



CRIMINAL JUSTICE & COURTS BILL: PART 4

House of Lords Report Stage: October 2014

JOINT BRIEFING ON JUDICIAL REVIEW



Introduction

Judicial review is a legal process by which individuals can challenge decisions made by public authorities on the basis that they are unlawful, irrational, unfair or disproportionate. It is a directly accessible check on abuse of power, a means of holding the executive to account, increasing transparency, and of providing redress when public agencies and central Government act unlawfully. Part 4 of the Criminal Justice & Courts Bill proposes significant restrictions on the procedure for judicial review.

Reactions to this Bill and earlier consultations – including from the senior judiciary – doubt these measures address any identified risk or result in any significant savings. There are serious concerns about the constitutional implications of making it harder for those without means to challenge public decision making. Parliament's own Joint Committee on Human Rights ("JCHR") says there is no evidence to support the case for reform. Significantly, the JCHR also criticises the Lord Chancellor's "energetic pursuit" of reforms to insulate the executive from challenge as unavoidably problematic for the rule of law.

We represent issues, individuals and groups which are affected by public decision-making.

The effect of these proposals will be to suppress legitimate challenge; limit judges' discretion to act in the public interest and shield public agencies from effective oversight.

These proposals are not principally about the law or lawyers. They will affect decisions about the countryside, about schools, hospitals, our armed forces, police and security services; about housing, healthcare, education and transport.

Ultimately these changes will affect how and whether Government will abide by the rules which Parliament sets.

We support amendments to the Bill tabled by Lord Pannick and others, which broadly reflect the recommendations of the JCHR.

The Reforms: A Summary of Key Provisions

- Enabling the executive to escape legal consequences for unlawful action if it can persuade the court that it is highly likely that it would have taken the same action had it acted lawfully [Clause 70 of the Bill].
- Introducing new financial obstacles and costs threats in the path of those seeking to hold the executive to account [Clauses 71, 72, 74 and 75].
- Deterring charities and other individuals and organisations with specialist experience with limited funds from intervening in litigation to assist the court in cases that raise issues of wider public interest [Clause 73].
- Redefining the executive's relationship with the judiciary, by making the Lord Chancellor the primary arbiter of what is in the public interest for the purposes of litigation to which the Government may be a party [clauses 74(9)-(11), 75(3)].

“Highly likely” and unlawful public action – Clause 70

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

The Current Position: Where a public body has acted unlawfully, the court may, as an exercise of its discretion, refuse to act in a judicial review if it is **certain** that the outcome would be the same were the decision to be re-taken lawfully.

Effect of the proposal: In practice, it will enable public bodies to escape responsibility for unlawful decisions. In the long run it will change the role of judges on judicial review, as they are invited to second-guess how decisions might have been taken.

Considerations: This would create a scenario in which the executive would be able to act improperly, even dishonestly, without redress.

We support the amendments tabled by Lord Pannick and others which are designed to maintain the discretion of the Court.

Financial barriers to litigation – Clauses 71 - 72

The Bill contains several clauses which seek to impose greater financial penalties on unsuccessful judicial review claimants and charities and other NGOs who support test cases and other litigation:

- (1) The creation of a presumption on recovery of costs against third parties who support litigation could deter family members or other individuals with pure motives from supporting the costs of litigation for individuals with a legitimate claim but no access to legal aid.
- (2) Without further assurances, charities and not-for-profit organisations might be barred from acting to support litigation lest their members and trustees be adversely affected by unquantifiable costs risks.

The greater the limits on legal aid, the more likely that, individuals without means will look to other sources of support. These measures will – without more – shut down those avenues of charitable or philanthropic assistance.

Clauses 71 and 72 should not stand part of the Bill.

We support the amendments tabled by Lord Pannick and others which are designed to maintain the discretion of the Court.

Why clarity is needed on third party costs liability

If a family “chips-in” to fund a relative’s challenge to her treatment in a care home, will they be liable for costs (perhaps putting their homes at risk)?

Lawyers may act *pro-bono* to support people who can’t pay. Will their gift-in-kind mean they are treated as someone funding or likely to fund the case?

If a community group uses crowd-sourcing to fund litigation (e.g. the Lewisham hospital challenge), will every donation carry a costs risk?

Barriers to intervention – Clause 73

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. Interveners will generally be required to pay all parties' costs including the losing party.

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, and is permitted by the court to do so. The general practice is that interveners bear their own costs. However the court retains an absolute power to order that an intervener pays the costs of a party in any case.

Effect of the proposal: Most third sector organisations will be deterred by the risk that they are likely to have to pay significant 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 or bringing specialist expertise to bear.

These measures are not a bar to intervention. However they will, in practice, bar all those without significant resources from acting. Parties with means, such as Government Departments and private corporations will still be free to seek permission to intervene and influence the development of public law. The Government argues that parties with an interest in litigation should bear a proportionate cost. This neglects that interveners generally act in the public interest – without a direct interest in the claim - and contribute the cost of their own time for doing so.

Considerations: No evidence has been produced to show that the current costs rules result in injustice or waste. There is considerable judicial support for interventions, over which they have a wide discretion. It is in the public interest that when a court is considering important constitutional issues which will have a much wider impact than on the parties in the case that they understand the wider legal framework and the whole factual picture before settling the law.

Clause 73 should stand part of the Bill. However, we support amendments tabled by Lord Pannick and others, which would maintain the discretion of the court.

Interventions: Cases in the public interest

- What positive duties do hospitals owe to patients admitted voluntarily? (*Rabone*)
- How important are the best interests of children when parents are extradited? (*PH & HH*)
- Can the State lawfully imprison individuals who are neither convicted nor pending deportation? (*Belmarsh*)
- When should evidence that may have been obtained through torture be seen by our judges? (“A”)
- In what circumstances should doctors withdraw nutrition from a patient who no longer wishes to receive it? (*Burke*)

What the judges say: “Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer... interventions are enormously helpful”

Baroness Hale of Richmond, “Who Guards the Guardians” October 2013

Capping of Costs / Protective Costs Orders – Clauses 74 & 75

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

The Current Position: A PCO is an order that, at the outset of proceedings, extinguishes or limits a party's liability for their opponents' costs, in the event that the claim is lost. PCOs were developed by the courts to ensure that justice was not denied in important cases because of the financial risk of litigation. It is crucial to note that a PCO can be applied for, and granted, **before** permission to apply for judicial review is considered. At the heart of any PCO is always a case which the Court agrees it is in the public interest to hear.

Effect of the proposals: The proposals codify and alter the test for a PCO, raising some concerns.

First, limiting PCOs to cases where permission to apply for judicial review has already been granted, will have a dramatic effect on access to justice (Clause 74(3)). There are only a handful of PCOs granted each year, yet in those cases, almost all are made before permission is granted (the cases would not have proceeded if they had to wait for permission to be granted before seeking a PCO). The risk of having to pay a defendant's pre-permission costs would be too great to enable most individuals or charities to proceed. In recent examples the Government has stated itself to have incurred pre-permission costs of around £30,000. Costs of this level are entirely prohibitive.

Second, the Government proposes to limit the discretion of the court by dictating that judges "must", if they grant a PCO, also cap the costs that the claimant can recover (Clause 75(2)). A one-size-fits-all approach is crude and inappropriate: the court should retain discretion to make the overall order it considers to be interest of justice in any given case.

Finally, the Government proposes clauses which empower the Lord Chancellor to dictate to the court what is in the 'public interest' and what type of claimant can receive a PCO (Clause 75(10) without further parliamentary scrutiny. Not only is the Government proscribing the exercise of the court's inherent discretion as to costs but it intends to hold an enduring power to fetter that discretion if it does not like what the courts are doing.

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

We support amendments tabled by Lord Pannick and others which address these concerns.

Some public interest questions benefitting from a PCO

- Has the inquest following the death of a family member in hospital been conducted lawfully? (*Goodson*)
- When will the UK – through the Export Credit Guarantee - lawfully support a major overseas project involving a significant amount of public funds? (*Cornerhouse*)
- Can the Government protect a merchant vessel as a 'war grave'? (*Fogg & Ledgard*)
- When will a marriage conducted lawfully overseas be recognised in the UK? (*Wilkinson*)

Legal Aid, Sentencing and Punishment of Offenders Act (LASPO)

The changes in the Bill should be seen in the context of:

- (1) Financial barriers which already apply to judicial review, including changes to withhold payment in many cases otherwise eligible for legal aid. The senior judiciary has expressed doubt over whether those stand-alone reforms will impact on the ability of persons without means to pursue judicial review; and
- (2) The most recent review of costs in litigation concluded that the financial risks to judicial review claimants should be *reduced* (*Jackson, (2009)*).

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) made drastic cuts to civil legal aid, cutting access to support for individuals in whole areas of civil law regardless of the merits of any individual case or the vulnerability of any individual client. Less than a year after LASPO came into force, the Government proposed further wide-spread changes to exclude or restrict access to the remaining legal aid budget for prisoners, for non-residents and for judicial review. Each of these changes is currently subject to litigation in domestic courts.

There is no indication at all in these passages or in any of the other Parliamentary materials identified by the Ministry of Justice that the Government proposed to exercise the power to create a general exception of the type now contemplated under which individuals who do not meet a residence test would be excluded from access to many of the types of civil legal services.

Joint Committee on Statutory Instruments, Report on the Draft Residence Test Regulations,
para 4.13

Feelings of hostility to the alien or foreigner are common, particularly in relation to the distribution of welfare benefits. But they surely form no part of any justification for discrimination amongst those who, apart from the fact that they are 'foreign', would be entitled to legal assistance.

Certainly it is not possible to justify discrimination in an area where all are equally subject to the law, resident or not, and equally entitled to its protection, resident or not. In my judgment, a residence test cannot be justified in relation to the enforcement of domestic law or the protection afforded by domestic law, which is applicable to all equally, provided they are within its jurisdiction.

PLP v Secretary of State for Justice [2014] EWHC 2365, [84]

We support amendments tabled by Lord Pannick and others which would confirm that Parliamentarians had no intention that the Government should be able to make these new changes using delegated powers in LASPO.

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