Young Legal Aid Lawyers briefing for House of Lords debate
Second Reading of the Criminal Justice and Courts Bill
30 June 2014

1. On 30 June 2014 the second reading of the Criminal Justice and Courts Bill[1] (the Bill) will take place in the House of Lords. Part Four of the Bill contains proposals to make significant changes to judicial review by restricting the powers of the court to provide a remedy in certain types of challenges, and by imposing higher financial risks on claimants and interveners. These changes take place in the wider context of a series of recent changes to legal aid for judicial review, as well as numerous other changes to legal aid including cuts to criminal legal aid, the removal of legal aid for most prisoners and the forthcoming introduction of a "residence test" for civil legal aid. This briefing has been prepared to assist Peers attending the debate and to express our concerns about the impact of the proposals under the Bill.

About Young Legal Aid Lawyers

2. The Young Legal Aid Lawyers (YLAL) formed in 2005. We are a group of lawyers committed to practising in areas of law traditionally funded by legal aid. We have around 2,000 members nationwide including students, paralegals, trainee solicitors and barristers, and qualified junior lawyers. Our members share a belief in the importance of legal aid in upholding the rule of law and of being able to hold the state to account through proper judicial process.

Summary of the changes and our concerns

3. The key changes are as follows:
   a. Restricting the power of the court to grant a remedy in cases where it is satisfied that a public body has acted unlawfully;
   b. Increasing the cost risk to which interveners will be exposed in judicial review proceedings e.g. charities and NGOs who provide assistance to the court based on their specialism;
   c. Making the rules on Protective Costs Orders in public interest litigation more restrictive.

4. These changes need to be viewed in the context of recent cuts to legal aid for judicial review (see below). By restricting the right of claimants to bring a judicial review against the State, irrespective of the legality of that particular State act, these proposals serve to gravely undermine the separation of powers and reduce the accountability of the State. And by exposing charities and other interested parties who act in the public interest to greater financial risk these proposals will discourage public interest litigation. The Joint Committee on Human Rights (JCHR) in particular

[1] In the House of Commons, the second reading of the Bill took place on 24 February 2014. The committee stage ran from 11 March to 1 April 2014. The first day of report was held on 12 May 2014. The Bill then carried over to the new session of Parliament and the final day of report stage and the third reading took place on 17 June 2014.

has been critical of the reforms[2] expressing concern over the conflict between the twin role of the Secretary of State for Justice as the Lord Chancellor and a Government Minister:

> '[T]he Lord Chancellor's energetic pursuit of reforms which place direct limits on the ability of the courts to hold the executive to account is unavoidably problematic from the point of view of the rule of law.'[3]

We agree. The detail of the changes and our concerns are set out below. We hope that MPs will take these into account.

Background to the judicial review process

5. Judicial review is the means by which decisions of public bodies may be challenged in the courts on the grounds that the decision is illegal, irrational, procedurally unfair or fails to comply with the Human Rights Act 1998. A challenge may be brought by any claimant who has 'sufficient interest' in the decision under scrutiny.

4. Where a claimant issues an application for judicial review the application will be considered on the papers by a judge. Where the judge considers that the case is arguable, permission will be granted and the case will proceed to a full contested hearing at which both the claimant and the defendant public body will attend. At the conclusion of this hearing the general rule in civil proceedings is that the unsuccessful party will pay the legal costs of the successful party. Where permission is refused on the papers the claimant has a further opportunity to seek permission at an oral hearing. The defendant is entitled but not obliged to attend this hearing.

5. Judicial review is an important means of maintaining state accountability. Without the safeguard of judicial review, the separation of powers and the rule of law are fatally undermined. In the words of the Senior Judiciary in their response to the consultation that preceded the Bill:

> 'Judicial review constitutes a safeguard which is essential for the rule of law: it ensures that public authorities are accountable and act lawfully; it guards against abuses of power and protects the rights of those affected by the exercise of public power; and it polices the parameters of the duties imposed and powers bestowed by Parliament.'[4]

Recent changes to legal aid for judicial review

9. The Government has recently enacted secondary legislation to implement changes to legal aid for judicial review. On 22 April 2014 the *Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014* (the Regulations) came into force. The effect of the Regulations is that payment will only be guaranteed in judicial review cases where the court grants permission for the case to proceed. Where payment is refused then no payment will be made for the work that has been done. Where the case settles before permission payment will be within the discretion of the Lord Chancellor. The stated aim of the Regulations is to reduce unmeritorious judicial reviews. The concern is that the Regulations will go much further than this restricting legally aided judicial review entirely: the financial risk will simply be too great. On Wednesday 7 May 2014 the House of Lords debated a regret motion tabled by Lord Pannick QC in relation to the Regulation. The House was unanimous in its condemnation of the changes.

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[2] *The implications for justice of the Government's proposals to reform judicial review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868, 30 April 2014

[3] *Ibid.* [22]

[4] *Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform*, November 1 2013, [3]

The proposed changes under the Criminal Justice and Courts Bill

14. The Criminal Justice and Courts Bill builds on these changes to legal aid. Under Part Four of the Bill, the key changes aim to restrict the powers of the court to provide a remedy in certain cases, and impose higher financial risks on those wishing to challenge the decisions of public bodies. The apparent motivation behind the changes is that judicial review is too often used as a campaigning tool or as a way of delaying Government decision making, and that too many unmeritorious judicial reviews are brought. The JCHR has been critical of this rationale observing that:

> 'We… do not consider the Government to have demonstrated by clear evidence that judicial review has "expanded massively" in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate."[5]

Turning to the detail of the proposals:

Likelihood of substantially different outcome for applicant (clause 64)

15. Currently the court may refuse to grant a remedy in cases where the decision would *inevitably* have been the same had it been made lawfully. The Government intends to lower this threshold, so that a remedy may be refused if it is '*highly likely* that the outcome for the applicant would not have been substantially different' if the unlawful conduct had not occurred. It is proposed that this question must be considered at the permission stage in any case where the defendant requests it.

15. The JCHR noted that Lord Pannick QC, the Bingham Centre for Rule of Law[6] and many other commentators[7] have all raised concerns as to the constitutional implications of these alterations. In effect, the proposals require the courts to ignore unlawful conduct by public authorities, even where the unlawfulness is 'material in the sense that it might have made a difference to the outcome'[8]. Commenting on this proposal, the JCHR suggested that it seeks to 'remove judicial discretion in the matter and instead tie the judges' hands by imposing an express statutory duty to refuse to grant permission to apply for judicial review, or to withhold a remedy, if the statutory test is satisfied'.[9]

18. The principle behind this change is concerning because it undermines the court's constitutional role in ensuring fair and lawful decision making. At present, except where the court refuses permission because it is inevitable that the decision would not have been made differently, it may order that the decision be remitted to a democratically accountable decision maker for reconsideration. This change may also increase the cost of judicial review as this argument will be raised by defendants at the permission stage, generating more involved argument at an earlier stage in proceedings, when the legally aided claimant will be working without guarantee of payment.

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[5] *The implications for justice of the Government's proposals to reform judicial review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868, 30 April 2014, [30]

[6] *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*, Bingham Centre Report 2014/01, February 2014

[7] See, for example, B. Jaffey and T. Hickman, *Loading the Dice in Judicial Review: The Crime and Courts Bill 2014*, UK Constitutional Law, 6 February 2014

[8] *The implications for justice of the Government's proposals to reform judicial review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868, 30 April 2014 [43]

[9] *Ibid.* [52]

Interveners and costs (clause 67)

19. At present, parties who intervene in proceedings (such as interested charities or the Equality and Human Rights Commission) will generally bear their own costs of intervening but not the costs of other parties. The Government intends to change this so that where parties apply to intervene (as opposed to being invited to intervene by the court) they will be liable to pay the costs arising from their intervention.

21. There is a real risk that this proposal will inhibit parties from intervening, thereby depriving the court and parties of the assistance of their legal argument, experience and expertise. Lady Hale in her closing address to the 2013 Public Law Project Conference observed:

> '…provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied. I believe, for example, that it was Liberty who supplied the killer argument in the Belmarsh case[10]'.[11]

The senior judiciary has warned that "[c]aution should be adopted in relation to any change which may discourage interventions which are of benefit to the court".[12]

22. NGOs and charities such as Liberty, Mind, Amnesty and the Public Law Project, are often those who are most likely to intervene, due to their relevant experience and insight into the issues. The Bill provides that the High Court or Court of Appeal must 'order the intervener to pay any costs' incurred by a party 'as a result of the intervener's involvement'. The impact of these changes will mean that potential interveners will be discouraged as they may be financially unable to take the risk of intervening in a case; even when they may be the best people to do so. This may well inhibit the development of our common law system, and will mean that it will be no longer possible for them to put forward appropriate and relevant legal arguments, and points of view which might have assisted the court.

Protective Costs Orders/Capping of cost orders (clause 68)

24. Protective Costs Orders (PCOs) protect a party by limiting the amount of costs for which they will be liable if they lose their case. They were developed by the courts in 'recognition of the chilling effect of costs liability on public law challenges'.[13] A PCO may be granted where the claim is of general public importance, where the public interest requires the issue in question to be resolved, where the claimant would probably not bring the case if the order were not granted and where it is fair and just to grant the order in view of the claimant's means[14]. The Government intends that PCOs (in non-environmental cases)[15] should be reserved for 'serious issues of the highest public interest in cases granted permission and which otherwise would not be able to be taken forward without a PCO'. While this in part reflects the existing common law framework for PCOs, the intention of the Government to restrict the availability of PCOs is evident. We are particularly concerned that the Bill makes provision for the Lord Chancellor to make further

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[10] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68

[11] http://www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf

[12] *Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform"* November 1 2013, [37]

[13] *Liberty's Submission to the Joint Committee on Human Rights*, 2014 [53]

[14] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600

[15] A separate regime applies in respect of environmental cases that fall within the scope of the Aarhus Convention.

legislative decrees as to matters the Court must have regard to when determining whether proceedings are public interest proceedings. This concern was put forward in the JCHR report and they recommended against granting the Lord Chancellor such extensive powers:

> '[W]e do not see the need for the Lord Chancellor also to have the power to change the matters to which the court must have regard when deciding whether proceedings are public interest proceedings. Such a power has serious implications for the separation of powers between the Executive and the judiciary and we recommend that the Bill should be amended to remove that power from the Lord Chancellor.'[16]

26. The most worrying aspect of the Bill's proposals for PCOs is that they will not be available until permission has been granted.[17] This will have a huge impact on the ability and willingness of individuals and organisations to bring actions against unlawful public decisions, undermining the very purpose of PCOs. As the Bingham Centre for the Rule of Law noted:

> 'The risk of unknown and potentially substantial pre-permission costs is a risk that those who would otherwise qualify for costs protection cannot possibly take. If a PCO cannot be obtained to protect against such a costs risk, very many claims with substantial wider public interest will not be brought.'[18]

27. This proposal, combined with the new Regulations (see above) removing any guarantee of payment for legally aided work unless permission is granted, means that practitioners will have to take the risk of potentially substantial pre-permission costs. The likely result will be that many claims with substantial wider public interest will not be brought.

Conclusion

28. We have strong concerns about the barriers to access to justice that the Government's changes will create. Any restriction on judicial review, by definition, will inhibit the ability of citizens to challenge unlawful State acts. Such changes must be scrutinized closely. We fully endorse the criticisms expressed by the JCHR, and hope that Peers will consider these concerns during the course of the debate.

Young Legal Aid Lawyers
June 2014
www.younglegalaidlawyers.org
ylalinfo@gmail.com
@YLALawyers

[16] *The implications for justice of the Government's proposals to reform judicial review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868, 30 April 2014, [103]

[17] Criminal Courts and Justice Bill, Clause 68(3).

[18] Bingham Centre for the Rule of Law, supplementary written evidence to the JCHR (12 February 2014), [24] cited in *The implications for justice of the Government's proposals to reform judicial review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868, 30 April 2014, [100]