Judicial Review: Proposals for Further Reform

Introduction

On 6 September 2013 the Secretary of State for Justice published further proposals to reform judicial review.[1] The deadline for responding to the consultation is 1 November 2013. These proposals are in addition to those made in *Transforming Legal Aid.*[2] Taken together, the proposals represent a profound and constitutionally significant attack on the ability of individuals, charities and NGOs to access judicial review. Their effect will be to insulate executive action from judicial scrutiny, weakening the rule of law.

Summary of the proposals

The proposals to reform judicial review generally have the effect of making it more difficult, and potentially more expensive to challenge the actions of public bodies. If all the proposals are implemented:

(1) Changes to the rules on standing[3] concern *who* should be allowed to bring a claim for judicial review rather than the current arrangements which focus on the *substance* of a claim and the importance of getting a claim before the court so that public law wrongs can be identified and remedied. The changes would mean that charities, NGOs and campaigning groups would have to show they had a direct interest in the outcome of the proceedings in order to be permitted to bring a claim for judicial review (see paragraphs 67-90).

(2) Changes to the rules on protective costs orders[4] (PCOs) would mean that such a "direct interest" in the outcome of proceedings would in the vast majority of cases be an absolute bar to charities, NGOs, and campaigning groups being able to access the court. This is because without some limit on the amount of money such organisations would have to pay towards the defendant's costs if the judicial review claim were to fail, most would be unable to bring a claim at all, even in cases where the court considers it is in the public interest for the organisation to bring the case (paragraphs 154-166).

(3) Changes to the rules on interventions would establish a presumption that third parties would be liable to pay the additional costs incurred as a result of their intervention (paragraphs [167-179])[5]. The proposals would increase the financial risk of intervening,

[1] The new consultation on judicial review is available here: https://consult.justice.gov.uk/digital-communications/judicial-review

[2] The *Transforming Legal Aid* consultation paper is available here: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid and the Government response is available here: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps

[3] A technical term which describes whether a claimant has sufficient interest in the outcome of a judicial review claim to be entitled to be heard by the court

[4] These are orders made at the beginning of a judicial review claim which limit a claimant's liability for costs if the claim is ultimately unsuccessful. They are a way for the court to allow NGOs to bring a claim where the court decides that it is in the public interest for a legal issue to be clarified, and where no individual can be found to bring the claim.

[5] Interventions are a means by which bodies, such as NGOs, which the court recognise as having specialist knowledge, can be permitted by the court to make submissions or present evidence to the court in the public interest. Interventions are only permitted where the court considers that it would be assisted by receiving evidence and/or submissions from an intervener.

and so would deter expert interventions, again by charities, NGOs, and campaigning groups.

(4) Changes to the rules governing costs would mean an increased costs risk for both claimants and their legal representatives, by restricting payment of legal aid in judicial review cases in which permission to apply for judicial review is not granted (paragraphs 114-134), by seeking to make claimants liable for all a defendant's costs where permission to apply for judicial review is refused (paragraphs 135-140), and by seeking to increase the circumstances in which the court is able to make wasted costs orders (orders that are made against legal representatives where costs have been wasted because of legal representatives' poor conduct) (paragraphs 141-153).

(5) Changes to the test the court would apply when decision making in cases where claimants challenge procedural defects in public bodies' decision-making would make such challenges more difficult to bring (paragraphs 91-105).

In addition, there are also other proposals which are not addressed in this note:

- to fast track challenges to planning decisions in a new chamber of the Upper Tribunal (paragraphs 34-52);

- to restrict challenges by local authorities to national infrastructure projects (paragraphs 53-62);

- to remove legal aid from certain types of challenge to planning decisions (paragraphs 63-66);

- to adopt a new procedure (it is currently judicial review) by which challenges based on a failure to discharge the Public Sector Equality Duty are brought (paragraphs 106-109);

- to introduce a principle that a claimant who fails to obtain permission at an oral permission hearing should in general have to pay the defendant's full costs of opposing permission (paragraphs 135-140);

- to extend the scope for leapfrogging cases to the Supreme Court directly from the first instance court (paragraphs 180-202).

What follows is a closer analysis of the proposals in *Judicial Review: Proposals for Further Reform.* The points made here are not exhaustive: they are simply meant to draw out some of the key considerations. Furthermore, while each proposal raises specific issues, they must be read together so as to understand the full effects of the proposed changes.
The present consultation proposals must be seen in the context of those made in the Government's April 2013 consultation, *Transforming Legal Aid.* In its response to that consultation, published on 5 September 2013, the Government has confirmed that it will implement cuts to prison law legal aid and a residence test for civil legal aid.

Analysis of the proposals

Changes to the rules on standing (paragraphs 67-90)

What is being proposed?

The issue identified in the consultation paper is that the Government is concerned that the test for standing in judicial review (as set out in section 31(1) of the Senior Courts Act 1981) is too liberal:

> "[A]llowing judicial review to be used to seek publicity or otherwise hinder the process of proper decision-making. The concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest." (Paragraphs 79-80)

The Government therefore proposes that individuals and groups who do not have a "direct and tangible interest" in the outcome of the proceedings should not have standing to bring judicial review claims (paragraph 80). This will involve amending the Senior Courts Act 1981 to change the "sufficient interest" test. The Government proposes substituting one of the following tests as the test for standing in judicial review:

(1) The victim test that is applied under section 7(1) of the Human Rights Act 1998 (paragraph 85);

(2) The "person aggrieved" test that is used in statutory planning challenges (paragraph 86); or

(3) The legal aid test for judicial reviews where the applicant must show that the claim has "the potential to produce a benefit to the individual" (paragraphs 87-88).

It should be noted that judicial reviews brought by environmental NGOs, charities or campaign groups are exempted from this proposal in accordance with the UK's obligations under the Aarhus Convention (paragraph 81).

Key points to consider

- **The proposal misunderstands the constitutional role of the court in judicial review cases to prevent abuse of power.**

  The proposal to prevent challenges brought by people who do not have a direct interest in the matter at hand misunderstands the constitutional role of judicial review. Judicial review is about public law wrongs that, if left unchecked, would undermine the checks and balances inherent in our constitutional settlement. All members of our society have an interest in the proper administration of executive power and it is for this reason that access to judicial review should be not restricted to those directly affected by the matter at hand:

  > "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; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for [permission to bring judicial review], the court's only concern

is to ensure that it is not being done for an ill motive." Sedley J in *R v Somerset County Council, ex p Dixon* [1998] Env LR 111 at 117-121.

- **It is in the public interest that meritorious challenges to government decisions are heard by the courts: technical rules on standing should not be used to insulate executive action from accountability.**

  In the consultation document the Government accepts that judicial reviews brought by interested groups have a higher success rate than those brought by individuals (paragraph 78). There is a public interest in meritorious cases being heard by the courts where those meritorious cases concern the legality of government action. It is for this reason that the rules on standing for judicial review are flexible. In *AXA General Insurance Limited v HM Advocate* [2011] UKSC 46 Lord Reed warned of situations "such as where the excess of misuse of power affects the public generally, [where] insistence upon a particular interest could prevent the matter from being before the court, and that in turn might disabled the court from performing its function to protect the rule of law." This statement echoes the words of the court in *R v Secretary of State for the Home Department, ex p Bulger* [2001] EWHC Admin 119 at 20: "the threshold for standing in judicial review has generally been set by the courts at a low level. This…is because of the importance in public law that someone should be able to call decision makers to account"[6].

- **If NGOs, charities, faith groups and campaigning groups cannot bring judicial reviews, some government action will be impossible to challenge.**

  This is because there are times when an individual is not able to bring a challenge. This might be because an unlawful policy exists, but has not affected any individuals yet and so could not be challenged by an individual claimant or because the people affected by an unlawful policy are unable to bring a challenge. For example, in a judicial review brought by the immigration detention charity Medical Justice, the courts decided that the Home Office policy of deporting people with less than 72 hours' notice, so that they did not have time to get legal advice, was unlawful because it violated the common law right of access to the courts.[7] This challenge could not have been brought by the individuals affected by the unlawful policy, because they had been deported without sufficient time to get legal advice on the lawfulness of their deportation or the lawfulness of the policy as a whole. Only an NGO could challenge the unlawful policy, and if Medical Justice had not brought the challenge, the unlawful policy might still be in existence.

  Another example is where an individual claimant can no longer proceed with his or her case, but it is in the public interest for the judicial review to be heard by the courts. In *R v Gloucestershire County Council ex p Barry* [1997] UKHL 58, for example, the Royal Association for Disability and Rehabilitation were substituted as the claimant, following the death of the individual litigant. In other cases, individual claimants are sometimes "bought off" by defendants (i.e. claimants are given what they ask for without the defendant agreeing to change the wider decision or policy under challenge). In such cases, unless a substitute claimant is found, the wider decision or policy would be left unchallenged, even though it might unlawfully affect many others.

[6] See also R v *Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617, in which Lord Diplock warned of the need to avoid the "grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."
[7] *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

- **The government has produced no evidence in its case for change, and in particular has failed to support its assertion that judicial reviews are brought by interested groups or individuals solely to get publicity or cause delays.**

  The consultation paper asserts that around 50 judicial review claims are issued each year, with 20 being granted permission, 13 being heard at a final hearing and 6 being successful for the claimant (paragraph 78). These figures are based on a "manual analysis of case level information" which "due to uncertainties in recording and interpretation" is "largely illustrative" (footnote 38). These figures are insufficiently precise to make a cogent case for reform. Furthermore, research conducted by the Public Law Project and the University of Essex and funded by the Nuffield Foundation concluded that challenges brought by NGOs in respect of wider public interest matters are few and far between. In a 20 month period between July 2010 and February 2012 there were only three non-environmental challenges that reached final hearing, brought by NGOs alone (CPAG, Medical Justice and Children's Right Alliance). A few other challenges were brought by interest groups combined with individuals (e.g. *Bone and National Secular Society v Bideford Town Hall*), or with commercial bodies (e.g. *Homesun Holdings and Friends of the Earth v Secretary of State for Energy and Climate Change*); such cases would presumably not be affected by the proposed restrictions on standing as the individuals or commercial bodies involved would be able to demonstrate a direct interest in the challenges. These facts contradict government assertions of abuse and raise questions as to the rationale and evidence relied upon by the government in proposing such far reaching restrictions on access to judicial review.

- **It is unclear what organisations will be prevented from bringing claims for judicial review.**

  It is proposed that changes to the rules on standing will prevent judicial claims being brought by organisations without a direct interest in the matter at hand. It is however unclear from the proposals precisely what types of organisations they are intended to catch. For example, it is unclear whether bodies like trades unions, representative bodies (e.g. the Law Society), faith-based organisations, or NGOs run as membership organisations (e.g. the Howard League for Penal Reform) would have standing to bring a challenge that would affect their members, if the proposals were implemented.

- **The Aarhus Convention establishes principles on the importance of judicial review for public interest litigation in the environmental context.**

  No principled reason has been advanced by the Government for curtailing the availability of judicial review in all cases in all other areas of law.

Rebalancing Financial Incentives

What is being proposed?

The Government is consulting on a number of proposals under this heading with the stated aim of "rebalance[ing] financial incentives which contribute to claimants' decisions whether or not to bring and pursue applications" (paragraph 149), including[8]:

(1) Changing the rules on Protective Costs Orders, inter alia, to make it impossible for those with a private interest in a judicial review claim to obtain one (paragraph 162);

[8] This list is not exhaustive, but covers what PLP considers to be the most important points.

(2) Increasing the circumstances in which the courts will order third party interveners to pay the additional costs the intervention has occasioned (paragraphs 167-179);

(3) Increasing the circumstances in which Wasted Costs Orders are made to penalise claimants' representatives who bring weak claims for judicial review (paragraphs 141-153);

(4) Modifying its earlier (April 2013) proposal that legal aid should not be paid to a claimant's representatives if no order to grant permission to apply for judicial review is made (paragraphs 114-134).

These proposals suffer from a number of common problems.

Key points to consider

- **Judicial review is unlike normal civil litigation, so requires special costs rules. No evidence has been provided to support changing the rules in favour of defendants.**

  The differences between judicial review and normal civil litigation stem from the inequality of power (most cases are brought by individuals against the State), differences in purpose (judicial review is intended to prevent abuses of power by the State), and differences in procedure (there are very tight timescales for bringing a claim for judicial review, and no procedure by which claimants can inspect the documents held by the defendant before deciding whether to proceed with a case). For these reasons special costs rules have been developed by the courts to protect non-State parties from financial ruin if a case is lost. These special rules were carefully considered in a major review of costs rules by Lord Justice Jackson, published in 2009, who made recommendations to protect judicial review claimants from being deterred from bringing good claims by the risks of having to pay excessive costs if the case is lost. The Government's proposals run counter to Lord Justice Jackson's expert report, and no evidence has been provided that Lord Justice Jackson's conclusions were incorrect.

- **In any event, financial incentives have already been rebalanced.**

  The Government's April 2013 reforms included the introduction of a fee for requests for an oral permission hearing, and the removal of the right to an oral hearing where a claim is certified as being totally without merit by the paper permission judge. At paragraph 112, the Government confirms that it expects that these reforms will result in fewer oral permission hearings "in the future". The Government should review the effectiveness of its April 2013 reforms before proceeding with the proposed further reforms.

With these introductory observations, the rebalancing financial initiatives proposals are now considered in turn.

Changes to the rules on Protective Costs Orders (paragraphs 154-166)

What is being proposed?

The Government is concerned about the "increasingly flexible approach" taken by the courts to PCOs, which means that PCOs are now granted "in wider circumstances than those envisaged in the *Corner House* case" (paragraph 157). In particular, the Government is concerned that PCOs are being used when a claimant brings a judicial review for his or her own benefit. In light of this:

> "The Government considers that the use of PCOs in non-environmental cases should be rebalanced to encourage better consideration by the claimant on whether to bring and pursue applications for judicial review. The Government wishes to achieve an appropriate balance in the costs regimes to ensure that access to justice is maintained but to ensure that parties are not unduly insulated from the costs of their litigation in inappropriate cases" (Paragraph 161).

The Government is therefore proposing, *inter alia,* that PCOs should not be available in any case where there is an individual or private interest, regardless of whether there is a wider public interest.

In addition if (contrary to the Government's proposals to restrict standing) "political" and "campaigning" judicial review claims are permitted where there is no claimant with a private interest, the Government questions, and seeks views on, whether PCOs should be permitted in non-environmental claims (paragraph 163).

Key points to consider

- **The courts have recognised that PCOs are needed so that cases can be brought in the public interest, where the claimant might otherwise be put off by the risk of an adverse costs order if they lose.**

  PCOs have developed because they are needed to level the playing field between claimants and defendants in public law. PCOs are only made where the proposed litigation is in the public interest, i.e. cases which raise a serious issue which affects or may affect the public generally or a section of it. Even if the claimant loses a public interest case, the court's decision can still help to clarify the law and deter unlawful decision making in future. Any constraints on the courts' powers to make PCOs will deter claims that would serve the public interest.

- **A body of case law has been developed by the courts establishing a comprehensive set of principles that govern when and how PCOs are made.**

  Judges are used to using their discretion when considering whether to grant a PCO. The current judicial consensus is that a private interest is a factor to take into account in making a PCO, but it is not enough on its own to prevent a PCO from being granted.[9] Nowhere in the consultation paper is there any consideration of the impact on the rule of law of preventing PCOs from being granted where the applicant has a private interest, for example by considering how many cases that ought to be brought in the public interest would not be brought following implementation of the more restrictive PCO regime that the Government is contemplating.

- **The "private interest" test that the Government wants to introduce has been widely criticised.**

  That is because it prevents public interest cases from coming before the courts where the claimant has a private interest in the outcome however slight the private interest may be, and however overwhelming the public interest may be in the case being brought before the court.[10]

[9] See for instance *Morgan v Hinton Organics* [2009] EWCA Civ 107.
[10] See for instance *Goodson v HM Coroner for Bedfordshire* [2005] EWCA Civ 1172 where the claimant sought a proper enquiry into the circumstances of her father's death. A PCO was refused on

- **The proposal has not been shown to be proportionate.**

  The consultation document contains no evidence of how many PCOs are granted each year. Joint research conducted by PLP and the University of Essex, funded by the Nuffield Foundation, reveals that during the 20 month period between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a PCO had been granted. This suggests that the Government's assessment of the scale of the problem it perceives is exaggerated, and militates strongly against the proportionality of the proposal.

- **NGOs would be in a Catch-22 position.**

  If the Government's proposals on standing are implemented, anyone who had standing to bring a judicial review claim would be excluded from getting a PCO. NGOs would therefore be placed in a Catch-22 situation: the proposals on standing, if implemented, would mean that NGOs would not be able to bring claims for judicial review unless they were directly affected by the decision under challenge; but the proposals on PCOs would mean that any NGO able to meet the new standing test would be barred from obtaining a PCO.

Changes to the rules on third party interventions (paragraphs 167-179)

What is being proposed?

The Government is concerned that additional parties substantially increase the costs of judicial review claims. It is therefore proposing, *inter alia,* that where a third party intervenes in a case and raises issues that result in the claimant or defendant incurring legal costs, the intervener should be liable for those costs (paragraph 177).

Key points to consider

- **There is no evidence that interventions generally add much if at all to the overall costs of the case** .

  An intervener may provide evidence or legal argument the court or the parties would otherwise have had to pay to obtain. By ensuring all relevant issues and information are before the court when it makes its decision, an intervention may save the costs of further litigation to clarify issues that would not otherwise have been raised. In cases where one of the parties is unrepresented, an intervention may save the court the cost of appointing an 'advocate to the court', appointed by the Attorney General at the behest of the court to assist the court.[11]

- **Courts have a wide discretion as to the terms on which they allow interventions.**

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the basis that Mrs Goodson had a private interest in the outcome of the case. That decision has been widely criticised. The enquiry Mrs Goodson sought forms part of the right to life under Article 2 ECHR. Such fundamental rights should not be frustrated by an inability to access the courts.

[11] See for instance Lassal C-162/09, a case raising an important point of EU law referred by the CA to the CJEU on appeal by the DWP against an Upper Tribunal decision. The claimant was unrepresented, CPAG intervened to represent the interests of claimants in general. Had CPAG not intervened, the CA may well have had to appoint an advocate to the court to represent the interests of the claimant.

The court often confines interveners to making representations on the papers of a limited length and/or or to oral submissions of a limited length that do not significantly affect the time estimate for the hearing. The Supreme Court has a comprehensive set of rules and practise directions governing interventions by third parties, including costs. Rule 46(3) provides that orders for costs "will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted in as the sole or principal appellant or respondent)." By Practise Direction 6.9.6 "Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal." In our experience, the practise of the Supreme Court is generally applied in the Administrative Court i.e. that interveners are expected to bear their own costs.

- **An intervener may have particular expertise to contribute to a case either in specialist legal arguments or in evidence they can provide.**

  Interventions may be brought by individuals, by charities and NGOs, by companies and by public bodies; Government ministers are frequent interveners in cases in the UK courts.[12] If the proposal is implemented, the result will be that the court will only be able to hear from organisations with something useful to say if they can afford to bear the costs. Many charities and NGOs who are concerned with large sections of society affected by the courts' decisions, would be unable to afford the costs risk. So interventions would continue to be made, but only by those representing well-resourced financial interests.

Changes to the rules on Wasted Costs Orders (paragraphs 141-153)

What is being proposed?

The Government observes that Wasted Costs Orders (WCOs) against claimants' legal representatives are rarely made (paragraph 147). Although it does not identify any cases where a WCO should have been made, but was not, the Government proposes that further changes should be made to "rebalance financial incentives which contribute to claimants' decisions whether or not to bring and pursue applications" (paragraph 149).
The Government is therefore proposing that WCOs should be available for a wider range of conduct than is currently set out section 51(7) of the Senior Courts Act 1981 (which allows the court to penalise a legal representative for "any improper, unreasonable or negligent act or omission"). In addition, the Government is proposing that a fee is charged for the cost of an oral hearing to contest a WCO.

Key points to consider

- **It is unclear why there is a need for reform of the current system of WCOs and no evidence is provided to illuminate this**

  WCOs already penalise legal representatives for improper, negligent or unreasonable conduct. The Government accepts that a number have been made in judicial review proceedings (paragraph 147).

[12] See for instance R(G) v London Borough of Southwark [2009] UKHL 26 (Secretary of State for Children, Schools and Families intervening), Birmingham City Council v Ali and others [2009] UKHL 36 (Secretary of State for Communities and Local Government intervening)

- **The courts have made it clear that there are important public policy reasons why pursuing a weak case should never – for that reason - result in a WCO**

  The leading case on WCOs, *Ridehalgh v Horsefield* [1994] Ch 205, is cited in the consultation document at [145], where the court's conclusions in that case are summarised. However the reasons for those conclusions are not set out in the consultation document. The leading judgment was given by Sir Thomas Bingham MR, who stated: "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it." The court contrasted a lawyer bringing a weak case with "lend[ing] his assistance to proceedings which are an abuse of the process of the court", such as failing to make full disclosure, or pursing a case known to be dishonest, which could result in a WCO.

- **The proposal will have a disproportionate and unfair impact on judicial review claimants of limited financial means**

  Weak cases in judicial review proceedings are already liable to be dealt with by an award of costs against the losing party (not the representative) in the normal way, at the permission stage which identifies and filters out weak cases. A wider use of WCOs will be pursued by defendants against the legal representatives of claimants without financial resources, as defendants will not be able to recover costs from such claimants even if they obtain an order for costs against them. The result is therefore to discourage legal representatives from bringing judicial review claims on behalf of those of limited means. This is a matter of particular concern given the crucial role judicial review performs in safeguarding the fundamental rights of minorities, including those without financial resources. As is clear from the judgment of Lord Bingham cited above, the courts are aware of the dangers of WCOs being misused in this way and the current limits set by the courts on their use has this very important consideration firmly in mind.

Changes to funding for judicial review claims (paragraphs 114-134)

What is being proposed?

The Government has modified the proposal set out in *Transforming Legal Aid* by which providers would not be paid for judicial reviews that did not get permission to proceed to a full hearing, following widespread opposition.[13] The modified proposal reflects the Government's acceptance that its original proposal would have deterred lawyers from bringing good judicial review claims as well as the weak claims the proposal purported to target (paragraph 115).

Under the modified proposal, legal aid will continue to be available for the preparatory stages of a judicial review claim, prior to the claim being issued. If a claim is issued, but settles in favour of the claimant prior to the permission decision, the claimant should pursue a costs order against the defendant. If this is unsuccessful, the Legal Aid Agency will have a discretion to pay the provider for the work done post-issue by reference to exhaustive criteria set out at paragraph 125. If a claim does not settle in favour of the claimant and does not get

[13] See for example, the Public Law Project's response at paras 7-68: http://www.publiclawproject.org.uk/documents/PLP_legal_aid_consultation_response_4_June_2013.pdf

permission to proceed to a full hearing, the provider will not be paid for the work completed post-issue.

Key points to consider

- **The proposal proceeds on a false basis.**

  The proposal to increase the costs and risks to claimants and their representatives suffer from the same fundamental flaw as the Government's past and present proposals for restricting legal aid payments to claimants' representatives; namely, they proceed on the false basis (at paragraph 150) that:

  > "[t]he [claimant's] legal representative is in the best position to advise their client of the likelihood of success, first prior to the initial application on the papers for permission and then again at the oral renewal hearing".

  In fact, as judicial review practitioners know well, it is the defendant who is best placed to assess the merits of the vast majority of claims for judicial review because it is the defendant (not the claimant's representative) that has access to all the relevant information about how a decision was reached. For further reasons why the proposal is misconceived, see paragraphs 7-68 of PLP's previous consultation response (link in previous footnote).

- **The modification offers very little comfort – it does nothing to reduce the uncertainty over whether legal representatives will be paid, and is unlikely to benefit claimant lawyers in most cases.**

  There is much scope for uncertainty about the manner in which the exhaustive criteria will be applied by the LAA. In addition, the discretion is likely to operate in a very narrow range of cases as there is likely to be little difference in practice between application of the exhaustive criteria by the LAA, and the criteria applied by the court in considering whether to make a costs order in the claimant's favour. Legal aid practitioners' recent experience would suggest that there is very little prospect of a liberal approach being taken to the application of the criteria by the LAA.

- **The modification to the Government's original proposal aggravates rather than alleviates the original concerns because the uncertainty over whether payment will be forthcoming is increased, as is the work required to be done by the solicitor at risk.**

  The uncertainty over whether payment will be forthcoming is liable to be increased beyond the conclusion of the proceedings - in the absence of a costs order a further bureaucratic and time-consuming process will have to be embarked upon by the claimant's representative (see paragraph 129), which will also be carried out at risk.

Changes to judicial review claims brought on the basis of procedural defects (paragraphs 91-105)

Where, in deciding a judicial review claim, the court identifies a procedural flaw in the decision-making process, the judge will proceed to consider whether to grant the claimant a remedy. Currently the judges apply a "no difference" test: they consider whether the procedural flaw would inevitably have made no difference to the decision under challenge, and if they conclude that it did not make any difference, they are likely to refuse to quash the unlawful decision and to remit it to the decision maker for fresh consideration.

What is being proposed?

The Government considers that in some circumstances a case founded on a claimed procedural defect in decision-making may be successful, but will result in no change to the substantive outcome once the decision under challenge is re-taken, and therefore no substantive benefit to the claimant.

The Government therefore makes two alternative proposals:

(1) to bring consideration of the "no difference" test forward to the permission stage;

(2) to lower the threshold of the "no difference" test from inevitability to high likelihood.

The Government may decide to do (1) alone, or both (1) and (2).

Key points to consider

- **No evidence has been provided that the current test applied by the court is flawed. The proposal will not in any event achieve the Government's stated aim.**

  The Government's case, at paragraph 99, is that "judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality. The Government is considering strengthening the law and practice to enable the Courts to deal more swiftly with applications where the alleged flaw complained of would have made 'no difference'."

  The proposal will not achieve the Government's stated aim of preventing delay to "perfectly reasonable decisions or actions". Where decisions or actions are "perfectly reasonable", judicial review challenges will, in any event, be filtered out of the system at the permission stage. The only cases that would be caught by the proposal are those where the decision or action being challenged has been reached by an unlawful decision-making process. No evidence is advanced by the Government that the courts do not strike the right balance in applying the present multi-faceted test for granting or withholding a remedy in such cases.

- **There are important and well established public policy reasons for maintaining the current high threshold before a court withholds a quashing order.**

  The dichotomy between "procedural defect" and "substantive illegality" that the consultation document seeks to draw at paragraph 99 is misconceived: judicial review is routinely concerned with challenges to the lawfulness of procedure. The judicial review court has in general no expertise to consider the merits of a public body's decision, and is loath to do so. The "no difference test" has been developed by the courts with this in mind. For example, in *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, May LJ stated (at paragraph 10, of the judgment): "I have already noted that neither [counsel] contended that the judge's second reason, that is that the decision would probably have been the same anyway, was alone sufficient to sustain his conclusion. That is a proper concession. Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision" (emphasis added). Were the "no difference" test to be modified as is

proposed, it would necessarily involve the court in matters it is ill equipped to adjudicate on. This will add to costs and require additional court time.

- **Good public administration requires decision makers to be aware when they have got the law wrong.**

  Dealing with issues of remedy at the end of proceedings makes sense both in terms of the most efficient use of the court's resources, and also because it is an important part of good public administration that decision makers are aware when they get the requirements of the law wrong. Where cases involving challenges to unlawful decision making (which are the ones that will be caught by this proposal) are filtered out at the permission stage, decision makers will not receive guidance from the court to enable them to avoid future unlawful decisions.

- **The proposal may incentivise bad decision-making.**

  The proposal may incentivise some public bodies to seek to insulate decisions from challenge where they are advised that the procedure being followed is or may be unlawful, by qualifying decisions with a rider that a particular issue of legal significance would not have made any difference had it been decided in a different way. This outcome would be inconsistent with decisions being reached on their merits, and so inconsistent with good public administration.

- **There will be increased costs and "bottlenecking" of proceedings if consideration of the "no difference" test must take place early in proceedings at the permission stage**.

  Defendants are likely to consider it advantageous to assert the "no difference" argument in the Acknowledgement of Service in order to seek to avoid a full hearing – particularly if it is made easier to meet the test by lowering of the applicable threshold. Where the point is taken in the AOS, there will be an increased need for oral hearings (which will be longer), lengthier pleadings, and more extensive case preparation, all of which will drive up costs for the parties and take up valuable court time.

- **The proposals would aggravate the chilling effect on legally aided claimants' representatives if the Government's legal aid proposal is implemented.**

  If the Government's proposal for paying for pre-permission work in legal aid cases are implemented, the increased uncertainty and costs that would result from bringing forward consideration of judicial review remedies to the permission stage would have an additional chilling effect on legally aided claimants' representatives' willingness to act.

Conclusion

The deadline for responses is 1 November 2013. Readers are urged to respond.