Criminal Justice and Courts Bill

Fact Sheet: Reform of Judicial Review

Introduction

1. Judicial Review is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions, actions or inaction of public authorities, including those of Government Ministers, local authorities, other public bodies and those exercising public functions.

2. On 6 September 2013, the Justice Secretary launched a consultation entitled 'Judicial Review: Proposals for further reform'. The consultation examined proposals in six areas aimed at reducing the burden of judicial review. In particular the Government was concerned to speed up planning cases and tackle the potential for abuse of judicial review by those seeking to generate publicity or delay implementation of decisions that had been properly and lawfully taken. The consultation closed on 1 November 2013.

3. Having carefully considered all responses, on 5 February 2014 the Government published its response to the consultation setting out its intention to bring forward a package of reforms to judicial review, having previously made reference to some of these in the National Infrastructure Plan and the Autumn Statement. The following measures are being taken forward in primary legislation and are provided for in the Criminal Justice and Courts Bill:

   - allowing cases being appealed to 'leapfrog' directly to the Supreme Court in a wider range of circumstances;
   - a package of financial measures, including reforming Protective Costs Orders, Wasted Costs Orders, interveners' costs and third party funding;
   - introducing changes so that claims based on defects that are highly unlikely to have affected the outcome are dealt with proportionately; and
   - requiring the permission of the High Court before challenging certain planning decisions.

   Two of these measures (leapfrogging and Wasted Costs Orders) apply to all civil proceedings rather than just judicial review and so are contained within Part 3 of the Bill. The rest are within Part 4.

4. These measures will not stop the crucial role that judicial review plays; it is, and will continue to be, a key way to hold public authorities to account and ensure that decisions are lawful. Rather, the Government's reforms are designed to tackle the large and growing number of unmeritorious judicial review applications which clog up our court system, put burdens on public services, and hold up reform.

Data

5. The latest court statistics published on 19th June 2014 show that there has been a significant growth in the volume of judicial reviews lodged, which by 2013 was over three times the volume in 2000 (rising from around 4,300 in 2000 to around 15,700 in 2013). For cases lodged in 2013, around 7,900 were considered for permission and around 1,500 secured permission (including after an oral renewal).[1] In 2013 the vast majority of applications, more than 13,000, were for immigration and asylum cases – and around 240 were on planning issues.

6. There have been a number of judicial reviews which have resulted in considerable delay to development projects, including infrastructure, housing, retail and residential developments. For example:

- the expansion of Bristol airport which was delayed by around 36 weeks;
- a £38m retail development in East London, due to create 500 jobs, which was delayed by 15 months at considerable cost to the developer and local economy;
- a development of 360 dwellings in Carmarthenshire which was delayed by around 18 months by an unsuccessful judicial review;
- a supermarket development in Skelton which was challenged by a rival store, delaying the development by around 6 months. The judicial review was found to be totally without merit;

7. The recent unsuccessful judicial review against the Secretary of State for Justice's decision to grant a licence to exhume human remains that turned out to be those of Richard III was brought by a limited company - the Plantagenet Alliance Limited – which was formed for the purpose of bringing the litigation. The claimant company sought, and was granted, an absolute protective costs order on the basis that it did not have any assets, transferring the risk from the director of the company to the taxpayer. This meant that the director was protected from cost liability. Despite winning the judicial review on all grounds, the absolute protective costs order granted in the claimant's favour means that the Government is unable to recover any costs from the Plantagenet Alliance Limited. The Ministry of Justice estimates its own unrecoverable costs at around £90,000. The other defendants in the case, the University of Leicester and Leicester City Council, are also unable to recover their costs from the claimant.

Appeals which move direct to the Supreme Court (Leapfrogging)

8. Leapfrog appeals are cases which move directly from the High Court to the Supreme Court, missing the Court of Appeal. The current approach requires that the case involves a point of law that is of general public importance, and which either relates to statutory interpretation that has been fully argued or is one where

[1] This figure does not include those cases that withdraw before a permission decision is made. This figure may increase as some cases may be awaiting an oral hearing.

the court of first instance would be bound by a superior court. Both the High Court and a Committee of the Supreme Court have to agree before a leapfrog appeal can take place, and both parties must also give their consent.

9. The Government's view is that some cases which it is clear will not end in the Court of Appeal but will involve a further appeal to the Supreme Court should get there more quickly. Moving step by step through the court hierarchy can lead to lengthy delays, adding to costs and damaging public confidence in the effectiveness of the justice system. Therefore the legislation will make three changes to the present arrangements to extend the potential for leapfrog appeals:

    i. allowing a case to leapfrog if it raises issues of national importance, where the result is of particular significance or cases where the benefits of earlier consideration by the Supreme Court outweighs the benefits of consideration by the Court of Appeal;
    ii. removing the requirement for all parties to consent; and
    iii. allowing leapfrog appeals from decisions of the Upper Tribunal, Employment Appeals Tribunal and Special Immigration Appeals Commission.

10. As at present the judiciary will retain control over when a case can leapfrog. These changes will apply to civil and administrative proceedings generally, not just judicial reviews. For this reason the relevant clauses are in Part 3 of the Bill, which covers changes to courts and tribunals.

Wasted Costs Orders

11. Wasted Cost Orders (WCOs) enable the Court to order that a legal representative is personally liable for some of the costs of litigation which they have caused unnecessarily by their improper, unreasonable or negligent behaviour, and which it is unreasonable to expect the litigant to meet.

12. Whilst a WCO is a serious matter, there are currently no formal regulatory or contractual consequences for the legal representative who has acted improperly, unreasonably or negligently. The Government wants to strengthen the implications for the legal representative where a WCO is made. This should help encourage legal representatives to consider more carefully the decisions they make in handling a case.

13. The legislation will place a duty on the courts to consider notifying the relevant regulator and, where appropriate, the Legal Aid Agency, when a WCO is made. This duty will apply in respect of all civil cases, not only judicial reviews. For this reason the relevant clauses are in Part 3 of the Bill, which covers changes to courts and tribunals.

Likelihood of substantially different outcome for applicant

14. At present, the court may refuse to grant permission or award a final remedy on the basis that it is inevitable that a complained of failure would not have made a

difference to the original outcome. 'Inevitable' is a high threshold to meet, and the court rarely examines no difference arguments at the permission stage.

15. The Government's view is that, in a case where the defect complained of is highly unlikely to have made a difference, any remedy the court awards will also be unlikely to make any substantive difference to the outcome. The Government's position is that judicial reviews based on failures highly unlikely to have made a difference are not a good use of court time and money. The legislation therefore modifies the existing approach (developed by the courts in case law) so that permission to bring a judicial review or a remedy must not be granted where the court considers complained of conduct would be highly likely not to have resulted in a substantially different outcome for the applicant.

Provision and use of information about financial resources

16. The Government wants to ensure that claims cannot be brought in a way that limits a person's proper cost exposure and circumvents the court's powers to make them liable for the defendant's costs where they lose. This might include a person who is not a formal party to a claim, but provides financial backing and advice to the 'named' claimant, or where potential claimants create companies, in both cases to evade the full financial risk from a claim. This behaviour by 'non parties' might cost the taxpayer significant sums. The Government's view is that non parties who are, in practice, funding and driving litigation (and who may ultimately benefit from it) should have to face a more proportionate amount of the cost risk.

17. The Government considers that the courts should always have the necessary information to identify such non parties in judicial review cases. This will enable them to make effective costs orders under their existing powers (the general discretion to make costs awards extends to non parties). The legislation stipulates that an applicant must provide information on funding at the outset of the judicial review - a court may not grant permission to proceed unless the information is provided. New provisions will also require the courts to have regard to this information in order to consider making costs orders against those who are not a party to the judicial review. This will allow the courts to make better use of the powers that they have. The courts will retain their discretion not to award costs against a non party where it is not in the interests of justice to do so.

Interveners and costs

18. Under current rules any person who is interested in the issues being considered in a judicial review can seek permission from the court to intervene in the case by filing evidence or making representations. At the end of the proceedings the court will consider who should bear the costs that arise from any intervention. The courts have powers to make an award of costs against a person who is not a party to a claim such as an intervener.

19. However the Government wants to ensure that those who choose to become involved in litigation have a more proportionate financial interest in the outcome

and this principle should extend to interveners. The legislation therefore establishes a presumption that those who apply to the court to intervene in a judicial review case will have to pay their own costs and, if a party to the judicial review requests it any costs they have caused to the parties to the hearing that arise from their intervention. The court should require interveners to pay these costs unless it considers that there are exceptional reasons for not doing so.

20. The legislation will not apply to a party who is requested to intervene by the court, rather they will only apply to those who choose to make an application to the court to intervene. The courts will retain their discretion not to award costs where it is not in the interests of justice to do so.

Cost Capping Orders (often known as Protective Costs Orders)

21. Cost Capping Orders protect the unsuccessful claimant - and sometimes a defendant - against some or all of the other side's costs. Developed by the courts as Protective Costs Orders (PCOs) they were originally intended to be exceptional (although this is no longer an explicit requirement) and have the effect of shielding the claimant from some or all of the financial consequences of the litigation. Cost capping orders are now being granted in wider circumstances than those originally envisaged in the *Corner House* case which codified the regime.

22. The Government wishes to make sure that in future cost capping orders are reserved for cases which receive permission and where there are serious issues of the highest public interest and which otherwise would not be able to be taken forward without such an order. It is only in those cases that the Government, regardless of whether it wins or loses, should have to meet its own costs and the costs of the claimants, thus carrying virtually all of the costs of the litigation. The Government also wants to ensure that where a cost capping order is granted to a claimant, the court also caps the defendant's costs, ensuring that the taxpayer also has cost protection to ensure that costs overall remain within reasonable limits.

23. The legislation sets out the framework for cost capping orders, replacing the regime in case law, and governs the circumstances in which cost capping orders may be made in judicial review proceedings. A stricter approach will be established so that the use of such orders is limited to exceptional cases where there is a real public interest in hearing the case, and requiring a cross cap for a public defendant's costs in all cases. The changes will also require claimants to provide details of sources of funding that they receive or are likely to receive and restrict the ability to award a cost capping order until a case has been granted permission to proceed so that only cases which clearly have some merit will benefit.

24. These changes do not apply to PCOs in environmental cases as they fall under the Aarhus Convention and the Public Participation Directive and are subject to a separate regime.