Public Law Project

Parliamentary Briefing Paper
Part 4 Criminal Justice & Courts Bill (Judicial Review)
February 2014

This is a briefing paper by the Public Law Project (PLP). PLP is a legal NGO, a registered charity concerned with quality and transparency of public decision-making, and a recognised authority in matters of public law[1]. It is concerned with Part 4 of the Criminal Justice & Courts Bill, in which various amendments to judicial review are proposed. We have also prepared a shorter briefing to accompany our suggested amendments to the Bill.

Judicial review is the mechanism by which citizens may hold the state to account. It is a powerful and fundamental tool of our democracy. It is a directly accessible check on abuse of power, holding the executive to account and requiring it to act in accordance with the Rule of Law.

> "*There is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review*." Lord Dyson, now Master of the Rolls, in R (Cart) v Upper Tribunal [2011] UKSC 2

The proposals in the Bill, if enacted, will impede access to the courts. Whilst they purport to address unmeritorious claims, red tape, and economic inefficiency, they will in fact have little, if any, impact on these alleged problems[2]. PLP would welcome genuine proposals to improve efficiencies in judicial review[3]. But nothing in Part 4 of this Bill will have that effect.

While some of the contentious proposals that were consulted upon are not now to be pursued, the effect of a number of the proposals that remain will be to suppress legitimate challenge, and insulate unlawful executive action from judicial scrutiny.

What is more, these proposals are only the latest in a series which have sought to weaken and dilute the constitutional protection provided by judicial review[4]. The

[1] PLP undertakes research, casework, training and policy work. It runs conferences and training events across England and Wales, undertakes and publishes independent empirical research, and conducts public law litigation, both in its own name (where appropriate) and representing others. PLP is recognised as having particular expertise in this area: in 2013 it was awarded the *Special Rule of Law* award by Halsbury's Laws.

[2] The evidential basis for the alleged need for change was overwhelmingly rebutted during the consultation process, which produced negative responses to the need for, and effect of, the proposals from across civil society (including from judges, academics, lawyers, charities and other groups – for the Government's summary of responses, see https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response---annex-a.pdf).

[3] See for example the ongoing inquiry into reform of judicial review procedure in a manner consistent with the Rule of Law by the Bingham Centre for the Rule of Law (www.biicl.org/binhamcentre/JRinquiry).

[4] These reforms should not be considered in isolation. Note in particular:

proposals are technical in nature, but should be of concern to everyone, as they will fundamentally affect the extent to which the Government can be held to account by citizens of all political persuasions and none. Parliament must be aware that the proposals threaten to undermine our constitution and destabilise our democracy.

The Reforms: A Summary

PLP is particularly concerned about four provisions of the Bill:

- A proposal to enable the executive to escape legal consequences for unlawful action if it can persuade the court that it is **highly likely** that it would have taken the same action had it acted lawfully [clause 50 of the Bill].

- Proposals to introduce new financial obstacles and costs threats in the path of those seeking to hold the executive to account [clauses 51, 52, 54 and 55].

- A proposal to deter charities from intervening in litigation to assist the court in cases that raise issues of wider public interest [clause 53].

- An attempt by the executive to redefine its relationship with the judiciary, by making the Lord Chancellor the sole arbiter of what is in the public interest for the purposes of litigation to which the Government may be a party [clauses 54(8)-(10)].

The Reforms: Key Detail & Considerations

Likelihood of substantially different outcome for the applicant – clause 50

The Proposal: The court must refuse judicial review if the court concludes that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

The Current Position: Where a public body has acted unlawfully, the court may, as an exercise of its discretion, decline to grant judicial review if it is **certain** that the outcome would be the same were the decision to be re-taken lawfully[5]. A central function of

- November 2010 proposals for the reform of legal aid (*'Proposals for the Reform of Legal Aid'*) – as a result of which several areas of law have been removed from the scope of legal aid by virtue of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, including judicial review of certain immigration and asylum matters.

- December 2010 proposals for the reform of judicial review (*'Judicial Review Proposals for Reform'*) – as result of which an additional fee for claimants has been introduced (for oral renewal hearings); the right to an oral renewal hearing has been removed where a case is certified as 'totally without merit'; and the time in which to bring judicial review proceedings has been reduced from three months to six weeks in planning matters, and to 30 days in procurement matters.

- April 2013 further proposals for the reform of legal aid (*Transforming Legal Aid: Delivering a more credible and efficient system*) – as a result of which those who fail a 'residence test' will no longer have access to legal aid; and prison law matters are largely removed from the scope of legal aid (except for Parole Board proceedings where there is a power to grant release).

- September 2013 further proposals for reform of judicial review (*'Judicial Review: Proposals for Further Reform'*) – which has led to the current proposals for legislation.

[5] And the courts often do. The Government could not cite any cases in support of its proposals, only cases that demonstrate how effectively the system currently works.

judicial review is to ensure that decisions are properly taken, by those whose function it is to take them. As a general rule, a judicial review will not look at the substance of the underlying decision, but will simply check it has been taken lawfully. It is for the courts to ensure that decisions are taken in accordance with the law, but for the executive to take the substance of those decisions.

Effect of the proposal: In practice, it will enable public bodies to escape responsibility for unlawful decisions, decrease the quality of our public administration and add to the cost of judicial review cases. For example, a public authority which has misapplied the law would be able to stop a judicial review in its tracks by making the self-serving assertion to the court that it would take the same decision again if it were forced to apply the law.

Considerations: If it enacts this provision, Parliament endorses a scenario in which the executive may act improperly, even dishonestly. It *might*, if it had acted honestly, have reached a different conclusion, and yet the court is rendered powerless to require it to retake a proper and honest decision. As Lord Justice Staughton observed in *R v Ealing Magistrates' Court ex p Fanneran*(1996) 8 Admin LR 35 at 356E:

> *'…the notion that when the rules of natural justice have not been observed, one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship.'*

Where decision-making processes are unlawful, it is in the interests of good public administration that legal defects are identified and recognized, so that they are not repeated. This proposal will prevent the identification of legal defects, as claims are liable to be knocked out at the permission stage before an authoritative ruling has been obtained from the court (clause 50(2)). In consequence, the permission stage of judicial review will escalate into a full-blown mini-trial, and, where permission is granted, will simply lead to excessive duplication of costs.[6]

What should happen? The clause should be rejected. It is not supported by the senior judiciary[7]. It will have the adverse consequences highlighted above. No need for reform has been demonstrated[8].

Financial incentives - introduction

The Bill contains several clauses which seek to impose greater financial penalties on unsuccessful judicial review claimants and charities and other NGOs who seek to assist the court. These should be seen in context of:

(1) The Jackson report (following a lengthy enquiry into civil costs carried out by Lord Justice Jackson); and

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[6] This should be viewed in conjunction with the other proposals being taken forward to make the permission stage disproportionately financially risky for claimants.

[7] See the senior judiciary's consultation response: www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

[8] For more detailed commentary, see PLP's consultation response at paragraphs 28-38: www.publiclawproject.org.uk/data/resources/147/PLP_consultation-response_JR_further_reforms_1_11_13.pdf

(2) Reforms to the costs rules that apply in judicial review that are being taken forward by other means. These reforms include withholding legal aid in cases where permission is not granted and enabling defendants who successfully oppose permission to recover all of their costs of the permission hearing.

Viewed in the context of the Jackson report, the Government's assertion that the costs of judicial review need to be rebalanced in favour of defendants (ie itself!) does not withstand scrutiny. Lord Justice Jackson concluded his comprehensive, year-long review of costs in civil cases in 2009. He proposed a package of reforms designed to ensure proportionality in civil costs and promote access to justice. In response to Jackson LJ's authoritative report, in respect of judicial review, the Government implemented those proposals which assisted defendants and declined to introduce the key proposals identified as necessary to create balance for claimants. In particular, the Government declined to follow the recommendation to introduce Qualified One-Way Costs Shifting ('QOCS') (i.e an extension of the use of 'cost-capping' which the Government now seeks to legislate to restrict).

Also relevant is the Government's proposal to withhold legal aid in cases where permission is not granted (although this is being implemented otherwise than by the Bill). It should be noted however that the proposal is unreasonable and unfair. It is unreasonable because the Government has produced no evidence that the Legal Aid Agency routinely fails in its remit to vet cases before legal aid is granted so as to ensure that only meritorious cases are brought. It is also unreasonable because it fails to acknowledge that the claimant's lawyer is not in the best position to assess the merits of the claim - since judicial review proceedings must be brought and resolved quickly in the interests of good public administration, there is no time for claimants to get full disclosure from defendant public bodies. This means that the party best able to assess the merits of a claim will almost always be the defendant, who has access to all the papers.

Abuse of the system is therefore easier for defendants who routinely oppose permission being granted – in full knowledge of all the relevant documents – in meritorious cases. The proposal on pre-permission legal aid is unfair because it encourages such abuse: it is not envisaged that costs should be paid by defendants who wrongly oppose permission. The Government do not address this issue, yet any measure that encouraged defendants to refrain from (routinely) serving summary grounds opposing permission in meritorious cases would lead to massive savings in court time and costs. The reforms instead encourage a common (and wasteful) mindset amongst defendants, which is to assert that every case lacks sufficient merit to warrant permission.

The proposal that defendants should be able to recover their costs of opposing permission (to be implemented by changes to the Civil Procedure Rules) is similarly one-sided, and again encourages such abuse by defendants. If the costs of opposing the permission application are to be recoverable, that should be the case for both parties.

These one-sided and unfair proposals, although not part of the Bill, should inform the following provisions.

Interveners and Costs – clause 53

The Proposals: To prevent third party interveners from seeking their costs against the

other parties, and to require the court to order that an intervener must pay other parties' costs arising from the intervention. The court will only have discretion to depart from this rule in exceptional circumstances (which will themselves be defined).

The Current Position: A third party intervention occurs where an organisation (such as an NGO or charity or a local authority) with a particular interest or expertise in a matter before the court, applies for permission to make submissions to the court. The court will only permit interventions when satisfied it will assist the court in the interests of justice. The general practice is that interveners bear their own costs, and neither seek their costs from any party nor have costs awarded against them. However the court retains an absolute discretion to order that an intervener pays the costs of a party in any case, if, for example, an intervener were to waste the court's or a party's time.

Effect of the proposal: The effect of the proposal, if enacted, will be to prevent all but the best resourced organisations (who will often be representing powerful financial interests) from intervening to assist the court. The majority of third sector organisations will be deterred by the uncertainty arising from the risk that they will have to pay the defendant's costs. There is a real risk that the court will therefore lose the ability to hear from that part of civil society representing the poor, the weak and the excluded.

Considerations: No evidence has been produced to show that the current costs rules result in injustice or waste. On the contrary:

- Interventions assist the court. There is considerable judicial support for interventions, and the role they play[9].

- On important issues, it is in the public interest for the court to hear all competing views and consider all relevant evidence before settling the law. Amending costs rules with the intention of limiting interventions will detract from the quality of judicial decision-making.

- The court already has a wide discretion as to the terms on which it will permit (or decline to permit) interventions. The senior judiciary does not consider there is any problem[10].

- It is inappropriate for the executive to seek control the exercise of judicial discretion in litigation to which the executive is frequently a party.

What should happen? Clause 53(4) should be rejected. The court's existing discretion

[9] See Lady Hale's address to PLP's judicial review conference on 14 October 2013, *Who Guards the Guardians?*, (www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf) and the senior judiciary's consultation response *'The court is already empowered to impose cost orders against third parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court.'* (para. 37 www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf)

[10] See http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf at paragraph 37.

on costs has not been shown to be defective[11].

Capping of Costs / Protective Costs Orders – clauses 54 & 55

The proposals: To codify the costs protection that is available to claimants bringing public interests proceedings ('Cost-capping' or 'Protective Costs Orders (PCOs)')[12]. To prevent such orders being granted before permission is granted in a judicial review. To empower the Minister for Justice to define and limit the Public Interest test. To empower the Minister for Justice to alter the criteria which determine whether a costs capping order should be made.

The Current Position: A PCO is an order that, at the outset of proceedings, extinguishes or limits a party's liability for their opponents' costs, in the event that the claim is lost. PCOs were developed by the courts to ensure that justice was not denied by the financial risk of litigation in cases which it was in the public interest to be heard.

In civil litigation, general rules and principles govern the award of costs (legal fees), but judges retain a discretion to ensure that these rules do not result in injustice in individual cases[13].

The availability of PCOs is governed by guidance developed by the judiciary precisely to ensure that the risk of costs does not prevent charities with limited funds, NGOs and other claimants from bringing important cases. The guidance essentially turns on the respective financial positions of the parties and whether the claim is of general public importance which the public interest requires to be resolved. It is applied flexibly, reflecting the court's over-riding concern for the interests of justice. PCOs are very rarely granted (research suggests no more than a small handful of times a year[14]) and the system operates to enable a small number of very important cases to be heard in the public interest, when they would otherwise never be brought.

An applicant for a PCO must already provide detailed financial information to the court and other parties to demonstrate its available resources. In general, the amount of costs the claimant can claim from the defendant if the claimant is successful is also capped as part of a PCO (although not necessarily to the same degree: any cross cap should be proportionate to the parties' resources). It is crucial to note that a PCO can be applied for, and granted, before permission to apply for judicial review is considered by the court.

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[11] For more detailed commentary see PLP's consultation response at paragraphs 64-69: www.publiclawproject.org.uk/data/resources/147/PLP_consultation-response_JR_further_reforms_1_11_13.pdf

[12] Currently, pre-emptive costs orders are widely known as Protective Costs Orders (PCOs) although the Bill uses the more general terminology of "costs capping orders"

[13] Part 44.2, Civil Procedure Rules at http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#rule44.2

[14] See PLP's consultation response at paragraphs 60 and also 24 http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

Effect of the proposal: The proposals do not alter the present tests for a PCO significantly (although they do introduce additional criteria[15]). However, there are two areas of serious concern.

First, the provision at Clause 54(3) that the court may only make a PCO where permission to apply for judicial review has (already) been granted, will have a dramatic effect on access to justice. There are only a handful of PCOs granted each year, yet in those cases identified by PLP in its research, almost all required PCOs to be made at the interim stage before permission is granted (and would not have proceeded if they had to wait for permission to be granted before seeking a PCO). The reason for this is that the risk of having to pay a defendant's costs up to permission (when applicants for a PCO would not have any costs protection under the proposals) would be too great to enable most charities to apply for a PCO in the first place. This difficulty for claimant charities is going to be exacerbated by the related proposals meaning that the costs risks at the permission stage will be even higher.

In sum, Clause 54(3) threatens to render the whole jurisdiction of PCOs academic for majority of claimants – they simply would not be able to afford the risk of applying or one. If costs protection is necessary in the interests of justice, it is necessary for the whole of the case.

Second the Government proposes clauses which empower the Lord Chancellor to dictate to the court what is in the 'public interest' [see clause 54(9)[22]]. The Lord Chancellor is also empowered to dictate the type of claimant who can receive a PCO [Clauses 55(1) and (3)]. These are unprecedented incursions into the independence of the court. Not only is the Government proscribing and fettering the exercise of the court's inherent discretion as to costs but it seeks to hold over the court an ongoing power to fetter that discretion if it does not like what the courts are doing. This is in our view unprecedented and constitutionally improper given that the Government stands to benefit (as a regular party to litigation) from its ability to make rules governing the courts' discretion.

Considerations: Once again, the Government has failed to produce any evidence that the courts have been overzealous in granting PCOs or have acted in a way that is contrary to the interests of justice. There is no evidence or judicial perception of any problem with the current rules. The proposals are not designed to limit abuse/weak cases: they are designed simply to increase the financial risk of public interest litigation to such a degree that they will operate to insulate defendants against challenge. There is no justification for removing all pre-permission costs from the PCO scheme.

What should happen? Clause 54(3) should be removed because its practical effect is to defeat the interests of justice and to remove PCOs from the scope of all but the wealthiest individuals and organisations. Clauses 54(8)-(11), and 55(3) should be removed as they are constitutionally undesirable[16].

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[15] E.g. clause 55(1)(b), (c), and (e): the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review; the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review; and whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

[16] For more detailed commentary see PLP's consultation response at paragraphs 56-63: http://www.publiclawproject.org.uk/data/resources/147/PLP_consultation-response_JR_further_reforms_1_11_13.pdf