Public Law Project

Briefing for the 27 June 2013 House of Commons backbench debate: General debate on the legal aid changes

The Public Law Project (PLP) is an independent national legal charity which aims to improve access to justice for people who are disadvantaged by poverty, discrimination or other similar barriers. To fulfil its objectives PLP undertakes research, casework, training and policy work. PLP is based in London but has a national presence and standing. This briefing is in response to the proposed changes to legal aid in the government's *Transforming Legal Aid* consultation paper. It looks at two issues that are within the Public Law Project's expertise.

Exceptional funding - a fig leaf not a safeguard

The government wants to cut legal aid for judicial review cases, introduce a residence test, and remove large parts of prison law from the scope of legal aid, amongst other cuts. It says the effects of these cuts can be mitigated by exceptional funding, and that this will protect the public's right to access to justice[1].

Exceptional funding is already in place: it is designed to be a safety net for the most vulnerable litigants who have strong cases. The MoJ estimated that there would be 5,000-7,000 applications from the last legal aid cutbacks under LASPOA[2]. PLP is running a project to help people make applications for exceptional funding to the Legal Aid Agency. The project is grant funded and is the only one of its kind.

It is PLP's experience, having worked on dozens of exceptional funding cases since 1 April 2013, that the system for granting exceptional funding is not fit for purpose; it does not safeguard access to justice because it is beset with operational failings that bar vulnerable people with strong cases from accessing legal aid:

- The test for getting exceptional funding is complicated and difficult to meet. You have to show either human rights law or European Law requires legal aid to be granted, and that it would be impossible for you to bring your case without a lawyer.

- In practice, anyone who wants to get exceptional funding has to get a lawyer to help them apply for it, and there is no funding to pay for a lawyer to help them apply. The application form is 14 pages long, and the legal issues claimants have to address are complicated. In PLP's experience it takes many hours of work by a qualified lawyer to make an application. **Without the funding you can't get a lawyer, but without a lawyer you can't get the funding.** This means that vulnerable people with strong cases are not getting access to justice.

- In the first two months of the scheme there were fewer than 100 applications, well under the number estimated by the MoJ. We think that is because the application process is too onerous for claimants to manage by themselves. Only one application has been granted so far, to PLP's knowledge.

[1] "It is right to have an exceptional funding scheme to provide an essential safeguard for the protection of an individual's fundamental right to access to justice" Jonathan Djanogly, House of Commons 8/9/11.
[2] The Legal Aid, Sentencing and Punishment of Offenders Act 2012.

- Lots of legal cases are very urgent, but the Legal Aid Agency's target time for deciding exceptional funding applications is 20 days. That is too late for many. There is no emergency procedure.

- There is no exemption for people who do not have capacity to litigate, for example because they suffer from dementia. They cannot bring a case on their own because they have been assessed as incapable of doing so. If these people cannot get legal aid to pay for a lawyer to represent them, they will be denied access to justice.

- Exceptional funding is only available for cases that are not normally eligible for legal aid. It is therefore not available for community care cases, domestic violence cases, mental health cases, homelessness cases, judicial reviews, actions against the police, special educational needs and discrimination. This means that it cannot be a safety net for people needing to bring such cases who fail the proposed residence test. The only way of making exceptional funding available for cases that are in scope, but where the individual affected fails the proposed residence test, would be to amend the primary legislation.

Judicial review: debunking the government statistics

Judicial review is a process by which the government and other public bodies, such as local authorities, can be held to account by citizens, and their decisions and actions can be scrutinised by the courts. The proposal to cut legal aid for judicial review cases will stop that from happening.

The proposal is based on statistics that PLP research shows are misleading and misconceived. Any proposal based on inaccurate data should be viewed with suspicion. Since the proposal interferes with this country's long tradition of using public law to ensure government accountability, the absence of credible data should not be tolerated.

The Lord Chancellor says that judicial review cases are on the rise. This is not the case:

- Leaving aside asylum and immigration cases, there is no evidence of any significant change in the volume of judicial claims over the last ten years. MoJ data demonstrates this.[3]

- The MoJ's own statistics show that the number of final judicial review hearings is steadily decreasing. In 2010 the number of final judicial review hearings decreased by 6 per cent on 2009[4] and in 2011 the number decreased by 14 per cent on 2010.[5]

The Lord Chancellor says that of the huge number of judicial review cases brought last year, "virtually none were successful". In an interview on the Today Programme, he said that of the 11359 applications for judicial review, only 144 were successful.[6] This is not the case: PLP's

[3] See p.10, fig.1 of the *Judicial Review: Proposals for Reform* consultation paper CP25/2012. Available at: https://consult.justice.gov.uk/digital-communications/judicial-review-reform

[4] *Judicial and Court Statistics 2010*, Ministry of Justice (2011), p.145. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf

[5] *Judicial and Court Statistics 2011*, Ministry of Justice (2012), p.65. Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf

[6] In an interview on the Today Programme on Radio 4 on 23 April 2013, Chris Grayling stated: "Well let me give you a raw piece of statistic that will explain the nature of the problem. In 2011, the last year we had figures available, there were 11,359 applications for judicial review. In the end 144 were successful and all of the rest of them tied up government lawyers, local authority lawyers in time, in expense for a huge number of cases of which virtually none were successful. We're not saying there shouldn't be judicial review, we're not saying that members of the public and organisations should not be able to challenge public bodies, but what we're saying is that we have to raise the bar so that we have fewer cases that have no chance of succeeding."

research[7] shows that thousands of cases will have settled with a positive outcome for the claimant at some stage of the proceedings before the final hearing.

Judicial review is a two stage process, once a case is issued in the court, a judge must give permission for the case to proceed to a full hearing; that means the judge must accept the claimant has a good case before it can go forward:

- Around one-third of judicial review claims are withdrawn following a settlement before they get to court. In around three-quarters of those cases, the settlement will have been in the individual claimant's favour. This means that in those cases, the public body who is being challenged admits that it has done something wrong.

- Of the cases that get to the permission stage, around one-third are granted permission to proceed to a full hearing. This is because there are good arguments that the public body who is being challenged has done something wrong.

- Of the cases that are given permission to proceed to a full hearing, over half of them settle before the hearing, again with around three-quarters of the settlements being in the individual's favour. This is because a public body accepts that it has done something wrong.

- Of the small number of judicial reviews that actually get to a full hearing, individuals succeed in approximately 40%. This means that in 40% of cases, a judge finds that a public body has done something wrong.

What these figures show is that public bodies get things wrong and that judicial review is a very effective way of individuals holding them to account. If the government brings in the proposal to remove funding for judicial reviews that do not get permission, these cases will not be brought and unlawful and unfair decision making will go unchallenged.

Government accountability to the British public through the courts is a fundamental part of the British constitution. These proposals to cut legal aid for judicial review are an attack on our democracy.

The government has not made its case that judicial review is on the rise or that there are lots of weak judicial review claims. There is therefore no basis for interfering with the constitutional right of the citizen to bring meritorious challenges against state decision making.

To discuss any of the issues raised in this briefing in more detail, please do not hesitate to contact Martha Spurrier, barrister at the Public Law Project, on 020 7843 1267 or m.spurrier@publiclawproject.org.uk

[7] See *Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before final hearing*; Bondy and Sunkin PLP 2009, A Nuffield Foundation funded project and Bondy and Sunkin's rebuttal of the Lord Chancellor's figures: http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf. Their analysis looks at civil non-immigration and asylum judicial reviews.