The Law Society

The Law Society's Response to the Parliamentary Joint Committee on Human Rights' call for evidence on the implications for access to justice of the Government's proposed judicial review reforms

November 2013

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Introduction

- The Law Society of England and Wales (the 'Society') is the professional body representing more than 166,000 solicitors in England and Wales. Its concerns include the independence of the legal profession, the rule of law and human rights throughout the world.

- This submission has been produced by the Society through its Human Rights Committee in consultation with its International Department and Legal Policy Department. The Committee is a specialist body of the Society comprised of practitioners and experts in domestic and international human rights law. It is networked with a broad spectrum of international professional legal bodies, inter-governmental organisations, and non-governmental and civil society organisations.

- The Society regularly writes reports and provides specialist submissions on these subjects to UK, international and inter-governmental bodies. Many of these reports are referenced in this submission.

This paper is divided into 3 sections. First, we provide an overview of our concerns regarding the Government's proposed judicial review reforms, next we respond to the specific list of issues referred to in the Joint Committee on Human Rights' (JCHR) call for evidence. Thirdly, we make some concluding comments.

Government's proposed judicial review reforms

1.0 The Law Society is concerned by the latest set of proposals from the Government for changes to judicial review. The right of the ordinary citizen to challenge the decision of a public body is fundamental to the concepts of civil society and the rule of law. It is essential that there should be an effective legal right of protection against arbitrary or unlawful decisions by public bodies. Judicial review has been developed by the courts as the functions of the state have expanded into every aspect of people's lives.

1.1 It may be inconvenient and time consuming for the decisions of public authorities to be susceptible to legal challenge. However, if the right to judicial review is reduced it is likely that in the long term everyone will suffer as decision makers could become less accountable and more careless in their actions. The ordinary citizen will have less scope for seeking redress for wrongs which they may have suffered at the hands of public bodies. As a consequence public trust in authority will in time be undermined.

1.2 Civil society has to be founded on checks and balances. At present, judicial review is the principal restraint on unlawful state action in the United Kingdom. The erosion of the right to judicial review would be regrettable. The full consequences will take considerable time to emerge and as a result, no changes should be adopted without significant consideration.

1.3 There are two key proposals in the Ministry of Justice consultation *Judicial review – proposals for further reform* which will impact on recourse to judicial review. Proposals to narrow the standing of applicants are likely to reduce legal challenges. Proposals to limit legal aid payment to judicial review cases which receive permission to be heard, are likely both to reduce the ability of lawyers to undertake cases and also deter members of the public from applying for judicial review.

1.4 The proposals proceed from a fundamental misunderstanding of the nature of the judicial review remedy. Although claims may be brought only by a person with a "sufficient interest" in the matter at issue, it is wrong to equate judicial review claims to private law claims. Judicial review is a means of correcting public law wrongs rather than simply asserting private law rights. Indeed, the discretionary nature of the remedy – of which the Government no doubt approves – is as much a reflection of the public interest nature of the jurisdiction as are the rules of standing and third party intervention which the Government seeks to curtail.

Issues listed in the JCHR's call for evidence.

2.0 This section responds to some of the issues and cases mentioned in the JCHR's call for evidence.

Standing and third party interventions

2.1 The Law Society opposes the case for altering the test for judicial review. The Government maintains that too many cases are being brought by claimants with little or no direct interest in the matter. The Government's proposed remedy is to legislate to alter the test for standing, requiring claimants to show a more direct interest in the matter. The Government appears to be committed to this course in principle. The consultation focuses on the options for an appropriate new definition for standing.

2.1.1 The Law Society believes that there is no need to alter the test for standing. The permission stage already acts as a filter mechanism, weeding out applicants who are considered "timewasters" or "busybodies". This involves an assessment by the judge of whether the applicant has sufficient interest; a process which is not automatic.

2.1.2 Altering the test for standing appears to be designed to restrict the scope for non governmental bodies and charities to pursue an issue in the courts as they would have to demonstrate a direct interest in the proceedings in order to be able to apply for judicial review. NGOs and charities perform an invaluable service in taking up issues which affect groups of people rather than individuals. In their absence it is likely that unlawful decisions will go unchallenged. The two cases cited in the consultation paper – *Maya Evans*[1] and *World Development Movement*[2], are both cases where no individual claimant was available to challenge decisions or practices that the court found to be unlawful. In a later case, Maya Evans was denied standing because an affected individual was also bringing a claim. In the *World Development Movement* case, it would have been unrealistic to expect an affected individual – and it is worth noting that any such potential claimant would in future be denied legal aid for non-compliance with the UK residence test that the Lord Chancellor proposes to introduce early next year.

2.1.3 The consultation paper notes that challenges brought by public interest claimants are significantly more successful than those brought by individuals. Restricting standing is likely to reduce the number of such claims and increase the number of cases where unlawful action by public authorities goes unchallenged. Combined with the reduction in legal aid, it will mean that those with standing will not have the resources to litigate while those with the resources will not have the standing.

2.1.4 The Government is also proposing to modify the rules to discourage interveners and third parties in judicial review cases. In reality interveners perform a valuable role in

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[1] *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445.

[2] *World Development Movement Ltd* [1995] 1 WLR 386

assisting the court with additional information and the broader perspective. They are often able to represent the interests of the wider community in addressing issues of public concern. For example - charity groups for disabled people challenging welfare changes. Preventing such groups participating in judicial review cases would be to the detriment of civil society. It will prevent the voice of those least able to represent themselves under the law from being heard. It is to be noted that Government departments frequently intervene in judicial review claims to put forward the interests of their department.

2.1.5 The introduction of a costs risk for third party interveners will effectively curtail such interventions, since hard-pressed charities and NGOs will be deterred from intervening by the risk that an application for costs might be made against them. The courts are able to control the scope of third party interventions without the need for this additional power.

Costs

2.2 The Law Society opposes the proposal to make legal aid payment for bringing a judicial review claim dependent on the grant of permission (with a residual discretion in the Legal Aid Agency (LAA) in cases settled before permission). The Society rejects the Government's assertion that "it is appropriate for all of the financial risk of the permission application to rest with the provider [lawyer]". It is not the responsibility of lawyers to underwrite members of the public seeking redress for faulty decision making by public bodies.

2.2.1 This potential financial penalty is calculated to deter lawyers and members of the public from challenging public bodies. If this proposal is adopted, a likely consequence is that lawyers will feel unable to assume the risk of not being paid at all for the very substantial work involved in bringing legitimate cases to court. Members of the public deprived of legal advice from lawyers (and legal assistance from NGOs and charities if the test for standing is adopted) will confront the stark choice of trying to bring cases to court in person or letting a matter drop. In practice either option will mean that individual's access to justice has been significantly eroded.

2.2.2 The damaging effect of the proposal cannot be offset by the proposal that in exceptional cases of general public interest the Legal Aid Agency has the discretion to award legal aid funding. It does not deal with cases settled between refusal and renewal of the permission application. Further, experience of the practice of the LAA and the Legal Services Commission (LSC) leads us to believe that the discretion will be exercised sparingly and slowly.

2.2.3 The development of Protective Costs Orders (PCO) in public law cases has been beneficial in ensuring that public law wrongs are effectively challenged. They have public interest challengers to bring before the courts serious issues that the public interest requires should be litigated. The conditions governing PCOs are tightly controlled and ensure that frivolous or trivial claims are filtered out. Any restrictions on the availability of PCOs are likely to have the effect of deterring claims being brought which are in the public interest.

Procedural as opposed to substantive defects in decisions

2.3 The Law Society agrees that minor defects which would have made no difference to the outcome should not necessitate an authority to revisit its decision. That is the current law. However, the Law Society objects on practical grounds to the proposal to enable cases to be dismissed at the permission stage on the grounds of no difference. The Law Society believes that it would lead to full rehearsal of the arguments at the permission stage and be productive of delay and increased cost. The option of applying a lower test - that it is highly likely that the outcome would be the same - would undermine the importance of consultation, public participation in decision-making and procedural fairness, which are important elements of a democratic society.

Government's proposals to reform legal aid, in particular the proposed introduction of a residence test

2.5 The Law Society is concerned that the test remains fundamentally discriminatory and potentially unlawful under English and EU law.

2.5.1 The recent MOJ consultation *Judicial review – proposals for further reform* omitted to refer to the proposal in the earlier *Transforming Legal Aid* consultation paper to impose a 12 months lawful residency requirement for eligibility for civil legal aid. That proposal is clearly intended to restrict access to the courts. It will have a particular impact on people challenging the decisions of public bodies in relation to asylum and immigration status. The Government has had to acknowledge the overwhelming criticism of the proposal by exempting certain classes of people from the residence test. Nonetheless the Law Society remains of the view that the introduction of a residency test is not compatible with the European Convention on Human Rights or Common Law rights of access to the courts. It cannot be squared with Article 14 (prohibition of discrimination) when combined with Article 6 (right to a fair trial). The residency test would discriminate between people in relation to proceedings before the courts and for the purposes of legal aid eligibility.

The provisions in Part 2 of the Immigration Bill reducing rights of appeal against immigration decisions.

2.6 The success rate in appeals to the Tribunal against immigration decisions in managed migration cases (e.g. those seeking to work or study in the UK lawfully) stands at around 50%. This suggests that preliminary decision-making is poor. Removing the right of appeal in all these cases will mean that the only way to challenge such decisions through an independent judicial process is by way of judicial review.

2.6.1 Many such migrants (or potential migrants) would previously have been eligible for legal aid to challenge a negative decision by way of judicial review. Unfortunately the soon-to-be-introduced Residence Test will mean that such people are excluded from

legal aid. By definition these people will not meet the Residence Test because either they will not be lawfully resident by the time they are able to seek to challenge a negative decision (continuing leave under section 3C of the Immigration Act 1971 will cease once a decision is made on administrative review (clause 11 Immigration Bill 2013)) or they will be outside the UK. Those inside the UK will automatically become overstayers at this point and could face criminal sanction despite being the victim of a potentially unlawful decision. The number of people placed in this position will be significant in light of the success rate cited above.

2.6.2 Moreover the proposed changes in the Immigration Bill will further limit rights of appeal in immigration cases. This means that many decisions made in managed migration cases will not be able to be judicially challenged as there will be no right of appeal and no legal aid for judicial review. This will severely restrict access to justice for those wishing to lawfully enter or remain in the United Kingdom.

Concluding remarks

2.7 The right of the ordinary citizen to challenge the decision of a public body is fundamental to the concepts of civil society and the rule of law.

2.7.1 It is essential that there should be an effective legal right of protection against arbitrary or unlawful decisions by public bodies.

2.7.2 In the long term, if the right to judicial review is reduced, many will suffer.

2.7.3 The ordinary citizen will have less scope for seeking redress for wrongs which they may have suffered at the hands of public bodies. Public trust in authority will in time be undermined.

2.7.4 The proposals proceed from a fundamental misunderstanding of the nature of the judicial review remedy.