BRIEFING FOR
ALL PARTY GROUP ON LEGAL AID
BREAKFAST MEETING ON CHANGES TO JUDICIAL REVIEW:
8 APRIL 2014, 8.30 AM TO 10 AM, THE JUBILEE ROOM, HOUSES OF PARLIAMENT

The meeting

The purpose of this meeting is to:

- Update Parliamentarians in relation to important judicial review changes that are currently before Parliament, both in primary and secondary legislation;
- Launch a preview of a short film by the Justice Alliance highlighting the impact of the changes on ordinary people; there will be two showings, one at 9am and one at 9.30am;
- Provide short speeches on the impact of the changes from expert lawyers and an opportunity for discussion; and
- Outline what can be done to influence these proposals.

Breakfast will be provided. We welcome your attendance, if only for a few minutes, on this vital issue. We hope that the meeting will assist Parliamentarians in contributing to forthcoming debates on these important issues[1].

What are the changes and why are they so important? A summary

The changes concern judicial review cases. 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 cannot bring a judicial review on grounds of cost, the separation of the powers and the rule of law become defunct.

There are two clusters of changes:

(i) Changes to payment arrangements in legal aid judicial review cases which are likely to have a chilling effect as lawyers may be unable to take the financial risk of bringing cases

(ii) Changes to costs rules for public interest judicial reviews which will make it harder for charities bringing claims in the public interest to get costs protection or for organisations intervening in cases to run the risk of having to pay the costs of the other parties' lawyers.

[1] An EDM has been laid in the Commons on the changes to legal aid for judicial review http://www.parliament.uk/edm/2013-14/1220 and a motion has been laid in the Lords (debate on 7/5/14 at 7pm); the other matters will be debated as the Crime Bill progresses through Parliament.

Changes to legal aid payments in judicial review cases

Changes to the way lawyers will be paid for judicial review work which will mean lawyers will have to risk not being paid at all for this work unless the High Court grants the client 'permission' to proceed. The work up to this stage can be many thousands of pounds. These changes have been introduced by secondary legislation and are due to come into force on 22 April 2014. Motions against the legislation have been tabled in both Houses.

Changes to public interest judicial review cases

Changes to the costs rules for judicial reviews brought in the public interest will make it much more difficult for charities and other non-governmental organisations to be involved in cases that raise issues of public importance, either as litigants or as interveners. This is because it will be harder for litigants to obtain costs protection and interveners will risk becoming liable for the other parties' costs. These changes are being brought in through the Criminal Justice and Courts Bill, which has just been through committee stage in the House of Commons.

Detailed briefing

Background to the changes

On 8 April 2013 the Government announced its plans for a further round of changes to legal aid, in the "Transforming Legal Aid" consultation.[2] The aim is 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 started to enact secondary legislation to implement some of the proposals. It has also produced two further consultations entitled "Transforming Legal Aid: Next Steps" and "Judicial Review: Proposals for Further Reform".[3] On 13 December 2013, the Joint Committee on Human Rights (JCHR) published its report on "The implications for access to justice of the Government's proposed legal aid reforms".[4]

In its response to the judicial review consultation, on 5 February 2014 the Government announced a number of significant changes to judicial review.[5]

Introduction to judicial review

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

[2] *Transforming Legal Aid: delivering a more credible and efficient system*, MoJ April 2013
[3] *Judicial Review Proposals for Further Reform*, MoJ September 2013
[4] The implications for access to justice of the Government's proposed legal aid reforms, Joint Committee on Human Rights, 7th Report, 11 December 2013
[5] *Judicial Review – proposals for further reform: the Government response*, MoJ February 2014

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.*[6]

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

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.

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 organizations such as the Public Law Project, that the evidential basis for the changes is flawed.[7]

These regulations 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).

---

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

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

- 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).

Concerns raised by practitioners in relation to this change include:

- That it 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.[8] 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"[9]. 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 compromise 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.
- These regulations renege on the Government's assurance that it would keep legal aid available for urgent injunctions (such as emergency injunctions requiring local authorities to house homeless families) and also remove the right to appeal decisions about legal aid for judicial review to an independent adjudicator.

Parliamentary activity on the Regulations

On 27 March 2014 the Secondary Legislation Scrutiny Committee published its report drawing the regulations to the special attention of the House of Lords "on the grounds that they are legally important and raise issues of public policy".[10] The report

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

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

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

states 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.*
>
> *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.*
>
> *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."*

The Civil Legal Aid (Remuneration) (Amendment) (no. 3) Regulations 2014 were laid before Parliament on 14 March 2014 and are due to be implemented on 22 April 2014. On 24 March 2014 Ed Milliband tabled an Early Day Motion asking for the Regulations to be annulled.[11] The matter will proceed to a debate, although at time of writing one is not currently scheduled. A similar motion has been laid by Lord Pannick QC in the Lords and a debate has been pencilled in for the evening of 7 May 2014.

Changes to judicial reviews brought in the public interest

The Criminal Justice and Courts Bill was presented to Parliament on 5 February 2014 and the second reading took place on 24 February 2014. It has now been considered by the Commons Bill Committee. The main changes contained in the Bill are summarised below.

Protective Costs Orders / costs capping orders

Protective Costs Orders (PCOs) protect a party by limiting the amount of costs for which they will be liable for if they lose the case. 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

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

claimant's means. The Government intends that PCOs (in non-environmental cases)[12] 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". The intention is that where a PCO is granted the same cost protection should also apply to the defendant.[13]

One criticism of this change is the proposal that cost protection should routinely apply to defendants. The justification for limiting the claimant's liability to pay costs is that they would not otherwise be able to bring an important case. In the majority of cases this justification will not apply to defendants.

Interveners

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.

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 (A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68).*[14]

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".[15]

Substantially different outcome

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 unlikely* that the outcome for the applicant would not have been substantially if the [potentially unlawful] conduct complained of had not occurred". It is proposed that this question

[12] A separate regime applies in respect of environmental cases that fall within the scope of the Aarhus Convention.
[13] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/cbill_2013-20140169_en_1.htm
[14] http://www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf
[15] *Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform"* November 1 2013, paragraph 37

must be considered at the permission stage in any case where the defendant requests it.

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 appropriately 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.

Costs at oral permission hearings

Currently, where a claimant is refused permission at an oral permission hearing, the defendant will not normally be able to recover the costs of that hearing. The Government intends to change this practice so that the default position will be that a defendant can recover their costs at this stage.

This misunderstands the purpose of the permission stage which is to provide a mechanism for the court to filter out unmeritorious cases by placing the onus on the claimant to establish that their case is arguable. The function of this stage is not to provide a further "battleground" where the claimant and defendant can contest their respective cases. It is for this reason that the defendant is not required to attend the permission hearing. In the majority of cases where they choose to do so it is appropriate that they should bear their own costs. In those cases where it *is* deemed appropriate that the claimant should bear the defendants costs, the court already has full discretion to make such an order.

Other changes to legal aid

The reforms to judicial review are taking 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.

Legal Aid Practitioners Group
Young Legal Aid Lawyers
April 2014

Contact details: office@lapg.co.uk
ylalinfo@gmail.com