

## THE REFORMS TO JUDICIAL REVIEW

### 1. What is judicial review ("JR")?

- JR is the means by which decisions of public bodies may be challenged in the courts.
- The grounds of JR may be that the decision is illegal, irrational, procedurally unfair, or fails to comply with the Human Rights Act 1998.
- Senior Judiciary: "*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.*" (Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform", 1 November 2013, paragraph 3)
- JR procedure:
  1. JR pre-action protocol;
  2. Claimant issues an application for judicial review in the High Court;
  3. The application for permission to proceed 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 substantive hearing;
  4. In urgent cases, the claimant may make an interim relief application. An interim relief application is for preliminary relief, such as an injunction, granted by the court to preserve the status quo pending trial; and
  5. The substantive hearing.

### 2. Why does the government want to reform JR?

- Following the Government's "Transforming Legal Aid" consultation, it produced a subsidiary consultation entitled "Judicial Review: Proposals for Further Reform".
- On 5 February 2014 in its response to the latter consultation on judicial review, the Government announced a number of significant reforms.
- Motivation behind the reforms:
  - A belief that too many unmeritorious cases are brought;
  - That judicial review is being used as a device to stymie planning developments; and
  - That the financial risks of judicial review should be rebalanced in favour of defendants.

### 3. Pre April 2014, what was the position regarding legal aid for JR?

- Legal aid is available to fund judicial review proceedings.
- Claimant must pass the normal means tests and the normal merits test.

### 4. Post April 2014, what is the position regarding legal aid for JR?

- Same as before, but in addition new regulations have changed the rules on how firms are paid for publicly funded JRs.
- The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (the Regulations) came into force on 22 April 2014.
- These regulations are designed to reduce the number of unmeritorious cases by restricting the availability of legal aid for judicial review.
- Firms will only be paid for the work carried out subsequent to the issuing of proceedings where permission is granted by the High Court.
- However, even if permission is refused, disbursements such as court fees and interpreter's fees will still be paid, as will fees for work carried out on applications for interim relief.
- Also, the client retains costs protection under s26 LASPO.
- The Legal Aid Agency will retain a discretion to make payment in cases where permission is refused. The LAA will consider the following non-exhaustive factors:
  - The reason for the provider not obtaining a costs order or agreement (whether in full or in part) in favour of the legally aided party;
  - The extent to which, and reason why, the legally aided party obtained the remedy they had been seeking in the proceedings (or failed to do so); and
  - The strength of the application when it was made (based on the facts which the provider knew or reasonably ought to have known, and on the state of the law at that time).

### 5. In practice, what will this mean?

It is not clear at this point exactly how this will work in practice. But it as far as we can tell at this time:

- A solicitor WILL be paid for all work she carries out where the case ends before proceedings are issued in court. For example:
  - A solicitor obtains public funding, investigates the merits of the case, prepares a detailed letter before action, and obtains advice from counsel – but counsel's advice is negative and so the case does not proceed further.
  - A solicitor obtains public funding, investigates the merits of the case, prepares a detailed letter before action, engages in pre-action negotiations with the defendant, and the public body agrees to provide what is requested.

- A solicitor WILL NOT be paid for work carried out after issue of proceedings if permission is refused:
  - A solicitor obtains public funding, issues an application for judicial review (no application for interim relief is made), and the High Court refuses permission to proceed to a substantive hearing. The solicitor will not be paid her fees for all this work (BUT disbursements such as court fees and interpreter's costs will be paid)
- A solicitor WILL be paid for work conducted on interim relief applications, even if permission is refused:
  - A solicitor obtains public funding, issues an application for judicial review, makes an application for interim relief, and then the High Court refuses permission to proceed to a substantive hearing. The solicitor will be paid for work carried out on the application for interim relief but will not get paid for the remainder work (save for disbursements etc as above).
- A solicitor WILL be paid for all work conducted on a case where permission to proceed is granted (subject to the usual LAA or court assessment on costs).
- A solicitor will not know whether she will be paid where an application is issued, but the claim settles before the case reaches the permission stage. The claimant will seek costs against the defendant. But, if this is unsuccessful, then it will fall to the mercy of the LAA discretion as to whether the solicitor is paid for her work (although disbursements, etc. will be covered as set out above).

#### **6. Main concerns about these regulations are:**

- The "chilling effect" of the change – that meritorious judicial reviews will be inhibited since it will no longer be viable for providers to undertake legally aided judicial review work.
- The discretionary payments mechanism introduces a further layer of bureaucracy.
- The Government implemented the change by way of secondary legislation, which means it was not subject to full scrutiny in Parliament.
- The Government refrained from cutting legal aid for judicial review in the Legal Aid Sentencing and Punishment of Offenders Act 2012 on the basis that judicial review "represent[s] a crucial way of ensuring that state power is exercised responsibly".
- Legal aid is already subject to a strict merits test.
- The case for change is questionable.

#### **7. Parliamentary activity on the Regulations:**

- On 24 March 2014 Ed Miliband tabled an Early Day Motion asking for the Regulations to be annulled.
- On 27 March 2014 the Secondary Legislation Scrutiny Committee published its report, stating that:
  - *"In this very sensitive area MOJ should have explained better how the revised payment system will function... That the MOJ itself cannot state with any certainty how many cases would receive a discretionary payment starkly underlines the concerns expressed [to the committee]... These changes aim to save between £1–3 million from the Legal Aid budget but the Committee was concerned that savings in this area will simply transfer costs to another area... As a minimum the MOJ should, before the legislation comes into effect, provide urgent clarification of exactly what work will, and will not, be paid for and how the Legal Aid Agency will exercise its discretion over payment."*
- On 30 April 2014 the JCHR published its report, expressing a number of serious concerns, including:
  - The conflict between the twin role of the Secretary of State for Justice as the Lord Chancellor and a Government Minister;
  - The lack of evidential basis for the changes;
  - The chilling effect of the changes; and
  - The fact the changes should have been brought about by primary legislation to enable proper scrutiny by Parliament.
- On 7 May 2014 the House of Lords debated a regret motion tabled by Lord Pannick QC against the regulations.

#### **8. Other reforms to JR:**

- The Criminal Justice and Courts Bill will introduce several reforms to judicial review:
  - Change to legal test about the likelihood of a different outcome for the applicant in judicial review cases
  - Costs penalties to third party interveners in judicial reviews: there will be a new presumption that anyone intervening in a case must be liable for costs if any party asks the Court to order them to pay.
  - Changes to orders protecting costs in public interest cases.
- The Bill is currently in the "report" stage in the House of Commons, which means the Bill Committee has debated its contents and shortly there will be a date set for a debate in the House of Commons.

#### **9. Conclusion:**

- Taken as a whole, the new regulations and the Bill represent a serious threat to the rule of law.
- YLAL is still in the process of lobbying peers and MPs on the JR reforms. To help, email [ylalinfo@googlemail.com](mailto:ylalinfo@googlemail.com) and ask to sign up to our APPG subgroup.
- Look out for future emails from YLAL about lobbying your MP.

