Leigh Day

RESPONSE OF LEIGH DAY TO THE MINISTRY OF JUSTICE CONSULTATION

JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM

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2. Leigh Day's Human Rights & Public Law Department is one of the UK's largest specialist practices in this field. It is recognised by its peers and the Legal Directories as one the top ranked practices in the country. It is one of only three firms named in Band 1 of both Chambers & Partners and the Legal 500 in the areas of Administrative & Public Law and Civil Liberties. Seven of the department's lawyers are named as leaders in these fields.

3. The firm holds a contract with the Legal Aid Agency to provide specialist services in Public Law and has done so since specialist franchises were first awarded.

4. Leigh Day are instructed in dozens of judicial reviews at any one time. The firm have been involved in some of the most important judicial review and public law cases over the last two decades including:

    - R (oao Corner House Research)-v-DTI [2005] EWCA Civ 192
    - R (oao Corner House Research & CAAT)-v-Director of the SFO [2008] UKHL 60
    - R (Wright & Ors)-v-SSH [2009] UKHL 3
    - R (oao Binyam Mohamed)-v-SSFCA [2010] EWCA Civ 65
    - Yunus Rahmatullah-v-SSD & SSFCA [2012] UKSC 48

5. Drawing on this vast experience and knowledge, Leigh Day are thus well placed to respond to those parts of the Ministry of Justice's ("MoJ") proposals which relate to or will have a direct impact upon judicial review.

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Introduction

6. When we responded to the first consultation paper this year – *Judicial Review: Proposals for Reform* – we spent a considerable amount of time addressing the misconceptions on which the Government had based its assertions of the need for change to the judicial review procedures. We addressed the haste with which the proposals were brought forward and the failure to grasp the ramifications of proposals. We pointed to the complete absence of evidence to support the perceived 'problem'. We explained why the premises on which the proposals were based – in particular: that there has been significant growth in judicial review; that judicial review stifles innovation, frustrates reforms and economic growth and recovery; that judicial review is subject to abuse; and that judicial review negatively impacts upon public authority decision making – were hopelessly flawed. We provided evidence to demonstrate this. Nevertheless, this latest consultation proceeds on the same and similar misconceived premises and fails to engage with the evidence to the contrary.

7. The reason for this has become clear in the interim – the changes to date, and these further proposals, are not driven by any objective problems with judicial review but by political ideology and an agenda which is inimical to a modern liberal democracy and the rule of law. That these changes are ideologically driven was confirmed by the Justice Secretary to the Justice Select Committee on 3 July 2013, when questioned in relation to depriving prisoners of access to judicial review. It has been confirmed again in the Justice Secretary's article in the Daily Mail on 6 September 2013, when announcing the current proposals, in which he asserted that judicial review was being used as "a promotional tool for countless left-wing campaigners".[1]

8. It therefore seems likely that any call to reason will fall on deaf ears and the substantial amount of time that has been put into responding to this, the third major consultation this year, will be wasted.

9. Nevertheless, we do respond because the proposals in this paper (barring a smattering of small sensible changes) taken together represent the greatest threat to our finely balanced constitutional settlement in recent memory. It would be remiss,

[1] This allegation of political partiality is particularly difficult to understand when many of the cases which appear to be the particular target of the Justice Secretary are either brought by non-politically affiliated charities and NGOs (from the Country side alliance to the RSPB and the Save Lewisham Hospital campaign) or are supported or brought by Conservative controlled local authorities (eg: Stop Stansted Expansion, HS2, etc).

for the record at least, not to respond as fully as possible to these hugely damaging proposals.

10. Some of these proposals if adopted would see the executive trespassing on the realm of the Courts in breach of the fundamental principle of the separation of powers in our democracy. Let us all be absolutely clear that these proposals as a package are aimed at insulating the executive from legal challenges to its unlawful actions.

11. Previous governments which have also suffered at the hands of the Courts have, properly, shied away from these kinds of changes.

12. The Impact Assessments accompanying the consultation are starkly clear that the policy objective is to reduce the number of judicial reviews currently brought. No genuine attempt is made to discriminate between meritorious or unmeritorious judicial reviews. This is about debarring access to the Court full stop. A significant proportion of the measures are aimed at debarring civil society and representative groups from bringing judicial reviews despite the fact that it is accepted that statistically these are more likely to successfully strike down unlawful action by the executive.

13. This is all presented under the guise of being good for business and the economy (a premise for which there is no evidence) and good for administrative decision making (a premise which flies in the face of the available evidence).[2]

14. Whatever the perceived benefits in the eyes of the executive, none are worth the damage that will be done to our constitution and civil liberties in this country if the proposals are implemented.

[2] *Judicial review litigation as an incentive to Change in Local Authority Public Services in England and* Wales, Sunkin, Platt and Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009).

Summary of Response

15. As referenced above, a number of the proposals within this consultation are not part of the overall package of attacks on the rule of law. We support, do not oppose, or support subject to limited qualifications set out in detail in the substance of our response, the following proposals:

- The creation of a specialist Tribunal Chamber to hear planning matter (Qs 1-2).
- Introduction of a permission filter for statutory challenges under the Town and Country Planning Act 1990 (Q 3).
- The introduction of fixed costs caps under the PCO jurisdiction (subject to removal or extension in exceptional circumstances) to mirror those applicable to Aarhus Convention cases (Qs 29-30)
- A requirement for parties to disclose third party funding of cases (subject to a proportionality test as to the detail of such funding) (Q 33)
- Broadening the circumstances in which a leapfrog appeal may be ordered (Qs 35-41)

16. We consider that the following proposals, if implemented, would mark the improper trespass of executive into the territory of court developed common law under the constitutional principle of the separation of powers. Such interference should only ever take place where there has been full scrutiny of the proposals by parliament and following the introduction of primary legislation. In any event we would oppose them (subject to certain qualifications expanded upon in the substance of our response below):

- Restricting the test of standing in judicial review (Qs 9-11)
- Interfering with the Court's discretion and established legal tests and procedure for determining relief in cases of procedural impropriety (Qs 12-16)
- Interfering with the Court's discretion and established practice as to costs awards in relation to oral permission hearings (Q 21), wasted costs orders (Qs 22-25) and third party interveners (Qs 31-32).
- Seeking to (in practice) abolish or severely restrict the Court developed Protective Costs Order jurisdiction (Qs 26-27).

17. We strongly oppose the further proposals to curtail the availability of legal aid and the consequent impact on access to justice:

    - Removing the availability of judicial review for statutory planning challenges (Q 8).

    - The principle of not paying providers for work on a judicial review where permission is not obtained (subject to a limited discretionary payment system) (Qs 19-20)

18. We oppose as a matter of principle the proposal that local authorities should be debarred from bringing a judicial review in any context (Qs 6-7).

19. We do not consider that there is any identified need for change in response to judicial review challenges to public authorities where they have failed to comply with their Public Sector Equality Duty (Qs 17-18).

Overarching Response

20. It is difficult in responding to the individual questions posed in the consultation paper (which we do below) to address properly the bigger picture issues raised by the proposals. Taking aside the handful of more sensible proposals, the impact of the remaining proposals as a package needs to be addressed. This is because they are based upon a fundamentally flawed approach and misconceptions (whether deliberate or not) which undermine the proposals and in our view render them perverse.

A. Unevidenced Assertion

21. In the Forward and Introduction to the paper, the same bald assertions are trotted out which we and so many others rebutted in the previous consultation papers this year. We address some examples as they arise.

Impact on Decision Making and the Economy

The Government is though concerned about the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision making. This is bad for the economy and bad for the taxpayer. [1]

wider economic costs might arise from judicial reviews in some cases. There may for example be an adverse impact on infrastructure or regeneration projects intended to support market access and economic growth. [16, bullet 4]

judicial reviews can also give rise to costs for third parties. In infrastructure cases, for example, delays in determining challenges against planning decisions may extend project delivery times and result in legal costs, implications for cash flows and borrowing costs. These additional costs and uncertainties might be reflected in the final price paid for the project output in question and can be reflected in initial project bids. [16, bullet 3]

22. No evidence is put forward to support these assertions that judicial review frustrates proper decision making and is bad for the economy/public finances. Indeed it flies in the face of detailed research on this subject. Research has demonstrated that rather than detracting from the quality of local government, an increased level of judicial review challenge leads to improvements in levels of performance against the

government's own indicators.[3] The same must be true of central government and other public bodies.

23. Not only by its nature does the existence of judicial review promote good administration and decision making, ensuring public authorities comply with the laws laid down by parliament – which it must be assumed were established in the public interest, including to promote economic growth – but it also provides a remedy for every person, individual or corporate, to ensure good administration.

24. A recent example of this can be seen in the successful judicial review brought by Virgin Rail against the decision to award the West Coast rail franchise to First Group. Not only was the decision unlawful, but it threatened the long-term economic stability of the franchise and could have caused irreparable financial loss for this large-scale piece of infrastructure. Another recent example is the series of judicial reviews brought by Cala Homes, challenging decisions by the Secretary of State for Communities and Local Government which threatened to derail much needed house building. After the Secretary of State conceded their final judicial review in February 2012, permission was finally granted for a substantial development to go ahead in October 2012.

25. A further point to note is that these assertions massively overstate the problem, even if it is accepted that one exists. Judicial reviews to all developments and infrastructure projects (let alone large ones) represent a tiny proportion of cases. There were only 15 cases flagged in 2011 out of c.400 planning cases (4%) or c.14,000 Administrative Court cases (0.1%). Despite raising this point previously, the Government has not looked into this further and continues to overstate the impact on development and infrastructure projects.

26. Furthermore, the assertion that third party businesses are put to significant cost by judicial review is backed up by a single anecdotal case and crude figures (see further below on this 'evidence'). However, the disbursement of legal costs by the third parties in judicial reviews is voluntary and in most cases unnecessary (and in any event this expenditure itself of course benefits the economy).

Significant growth in judicial review

However the Government considers that more needs to be done to prevent abuse of judicial review. [5]

[3] *Judicial review litigation as an incentive to Change in Local Authority Public Services in England and* Wales, Sunkin, Platt and Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009)

The Government is concerned that there has been significant growth in the use of judicial review, and that this is sometimes used as a delaying tactic in cases which have little prospect of success. [6]

27. Once again, no evidence of abuse is put forward to support these assertions.

There are more than twice as many applications for judicial review as there were ten years ago. Whilst much of the growth has been in immigration and asylum cases, those cases…[6]

The number of judicial review applications has more than doubled in recent years. [9]

28. This is a fatuous remark when, as the Government acknowledges, that growth is almost entirely down to immigration & asylum cases. Stripping these cases out – which is exactly what has just happened with transfer to the Tribunal system – and 80% of all judicial reviews are taken out of the Administrative Court. Left behind in all other categories of work are a touch over 2,000 judicial reviews a year – a figure which has barely risen at all over the last ten years.

Abuse of legal aid

[T]he use of the delays and costs associated with judicial review to hinder actions the executive wishes to take. The Government is concerned by the use of unmeritorious applications for judicial review to delay, frustrate or discourage legitimate executive action. In the case of legal aid the Government is concerned that weak judicial reviews are being funded, undermining public confidence in the legal aid system. [7(iii)]

29. Again, no evidence at all is put forward to back up these concerns. Given that the grant of legal aid has been taken entirely out of the hands of providers with the removal of devolved powers, the issue of legal aid is a matter for the MoJ, and these proposals do not address the purported problem.

Permission to bring judicial review:

30. The Government finally appears to accept the overwhelming evidence that vast majority of judicial reviews which do not reach the permission stage or are granted permission but do not reach final hearing, reflect successful outcomes for the claimant. However, the Government then goes on to seek to qualify this, but without pointing to any evidence.

Whilst this may be because the applicant has a legitimate grievance, the Government wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that a prolonged legal battle can involve. [12]

31. Investigating the reasons for concessions by public authorities would be valid research to undertake, but despite expressing this wish the Government has not done so and does not propose to do so. Instead, it simply decides to proceed with proposals on the basis that its speculative assumptions are correct.

Case Studies as "Evidence"

32. Despite wide-spread criticisms of the complete lack of evidence to support the assertions made in the previous two consultations this year, the best that the Government has come up with on this occasion is two isolated case-studies. These are provided in anecdotal form and are presented without sufficient information or context with which to assess whether they support the Government's propositions. Taking these in turn:

The impact of judicial review on economic recovery and growth. Case study: residential development [7(i)]

33. Firstly, this evidence is hobbled by the fact that it is presented as an isolated (and possibly extreme) example.

34. Secondly, the case was clearly 'meritorious' to the extent that the Court of Appeal granted it permission to proceed, so it cannot fall into category of unmeritorious and abusive cases which the proposals rely upon for their justification.

35. Thirdly, no evidence is presented of an improper motive on the part of the Claimants. They clearly had an interest in the future use of the site and if the local authority had acted unlawfully in carrying out its functions to pave the way for the development of the site, then they were entitled to have that dealt with by the Courts.

36. In respect of the legal costs to the developers, it was entirely up to the developers whether or not they opted to take an active part in the proceedings and whether they chose to instruct unnecessarily expensive lawyers (which would seem to be the case given the level of fees ratcheted up by the lawyers for an interested party).

37. There is also no detail of the report prepared by the developers as to the alleged financial loss which flowed from the delays occasioned by the legal proceedings.

There is therefore no way of auditing this figure and the presumptions upon which it is based.

38. The main problem that this case study evidences is one of delays inherent in judicial review proceedings. This is a matter to be addressed by speeding up the process not limiting the scope of judicial review. Further, it is to be hoped that this problem will have been substantially addressed by the removal of immigration and asylum cases from the administrative court. It certainly does not justify the barriers to access to justice which the proposals in this paper put forward.

the inappropriate use of judicial review as a campaign tactic. Case study: free school [7(ii)]

39. Firstly, it is clear that there was a meritorious case here. The Council retook the impugned decision in order to make it in compliance with the law and its Public Sector Equality Duty. There was therefore an accepted unlawful omission on the part of the Council at the heart of this case.

40. Secondly in terms of the merits of the claim, although not expressly stated it sounds as if this was a claim brought with the benefit of legal aid. That being the case, the Claimant would have had to have demonstrated to the satisfaction of the Legal Aid Agency ("LAA") that the prospects of succeeding were in excess of 50%. Again this strongly suggests that the claim was meritorious, if not ultimately successful. Furthermore, the claim was granted a full hearing by the High Court, which would support that assessment.

41. These two filters are safeguards to prevent unmeritorious cases from proceeding.

42. In any event, the system did not throw up insurmountable delays because the Court refused injunctions on three occasions, enabling development to begin and preventing the legal proceedings from causing undue prejudice (or being used simply to delay matters).

43. We note the further delay in applying for permission to appeal but this can only have been as a result of delays by the LAA in determining the Claimant's legal aid application and cannot be ascribed to the fault of the Claimant. Had there not been a good reason for the delay, the Court of Appeal would have refused the application for being out of time.

44. Finally, we repeat the point above in respect of the Developer in the first case-study: the Governing body was not "required" to divert enormous amounts of time and

resources to the Court process. That was a matter for them. It was the Council's decision that was being challenged and the Council who were required, if they chose, to defend it.

45. The unevidenced assertions and flawed examples highlighted above infect the entire paper. The fundamental flaws, misconceptions and reactions which flow from them render the proposals themselves unsafe.

B. Misconceptions about what constitutes a meritorious judicial review

46. The proposals in the paper proceed on the basis that an unsuccessful judicial review is an unmeritorious judicial review and that anyone who brings an unsuccessful claim has done something wrong. These are false premises.

47. While the Government now appears to acknowledge that a judicial review which does not reach the permission stage or which concludes prior to final hearing is not necessarily (or even likely to be) unmeritorious or unsuccessful [11-15], the paper goes on to gloss the distinction between meritorious and unmeritorious claims and treats the aim of reducing judicial reviews as an end in itself without reference to merit. The most glaring examples of this are in the proposals to restrict standing and neuter the PCO jurisdiction.

48. Further, there is wholesale failure to understand that the reality of judicial review challenges is that there is a very fine line of distinction between a successful and an unsuccessful challenge. Throughout the paper the Government characterises unsuccessful judicial reviews as 'unmeritorious' and uses the emotive language of judicial review being abused.[4] Applying the same logic, every time a public body unsuccessfully defends a claim for judicial review, it is abusing the judicial review process.

49. As any practitioner specialising in judicial review would be able to tell the Government, judicial review challenges are very difficult to call (whether you are representing the claimant or defendant). There are almost always respectable legal

[4] *"But the use of judicial review has expanded massively in recent years and it is open to abuse." [Forward]; "The Government is concerned about the time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made." [ibid.]; "The Government is though concerned about the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision making. This is bad for the economy and bad for the taxpayer." [1] etc.*

arguments on both sides.[5] Most judicial reviews that are issued will have been assessed by practitioners as having prospects of success in the region of 50-60%. It follows that, if those assessments are accurate, then 40-50% of cases brought by Claimants with the assistance of specialist lawyers will be unsuccessful. It does not follow that 40-50% of those cases were totally unmeritorious, let alone abusive.

50. The data presented in the paper tallies remarkably accurately with this common understanding of the difficulty of calling judicial review cases. 53% of judicial review claims either obtain permission or are withdrawn pre-permission. Of those which are withdrawn pre-permission, research suggests that the vast majority (over 80%) were successful.[6] Of those cases granted permission, only 19% are successfully defended at final hearing. Bearing in mind that the overall figures will be skewed by the fact that some hopeless claims are brought (typically by litigants in person or by lawyers who are not specialists in public law), then the data very strongly suggests that the assessments of expert practitioners are remarkably accurate and that there is in fact no problem of unduly large numbers of unmeritorious or abusive claims.

51. It would also be wrong to characterise any claim that fails at the permission stage as being self-evidently unmeritorious. The reality is that what was originally devised as a low-threshold test to wean out hopeless cases at minimal costs (and without the need for the Defendant to respond or attend any hearing) has become a much higher threshold test – something along the lines of 'has a good prospect of succeeding at final hearing' and a much more adversarial process than originally envisaged. Research has also demonstrated that there is a wide divergence in the rates of grant of permission amongst the judges of the Administrative Court.

52. It is not uncommon for oral applications for permission to go on for the best part of a day before a judge, with both sides presenting respectable arguments, but for the judge to refuse the application permission (ostensibly as unarguable), sometimes in a reserved judgment.

53. "Rolled-up" hearings are not infrequent. These are hearings at which permission and substantive arguments are heard at the same hearing. These are frequently used in urgent cases or are directed by judges when considering paper permission applications where the legal or factual issues appear too complex to assess on the

[5] Contrast a private law tort claim where the facts often speak for themselves in terms of wrongful act and causation of harm and lawyers are often able to put prospects of success in excess of 90%.

[6] *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Bondy and Sunkin, Public Law Project (2009).

papers. In such cases, Claimants must prepare for a final hearing before permission has been obtained. It is open to the Court, having heard a day or more's argument to refuse permission at the conclusion.

54. The statistical evidence simply underlines the misconception or false premise on which many of the proposals in the paper are based – particularly, no payment for the permission stage, which is predicated on the concept that somehow practitioners are failing to properly assess cases, are wasting public funds on hopeless cases and therefore should be punished financially.

C. Misconception that costs rules are skewed in favour of Claimants

55. The paper talks of 'rebalancing' the costs risks in judicial review when making proposals which would add further risk to Claimants and third parties. The Government is right in a sense. The balance of risk in relation to costs in judicial review needs to be urgently addressed. However, that balance needs to be corrected in favour of Claimants. Unless one is poor enough to be entitled to legal aid (and there is an increasingly stringent threshold for eligibility) or an extremely wealthy individual, then the costs risks of judicial review present an extremely chilling effect. The majority of people in this country simply cannot afford to bring a judicial review which would risk financial ruin for them and their families. The public authorities on the other hand are sufficiently well-resourced to defend all the challenges which come their way - out of the money of the very tax-payers who cannot afford to enforce their constitutional rights through the Courts. This situation is unsustainable in a modern democracy.

56. That the Government seeks to levy even more punitive costs against the citizen for access to the Courts beggars belief. It is behaving as an authoritarian state might in seeking to ensure that abuses of executive power should go unchecked by the Courts.

57. There remains a fundamental inequality of arms as between the citizen and the executive. The answer must be, rather than to introduce even more chilling costs rules, the belated introduction of Qualified One Way Costs Shifting (QUOCS) in judicial review cases.

58. The consultation paper refers to the review conducted by Lord Justice Jackson, who looked at how costs might be controlled and his recommendations, published in January 2010 [111].

59. What it fails to refer to is that, following his comprehensive review of civil litigation costs and funding, Lord Justice Jackson recommended the introduction of QUOCS for

judicial review but that this recommendation was not adopted by the MoJ. It is worth rehearsing Jackson LJ's comprehensively concluded recommendations in this regard:

> *"4.1 In principle. Having considered the competing arguments advanced during Phase 2 as well as the factors set out in PR chapters 35 and 36, I am quite satisfied that qualified one way costs shifting is the right way forward. There are six principal reasons for this conclusion:*
>
> *(i) This is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases.*
>
> *(ii) For the reasons stated by the Court of Appeal on several occasions, it is undesirable to have different costs rules for (a) environmental judicial review and (b) other judicial review cases.*
>
> *(iii) The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims.*
>
> *(iv) As stated in the FB paper, it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved.*
>
> *(v) One way costs shifting in judicial review cases has proved satisfactory in Canada: see PR paragraphs 35.3.8 and 35.3.9.*
>
> *(vi) The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value."*[7]

60. Despite the ideology and misplaced assertions underpinning the present consultation proposals, it should be noted that there is no evidence that the situation has altered since Jackson LJ's comprehensive review in 2009. Far from the consultation paper's assertion that the reforms then introduced by the Government "go some way to making costs more proportionate and balanced as between claimant and defendant", the Governments' one-sided adoption of Jackson LJ's recommendation to abolish

[7] *Review of Civil Litigation Costs: Final Report*, Jackson LJ, December 2009, Part 5, Chapter 30, paragraph 4.1.

recoverability of CFA success fees and ATE insurance premiums without the commensurate adoption of QUOCS, has tipped the balance firmly in favour of Defendant public authorities in judicial review. Jackson LJ was at pains, both in the Report and subsequently, to emphasise that his recommendations only made sense as a package. For the Government to cherry pick those recommendations which favoured them, demonstrated the worst kind of self-interested protectionism which is the hall mark of an unbridled executive.

61. We can put it no lower than to observe that to now seek to go even further to tip the balance in favour of the Government and against the citizen threatens real and lasting damage to the constitutional balance of this country.

62. We would note however that the MoJ committed to reviewing the operation of QUOCS and to consider its roll out to non-PI claims once it had been given the opportunity to examine the experience of it in PI claims. That review should be carried out as soon as sufficient evidence and data is available. Certainly no further steps should be taken to upset the already skewed balance as between claimant and defendant.

D. Missing the target

Our proposals are intended to act as a disincentive to those considering judicial review whose cases have no merit while helping to speed up those cases that proceed through the courts. [20]

63. Even if the 'implications' that the proposals purport to address are accepted, the proposals do not achieve the aims. As to reducing unmeritorious claims, the most extreme proposals (Standing, Costs) target at a tiny proportion of cases (fractions of a per cent of the claims brought each year) which on the evidence presented in the consultation paper are more successful than the average judicial review and which by their nature carry wider public benefits. The impact on access to justice and the ability to hold the executive to account will be entirely disproportionate to the number of cases affected but also miss the target (of unmeritorious claims) completely. The other proposals too do not discriminate between meritorious and unmeritorious claims but simply create a general chilling effect on claimants.

64. The proposals do not meet the stated aims of the consultation, instead they seek to bar access to the Courts on an arbitrary basis.

E. Prematurity

[U]nsuccessful judicial review applications can cause delays to the implementation of policies and projects. For cases lodged in 2012 it took, on average, around 83 days for an application to be considered for permission on the papers, and a further 95 days for decision on permission after oral hearing (where there was one). Overall, for applications lodged in 2011 which reached a final hearing, it took on average 313 days for these cases to reach a final hearing from the day they were lodged. [16, bullet 1]

65. There is no evidence to suggest that these delays are the fault of claimants as opposed to delays inherent in the system (or even of Defendants and Interested Parties); nor that judicial review is being used as a delaying tactic.

66. Furthermore, it is premature to seek to act on the basis of these figures. The impact of transfer of Immigration & Asylum judicial reviews (80% of all judicial reviews issued each year) to the Tribunal system has yet to be seen and cannot be underestimated. The Government should clearly wait to see the outcome of that change before relying upon delays inherent in the system to radically reduce access to the Courts.

67. Finally, the bald average figures do not take into account Courts' current flexibility in dealing with urgent cases, in particular where large sums or significant interests are at stake.

F. <u>Inappropriate approach to such significant changes</u>

Much of the legal framework on the grounds and scope for review, standing, justiciability and costs is established by judicial decision and has changed over time. [25]

68. This observation is quite correct. These changes have been an organic development of the English Common Law system, relating directly to the constitution of the UK. Just as the Courts should be very careful not to overstep their role and interfere with Parliament, so the Government of the day should be very careful not to overreach its bounds and should only interfere with the Common Law in the most careful manner and with the full scrutiny of parliament. One of the most worrying aspects of all of the proposals to date this year has been the extent to which the Government has sought to introduce change in bit parts through secondary legislation as far as possible and thus evading the effective scrutiny of parliament. These changes should be looked at as whole and debated properly by both houses of parliament if they are to be introduced.

69. Finally, we would once again urge on the Government a more responsible approach if it proposes to make such sweeping changes to judicial review given its constitutional importance. In our response to the first consultation we argued that if the Government is convinced that there is a case for change, then the appropriate response would be set up an independent inquiry to look into the evidence of the problem and make recommendation as to how any identified issues should be addressed.

70. The approach presaged in this consultation stands in stark contrast to the careful and detailed approach taken in previous reforms to the system and procedure of judicial review. The original reforms to judicial review were implemented following detailed study and recommendations by the Law Commission in 1976. The procedure was again considered by the Law Commission in 1994 when further recommendations for reform were made.[8] At the same time, civil procedure as a whole was preparing for its own fundamental reforms under the stewardship of Lord Woolf. The work of Lord Woolf was then taken forward in the specific field of judicial review under a one-year enquiry by Sir Geoffrey Bowman which culminated in the introduction of Part 54 of the Civil Procedure Rules.[9] These careful and detailed reviews stand in stark contrast to the hasty and ill-thought out proposals put forward in the consultation paper.

71. We consider that the only appropriate way forward, in view of the Government's determination to make fundamental changes to judicial review, is to establish an independent inquiry to consider and report on potential changes. It is not appropriate for changes of such significant constitutional importance to be rushed forward in 6 week consultation.

[8] *Administrative Law: Judicial Review and Statutory Appeal*, The Law Commission, 1994.

[9] *Review of the Crown Office List: A Report to the Lord Chancellor*, March 2000.

Response to Specific Proposals and Questions

G. Planning

72. We agree generally with the principle that planning cases should be speeded up – although this would apply equally or more so to other public law cases (for example liberty and homelessness cases). The steps taken to date, including a planning fast-track, a specialist list, priority listing and shortening the limitation period, and transfer of Immigration and Asylum matter to the Tribunal system will hopefully achieve this in any event.

Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?

73. Yes. Provided the new Chamber is a mirror of the High Court in terms of its powers and core procedures, we consider that there are additional benefits to creating a specialised Court to hear planning, environmental and related public law matters. Empowering a new Chamber of the Tribunal, manned by specialist Judges and support staff, would give confidence to litigants, is likely to lead to more consistent decision making and case law and would enable the Chamber to take forward developments in practice and procedure to further improve access to justice in this very important area. In particular the Chamber could be charged with overseeing and helping to ensure the UK's compliance with the Aarhus Convention.

Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?

74. We would support in principle the establishment of a new specialist Chamber of the Tribunal system to handle planning related public law cases. In our view specialisation is the way forward for the Courts and Tribunal system to ensure the most efficient discharge of justice. However, it would be a major opportunity missed if the new proposed Chamber did not also encompass environmental cases (whether applying the planning acts or otherwise) as well as other infrastructure and environmental related cases (transport, telecommunications etc). These will typically overlap in considerable part with planning and land law cases and the Judges and practitioners involved are likely to have overlapping expertise.

75. The establishment of a planning and environmental division or Tribunal has long found support amongst experts in the field and the judiciary. A new Lands, Environment and Planning Chamber could represent a valuable reform to the justice system.

Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and Country Planning Act?

76. We have no particular objection to this proposal. It has always seemed a curious anomaly that statutory reviews under the planning acts, and more generally, did not have a permission filter.

Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?

77. Only in the sense that case law suggests that the system works well in determining where illegality has taken place but that any negative impacts arise from the delays that are inherent in the system. It seems highly likely that the removal of approximately 80% of the Administrative Court's workload to the Immigration and Asylum Chamber of the Tribunal system will reduce this problem significantly at a stroke.

Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?

78. We have two suggestions which would significantly improve the efficiency and speed legal challenges relating to development and infrastructure (although these proposals should apply with equal force to all judicial reviews):

- That interested parties in judicial review proceedings should not be permitted to file evidence or take an active part in any hearing unless expressly invited to do so by the Court. Interested parties are named in and served with proceedings for the very good reason that they stand to be affected and/or prejudiced by the outcome of a judicial review. They ought therefore given notice of any such proceedings and provided with copies of the proceedings, as is the case now. It might also be reasonable to permit them to file short written submissions as a matter of course.

However, ultimately the matters in dispute in any judicial review case are matters of administrative and public law relating to the acts or omissions of a public authority. Interested parties are not true parties to the litigation. Yet, in our experience, Interested Parties often add considerably to the delay, cost and expense of judicial review proceedings, particular in planning and infrastructure cases.

Typically they will instruct very expensive lawyers and will file considerable materials as well as participating to a significant extent in oral hearings (both permission and substantive). It is no surprise to us to see in the first case study the interested party developer incurred £100,000 of legal costs. However, we doubt very much whether their participation in the process added anything save to escalate the costs and delays of the case. In our view, the usual rule should be that only if the Court believes that it will be assisted by the active participation of an Interested Party, and invites that participation, that the Interested Parties should be permitted to file evidence and/or take an active part in the proceedings.

There should be provision for the Interested Party to apply for permission to do so on presenting good grounds (for example, bringing to the Court's attention a potentially vital piece of evidence, or evidencing a prejudice that is likely to lead to relief being refused) but the extent of the involvement should be limited to that which is 'necessary' for the good administration of justice. In other cases, such as where a Claimant applies for an injunction to prevent the Interested Party from taken certain steps, then there should be a presumption that they will be permitted to take a full part in that application.

However, in all other respects they should be treated in the same manner as any other person, interested in the case, who applies to intervene in proceedings.

Such a change to the rules would present significant time and cost savings to Claimants, Defendants and the Court and would also reduce delays in the determination of urgent cases.

- That Defendants should be actively encouraged to concede permission in cases where a claim is clearly arguable by the introduction of a presumption that it should pay the costs of any contested permission application 'in any event' if permission is granted. A huge amount of Court time could be saved with a commensurate speeding up of the judicial review process if the time of Claimants and Judges was not wasted at the permission stage where a claim is clearly

arguable. A Defendant conceding permission is an extremely rare occurrence. A sensible approach by Defendants to permission applications would go a long way to speeding up the process and saving money.

We would not go so far as to say that the Treasury Solicitor (or other lawyers instructed by the Defendant) should not be paid for unsuccessfully resisting permission – as the government presently proposes for Claimant lawyers acting under legal aid - because that would be patently unfair. However, Defendants should be actively discouraged from wasting time and resources by resisting permission applications which are clearly arguable. That such resistance should sound in costs is a sensible way of achieving what Defendants have been unprepared to do of their own volition. If the claim were subsequently successfully defended at substantive hearing it would be a simple matter to off-set the costs of the permission stage against the cost of the substantive case and this would be simple and effective way of changing defendant behaviour, speeding up judicial review proceedings and reducing their overall cost.

Local Authorities Challenging Infrastructure Projects

Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?

79. We would strongly oppose this proposal. Firstly, as the paper acknowledges, there is no evidence of a problem to address here. Secondly, it would set a dangerous precedent to remove the ability of a democratically elected body to challenge other public authorities on behalf of the people it represents. Given the chilling effect of the current judicial review costs regime on the ability of citizens to actually use their constitutional right to judicial review and, in particular, the dramatic reduction in the availability of legal aid, local authorities (be they County or District Councils, Parish Councils or possibly even Neighbourhood Fora) have an increasingly important role to play in holding to account the national government and other public authorities. Such bodies are increasingly often best placed (and resourced) to represent the citizenry's interests as against unlawful acts of the national executive. Finally, such a proposal flies in the face of this government's flagship Localism Agenda.

Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?

80. We have first-hand experience of representing Parish Councils (and a Neighbourhood Forum) and can attest to the fact that their roles in representing the community interests have a very positive effect on community cohesion and empowerment in a

manner which is very difficult to achieve when individual citizens stand alone against the executive. Other examples of local authorities (often Conservative led authorities) playing an important role in holding the national executive to account in cases that we have been involved in include: The Stop Stansted Expansion litigation, the Save Lewisham Hospital litigation and the HS2 litigation. The impact of such involvement is entirely positive in our experience.

Challenges to Planning Decisions under sections 288 and 289 of the TCPA 1990

Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?

81. Yes. We strongly believe that there should remain legal aid in such cases. Not least because in the vast majority of such cases, to remove legal aid would breach the UK's obligations under the Aarhus Convention.

82. Further we note the statement in the paper that "*Currently legal aid is not generally available for planning cases or statutory challenges under sections 288 and 289 of the TCPA but is available (subject to means and merits) where an individual is at immediate risk of losing their home as a result of the proceedings in question*." [64]

83. This is incorrect. Under Part 19 of Schedule 1 of LASPO, judicial review is permitted and is defined as including (19(10)) "*any procedure in which a Court, Tribunal or other person mentioned in Part 3 of this Schedule is required by an enactment to make a decision applying the principles that are applied by the Court on an application for judicial review*." There is no specific exclusion under LASPO which catches sections 288 and 289 proceedings. Therefore it seems clear that s.288 & 289 proceedings are covered by LASPO without exception where the means and merits tests are made out.

84. Even were the Government's understanding to be correct, there can be no justification for removing the ability to challenge an unlawful decision by the Secretary of State, let alone where a person is at immediate risk of losing their home. In such cases there would be a clear risk of a breach of ECHR rights and so the proposal would be pointless. In all other cases, there is a clear risk that the proposal will breach the Government's obligations under the Aarhus Convention.

H. Standing

The Government is concerned that too wide an approach is taken to who may bring a claim, allowing judicial reviews to be brought by individuals or groups without a direct and tangible interest in the subject matter to which the claim relates, sometimes for reasons only of publicity or to cause delay. [67]

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

85. No. This is most extreme proposal in the paper. The paper and accompanying impact assessments are riddled with entirely unfounded accusations that organisations are bringing judicial review proceedings purely for the purposes of delaying the implementation of government policies and for self-publicity. This reflects the Secretary of States allegation in the Daily Mail that judicial review is being used as "a promotional tool for countless left-wing campaigners". This clearly political statement has no foundation in evidence. The one "case study" put forward to support the assertion does not stand-up to scrutiny and, even were the allegation made out, cannot stand as the basis for such a dramatic change to the constitutional balance of this country.

86. The Government is audaciously and improperly seeking to interfere with the test of standing established by the Common Law, implemented by the Senior Courts Act 1981 and construed by judicial interpretation thereafter, in order to protect its own interests.

87. The paper states that the identified "*concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest. On that basis, judicial review should not be used to undermine this role by putting cases before the courts from individuals with no direct interest in the outcome."* [80]

88. This is an astonishingly arrogant and conceited statement – almost Orwellian. The Government appears to be seeking to reverse several centuries of constitutional development and consign the concept of the separation of powers to the scrap-heap. It is not for the Executive to be the exclusive arbiter of what is in the public interest (much less to have that determination unchecked) but for all participants in the make-up of the state including the public at large, representative groups and, in particular the independent judiciary.

89. The concept that an individual bringing a judicial review should be required to have a direct interest in the matter in hand (apparently interpreted as being directly negatively impacted upon) is entirely misconceived.

90. The constitutional role of judicial review is not to enforce rights but to address public wrongs.[10] In *AXA General Insurance Limited v HM Advocate [2011] UKSC 46* Lord Reed warned of situations "*such as where the excess of misuse of power affects the public generally, [where] insistence upon a particular interest could prevent the matter from being before the court, and that in turn might disabled the court from performing its function to protect the rule of law*." This statement echoes the words of the court in *R v Secretary of State for the Home Department, ex p Bulger [2001] EWHC Admin 119* at 20: "*the threshold for standing in judicial review has generally been set by the courts at a low level. This…is because of the importance in public law that someone should be able to call decision makers to account*".

91. Further, this proposal is illogical in the context of the main purported aim of the proposals, to reduce the allegedly large numbers of unmeritorious judicial reviews. The statistics in the paper [78] point to the fact that claims brought by NGOs and other organisations are both (a) a tiny proportion of judicial reviews issued each year – 0.4%;[11] and (b) they have a higher success rate than other judicial reviews. Added to this must be the fact that claims brought by such organisations are not brought for their own direct interests (save to the extent that they tally with charitable aims etc) but for the benefit of the public at large and very often to the benefit of public funds at large by short-circuiting a situation that would otherwise see numerous individual judicial review challenges brought by directly affected individuals. The cost:benefit of NGOs, representative organisations, charities and other civil society organisations taking the lead in a handful of important cases is inestimable.

[10] "Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for [permission to bring judicial review], the court's only concern is to ensure that it is not being done for an ill motive." Sedley J in R v Somerset County Council, ex p Dixon [1998] Env LR 111 at 117-121.

[11] Research conducted by the Public Law Project and the University of Essex and funded by the Nuffield Foundation concluded that challenges brought by NGOs in respect of wider public interest matters are few and far between. In a 20 month period between July 2010 and February 2012 there were only three non-environmental challenges that reached final hearing, brought by NGOs alone (CPAG, Medical Justice and Children's Right Alliance).

92. The judicial reviews that the Government are seeking to block by changes to the standing rules are thus *de minimis* in number, more meritorious than the other judicial reviews and come at greater benefit to the public at large than claims brought by directly affected individuals. This is not therefore about saving money or credibility. In this light it becomes clear that the only rational motive for this change is to (improperly) protect the government from embarrassingly and inconveniently being held to account for its unlawful actions.

93. The paper seeks to cite hugely important cases which did great credit to our justice system in support of the proposition that standing should be restricted – the World Development Movement and Maya Evans cases. From the Government's perspective such cases may be embarrassing where they unearth wrong-doing and hold the Government to account. But on any objective analysis these are precisely the types of cases which cement the rule of law and keep in check overweening executive power in this country. They are the hallmarks of a functioning modern liberal democracy.

94. A recent example of the importance of the broad approach to standing can be seen in the judicial review brought by the immigration detention charity Medical Justice.[12] In that case the courts decided that the Home Office policy of deporting people with less than 72 hours' notice, so that they did not have time to get legal advice, was unlawful because it violated the common law right of access to the courts. This challenge could not have been brought by the individuals affected by the unlawful policy, because they had been deported without sufficient time to get legal advice on the lawfulness of their deportation or the lawfulness of the policy as a whole. Only a NGO could have challenged the unlawful policy, and if Medical Justice had not brought the challenge, the unlawful policy might still be in existence.

95. Other examples of important test cases brought by claimants with no direct interest (as the government would interpret it) include: R (oao Corner House Research Ltd)-v-SSTI [2005] EWCA Civ 192 (weakening of anti-bribery and corruption procedures); and R (oao Corner House Research & CAAT)-v-Director of the Serious Fraud Office [2008] UKHL 60.

96. Another situation in which the value of broad standing rules can be seen is where an individual claimant can no longer proceed with his or her case, but it is in the public interest for the judicial review to be heard by the courts. In *R v Gloucestershire County Council ex p Barry [1997] UKHL 58*, for example, the Royal Association for Disability

[12] *R (Medical Justice) v Secretary of State for the Home Department [2011] EWCA Civ 1710*.

and Rehabilitation were substituted as the claimant, following the death of the individual litigant.

97. The benefits of allowing representative organisations access to the Courts in public matters are clear and overwhelming:

- They represent a public interest and by definition will be seeking the Court's determination of matters of wider public importance.
- The claims they bring often save considerable money by bringing forward one claim where many individual claims might otherwise have been brought.
- Such claims often save time and money by allowing the Court to consider evidence and issues in the round rather than restricted to the facts of a particular case which may not clear up all of the legal issues (and whence further challenges based on nuances of fact may follow).
- They are usually capable of presenting an informed viewpoint and/or evidence that bears on the context of the challenge and they generally bring forward better prepared, resourced and represented cases
- They are capable of representing the views and interests of people who for practical, costs or other reasons may not be able bring claims themselves (for example, foreign nationals, vulnerable individuals, individuals without access to legal advice, without access to legal aid and unable to risk the costs involved).

98. These benefits will only become more critical to the proper operation of the UK constitution following the significant public funding cuts of the last few years under which legal advice centres and agencies have closed at an alarming rate and the availability of legal aid has been cut from huge swathes of the law.

99. In summary, this proposal is no more than an ideological and politically motivated attempt to insulate the executive from oversight and accountability and represents a grave assault on the constitution of this country.

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

100. None of the possible alternative standing tests put forward would be appropriate. The only appropriate option is not to interfere with the current position. Taking the alternatives put forward in the paper in turn:

101. The CJEU and the "direct and individual concern" test [84]: This test operates in the limited jurisdiction of EU affairs. It is not the appropriate basis for access to justice in the fundamental constitutional and administrative safeguards of a nation state. In any event there is respectable opinion that the CJEU standing is inappropriately restrictive and that it will need to be broadened at least to the extent that a case may fall under the Aarhus Convention.[13]

102. The Human Rights Act 1998 – "the victim" test [85]: The HRA is about enforcing ECHR rights and forms a narrow and limited part of our constitutional law. It establishes the constitutional right to enforce rights of the person. Victimhood is therefore the appropriate trigger to plead those rights. Judicial review and public law in the UK on the other hand is not about rights but about public wrongs (*ex parte Dixon*). It is about holding the executive to account for its wrongful and unlawful acts/omissions etc. A victimhood test would overly restrict the ability of the people in a democratic state to hold the government to account and check overweening executive acts (see examples above).

103. Statutory planning challenges – the "person aggrieved" test [86]: again this is an inappropriate analogy. Statutory planning challenges are essentially a limited final right of appeal, from a written determination, in a particular case, on particular facts affecting particular 'aggrieved' persons. Anyone who has an interest (however limited) can make themselves an aggrieved person by taking an active part in the underlying appeal to the Secretary of State – persons aggrieved are therefore self-selecting to a considerable extent. While many judicial reviews will proceed on a similar basis (eg: JR's of Tribunal decisions or against Public Authority decisions on a case specific basis) that is not justification for limiting the ability of the public at large to hold the executive to account for any decision, act or omission. Even where it is difficult to identify a direct interest that has been harmed, there are clear public interest reasons for those wrongs to be held in check producing benefits for the UK at large (eg: the Maya Evans case, Corner House No.1).

104. Legal aid – the "sufficient benefit" test [87-88]: Once again, this analogy is inappropriate. This is a test established in order to prioritise the allocation of limited and defined resources. It is circumscribed by necessity in a limited legal aid scheme which, while constitutionally very important, ultimately comes down to allocation of

[13] http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf

resources rather than fundamental constitutional principles. It seeks to draw a line as to where it is reasonable for a claim to be brought with the benefit of public funds and was only introduced as the pressure on those funds increased. It does not, and cannot, purport to limit access to the Courts directly.

Question 11: Are there any other issues, such as the rules on interveners, the Government should consider in seeking to address the problem of judicial review being used as a campaigning tool?

105. No. This question is predicated on the false premise that there is a problem with judicial review being used improperly as a campaigning tool. There is no evidence to support.

I. Procedural Defects

The Government believes that challenges which relate only to procedural issues could be determined more quickly and with less resource. In some circumstances a case founded on a procedural flaw, whilst technically successful, results in no substantive benefit to the claimant in that the same decision or action is taken again. Consequently, the Government wishes to strengthen the court's powers where a rectification of a claimed flaw would be likely to have made 'no difference' to the original outcome. [91]

The Government considers that judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality. The Government is considering strengthening the law and practice to enable the Courts to deal more swiftly with applications where the alleged flaw complained of would have made 'no difference' [99].

106. There is absolutely no evidence to support this assertion in respect of procedural challenges, or otherwise. Strikingly, in all of the cases cited in support this contention that Courts recognised this issue and dealt with it appropriately.

107. The Court already has a complete discretion in this regard not to grant a remedy sought where the unlawful act or omission was of no consequence. Nevertheless, the Courts are very reluctant to make this assessment, for very good reason.

108. The "no difference test" has been developed by the courts with this in mind. For example, in *Smith v North East Derbyshire Primary Care Trust [2006] EWCA Civ 1291*,

May LJ stated (at paragraph 10, of the judgment): "I have already noted that neither [counsel] contended that the judge's second reason, that is that the decision would probably have been the same anyway, was alone sufficient to sustain his conclusion. That is a proper concession. Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision". Were the "no difference" test to be modified as is proposed, it would necessarily involve the court in matters it is ill equipped to adjudicate on. This will add to costs and require additional court time.

Option 1 - Bring forward the Consideration

Question 12: Should consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?

109. No. This merely front-loads the process. If, as it is suggested, it may be necessary to hold a hearing with evidence on this issue alone, then you may as well hear the whole case (rolled-up hearing) as the Court will then be seized of all of the facts and the additional time to determine the legal grounds is likely to be marginal. To decouple the process will simply add to delays and Court time and expense which this consultation purports to be about saving.

Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

110. This would be the inevitable consequence of front-loading the issue for determination. The only mitigation would be to concede permission and move straight to a full hearing or to hold a rolled up hearing instead.

Option 2 – A different threshold

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

111. This would be inappropriate for the reasons enunciated by the Courts in the case law to date (above). Introducing such a change to this test would be improper interference by the Executive in the workings of justice.

112. From a practical perspective it would also ratchet up significant extra costs at the early stages of a judicial review as resources from both sides would be poured into the hotly contested debate as to whether the lower threshold test was made out by the Defendant.

113. It is predictable that the introduction of such a test will lead to Public Body defendants simply putting forward an officer to make a witness statement (ex post facto) stating that the decision would have been the same. Such statements should be treated with the upmost caution.[14] It is also likely to lead to an increase in applications for cross examination of witnesses to test the veracity of such claims – simply adding to cost and delay.

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

114. Without meaning to sound trite, it could take steps to ensure that procedural defects did not take place by applying additional resources to the training of those who take administrative decisions in public authorities. Mistakes will continue to happen as no one is perfect. But until we live in a perfect world the Courts will continue to play a vital role in ensuring that government is held to account where lawful procedures are not followed.

Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

115. Cases are often brought on the grounds of procedural defects and for very good reason. The attempt in the consultation paper to underplay the importance of procedural defects demonstrates a fundamental misunderstanding of the principles of public and administrative law.

[14] *R v Westminster City Council ex parte Ermakov [1996] 28 HLR 819*; *R-v-Croydon London Borough Council, ex parte Graham (1994) 26 HLR 286*.

J. The PSED and JR

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

116. In our view the Government is tilting at windmills in raising this as an issue.

117. After the introduction of the Public Sector Equality Duty there was a flurry of litigation in cases where public bodies had failed to comply with the duty when taking decisions affecting many people. However, this scenario is typical of the introduction of any new public duty where public bodies fail to get to grips with their new duties in time and unlawful decisions follow. That litigation served a useful purpose in (a) drawing attention to the duty; (b) constructing the duty and (c) assessing and giving guidance on the circumstances in which illegality might or might not lead to a decision being quashed he consequences that flowed from that. As is typical in such circumstances, there were a handful of successful challenges at the outset which set the parameters of the new law for public authorities, followed by a number of unsuccessful challenges which established the limits of public expectations as to the application of the duty.

118. To this extent, the Administrative Court and the judicial reviews which were brought before it carried out a typically valuable role in the bedding down of new law and delineating the margins of that law. The quantity of litigation on this issue appears now to have died down as one would expect.

119. As an example of the utility of such litigation, we would cite the case of *R (oao Treacher) v Secretary of State for Justice* brought by this firm. This case was successfully settled on the basis that Secretary of State agreeing to allocate a disabled prisoner to a disabled cell, to allow him to use a motorised wheelchair and to review and amend its policies relating to disabled prisoners in order to ensure compliance with the requirements of the Disability Discrimination Act.

120. It was argued that the Secretary of State for Justice / Prison Service was in breach of the general disability duty, introduced by the Disability Discrimination Act 2005, which requires public bodies to establish practices that actively embrace the diverse needs of disabled people by having due regard to the need to eliminate discrimination and harassment, to promote equality of opportunity, to promote positive attitudes towards disabled people, to encourage participation by disabled people in public life and to take steps to meet disabled peoples' needs, even if this requires more favourable treatment. It was argued that the Secretary of State for Justice/Prison

Service had failed in its duties by failing to produce an adequate Disability Equality Scheme, a further requirement introduced by the Disability Discrimination Act 2005, setting out how it intends to fulfil its duties as evidence of this failure.

121. Shortly before the substantive hearing, the Secretary of State for Justice also accepted that the Prison Service's existing policies for dealing with disabled prisoners *"do not appear to have worked"* in our client's case. The Secretary of State then also confirmed that the Prison Service would amend its existing policies in order that *"explicit consideration is made of disability issues and to the DED [disability equality duties] under the DDA"*. Finally, the Secretary of State confirmed that the Ministry of Justice would draft a Disability Equality Scheme (DES), with a section that covered prisoners.

122. There is no evidence that we are aware of that there is (or ever was) a problem which needed addressing in this regard. The fact that no firm proposals are put forward in the paper suggests that the government recognise this. If there are to be changes to the PSED itself, then that is a matter for parliament.

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide it?

123. None beyond the reported case law and that related above.

K. Rebalancing Financial Incentives

The current approach does not reflect all of the costs of the proceedings and does not provide the right incentives to prevent the pursuit of repeated and unmeritorious claims often at a cost to the taxpayer. [112]

124. We refer to what we say in the Overarching Response about the current imbalance and chilling effect of costs on Claimants in judicial review. The incentives to prevent the "pursuit of repeated and unmeritorious claims" already exist in the form of costs sanctions (including orders outside of the normal orders, indemnity costs and wasted costs) and ultimately vexatious litigant orders. There is no evidence that there is a problem here save to extent that the problem is access to the Courts in the face of risk of financial ruin for an individual or small organisation.

i. Legal Aid Costs at Permission Stage

In the recent consultation Transforming Legal Aid the Government proposed transferring the financial risk of the application to the provider in order to provide a greater incentive to give careful consideration to the strength of the case before applying for permission for judicial review. [114]

125. No. The proposal proceeds on the premise that claimant legal aid practitioners are careless in their assessment of the merits of judicial review and therefore waste public funds in brining unmeritorious claims. In fact, as we set out in the Overarching Response, this is a position that is blind to the practical realities of judicial review. The equation of unsuccessful claims with hopeless or unmeritorious claims is a convenient fallacy. It enables the Government to put forward this proposal which is in truth a bald attempt to significantly reduce the number of judicial reviews brought against it by attacking the financial viability of claimant practitioners.

126. It is worth noting at the outset that there is a financial risk to claimant lawyers when bringing any claim, even with the benefit of legal aid because the remuneration levels under public funding are so low. On the other hand, the lawyers acting for public authorities are safe in the knowledge that they will be paid for all of their work at sustainable levels. Profitability for lawyers acting for non-business claimants (or the very wealthy) is dependent upon winning cases and securing inter partes costs at market rates. Legal Aid is really a form of insurance payment. This firm could certainly not survive if it was solely paid at legal aid rates.

The Government considers that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility. [117]

127. This statement is to confuse need with success/merits. The two are not the same. Under the private paying client test and various exceptions to funding, it is clear that the importance to the client of the outcome of the case (eg: affecting life, liberty, home etc) is qualitatively different and is relevant to whether or not legal aid is appropriate in any given case. Currently every case (now that borderline cases are being excluded from funding) will have been assessed by the lawyers and by the LAA as having greater than 50% prospects of success.

128. Further, as explained in the Overarching Response, very few cases will have prospects of success in excess of 60%. That means that, if the assessments of the provider and the LAA are correct, then more than 40% of cases are likely to be unsuccessful. The data provided in the paper supports this.

129. Furthermore, it is the defendant who is best placed to assess the merits of the vast majority of claims for judicial review because it is the defendant (not the claimant's representative) that has access to all the relevant information about how a decision was reached.

130. In these circumstances it is clear that a significant proportion of legally aided judicial reviews will fail, even at the permission stage. That does not equate to a problematic level of unmeritorious cases being brought with legal aid – quite the contrary, it supports the assessments of lawyers and the LAA.

131. In this light, the proposals not to pay providers unless permission is obtained can be seen to be no more than an ideologically driven attempt to block challenges to government by squeezing the viability of the businesses representing claimants.

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

132. No. For the reasons above this is merely an attempt to insulate the executive from legal challenge by targeting the legal providers who represent claimants.

133. The obvious consequences of the proposal are:

- the viability of specialist claimant legal practices will be seriously undermined with the potential loss of suppliers and loss of jobs.
- There will be an increase in unchecked abuses of executive power and a decrease in access to justice, including all the knock on costs associated with poor decision making.[15]
- There will be a reduction in faith and trust in the both the system of government and the system of justice.
- There will be an increase in poorly presented claims, prepared at minimal cost.
- There will be a significant increase in oral renewals where claims are refused on the papers.
- There will be a significant increase in satellite litigation on costs where a claim is settled.
- There will be a significant increase in onward renewals to the Court of Appeal.
- There are likely to be frequent judicial review challenges of the LAA's exercise of the proposed discretionary payment system.
- There will be an increase in litigants in person in the Courts

134. Finally, we would note that if the proposal were to be brought forward, then there is absolutely no justification for the LAA to retain its power to oversee providers' assessments of the merits and to be the authority for determining applications for certificates, save to the extent of checking means assessments. In the misconceived event that this proposal was introduced, then devolved powers should be returned to providers in judicial review without delay and broadened to enable them to take all steps up to final determination of permission (at oral hearing in the High Court and in the Court of Appeal). This would at least have the happy consequence of enabling providers to prepare and issue proceedings promptly and litigate them without the delays inherent in having to obtain the authority of the LAA for steps which are at the providers own risk.

The Government proposes to determine payment according to the following exhaustive list of criteria:

[15] *Judicial review litigation as an incentive to Change in Local Authority Public Services in England and* Wales, Sunkin, Platt and Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009).

- ***The reason for the provider not obtaining a costs agreement (whether in full or in part) as part of any settlement, not seeking a costs order, or the court not awarding a costs order (whether in full or part). This will include consideration of the conduct of the provider under the pre-action protocol and in the proceedings;***

- ***The extent to which the client obtained the remedy, redress or benefit they had been seeking in the proceedings;***

- ***The reason why the client in fact obtained any remedy, redress or benefit they had been seeking in the proceedings;***

- ***The likelihood, considered at the point the settlement is made (or the case is otherwise concluded), of permission having been granted if the application had been considered, whether from a specific indication in the proceedings by the Court or based on the strength of the claim at that point. [125]***

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons

135. No. If a discretionary payment system is to be introduced there should be a presumption that the discretion will be exercised in favour of the provider unless: the LAA considers that the claim brought was totally without merit and that the provider was aware of this or ought to have been aware of this at the point in time at which it issued proceedings.

136. In the alternative, and at a minimum, the list of factors to be taken into account should either not be exhaustive or should include other factors, such as: the conduct of the Defendant and whether it is fair in all the circumstances for the provider not to be remunerated taking into account what was known to the provider (or ought to have been known) at the point in time at which the proceedings were issued.

137. Otherwise there is a risk of serious injustice. For example a Claimant could bring a JR following a lack of or an unsatisfactory response to PAP. The Claim could be predicated on facts which transpired to be incorrect, known to the Defendant but not to the Claimant. In such cases the Claimant would have to withdraw the claim but the costs rules would not generally lead to inter partes costs (unless there was some deliberate dishonesty on the part of the Defendant). In such cases the Claimant should be paid. There should be a general reasonableness test where subsequent facts undermine a JR reasonably brought.

ii. Costs of Oral Permission Hearings

[T]he claimant and the defendant can make their arguments orally (although the defendant is not obliged to attend unless ordered by the court). [135]

The Government attends most oral permission hearings where it is the defendant. [138]

[T]he introduction of a principle that the costs of an oral permission hearing should usually be recoverable and that it should be possible for an unsuccessful claimant to be ordered to pay the defendant's reasonable costs of defending the unsuccessful application. [139]

[T]he courts could make an order against the defendant to pay the claimant's reasonable costs should permission be granted. It is likely, however, that in these circumstances the court would make an order of 'costs in the cause' so that the costs of the oral permission hearing will be considered by the court at the conclusion of the case as part of its determination of the overall costs that fall to be met by the unsuccessful party to the main proceedings. [140]

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

138. If, as is the impression given in the paper, this is a one-way street, then the answer must be No. The costs regime in judicial review already presents a chilling effect on potential claimants seeking to enact their constitutional right to hold the executive to account. It was for this reason that Jackson LJ made his recommendation for QUOCS in judicial review proceedings and this is an issue that the Government should reivisit as a matter of priority.

139. The purpose of the permission filter is to weed out unmeritorious claims at minimal cost to the Court and Defendants. The Defendant is encouraged to file written submissions with its acknowledgement of service but is discouraged from taking part in any oral renewal hearing.[16] This is because the Court, with the benefit of the Defendant's written submissions is well placed to assess whether a claim is arguable after allowing the Claimant a 30 minute hearing slot. The whole aim is to keep the gateway costs to judicial review to a minimum.

[16] *R (oao Leach)-v- Local Commissioner for Local Administration [2001] EWHC 455 (Admin); R (oao Mount Cook Land Ltd)-v- Westminster City Council [2003] EWCA Civ 1346*.

140. The fact that Defendants routinely attend oral renewal hearings is a matter for them. It is their choice to expend public funds in this way. If a Defendant is confident that a claim truly is unarguable then there should be no reason or need for the Defendant to attend the renewal hearing. As it is the Defendant's attendance at permission hearings simply lengthens the proceedings and runs up costs to all parties in arguing about a case which it contends to be unarguable.

141. The pre-permission costs rules reflect this position, the Defendant normally being allowed its costs of preparing the acknowledgement of service, and there is no justification for introducing an even more chilling costs regime as against Claimants. The existence of the permission filter was one of the key reasons that Jackson LJ considered that QUOCS was appropriate in Judicial Review.

142. However, if the Government is to continue to ignore the recommendations of the Jackson report and still wishes to consider amendments to the costs regime at the permission stage then it would only be right and fair for there to be mirrored positions on costs. That is that if a Defendant unsuccessfully resists a permission application then the normal rule should be that it pays the costs of the Claimant of the permission stage in any event. As explained above, this could easily be reconciled by set-off in the event that the Defendant goes on to win the substantive claim.

143. There are very good policy reasons and costs savings to be achieved by altering the behaviour of defendants at the permission stage. A realistic and genuine assessment of the merits of claim by the Defendant at an early stage, with concession of permission where a case is arguable would save considerable time and cost. A change to the rules on costs to make Defendants liable for unreasonably resisting an application for permission would be the quickest way of achieving this sensible development in judicial review and would also fairly mirror the costs risk to which Claimants are put.

144. This would also reflect practice in other areas of civil litigation where interlocutory applications are made and unsuccessfully resisted, the respondent would expect to be ordered to pay the applicant's costs in any event. It would have the benefit of discouraging improper resistance of permission by Defendants, speeding up the judicial review process and reducing costs and delays in the Court.

145. Unless or until the Jackson recommendations are adopted, we consider that this is a sensible middle ground. We oppose absolutely the introduction of further punitive costs measures targeted at claimants who are simply effecting their rights as a citizen by bringing a judicial review.

iii. Wasted Costs Orders:

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?

Question 23: How might it be possible for the wasted costs order process to be streamlined?

Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

146. We deal with these questions together and briefly. The proposal is frankly bizarre and barely merits a response. It appears to be a proposition that Claimant lawyers should routinely be made to pay wasted costs where permission applications are unsuccessful.

147. Wasted costs orders are an extremely serious matter, usually leading on to disciplinary proceedings by the regulatory bodies. The high threshold for the award of wasted damages reflects the seriousness of the matter: improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative. The proposal, unclear as it is, would have the consequences either of subjecting lawyers to great cost and personal stress or would completely water down the seriousness of such an order to the extent that a significant motivating factor in ensuring the highest levels of professional conduct was neutered.

148. Reading between the lines, what this proposal actually appears to be is an attempt to recover government costs where there is no prospect of recovering costs from the Claimant because s/he is legally aided (or impecunious). That is a wholly improper motive for introducing a change of such magnitude.

149. If this proposal is even half-serious, there should be focussed and extensive consultation with representative bodies, the Law Society, the SRA etc.

iv. Protective Costs Orders

150. As with the issue of Standing, this attack on Protective Costs Orders is completely illogical bearing in mind the stated purposes of the proposals. By definition and application, PCOs will only be granted in meritorious cases. PCOs are determined at the point of the grant of permission and will only be granted if the case identifies an issue brought in the public interest which the public interest requires to be determined by the Court.

151. Attacking PCOs will not lead to anything other than a tiny reduction in the number of judicial reviews. Joint research conducted by PLP and the University of Essex, funded by the Nuffield Foundation, reveals that during the 20 month period between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a PCO had been granted – that is less than 0.03% of all cases issued or 0.3% of cases granted permission.

152. Nevertheless, by definition these cases raised issues of wider public importance which the public interest required to be litigated. We would expect most (if not all) such cases were also brought by organisations with all the additional benefits that such cases bring as outlined above.

153. This section of the consultation also proceeds on the basis of some fundamental errors and mis-readings of the Corner House case.

PCOs are now therefore being granted in wider circumstances than those envisaged in the Corner House case. [157]

154. Where is the evidence for this? We acted in the Corner House case and there has been no broadening of the jurisdiction at all. Save arguably in respect of the no private interest test – but this appeared in the Judgment unpressaged by oral submission and has subsequently been interpreted by the Courts on the only sensible analysis as being an interest that is primarily financially or egotistically motivated.

155. The only real surprise has been that so few cases have been granted PCOs.

156. Furthermore, to draw this conclusion from such a tiny number of cases in which PCOs have actually been granted, borders on the ridiculous.

In particular, there is no longer a requirement that the case be "exceptional" and PCOs have increasingly been granted where there is a private interest at stake in the judicial review claim. [157]

157. The first point is a fundamental misreading of the Corner House case. There never existed an additional criterion of exceptionality. This was bold a submission that was trotted out by Defendant advocates in cases following Corner House but the argument was swiftly put to bed by the Court by reference to the plain language of the judgment. Exceptionality is not one of the guiding principles and the use of the word in introducing them merely reflected the fact that only exceptional cases would meet the guiding principles for a PCO.

158. The no private interest test has been subject to judicial interpretation, barring the doubted decision in the *Goodwin* case, the Courts have emphatically concluded that the interpretation of this principle (on which it must be remembered there was no argument prior to the Corner House Judgment) should be that the nature of a private interest determines whether a PCO should be available – where there is a direct financial interest, a PCO is likely to be refused; where a more ephemeral interest , it is likely to be granted. There is nothing in the Corner House judgment to suggest this is wrong.

Further, where a cross cap is ordered, there is often disparity between the amounts capped for the claimant and the defendant. [160]

in practice the cap for the claimant is lower than that for the defendant. [160]

159. That is because there is meant to be. The PCO cap that the Claimant (and the public interest) benefits from is qualitatively different from the cross-cap which the Defendant benefits from. The former is a cap which is fixed at a level to make the litigation affordable to the Claimant. The latter is cap to control excessive costs being incurred by the Claimant based upon the principles in *Musa King*.[17]

The Government considers that the use of PCOs in non-environmental cases should be rebalanced to encourage better consideration by the claimant on whether to bring and pursue applications for judicial review. [161]

160. This demonstrates a further fundamental misunderstanding. Firstly, Claimants (or their lawyers for that matter) would not give anything other than the most diligent scrutiny to a case in which they proposed to seek a PCO. By their nature these are

[17] *Adam Musa King-v-Telegraph Group Ltd [2004] EWCA Civ 613*.

cases where the Claimant is impecunious and, in most cases, the claim is only able to be brought because the lawyers are prepared to act on a no win, no fee arrangement at very great risk to themselves. Secondly and more importantly, a PCO will only be granted if the Court considers the claim to be meritorious.

On a strict application of the principles as set out originally in the Corner House case, a PCO would be precluded if the claimant had a private interest or stake in the case. That is not, however, the approach that the courts are now taking when considering the granting of PCOs. The Government therefore seeks views on whether it is right for the courts to provide costs protection to claimants who have a private interest in a judicial review claim. [162]

161. Again this is an incorrect interpretation – the Courts have interpreted private interest to be a financial interest and it is their law to interpret – not the Government's. Furthermore, the Corner House guidance is exactly that – guidance – it is not a statute to be strictly construed, and even if it were, the Courts have conclusively construed it.

As indicated earlier the Government is seeking views on whether to amend the requirements to provide information on how litigation is funded and the power to award costs against non-parties. While it is already a principle that in considering a PCO the court should have regard to the financial means of the claimant, the Government considers this process should be more robust and wishes to seek views on whether when applying for a PCO, it should be mandatory for the claimant to provide details of who is funding the case and a statement of assets including any third party funding. The court would be required to consider these details in deciding whether, based on that information and the proposed cap, it is proportionate to make a PCO.

162. The Corner House guidance already provides for this.

The Government is also proposing that there should be a presumption when making a PCO that the court considers setting a cross cap for a defendant's liability for the claimant's costs. It would remain at the court's discretion to order a cross cap, but this would reflect the general principle of keeping costs in a case to a reasonable level, recognising that public resources are not unlimited. [166]

163. Again, this is already the position.

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest

164. This is an improper interference by the Government in Court made law. It should only be interfered with following full and proper scrutiny by parliament in primary legislation.

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

165. We note that the "The Government considers that there should be parity between environmental and non-environmental cases in the use of PCOs" [160]. We would agree. It would be much simpler and avoid considerable satellite costs to the tax payer if the Aarhus PCO regime as established in the Civil Procedure Rules was applied equally to any case meeting the Corner House principles. The fixed PCO cap and cross-cap, as a rebuttable presumption, would provide certainty, reduce satellite costs associated with PCO applications and strikes the right balance.

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

166. We have no objection in principle. The Corner House guidance provides for this in any event.

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

167. Again, such a presumption already exists. There should remain scope for this presumption to be rebutted.

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

168. Yes. See answer to Question 27.

Summary of protective court orders:

169. The true nature of the package of proposals becomes clear with the PCO proposals – on the one hand the Government argues that PCOs should not be available where a Claimant has a direct interest in a Judicial review, on the other it seeks to restrict the ability to bring a Judicial Review to cases where the Claimant has a direct interest. The Government is simply attempting to prevent inconvenient attempts to hold it to account. This is an assault on the rule of law and the constitution.

170. This is a rushed bag of proposals in contrast to the slowly and carefully developed PCO jurisdiction by the Courts under the common law. It is another instance of the Government interfering with the separation of powers and apparently seeking to avoid parliamentary scrutiny in the process.

v. Costs arising from the involvement of third parties and interveners and non-parties:

The intervention of additional parties to a judicial review (further to an application under CPR 54.17) has the potential to significantly increase the legal costs of the case. Greater clarity and understanding - at an early stage of the case - of the likely costs implications, following an intervention, would probably be welcomed by all the parties to the litigation. [170]

171. In our experience this is not an issue. Interventions are carefully managed and restricted by the Courts and typically the costs position will be determined at the same time as the application to intervene – the usual rule being that the intervener bears its own costs only because costs of an intervention are generally marginal, the intervention has been approved by the Court because it is likely to be of some assistance to the Court and interveners themselves require clarity and are usually unable to afford a significant costs risk.

172. Also, such interventions are relatively rare at first instance with interventions increasing when an important issue is on appeal. Where are the data to suggest that there is any problem here?

Additionally, any changes to standing as outlined above could impact on third party and non-party funding in two ways. Firstly, a more focussed rule on standing may lead to an increasing number of applications to intervene. In that event, the question as to who should pay for the costs arising from third parties intervening in judicial review claims may arise more often. [172]

173. That would certainly be the case but would be necessary and in the interests of justice were the change to standing to be introduced. In such cases, where the assistance of an intervener is deemed necessary (because they can present the bigger picture and assist the Court) then it would be even more important that such intervention were not at risk of any adverse costs order.

Secondly, as discussed earlier, representative bodies may be created, to act as claimants, in order to limit their members' financial risk from bringing a claim (as only the assets of the organisations are at risk, not those of the individuals). Further, funding for a claimant body may also be provided by other individuals or bodies who would not have a sufficient interest to bring a claim, but who are prepared to provide financial support for the claim because they agree with its aims. [173]

174. Once again there is no current issue here that we are aware of (and no evidence is presented of there being one). The case-law is clear that such manufactured attempts to avoid or limit costs liability will be pierced by the Courts. Mr Justice Williams held that the Coedbach Action Team – a private limited company incorporated in 2008 – was not a "member of the public concerned"' or a person having "'a sufficient interest" for the purpose of challenging the grant of planning permission for a biomass-fuelled power station in the Gwendraeth Valley. *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & ors [2010] EWHC 2312 (Admin)*.

175. Similarly where a third party is the true funder and driving force behind a claim the Court will not hesitate to make a third party funding order.[18]

176. Furthermore, funding by other bodies to support claimants in bringing legal action should be positively encouraged given the reduction in the availability of legal aid. Funders who do so in the general public interest (as opposed to a concealed funder of an action that furthers an economic interest) should certainly not be put at risk of further costs.

However, unless the claimant is in receipt of a prescribed funding agreement, such as a Conditional Fee Agreement (under which part of a solicitor's fees will only be payable if the case is successful), there is no provision in the Civil Procedure Rules for revealing the source of funding for litigation. [174]

177. We would have no objection to (indeed we would positively support) a rule which required all sources of funding to be declared in any case. But we would resist

[18] *R (Davies)-v-Secretary of State for the Environment, Food and Rural Affairs [200] EWHC 2762 (Admin)*

absolutely a general rule that such funders should be at risk of adverse costs orders where they are funding in the wider public interest (be that in furtherance of an organisations aims or otherwise).

The Government's provisional view is therefore that, where a party seeks to intervene in a case, the presumption should be that it should bear its own costs of doing so, whatever the result of the judicial review claim. Thus, whilst an unsuccessful claimant or defendant ought to pay the costs of its litigation opponent, it ought not to also have to pay the legal costs of the third party which voluntarily intervened in the case. [176]

178. We have never heard of this happening – where is the evidence?

Additionally, the Government seeks views on whether there ought to be a presumption that where an intervening party has raised issues that have resulted in the claimant or defendant incurring legal costs, to a significant degree over and above what would otherwise have been required, the intervening party ought to be liable for those additional costs. [177]

179. This should only ever happen where the intervener has acted unreasonably (as is presently the case). The corollary of this proposal is that other Interested Parties (including third party developers and businesses) should be liable for (the usually considerable) extra expense that they contribute to proceedings – perhaps to both the Defendant public authority and the Claimant.

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

180. Yes. This is the case now.

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

181. Only if they have acted unreasonably. They will have had the court's permission to intervene – typically on condition of no order as to costs – and should only face the threat of an adverse costs order if they act unreasonably or in a manner beyond the remit of their permission to intervene.

182. The question is much more interesting in the context of Interested Parties who do not require the Court's permission to participate in the proceedings and can do so unconstrained by conditions, often to great cost to the Claimant (and sometimes Defendant). There is a good argument that they should either have to seek the Courts permission to participate actively in the proceedings or should bear the other parties costs incurred as a result of their participation – see further abvove.

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

183. Yes, subject to a principle of proportionality. For example, it should be sufficient for Claimants to declare that they have raised funds through certain fundraising activities and calls for donations, if that is the case. But they should not have to itemise very single donation. Particularly large donations (say in excess of £1000) ought perhaps to be declared but anything smaller would involve the Claimant in disproportionate work and cost.

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

184. No.

L. Leapfrogging

Option 1: Extending the relevant circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

185. With some hesitation over the fact that the Supreme Court will lose the benefit of the views of up to three experienced Lord Justices of Appeal which might have the benefit

of informing argument and determinations in the Supreme Court, we do see the potential benefit of broadening the leapfrog procedures – particularly in cases where it is clear that the CA is bound by prior authority and/or it is clear that the matter is likely to progress to the SC in any event and it would be in the interests of justice for the matter to be determined as expeditiously as possible.

Option 2: Consent

Question 38: Are there any risks to this approach and how might they be mitigated?

186. We take objection to the assertion (again unevidenced) that in many cases which might benefit from leapfrogging the claimant's desired outcome may simply be delay, so they would not consent to expedite the case through leapfrogging [193]. That allegation is in our experience unfounded and no evidence is put forward to support it. Indeed, it is far more typical to see government departments seeking to delay and drag cases involving important issues which may impact upon a large number of cases or which they find embarrassing. For example in the case of *R (oao Francis)-v-The Secretary of State for the Home Department [2013] EWHC 2115 (Admin)* which is awaiting listing in the Court of Appeal, the Respondent Secretary of State is on the one hand delaying the listing and resolution of the appeal whilst at the same time seeking rely on the first instance decision to resist and strike out other cases which raise the same issues. Similarly in the case of *R (oao Daws Hill Neighbourhood Forum)-v-Wycombe District Council [2013] EWHC 513 (Admin)*, the appellant Neighbourhood Forum sought and obtained permission to appeal on an expedited basis yet, because of the availability of the Defendant public authority's counsel, the appeal has not been listed until February 2014, over a year after the hearing at first instance and at significant prejudice to the Appellant's aims in the case.

187. For this reason we also support the proposal that the consent of both parties should not be required for the leapfrog procedure to be instigated.

Option 3: Extending the Courts and Tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

188. Again, we agree with this proposal subject to the observations above.

Question 41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?

189. Again, we see no reason why not.

M. Impact Assessments

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

The Government would be particularly interested to understand the impact the proposals may have on Small and Medium-sized Enterprises and Micro businesses.

190. The impact assessments accompanying the consultation are fundamentally flawed as they proceed on the same flawed basis as the proposals. They are riddled with irrelevant or unevidenced considerations and fail to take into account most contrary relevant considerations. They are so one-eyed that it is impossible to respond fully without taking the Impact Assessments apart line by line, something we neither have the time or inclination to do.

191. To take one of countless examples in MoJ 2010 is: "*Legal services providers acting on behalf of claimants may also, through their behaviours, generate avoidable costs and delays which are currently met by claimants and defendants. They might not do so if they were more exposed to the costs of their actions, for example if they had to meet the costs generated by their unreasonable behaviour."[1.12]* Where is the evidence for this anywhere in the paper or impact assessments?

192. Further, the 'Costs to Claimants' section of this Impact Assessment is assessed solely on the basis that claimants will lose the opportunity for publicity and the opportunity to delay decisions with which they disagree [2.16-2.19] – motives for which there is no evidence in any event. No account at all is taken of the fact that unlawful decisions may go unchecked if these proposals are implemented.

193. It becomes clear from the Impact Assessments that the proposals do not entail a carefully targeted package of measures aimed to address particular identified problems but rather a wholesale and arbitrary attempt to reduce the number of legal challenges to the executive.

194. Self-evidently the proposals in their current form will have a significant adverse impact upon Small and Medium Sized Enterprises and Micro businesses. However, the

greater impact will be upon individuals who are the subject of unlawful acts by the state and upon the delicate constitutional balance of the UK.

195. If they are to be anything more than a sham, then the Government has no choice but to go back to the drawing board with the impact assessments, take on board the points made in the responses it receives the consultation and assess the true impact of the proposals afresh.

Question 43: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

The Government would welcome examples, case studies, research or other types of evidence that support your views. The Government is particularly interested in evidence which tells us more about applicants for judicial review and their protected characteristics, as well as the grounds on which they brought their claim.

196. Undoubtedly the proposals will have a disproportionate impact upon individuals with protected characteristics because of the arbitrary nature of the attack on judicial review and the fact that by their nature protected groups tend to comprise vulnerable individuals for whom the rule of law and the threat of unlawful interference by public authorities play a significant part in their lives.

Leigh Day

28 October 2013