Public Law Project

Parliamentary Briefing Paper
Part 4 Criminal Justice & Courts Bill (Judicial Review)
March 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. It is concerned with Part 4 of the Criminal Justice & Courts Bill, which proposes various amendments to judicial review.

Judicial review is the mechanism by which citizens may hold the state to account. 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.

Whilst the proposals purport to address unmeritorious claims, red tape, and economic inefficiency, they will in fact have little, if any, impact on these alleged problems. PLP would welcome genuine proposals to improve efficiencies in judicial review, 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.

Our proposed amendments to the Bill are attached. This short paper is intended to explain why such amendments are necessary. PLP has prepared a more detailed briefing paper which is available here.

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)].

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.

Effect of the proposal: In practice, it will enable public bodies to escape responsibility for unlawful decisions.

Considerations: If it enacts this provision, Parliament endorses a scenario in which the executive would be able to 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.

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 in 2009) which concluded that the financial risks to judicial review claimants should if anything be reduced; and

(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.

Also relevant is the Government's proposal to withhold legal aid in cases where permission is not granted even though the Government has produced no evidence that the Legal Aid Agency fails in its remit to vet cases before legal aid is granted.

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.

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 to make submissions to the court. The general practice is that interveners bear their own costs, however the court retains an absolute discretion to order that an intervener pays the costs of a party in any case.

Effect of the proposal: The effect of the proposal will be to prevent all but the best resourced organisations 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 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. There is considerable judicial support for interventions, over which they have a wide discretion. It is in the public interest that when a court is considering important issues they hear all competing views before settling the law.

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 ('Protective Costs Orders (PCOs)'). To prevent such orders being granted before permission is granted in a judicial review. To empower the Minister of Justice to define and limit the Public Interest test and 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 because of the financial risk of litigation. It is crucial to note that a PCO can be applied for, and granted, **before** permission to apply for judicial review is considered.

Effect of the proposals: The proposals do not alter the present tests for a PCO significantly (although they do introduce additional criteria) but they do raise concerns.

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 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 would be too great to enable most charities to apply for a PCO in the first place.

Second the Government proposes clauses which empower the Lord Chancellor to dictate to the court what is in the 'public interest' and what type of claimant can receive a PCO. 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.

Considerations: Once again, the Government has failed to produce any evidence that the courts have been overzealous in granting PCOs. The proposals are designed to increase the financial risk of public interest litigation to such a degree that they will operate to insulate defendants against challenge.