Public Law Project

Parliamentary Briefing Paper
Part 4 Criminal Justice & Courts Bill (Judicial Review)
Lords Committee Stage: July 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.

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 has evolved out of many centuries of judicial oversight of Government as 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

There is no evidence that judicial review is abused by campaigners, and no evidence that the financial risks need to be rebalanced[2]. That is not to say 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. In 2013 PLP 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).

Government supporters frequently cite one isolated case, Plantagenet Alliance (the 'Richard III case) as providing an example of the need for reform. PLP has produced a further short paper specifically debunking this claim.

current system is perfect. PLP would welcome genuine proposals to improve efficiencies in judicial review[3]. But nothing in Part 4 of this Bill will have that effect. The effect of these reforms will be to suppress legitimate challenge, and insulate unlawful executive action from 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 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.

The Reforms: Key Detail & Considerations

Likelihood of substantially different outcome for the applicant – clause 64

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]. As a general rule, and by virtue of its constitutional role, a judicial review court 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. This is the constitutionally proper approach.

[3] See for example Streamlining Judicial Review in a Manner Consistent with the Rule of Law, the Bingham Centre for the Rule of Law, February 2014 (www.biicl.org/files/6813_bingham_jr_report_web.pdf)

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

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.

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.'*

It is in the interests of good public administration that legal defects in decision making are not repeated. This proposal will prevent the identification of legal defects and incentivise poor decision-making, as defendants will know that even in the face of clear illegality there is a self-serving 'defence' available, that they would have reached the same outcome anyway. Further, where cases are brought the fact a Court to focus on outcome rather than process the costs of permission stage will escalate significantly, and, where permission is granted in any event, will result in 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

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

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

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

(2) Reforms to the costs rules that apply in judicial review that have been taken forward by other means, including Regulations to withhold legal aid payment in judicial review cases where permission is not granted[9].

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

[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

[9] The Civil Legal Aid (Remuneration) Regulations 2014 ("Remuneration Regulations") came into force on 22 April 2014.

Interveners and Costs – clause 67

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, defined by Government.

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 Court permits interventions when satisfied they are 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, they were to waste the court's or a party's time.

Effect of the proposal: The proposal, if enacted, will prevent all but the best resourced organisations (who will often be representing powerful financial interests) from intervening to assist the court. The majority of interveners 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. On the contrary:

- Interventions assist the court. There is considerable judicial support for interventions, and the role they play in helping judges reach the right

answer[10].

- 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.

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

What should happen? Clause 67(4) should be rejected. The court's existing discretion on costs has not been shown to be defective[11].

Capping of Costs / Protective Costs Orders – clauses 68 & 69

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.

[10] 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 http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf)

[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"

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 carefully developed by the courts to ensure that the litigation risk did not result in a denial of justice in public interest cases.

In civil litigation, general rules and principles govern the award of costs (legal fees), but judges retain overall discretion to ensure justice in individual cases[13].

The current PCO guidance focuses 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[15]). 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.

Effect of the proposal: The proposals do not alter the present tests for a PCO

[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/

significantly (although they do introduce additional criteria[16]). However, there are areas of serious concern.

First, the provision at Clause 68(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.

Clause 68(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 68(9)[22]]. The Lord Chancellor is also empowered to dictate the type of claimant who can receive a PCO [Clauses 69(1) and (3)]. These are unprecedented incursions into the independence of the court. Not only is the Government proscribing and limiting the exercise of the court's inherent discretion as to costs but it seeks to hold over the court an ongoing power to further limit that discretion if it does not like what the courts are doing. This is unprecedented and constitutionally improper: the Government stands to benefit (as a regular party to litigation) from its ability to

[16] E.g. clause 69(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.

make rules governing the courts' discretion.

Finally the proposals for reciprocal costs-caps in clause 69(2) represent a crude departure from the Court's carefully developed guidance and again limit the court's discretion.

Considerations: Again, there is no 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 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 68(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 68(8)-(11), and 69(3) should be removed as they are constitutionally undesirable[17] Clause 69(2) should be amended to provide that the Court "should normally" impose a reciprocal cap sufficient to fund modest representation.

Amendments

PLP supports and endorses the amendments proposed by the Joint Committee on Human Rights.

[17] 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