasionally, of winning’.<sup>104</sup> Although he was writing from a human rights perspective, his words are equally applicable across all of public law. The ability to stand up against one’s government, to hold it to account for its decisions, and ensure that it behaves according to the law, is essential to any free society, yet we have reached a point where this is simply not reasonably affordable to the vast majority of people. It is one thing to recognise that there are many competing demands on public funding which require compromises be made, but entirely another to block access to a whole system of legal procedure for all but the very wealthy. Although the cuts to legal aid funding and costs protection regimes for judicial review claimants do not directly prevent people from taking their cases to court; they ensure that many who do still manage to pursue their claims will do so either at great financial risk or at a significant disadvantage as a result of their inability to afford legal representation.

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<sup>104</sup>Geoffrey Robertson, *The Justice Game* (Chatto & Windus 1998) 228.

