

The Judicial Review Consultation: Reflections, Predictions, and Predicaments

Introduction

2013 heralded a further consultation from the Ministry of Justice on its proposals for further reforms of judicial review in England and Wales. The Consultation closed on 1 November 2013 and we are awaiting the Government response.

In response to the initial consultation paper in 2012, the Government announced that it would be:

- *shortening the time limit for bringing a judicial review from three months to six weeks in certain planning cases and to thirty days in certain procurement cases, bringing them into line with the time limits for statutory appeals;*
- *removing the right to an oral renewal where the case is assessed by a judge as totally without merit on the papers; and*
- *introducing a fee for an oral renewal hearing, where permission has already been refused by a judge on the papers but the claimant asks for the decision to be reconsidered at a hearing.*

The further proposals for reform were put forward with the following stated aims:

- (1) Protecting economic recovery and growth by ensuring that vital infrastructure and long-term projects are not threatened or lost through judicial challenge;
- (2) Curtailing the use of judicial review as a “campaign tool”; and
- (3) ***“[T]he delays and costs associated with judicial review to hinder actions the executive wishes to take.”***

It is beyond any reasonable argument that the Government’s approach is designed to insulate, insofar as it possibly can, its decisions from judicial review. This, much like the legal aid reforms, is driven by political ideology rather than by genuine economic concerns. Given the Government’s approach to its consultations thus far, it is unlikely that its planned reforms will change in any meaningful way and those representing claimants in judicial review should be prepared to face significant changes in terms of both funding and substance.

This paper considers two of the most concerning proposals, namely:

- (1) The restrictions on funding for the permission stage; and
- (2) The restrictions on standing and the ability of third parties to intervene.

In my view, these are also the two aspects of reform most likely to be pushed through as they present an easy means through which the Government can score political points and instantly reduce the amount of challenges to its decisions, particularly those which are high profile and potentially impact upon a large pool of individuals.

The Proposed Reforms

A. “Rebalancing Financial Incentives” (AKA “making Judicial Review less Affordable”)

The Government is concerned about costs. In its consultation paper, the Government sets out the rationale thus:

“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. There is a need to consider reforms to rebalance the system so that those involved have a proportionate financial interest in the costs of the case. The new fee for an oral permission hearing which is to be introduced as soon as practicable is a sensible first step to give the claimant a greater financial interest. The Government expects that the combined effect of the new fee and the removal, from 1 July 2013, of the right to an oral renewal hearing in cases certified as totally without merit will be fewer requests for oral permission hearings in the future.”

The Government has proposed 5 areas in which costs could be saved: (1) restricting payment to legal aid providers unless permission is granted (subject to discretionary payment by the LAA); (2) the costs of oral permission hearings; (3) wasted costs orders; (4) protective cost orders; and (5) costs relating to third party interventions. The Government’s proposals in relation to funding and costs are all of concern and carry with them a real risk that meritorious judicial reviews are not brought.

(1) Limitations on Funding at the Permission Stage

The Consultation suggests that legal aid providers should only receive payment for the permission stage where permission is granted and goes on to a substantive hearing. This includes all work carried out in relation to oral renewal applications but would not cover Pre-Action Protocol work, including letters before claim and advice on the merits. They apply only to issued claims but put at risk all work carried out under CPR Part 54. Furthermore, the proposed restrictions would cover permission applications heard both by the High Court and the Upper Tribunal in its judicial review jurisdiction.

The Consultation states that:

“The Government considers that it is appropriate for all of the financial risk of the permission application to rest with the provider. It is legitimate to use the permission test as the threshold for provision of legal aid. The provider is well placed to assess the strength of their client’s case and the likelihood of it being granted permission; and thus well placed to make an informed judgement as to whether the permission test is met.”

The Government has also put forward a set of exhaustive criteria against which the Legal Aid Agency could exercise discretion and grant funding for cases which do not reach the permission stage but are meritorious (i.e. those claims which settle). Those criteria are:

- i) 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;*
- ii) The extent to which the client obtained the remedy, redress or benefit they had been seeking in the proceedings;*
- iii) The reason why the client in fact obtained any remedy, redress or benefit they had been seeking in the proceedings;*
- iv) 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.*

The proposed restrictions on legal aid payment at the permission stage will in practice result in meritorious claims not being brought. Although the Government is able to rely on the popular myth of the over-paid lawyer, legal aid funding is already unacceptably low and high quality practitioners are struggling to remain financially viable. This is the case for a number of reasons, including but not limited to:

- 1) A competent judicial review practitioner is likely to be instructed in relation to a significant number of decisions that turn out to be lawful and so do not result in proceedings. Advising in relation to those matters will either be unpaid or poorly paid.
- 2) Legal aid rates are relatively low and do not reflect commercial rates.
- 3) The Legal Aid Authority will often refuse to authorise adequate time to be spent on a claim (*R (JFS) v Office of Schools Adjudicator* [2009] 1 WLR 2535). As a consequence, lawyers end up acting pro bono at times.

Against that backdrop, further cuts to funding for the permission stage are going to have a significant impact and restrict access to justice.

The Government seeks to justify its proposed cuts on the basis that where practitioners ensure that only meritorious claims are brought, permission will be granted and no issue with funding will arise. Conversely, the Government says, the proposed funding restrictions will alleviate the problem of the court system being clogged up with unmeritorious or frivolous claims.

It goes almost without saying that those arguments are fundamentally flawed. As any judicial review practitioner knows, meritorious claims may fail to get permission and the number of wholly unmeritorious claims is relatively low (and are themselves subject to cost penalties). Amongst the reasons that permission may not be granted, even where the claim has merit are:

- 1) Judicial review is inherently unpredictable. Concepts such as fairness involve difficult judgments. A good example of the difficulties assessing the merits of a claim is the recent judgment of the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61. This was a case where five Supreme Court judges concluded that the Parole Board had acted unlawfully. However, the High Court had concluded that the claim was not merely wrong but also unarguable. As a consequence, experienced High Court judges had reached conclusions regarding the merits of a claim that were plainly wrong.
- 2) Public authorities often fail to engage adequately with the pre-action process. As a consequence, representatives may lack the information needed to see the flaws in a claim.
- 3) The factual position may change. For example, in an immigration case, a claimant may challenge detention. However, before permission is granted, the matters that were preventing removal may be resolved so that removal takes place. If that happens, the solicitor may be without instructions.
- 4) The law in this area is dynamic so that judgments may be delivered undermining the claim after the claim is lodged. The claim may have been based on arguable legal claims when lodged that become unarguable by the time that permission is determined.

Matrix and many others in response to the Consultation raised these points. However, given the Government's current approach to legal aid and funding restrictions, as well as the fact that public support remains on side for such cuts, it seems unlikely that the Government will retract from its proposals when it responds.

(2) Costs of Permission Hearings

The Consultation asked for views on whether the costs of unsuccessful permission applications should be borne by the Claimant as a matter of course rather than, as is presently the case, only in exceptional circumstances.

The problems with this approach are obvious. Aside from the fact that as a matter of principle, a procedure designed to ensure proper public administration and accountability should be paid for by public bodies, introducing a further, not insignificant cost risk, will serve as a further barrier to many publicly funded practitioners. Judicial reviews carry a high risk, independently of the merits and exposing a claimant to costs, potentially in the region of several thousand (especially where there is more than one defendant), is likely to severely restrict access to justice.

(3) Wasted Costs Orders

This proposal would in effect extend the scope of WCOs to conduct that is neither improper, negligent, nor unreasonable. That means that practitioners who have advised a privately paying client that their claim is weak, but arguable, would be at risk of having a WCO made against them. Clearly, this poses significant ethical problems for practitioners, who are obliged to fearlessly argue their client's case where it is arguable but for whom the risk of a WCO would be a significant incentive to withdraw from poorly funded cases where the merits are weak. It is also important to remember that a claim may have weaker prospects of success not because it is a frivolous or vexatious claim but because, for example, it raises a new or novel point of law.

There would be a further problem with extending the jurisdiction to award wasted costs. There is no obvious reason why this jurisdiction should only apply to claimant lawyers in judicial review proceedings. However, it is plain that there are problems in changing the approach in other contexts. There is no mechanism for making government lawyers personally liable for defending weak claims. In addition, putting lawyers at risk of costs if they defend weak private law claims will potentially deny private citizens the opportunity to instruct lawyers to defend weak (but arguable) claims.

Even if this proposal is implemented, it is difficult to see how this could be enforced in practice. How could the court determine whether a lawyer is to blame for bringing a weak claim? That could only be determined if privilege was waived. However, it would never be in the interests of a client to waive privilege in a case in which a lawyer had a proper defence to a claim for wasted costs. It seems that this proposal simply wouldn't work in practice and the Government may simply choose not to adopt it.

(4) Protective Cost Orders/Third Party Interveners

This aspect of the Government's cost-cutting proposals should be read together with those in relation to standing. The Government is concerned that NGOs and other organisations have too much power to intervene and seeks to restrict the use of PCOs to "exceptional" cases and in circumstances where the individual claimant has no personal interest. The Government is also considering a cost cap designed to "rebalance the inequality between the parties".

Again, this proposal is poorly thought out and ignores the basic principle that PCOs are only granted where there is a public interest in bringing the action. Should this proposal be implemented, a large number of claims with a wider public interest – even where there is also a claimant with a personal interest – will not be brought.

When PCOs are considered alongside the proposals relating to exposing third party interveners to cost risks, it is difficult to see why NGOs – often represented by lawyers acting pro bono – would become involved in litigation in all but the most exceptional circumstances.

The courts may simply carve out a discretion designed to minimize the impact of the proposals but it certainly seems as if PCOs and the involvement of third party interveners is going to become far more difficult.

B. Standing

As with the proposed cost and funding reforms, the Consultation proposes further restrictions on the ability of individuals to bring judicial reviews through reforms to the current rules on standing. The Consultation avers that at present, there is a real problem with individuals bringing judicial reviews despite having little or no direct interest in the claim. The Government proposals – with the exception of environmental challenges under the Aarhus Convention – would introduce a far more restrictive test, most likely requiring some sort of "direct and personal interest" in the outcome. Although no "actual damage" test is sought, it is clear that the proposed standing reforms would significantly restrict the ability of individuals and third parties to challenge the decisions of public bodies.

Judicial review is not primarily about individual rights, but about public wrongs and ensuring that government acts within the boundaries of lawful power.¹ The courts have therefore interpreted the “sufficient interest” test flexibly in order to enable the key function of judicial review, to ensure that the government acts lawfully. As Lord Diplock declared in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Ltd* [1982] AC 617, 644:

“It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped.”

The concerns raised in the Consultation are based on *“the principle that Parliament and elected government are best placed to determine what is in the public interest.”* This statement shows a gross misunderstanding of the function of judicial review and what constitutes “public interest”. It is always in the public interest for unlawful conduct to be stopped, and it cannot be in the public interest for authorities to be able to evade accountability because no directly affected individual has brought a claim. For this reason it has been understood by courts that with regard to judicial review “the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interest are involved.”²

In support of the proposed reforms, the Consultation refers to *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 and *R v Foreign Secretary ex parte World Development Movement* [1995] 1 WLR 386 as examples of the “expansive” approach to standing. Quite contrary to the government’s implication that these cases constitute paradigm “problem” cases that would fail under a reformed standing procedure, the cases are both vindications of a flexible approach to standing in judicial review.

¹ See Sedley J, *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 at 121: “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.”

² Professor Wade, *Administrative Law* 7th Ed, p 712 endorsed in *ex parte World Development Movement* at 395F.

- 1) *Evans* resulted in a full review of UK policy with regard to the transfer to Afghan Authorities of suspected insurgents detained by UK armed forces in the course of operations in Afghanistan. It was found that there existed a real risk that detainees would be “subjected to torture or serious mistreatment” at the NDS facility in Kabul and a moratorium was placed on transfers to the facility. The case has been absolutely critical for monitoring UK human rights compliance in Afghanistan and its legacy continues to have effect, with the UK subsequently introducing broader moratoriums on handovers in order to comply with the findings of the case. Under the proposed reforms to standing this type of case, which concerned the UK government’s complicity in torture overseas, would be impossible to bring unless a direct victim of such torture could be found to bring the claim.³

- 2) *Ex parte World Development Movement* challenged the grant of overseas funding to the Government of Malaysia for the Pergau Dam. The grant was found to be unlawful as the government did not have the power to make the grant under the relevant statute as the project itself was uneconomic. The government had ignored the financial advice of the Permanent Secretary and made the grant for political reasons. *Ex parte World Development Movement* thus serves as a key example of judicial review reminding the executive of the rule of law, and it would be very difficult to bring such a claim under a narrower test for standing.

Evans and *Ex parte World Development Movement* thus illustrate the importance of a flexible approach to standing in order to ensure that government acts lawfully.

The practical difficulties of any sort of “direct interest” test are obvious. For example, cases such as *Evans* that involve unlawful behaviour overseas on the part of the UK government, would be extremely difficult under an alternative standing test. In *Evans*

³ The government’s statement at §75, that “it was noted by the court at §2 of the judgment that the applicant’s standing would have at one time been an issue”, is misleading and incorrect. §2 of the judgment in fact reads: “It raises issues of real substance concerning the risk to transferees and, although the claimant’s standing to bring it was at one time in issue, the point has not been pursued by the Secretary of State.” At no point was it implied in the judgment that *Evans* constituted an expansion to the accepted rules of standing.

those with a “direct interest” were being held in a detention facility in Kabul. It would have been impossible for them to lodge an application for judicial review. Changing the current rules of standing would trap individuals such as the detainees in *Evans*, in a Catch 22 situation, unable to challenge their detention and transfer because they were in detention at the time. That result, however, is likely to be something which is politically desirable to the Government, particularly while it retains a military presence overseas.

Conclusion – where do we go from here?

The Government’s proposals ignore the fact that judicial review is not primarily about individual rights but about ensuring public accountability. Read in the context of the other proposals, the potential limitations on the ability of the individual to challenge the state are alarming. If the Government introduces these reforms through primary legislation, the Courts will struggle to carve out any meaningful discretion but it is not impossible that a degree of flexibility can be introduced through the common law. There may also be the possibility of legal challenge, although the reforms will make even that difficult.

There may be creative ways through which some of the cost-risk imposed by the reforms is mitigated. However, there seems little that can be done to avoid third party interveners or NGOs finding extremely difficult to become involved in or bring judicial reviews under the proposed reforms. The reforms risk fundamentally altering the nature of judicial review. Some of the proposals, such as WCOs are simply too ill-thought out to have any effect in practice. Nonetheless, judicial review practitioners face considerable challenges as the landscape changes and the state becomes less accountable for its wrongs.

**KIRSTEN SJØVOLL
MATRIX**