ALL PARTY GROUP ON LEGAL AID MEETING 11 FEBRUARY 2014

BRIEFING NOTE ON CHANGES TO JUDICIAL REVIEW

1. On 5 February 2014 the Government announced a number of significant changes to judicial review[1]. This note provides a short introduction to judicial review and a summary of the principal changes. Many of the changes outlined below are contained in the Criminal Justice and Courts Bill the second reading of which will take place on 24 February 2014. Some will be introduced shortly through secondary legislation.

JUDICIAL REVIEW

2. 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.[2]

3. 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 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.

4. Currently legal aid is available to fund judicial review proceedings which have prospects of success of 50% or more, subject to a means test.

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[1] *Judicial Review – proposals for further reform: the Government response*, MoJ February 2014. This was a response to the consultation *Judicial Review Proposals for Further Reform*, MoJ September 2013, which built on elements of the earlier consultation *Transforming Legal Aid: delivering a more credible and efficient system*, MoJ April 2013

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

POLITICAL CONTEXT

5. The current changes to judicial review are motivated by a number of factors, set out in *Judicial Review – proposals for further reform: the Government response*, 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[3]. These points are elaborated below.

SUMMARY OF THE CHANGES[4]

Legal aid: no guarantee of payment unless permission is granted

6. To reduce the number of unmeritorious cases the Government intends to restrict 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. 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:

    (i) 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.

    (ii) 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).

    (iii) 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).

    These factors are not exhaustive. These changes will be implemented by way of Secondary Legislation in Spring 2014.

7. Concerns in relation to this change include:

    (i) 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"[5] of the change. 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.

    (ii) The discretionary payments mechanism introduces a further layer of bureaucracy into an already complex payment system.

    (iii) 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 on the basis that judicial review "represent[s] a crucial way of

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

[4] This is a summary of the changes which will impact most significantly on access to justice. It is not an exhaustive list. Challenges to planning decisions have not been addressed.

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

ensuring that state power is exercised responsibly"[6]. The Government is now seeking to implement such changes by way of secondary legislation.

(iv) 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.

(v) 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.

Protective Costs Orders / costs capping orders

8. 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 claimant's means. The Government intends that PCOs (in non-environmental cases)[7] 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. This change is contained in the Criminal Justice and Courts Bill[8].

9. 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

10. 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. This change is contained in the Criminal Justice and Courts Bill.

11. 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

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

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

[8] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/cbill_2013-20140169_en_1.htm

> 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).[9]

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"[10].

Substantially different outcome

12. 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 must be considered at the permission stage in any case where the defendant requests it. This change is contained in the Criminal Justice and Courts Bill.

13. 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

14. 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 change is contained in the Criminal Justice and Courts Bill.

15. 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 defendant's costs, the court already has full discretion to make such an order.

[9] http://www.publiclawproject.org.uk/data/resources/144/PLP_conference_Lady_Hale_address.pdf
[10] *Response of the senior judiciary to the Ministry of Justice's consultation entitled "Judicial Review: Proposals for Further Reform"* November 1 2013, paragraph 37

CALL TO ACTION

16. These changes represent a serious threat to the rule of law. They add nothing to the present position concerning judicial review:

    - All legal aid applications for judicial review are already checked by the Legal Aid Agency before funding is authorized.

    - The Court has the discretion to order costs against any party in cases at present where it considers it appropriate and Defendants can already apply for a cross-cap where the Claimant seeks a protective costs Order.

    Rather, as the senior judiciary has warned, the changes will have a chilling effect in deterring claimants from enforcing their rights or challenging abuse by the state as practitioners will be unable to take the business risks expected of them.

17. We call on Members of both Houses to resist the changes in primary legislation as the Bill proceeds and to lay prayers against the relevant secondary legislation. We urge Members to ensure that the legislative scrutiny committee, the Joint Committee on Human Rights (still to issue its report on these proposed changes) and the Justice Select Committee consider these changes.

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