An update on the Judicial review reforms

> "The professional campaigners of Britain are growing in number, taking over charities, dominating BBC programmes and swarming around Westminster. Often, they are better paid than the people they lobby as they articulate a Left-wing vision which is neither affordable nor deliverable".
>
> (Chris Grayling writing in the Daily Mail, 6 September 2013[1])

This was written by the Lord Chancellor and Secretary of State for Justice under the headline "The judicial review system is not a promotional tool for countless Left-wing campaigners". It was published on the day that the Government published its proposals for further reform of judicial review.

My task today is to give you an update on those reforms. In so doing, I hope to look at how we have gone from:

> "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."[2]

and

> "the court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power" and it "must not shrink from its fundamental duty to 'do right to all manner of people'"[3]

to:

> "We have seen a huge surge in Judicial Review cases in recent years. The system is becoming mired in large numbers of applications, many of which are weak or ill-founded, and they are taking up large amounts of judicial time, costing the court system money and can be hugely frustrating for the bodies involved in them. I am concerned that Judicial Review is being used increasingly by organisations for PR purposes. Often the mere process of starting a Judicial Review will generate a headline. We want go back to a system where Judicial Review is available for genuine claims, which provides people with access to Judicial Review where they need it but weeds out the cases that should frankly never be there in the first place.[4]"

In this short presentation, I am going to try to track a marked change in the Government's approach to judicial review, and (in my view) the rule of law.

November 2010 - Proposals for the reform of legal aid in England and Wales[5]

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[1] http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html

[2] Lord Dyson, now Master of the Rolls, in *R (Cart) v Upper Tribunal* [2011] UKSC 2 at [122]

[3] Lord Bingham, then Master of the Rolls in *R (Smith) v Ministry of Defence* [1996] QB 517, 556

[4] Press release, Ministry of Justice 13 December 2012 (https://www.gov.uk/government/news/judicial-review-consultation)

[5] Consultation paper: CP12/10 at para 4.17 (and also see paras 4.95-4.99) http://www.official-documents.gov.uk/document/cm79/7967/7967.pdf

The Government consulted on proposals for the reform of legal aid in England and Wales. £350 million of savings were proposed by Lord Chancellor Ken Clarke. But judicial review was spared. The consultation paper stated:

> "In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly."

June 2011 – Proposals for the reform of legal aid in England and Wales - the Government response[6]

"*Key issues raised: judicial review*

13. Most respondents agreed with the consultation proposal that judicial review proceedings should remain in scope, but the sub-committee of the Judges' Council which responded to the consultation made a number of detailed suggestions about how to further limit funding for unmeritorious judicial reviews. Some of their suggestions do, we believe, have the potential to reduce the number of unmeritorious judicial reviews brought with the benefit of legal aid. The Judges' Council's response argued that many judicial reviews in immigration and asylum cases which came before the courts had already had at least one oral hearing on the same issue, and that public funding should therefore be removed from these cases or severely curtailed. The response suggested that funding should also be removed if the case were a challenge to removal directions or detention pending removal, on the basis that such challenges are often designed to frustrate the removals process rather than to raise a point of genuine merit.

The Government response

14. Although only a minority of the immigration and asylum judicial review cases referred to by the Judges Council are funded by legal aid, we believe that the principle of refusing funding for a case which has already had at least one full oral hearing on the same, or substantially the same, issue is the right one.

15. Given our aim to reduce unnecessary litigation, and to target resources to those who need them most, the Government does not believe that public funding is merited in these cases. We have therefore decided that legal aid will no longer be available in this narrow group of cases. However, we consider that there should be some important exceptions to these exclusions principally to take into account potential changes in an individual's circumstances over time, and to ensure that cases where an appeal has not already taken place are not inadvertently captured. We also consider that challenges to detention pending removal should remain in scope (as they relate to the applicant's liberty).

16. The Government therefore generally intends to retain legal aid for judicial review in immigration and asylum cases, except for:

[6] http://www.official-documents.gov.uk/document/cm80/8072/8072.pdf

i) immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year, except so far as necessary to comply with article 15 of the EU Procedures Directive

ii) judicial reviews challenging removal directions except where there has been a delay of more than one year between the determination of the decision to remove a person and the giving of removal directions.

17. However, cases falling within these categories would be subject to certain exceptions:

- where funding is necessary to comply with article 15 of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (this will apply to 'fresh claim' judicial reviews and cases against a certificate issued under section 94 of the Nationality, Immigration and Asylum Act 2002); and

- where the challenge is to a certificate issued under section 96 of the Nationality, Immigration and Asylum Act 2002."

4 September 2012 - Chris Grayling appointed justice secretary

The Daily Telegraph described the appointment as "a sop to Conservative right", and described Grayling as "a Eurosceptic Conservative known in Opposition as the party's right wing attack dog". [7] He became the first non-lawyer to serve as Lord Chancellor since the Earl of Shaftesbury in 1672-3.[8]

20 November 2012 - David Cameron's Red Tape Speech to the CBI[9]

> "First [in the Prime Minister's list of problems to be solved], judicial reviews. This is a massive growth industry in Britain today. Back in 1998 there were four and a half thousand applications for review and that number almost tripled in a decade. Of course some are well-founded – as we saw with the West Coast mainline decision. But let's face it: so many are completely pointless. Last year, an application was around 5 times more likely to be refused than granted. We urgently needed to get a grip on this.
>
> So here's what we're going to do. Reduce the time limit when people can bring cases. Charge more for reviews – so people think twice about time-wasting. And instead of giving hopeless cases up to four bites of the cherry to appeal a decision, we will halve that to two."

13 December 2012 – Judicial review proposals for reform

Chris Grayling stated[10]:

> "We have seen a huge surge in Judicial Review cases in recent years. The system is becoming mired in large numbers of applications, many of which are weak or ill-

[7] http://www.telegraph.co.uk/news/politics/9521055/Chris-Grayling-appointed-Justice-secretary-in-sop-to-Conservative-right.html
[8] http://en.wikipedia.org/wiki/Chris_Grayling
[9] http://www.cbi.org.uk/media/1849566/prime_minister_speech_to_cbi_annual_conference_2012.pdf
[10] https://www.justice.gov.uk/news/press-releases/moj/judicial-review-consultation

> founded, and they are taking up large amounts of judicial time, costing the court system money and can be hugely frustrating for the bodies involved in them. I am concerned that Judicial Review is being used increasingly by organisations for PR purposes. Often the mere process of starting a Judicial Review will generate a headline. We want go back to a system where Judicial Review is available for genuine claims, which provides people with access to Judicial Review where they need it but weeds out the cases that should frankly never be there in the first place."

This contrasts with the Ken Clarke approach of June 2011. It must have been a very sudden surge. The proposals were summarised as follows:

- "For planning cases - reducing the time after the initial decision that an application for Judicial Review can be lodged from three months to six weeks, to match the time limit for challenges to the High Court on planning matters [introduced]

- For procurement cases - reducing the time after the initial decision that an application for Judicial Review can be lodged from three months to 30 days, to match the time limit for procurement appeals [introduced]

- For cases based on a continuing issue or multiple decisions – clarifying the point when the time limit starts, to avoid long delays [subsequently abandoned]

- Scrapping oral renewals (which can be used to challenge a decision to refuse permission to bring a Judicial Review application) for any case which has already had a hearing before a judge on substantially the same matter, for example, at a court, tribunal or statutory inquiry [subsequently abandoned]

- Scrapping oral renewals for any case where the application for permission has been ruled to be 'totally without merit' by a judge on the papers [introduced]

- Introducing a new fee for an oral renewal of £215 (but potentially rising to £235 under separate proposals)" [introduced]

The consultation process ran from 13 December 2012 to 24 January 2013.

9 April 2013 - Transforming Legal Aid: Delivering a more credible and efficient system

8 days after LASPO came into force, the Government opened a further consultation on legal aid. The civil legal aid proposals were summarised as follows:

> "proposals for improving public confidence in the legal aid scheme…includ[ing] reforms to prison law to ensure that legal aid is not available for matters that do not justify the use of public funds such as treatment issues; the introduction of a household disposable income threshold above which defendants would no longer receive criminal legal aid; a residence test for civil legal aid claimants; reforms to reduce the use of legal aid to fund weak judicial reviews; and amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success".

There were also proposals to reduce fees for lawyers and experts. These proposed reforms to civil legal aid were buried in a host of other proposed reforms to criminal legal aid, most controversially, the proposal that there should be price competitive tendering of criminal contracts, so that legally aided defendants would no longer have a choice of publicly funded solicitor.

But the civil legal aid proposals were extremely restrictive, including in relation to legal aid for prison law, for judicial review and for those individuals who were not lawfully resident in the UK. A key point is that these restrictions were not about saving money, but rather "to ensure public confidence in the legal aid scheme by targeting limited public resources at those cases which justify it and those people who need it".[11]

The consultation ran from 9 April to 4 June 2013. There were an unprecedented number of responses for a consultation of this sort – nearly 16,000 according to the Ministry of Justice.

PLP along with 13 other NGOs commissioned an advice from counsel on the proposed residence test. The advice was that the proposed residence test would fall foul of the common law right of access to the court, the Human Rights Act and EU law. Detailed rebuttals were offered of the reasoning underpinning the Government's proposals to withhold legal aid in judicial review claims where permission was not granted, and to require prisoners to apply to raise any complaints through the prison ombudsman rather than through lawyers.

23 April 2013 – Chris Grayling interview on the Today Programme on Radio 4

On being asked by John Humphreys why the Government planned to make changes to judicial review, the Lord Chancellor stated[12]:

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

A research paper published by PLP and Essex University demonstrated that the Lord Chancellor had misspoken (not for the first time in his use of statistics[13]) by ignoring the many thousands of cases that settle before a full hearing on terms favourable to the claimant. The research paper concluded that:

> "based on the statistics available for 2011, it can be estimated that claimants will have obtained a benefit (and by implication that their claims had merit) in over 40 per cent of the civil non-immigration/asylum claims issued in that year."[14]

40 per cent of the civil non-immigration/asylum claims issued in 2011 is rather more than 144.

April 2013 – Reform of judicial review – the Government response[15]

The Government announced that it would implement the following proposals:

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[11] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid - see the civil credibility impact assessment

[12] See PLP publication "PLP debunks the Lord Chancellor's misuse of judicial review statistics":http://www.publiclawproject.org.uk/data/resources/127/PLP_2013_Debunking_the_myth.pdf

[13] http://www.independent.co.uk/news/uk/politics/lies-damn-lies-and-tory-crime-statistics-1889927.html

[14] http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Legal/UnpackingJRStatistics.pdf

[15] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228535/8611.pdf

- A reduction in the time limits for bringing a claim from three months to six weeks in planning cases and 30 days in procurement cases;

- The introduction of a new fee for an oral renewal hearing, where the claimant does not accept a refusal of permission on the papers, and asks for the decision to be reconsidered at a hearing (an "oral renewal"); and

- The removal of the right to an oral renewal where a judge certifies the case to be "totally without merit" on the papers.

The Government's response confirmed that in arriving at these measures, it had only one objective:

> "In developing these proposals, we set out one clear objective: to reduce the burdens placed on public authorities while maintaining access to justice and the rule of law…. The intention was to target weak, frivolous and unmeritorious cases, so that they were filtered out quickly and at an early stage, while ensuring that arguable claims could proceed to a conclusion without delay."

5 September 2013 – Transforming Legal Aid: next steps[16]

In this document, the Government published its response to its April 2013 consultation, "Transforming Legal Aid: Delivering a more credible and efficient system", and consulted on further reform to criminal legal aid. The response to *Transforming Legal Aid* included an announcement that the Government was minded to amend its proposal to withhold funding of judicial review claims unless permission is granted, and that the amended proposal would be the subject of a further consultation exercise. The amendment provided that where a case settles prior to permission, the LAA would have discretion to make payment.

6 September 2013 – Judicial review – proposals for further reform[17]

This major new consultation was announced on the day that the Lord Chancellor wrote his piece in the Daily Mail under the heading "The judicial review system is not a promotional tool for countless Left-wing campaigners". The key features were as follows:

(1) Pre-permission costs – the consultation paper proposed that the Government's original proposal that the claimant's costs should not be funded by legal aid unless permission is granted, should be amended by providing the Legal Aid Agency with a discretion to grant funding where a case is settled pre-permission.

(2) The consultation paper proposed that challenges to planning decisions should be fast tracked to a new planning chamber of the Upper Tribunal.

(3) The consultation paper proposed that leapfrogging of important cases to the Supreme Court should be facilitated in appropriate cases.

(4) Local authority challenges to national infrastructure projects – the consultation paper proposed that they should be restricted.

(5) The consultation paper proposed that the test applied by the court to standing should be made more restrictive.

[16] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view
[17] https://consult.justice.gov.uk/digital-communications/judicial-review

(6) Challenges to procedure – the consultation paper proposed that (a) the test for when judicial review should be refused because if a decision is re-taken it will make no difference should be changed so that permission would be refused if it were highly likely that it would make no difference, and (b) consideration of that issue should be brought forward to the permission stage.

(7) The public sector equality duty (PSED) – the consultation paper invited suggestions for an enforcement procedure other than judicial review.

(8) Costs of permission hearings – the consultation paper proposed that claimants should be liable for more of the defendants' costs if permission is refused at an oral hearing.

(9) Wasted costs – the consultation paper proposed making them easier to obtain against judicial review claimants' lawyers.

(10) Protective Costs Orders (PCOs) – the consultation paper proposed making them harder to get where the applicant has a private interest in the outcome.

(11) Third party interventions – the consultation paper proposed that interveners should in general be held liable for the costs attributable to the intervention.

The consultation ran for 8 weeks to midnight on 1 November 2013.

5 February 2014 - Judicial Review – proposals for further reform: the Government response[18]

Under the heading "Why further reform is needed", the Government response stated:

> "The latest court statistics published on 19 December 2013 show that there has been a significant growth in the volume of judicial reviews lodged, which by 2012 was nearly three times the volume in 2000 (rising from around 4,300 in 2000 to around 12,600 in 2012). For cases lodged in 2012, around 7,500 were considered for permission and around 1,400 secured permission (including after an oral renewal). The volume of judicial reviews lodged continued to increase during 2013. In the first nine months of 2013, around 12,800 judicial reviews were lodged, exceeding the total of around 12,600 for the whole of 2012".

It should be observed in passing that the increase in judicial review cases is almost entirely due to an increase in immigration- and asylum-related judicial review claims, which have largely been transferred to the Upper Tribunal, and so are no longer a drain on the Administrative Court.

The true picture was revealed in a statistical notice published by the Ministry of Justice on 29 November 2013[19], which included the following table:

Table 2: Volumes of judicial reviews revised in November 2013

	2007	2008	2009	2010*	2011	2012	Change 2007 to

[18] https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf
[19] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262036/revision-judicial-review-figures-stats.pdf

							2012
Total applications lodged	6,683	7,093	9,098	10,549	11,360	12,434	86%
Civil – Immigration and Asylum	4,342	4,609	6,648	8,148	8,855	9,958	129%
Civil – other	2,052	2,167	2,145	2,065	2,166	2,118	3%
Criminal	289	317	305	336	339	358	24%

Nevertheless, the Government response proceeded as follows:

> "**The way forward**
>
> 13. Overall the Government has concluded that reform is necessary to address the problems it had identified and to help ensure that in future judicial review is used appropriately. This document sets out a package of measures, some of which have already been announced, which are the result of careful consideration of the many consultation responses. On 4 and 5 December 2013 respectively the National Infrastructure Plan and the Chancellor's Autumn Statement set out the Government's intention to proceed with the following reforms:
>
> - a specialist Planning Court within the High Court to deal with judicial reviews and statutory appeals relating to Nationally Significant Infrastructure Projects and other planning matters;
>
> - a lower threshold test for when a defect in procedure would have made no difference to the original outcome. The Government will also establish a procedure to allow this to be considered earlier in the case at the permission stage; and
>
> - allowing appeals to 'leapfrog' directly to the Supreme Court in a wider range of circumstances by expanding the criteria for such appeals, removing the requirement for consent of both parties, and allowing leapfrog appeals to be brought from more courts and tribunals.
>
> 14. The Government will also be taking forward a set of reforms to certain financial aspects of judicial review, the aim being to deter claimants from bringing or persisting with weak cases. Accordingly this document details action to be taken in respect of legal aid for judicial review cases, oral permission hearings, Protective Costs Orders, Wasted Costs Orders, interveners' costs and third party funding. The Government considers that these changes are a more effective means of reducing the number of unmeritorious judicial reviews that are either brought or persisted with than changing the test for standing.
>
> 15. The Criminal Justice and Courts Bill makes provision for the reforms in relation to procedural defects, the various financial elements of the package, and leapfrogging. Other elements in the overall reform package will be taken forward by means of secondary legislation."

The Government's conclusions, in summary, were as follows:

(1) The Government decided to proceed with its proposal to withhold legal aid for judicial review claimants' lawyers where permission is not granted, subject to a discretion on

the part of the Legal Aid Agency to make payment according to certain criteria which were amended from those consulted on.

(2) Instead of setting up a Planning Chamber of the Upper Tribunal, as proposed in the consultation paper, the Government have decided to introduce a streamlined Planning Court. A permission stage is to be added to planning challenges under section 288 of the Town and Country Planning Act 1990 (which are brought on public law grounds albeit currently without a permission filter).

(3) The Government is persuaded to introduce legislation to enable cases to leapfrog the Court of Appeal and proceed directly from the High Court to the Supreme Court more easily (in all forms of litigation, not just judicial review).

(4) The proposal relating to restricting local authority challenges to infrastructure projects was not pursued.

(5) The proposal to restrict the test for standing was also not pursued, as the Government considered that "the better way to deliver its policy aim is through a strong package of financial reforms to limit the pursuit of weak claims and by reforming the way the court deals with judicial reviews based on procedural defects".

(6) The Government decided to pursue its proposal that permission should be refused if the court considers the claim would be "highly likely" to make a difference (as opposed to the present test of inevitability), on the basis of its view that "judicial reviews based on failures highly unlikely to have made a difference are not a good use of court time and money".

(7) In relation to the PSED, the results of a consultation exercise which considered evidence on the enforcement (currently by way of judicial review) of the PSED were being considered by the Government Equalities Office.

(8) The proposal to make judicial review claimants who are refused permission at an oral hearing liable for the defendant's costs of the hearing are to be pursued. The paper stated that "[t]he Government intends to revise [the] rules so that such awards are routine, but this will still be subject to the court's general discretion on costs".

(9) In relation to Wasted Costs Orders, the Government decided not to amend the existing test for making a WCO against the lawyers for judicial review claimants, but instead "intends to place a duty on the courts in legislation to consider notifying the relevant regulator and, where appropriate, the Legal Aid Agency, when a WCO is made … in respect of all civil cases, not only judicial reviews".

(10) In relation to PCOs, the Government stated it would "introduce primary legislation to set out the framework for PCOs, and in particular intends to ensure that a strict approach is taken to deciding whether it is in the 'public interest' that the issues in the claim are resolved; that only cases with merit should benefit so that PCOs should only be available once permission to proceed to judicial review has been granted by the court; and that, where a PCO is granted, there should be a presumption that the court will also include in the order a cross-cap on the defendant's liability for the claimant's costs. In addition, the Government will firmly re-establish the principle that a PCO should only be granted where the claimant would otherwise discontinue the claim, and would be acting reasonably in doing so".

(11) In relation to interveners' costs exposure, the Government stated that it would "take forward reform, through primary legislation, to introduce a presumption that interveners

will bear their own costs and those costs arising to the parties from their intervention. The courts will retain their discretion not to award costs where it is not in the interests of justice to do so".

(12) In relation to non-parties who fund judicial review claims, the Government stated that it would introduce primary legislation so that an applicant must provide information on funding at the outset of the judicial review, and requiring the courts to have regard to this information in order to consider making costs orders against those who are not a party to the judicial review.

5 February 2014 – First Reading of the Criminal Justice and Courts Bill in the House of Commons[20]

Part 4 of the Bill contains 7 clauses relating to judicial review dealing with the financial rebalancing and the test for refusing permission where the claim would be highly unlikely to make a difference.

14 March 2014 – The draft Civil Legal Aid (Remuneration) (Amendment) (no. 3) Regulations 2014 were laid before Parliament

The draft Regulations sought to amend the Civil Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/422) to provide that where an application for judicial review is issued, the Lord Chancellor must not pay remuneration for the making of that application unless either permission to proceed is given by the court, or permission is neither given nor refused and the Lord Chancellor considers that it is reasonable to pay remuneration. In making this decision, the Lord Chancellor is entitled to consider in particular:

"(i) the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;

(ii) the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings; and

(iii) the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time"

The Regulations were subject to a negative resolution procedure.

9 April 2014 – The JCHR published a report entitled "The implications for access to justice of the Government's proposals to reform judicial review"[21]

The report expressed concern at the implications for access to justice of the proposals:

- to refuse permission to apply for judicial review where it is highly likely that the claim would make no difference.

- to deny claimants' lawyers legal aid unless permission is granted, subject to the Legal Aid Agency's discretion to make payment anyway.

- to restrict PCOs being granted prior to permission, to impose a presumption of a cross-cap on the amount of costs recoverable from the defendant where a PCO is granted,

[20] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/cbill_2013-20140169_en_1.htm
[21] http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/174/174.pdf

and to give the Lord Chancellor the power to change the matters to which the court must have regard when deciding whether proceedings are in the public interest.

- to (potentially) replace judicial review with a less robust means of enforcement.

It also expressed concern at a potential conflict of interests in one person purporting to discharge the duties of both Lord Chancellor and Secretary of State for Justice.

22 April 2014 - The Civil Legal Aid (Remuneration) (Amendment) (no. 3) Regulations 2014 came into force[22]

15 July 2014 – The Government published its response to the JCHR report of 9 April 2014[23]

The Government accepted that the clause relating the interveners' costs exposure had caused some disquiet, and suggested it is looking at that part of the Bill with particular care, but otherwise made no concessions.

The Bill is presently in Committee in the House of Lords, where proceedings will continue on 21 July 2014. PLP's briefing for the Committee stage is reproduced as an appendix below.

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Public Law Project

17 July 2014

[22] http://www.legislation.gov.uk/uksi/2014/607/contents/made
[23] http://www.parliament.uk/documents/joint-committees/human-rights/Cm8896_Draft%20JCHR%20Response_110714_FINAL_WEB.PDF

Appendix

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[24]. 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[25]. That is not to say the current system is perfect. PLP would welcome genuine proposals to improve efficiencies in judicial review[26]. 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. 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.

[24] 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.

[25] 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.

[26] 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)

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. 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[27]. 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.

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[28].

What should happen? The clause should be rejected. It is not supported by the senior judiciary[29]. It will have the adverse consequences highlighted above. No need for reform has been demonstrated[30].

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[31].

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[27] 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.

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

[29] 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

[30] 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

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 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.

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[32].

- 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.

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

[32] 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)

- 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[33].

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)')[34]. 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 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[35].

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[36]) 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.

Effect of the proposal: The proposals do not alter the present tests for a PCO significantly (although they do introduce additional criteria[37]). However, there are areas of serious concern.

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[33] 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

[34] 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".

[35] 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

[36] 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/

[37] 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,

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 for 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)].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 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[38]. 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.

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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.

[38] 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