Young Legal Aid Lawyers briefing for House of Lords debate on legal aid for judicial review – evening debate 7 May 2014

1. On Wednesday 7 May the House of Lords will debate a regret motion tabled by Lord Pannick QC "to move that this House regrets that the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 make the duty of the Lord Chancellor to provide legal aid in judicial review cases dependent on the court granting permission to proceed. (SI 2014/607)". This briefing has been prepared to assist Peers attending the debate and express our concerns about the impact of the Regulations.

ABOUT US

2. 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.

INTRODUCTION

3. The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (the Regulations) concern the payment of legal aid for judicial review cases. The Regulations came into force on 22 April 2014.

4. Judicial review is a key element of our unwritten constitution as it allows public bodies to be held to account through the Courts. If an ordinary person with sufficient interest cannot bring a judicial review to challenge the unlawful act of a public body then the separation of powers and the rule of law are fatally undermined. The effect of the Regulations is that legal aid will no longer be available to fund judicial review cases unless and until the High Court grants "permission" for the case to proceed. The work up to this stage can cost many thousands of pounds. The Legal Aid Agency will retain a discretion to grant funding retrospectively for those cases which settle prior to the grant of permission, but firms will not know at the outset whether they will be paid for the work that they do.

5. We are concerned that these changes will have a chilling effect on the ability of the citizen to seek judicial review as lawyers may be unable to take the financial risk of bringing cases. The Secondary Legislation Scrutiny Committee has also expressed concern over the changes and the Joint Committee on Human Rights has been robust in its criticism. Their report expresses concern over the conflict of interest in the role of the Lord Chancellor which these changes have brought to the fore; the lack of evidence to justify the chilling effect of the changes; and the decision to implement the changes by way of secondary and not primary legislation.

6. These changes also need to be viewed in the context of wider changes to judicial review contained within the Criminal Justice and Courts Bill which, among other things, will make it harder for charities bringing claims in the public interest to get costs protection and mean that organisations intervening in important cases run the risk of having to pay the costs of the other parties' lawyers. The Bill is due to have its report stage and third reading in the House of Commons on a date to be announced. The changes also take place alongside numerous other cuts to legal aid including cuts to criminal legal aid, the removal of most legal aid for prisoners and the introduction of a residence test for civil work.

DETAILED BRIEFING

Background to the changes

7. On 8 April 2013, a week after the coming into force of the Legal Aid Sentencing and Punishment of Offenders Act 2012, the Government announced its plans for a further round of changes to legal aid, in the "Transforming Legal Aid" consultation.[1] The aim was to further reduce the legal aid budget. The consultation received around 16,000 responses. A Government response to the consultation was published on 5 September 2013, and the Government has already enacted secondary legislation to implement some of the proposals. It also produced two further subsidiary consultations entitled "Transforming Legal Aid: Next Steps" and "Judicial Review: Proposals for Further Reform"[2]. On 5 February 2014 in its response to the latter consultation on judicial review, the Government announced a number of significant changes to judicial review[3]. The changes relating to legal aid announced in this response are contained within the Regulations being debated today.

Introduction to judicial review

8. 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. In broad terms judicial review is the means by which the citizen may hold the state to account for unlawful acts. In the words of the Senior Judiciary in their response to the judicial review consultation:

> 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]

9. 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.

Changes to legal aid funding for judicial review

10. Currently legal aid is available to fund judicial review proceedings which have prospects of success of 50% or more, and only where the claimant passes a stringent means test.

11. The proposed changes to judicial review are motivated by a number of factors, set out in "Judicial Review – proposals for further reform: the Government response" (see footnote 2), including 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. However, concern has been expressed by

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1 *Transforming Legal Aid: delivering a more credible and efficient system*, MoJ April 2013
2 *Judicial Review Proposals for Further Reform*, MoJ September 2013
3 *Judicial Review – proposals for further reform: the Government response*, MoJ February 2014
4 *Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform"* November 1 2013, paragraph 3

organisations such as the Public Law Project[5], and more recently by the Joint Committee on Human Rights (JCHR)[6], that the evidential basis for the changes is flawed.

12. The Regulations being debated on 7 May are designed to reduce the number of unmeritorious cases by restricting the availability of legal aid for judicial review so that providers will only be paid for the work carried out subsequent to the issuing of proceedings where permission is granted by the High Court. To alleviate the rigours of the change, the Legal Aid Agency (LAA) will retain a discretion to make payment in cases where permission is refused. In deciding whether to make a discretionary payment to a provider 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).
    - 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).

13. Our concerns about these Regulations are as follows:
    - That they will inhibit meritorious judicial reviews since it will no longer be viable for providers to undertake legally aided judicial review work; the risk of non-payment will be too great. This will undermine the ability of individuals of modest means to hold the state to account since it will be increasingly difficult to find a lawyer who can assist. The senior judiciary has described this as the "chilling effect" of the change.[7] The mechanism for discretionary payments above does not alleviate this risk. The bottom line is that providers will not know at the outset whether they will be paid for bringing the case.
    - The discretionary payments mechanism introduces a further layer of bureaucracy into an already complex payment system.
    - The Government refrained from making changes to judicial review by way of primary legislation in the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO") on the basis that judicial review "represent[s] a crucial way of ensuring that state power is exercised responsibly"[8]. The Government is now seeking to implement such changes by way of secondary legislation, which means it they may not be subject to full scrutiny in Parliament. These Regulations should have been laid under section 9 of the LAPSO, which requires affirmation from Parliament, rather than by a negative statutory instrument.
    - Legal aid is already subject to a strict merits test: funding is not available where prospects of success are less than 50%. Cutting legal aid does not stop litigants bringing frivolous cases. Rather, it means that they will bring them without lawyers. Without the benefit of sensible, robust legal advice litigants in person are far more likely to bring bad cases, to the detriment of the administration of justice.
    - The case for change is questionable. The Government has failed to take into account the reasons why cases may be compromised before permission is granted. It cannot be assumed that they are unmeritorious. Cases may settle, for example, where the defendant concedes. The statistics relied on in the consultation did not include any such analysis.

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[5] See *Written Evidence to the JCHR*, PLP 27 November 2013

[6] *The implications for access to justice of the Government's proposals to reform Judicial Review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868 http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/174/17402.htm

[7] *Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform"* November 1 2013, paragraph 24

[8] *Proposals for the Reform of Legal Aid in England and Wales*, MoJ November 2010 paragraph 4.16

- In the consultation response the Government provided an assurance that it would keep legal aid available for urgent injunctions (such as emergency injunctions requiring local authorities to house homeless families). We understand this is still the intention. However the Regulations are ambiguous[9]: it is not entirely clear whether funding will be available for these important cases. This ambiguity is concerning and should be resolved.
- The Regulations remove the right to appeal decisions about legal aid for judicial review to an independent adjudicator.

Parliamentary activity on the Regulations

14. The Regulations were laid before Parliament on 14 March 2014. On 24 March 2014 Ed Miliband tabled an Early Day Motion asking for the Regulations to be annulled.[10] We understand that the matter will proceed to a debate, although at the time of writing one is not currently scheduled. On 27 March 2014 the Secondary Legislation Scrutiny Committee published its report drawing the regulations to the special attention of Parliament "on the grounds that they are legally important and raise issues of public policy".[11] The report stated that:

> ...judicial review plays a significant role in checking that the actions of the Executive are consistent and rational. As several of the submissions we have received state, it is also used to test "new or disputed borders of the law" to set precedents and to clarify how new legislation should properly be interpreted.
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> In this very sensitive area MOJ should have explained better how the revised payment system will function. We note with concern that there are key aspects of the Regulations that are not clear... The Committee notes that using figures for 2012–13 MOJ states that these changes would definitely have removed legal aid from 20% of cases (751) and that up to 69% of the total cases (2,483) might have been affected. That the MOJ itself cannot state with any certainty how many cases would receive a discretionary payment starkly underlines the concerns expressed in the submissions received and published on our website. 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.
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> 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.

15. The Regulations came into force on 22 April 2014. On 30 April 2014 the JCHR published its report on the totality of the Government's judicial review changes, including those contained within the Regulations[12]. The report expresses a number of trenchant concerns about the package of reforms as a whole, including the conflict between the twin role of the Secretary of State for Justice as the Lord Chancellor and a Government Minister:

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[9] Arguably an application for interim relief in the context of judicial review would fall under CPR 25 and not CPR 54 and therefore would not fall within the definition of an application for judicial review under Regulation 5A(3)(c). If that is the case then funding would be available. On the other hand a claim for interim relief under CPR 25, by CPR 54.6, must be included within the Pt 54 claim for judicial review. This might be read as suggesting that interim relief in this context does fall within Pt 54 meaning funding would not be available. Clarity on this important point would be reassuring and would reduce the prospects of pointless litigation over this issue.

[10] http://www.parliament.uk/edm/2013-14/1220

[11] See 37th Report of Session 2013-14, Secondary Legislation Scrutiny Committee, House of Lords, 27 March 2014

[12] *The implications for access to justice of the Government's proposals to reform Judicial Review*, JCHR 13th Report of Session 2013-2014, HL 174 HC 868

> …the 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.[13]

Criticism of the evidence base for the changes:

> We therefore 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.[14]

> We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. In our view, for the reasons we have explained above, it constitutes a potentially serious interference with access to justice and, as such, it requires weighty evidence in order to demonstrate the necessity for it—evidence which is currently lacking.[15]

The chilling effect of the changes:

> ...the reform pushes too much risk onto providers, and creates too much uncertainty about the degree of such risk, causing a chilling effect on providers which will have a significant impact on access to justice because meritorious judicial review cases will not be brought.[16]

And the fact that the changes have been brought by secondary legislation:

> In our view, the significance of the measure's implications for the right of effective access to court is such that it should have been brought forward in primary legislation, to give both Houses an opportunity to scrutinise and debate the measure in full and to amend it if necessary.[17]

The JCHR concludes that the Regulations should be withdrawn and the changes introduced by means of the Criminal Justice and Courts Bill instead to ensure appropriate scrutiny[18].

CONCLUSION

16. We fully endorse the criticisms expressed by the Secondary Legislation Scrutiny Committee and the JCHR, and hope the Peers will consider these concerns during the course of the debate.

Young Legal Aid Lawyers - April 2014

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[13] *Ibid.* [22]
[14] *Ibid.* [30]
[15] *Ibid.* [79]
[16] *Ibid.* [76]
[17] *Ibid.* [81]
[18] *Ibid.* [82]