Motion to regret:
Civil Legal Aid (Remuneration)(Amendment)(No 3) Regulations (7 May 2014)

1 May 2014

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

Summary

2. On 7 May 2014, the House of Lords will debate a Motion to Regret the Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014 ("the Regulations"), tabled by Lord Pannick QC. The Regulations were laid on 14 March 2014 and came into force on 22 April 2014.They give effect to the Government's decision to significantly restrict access to legal aid for judicial review applications. JUSTICE is concerned that – in light of the significant constitutional function of judicial review – these changes are unnecessary and ill-considered. They will, in our view, have a damaging effect on the right of individuals without means to secure advice and representation for the purposes of pursuing a judicial review. In turn, this will inhibit transparency and accountability in public decision making and the long-term development of public and administrative law. The Regulations themselves contain little detail and may have a broader effect than intended by Government. We consider that there are significant questions to be raised about their legal basis.

3. Our concerns are mirrored in recent critical reports by both the House of Lords Secondary Legislation Committee and the Joint Committee on Human Rights ("JCHR") on the Regulations.[1] Importantly, the JCHR concludes that the significance of these changes means that they should not have been made in secondary legislation (and particularly by the negative resolution procedure). They have recommended that Government annul the Regulations and reintroduce the measures as amendments to the Criminal Justice and Courts Bill, in order to allow for full parliamentary scrutiny.

4. We encourage Peers to support Lord Pannick's Motion to Regret. Without further action by individual Peers and MPs, this may be one of the only opportunities for Parliament to express their view on a reform which could have significant constitutional implications.

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[1] Thirty-seventh Report of Session 2013-14, *Civil Legal Aid (Remuneration)(Amendment)(No 3) Regulations,* HL Paper 157; Thirteenth Report of Session 2013-14, *The implications for access to justice of the Government's proposals to reform judicial review,* HL Paper 174/HC 868 ("the JCHR Report").

The constitutional function of judicial review and the effect of the proposed changes

5. Judicial review and associated administrative law provide an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again. In a country with no written constitution to control the relationship between the citizen and the State, this function takes on a particular constitutional significance.[2]

6. The Government proposes that legal aid should not be recoverable in judicial review claims except where permission is granted. In cases where applications are withdrawn before a permission hearing, the Legal Aid Agency ("LAA") will have limited discretion to make *ex gratia* payments in connection with work done.

7. Clearly, it must be open to the Government – and to Parliament – to review whether the existing arrangements for judicial review are working, including whether the procedure adopted is disproportionate, unduly restrictive or overly burdensome. However, the constitutional importance of judicial review places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place to preserve access to justice, accountability and good administration. Parliament should ensure that the Government takes this obligation seriously. Yet, the JCHR shares the concern expressed by many that there is no evidence to support the case for reform:

> *"We note that the number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded [The Committee earlier notes that immigration judicial reviews have been removed from the High Court to the Upper Tribunal]…We therefore do not consider the Government to have demonstrated by clear evidence that judicial review has "expanded massively" in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate"* [3]

8. The determination that the risk of public law litigation should be met by lawyers representing vulnerable people without other means to challenge life-changing decisions, in our view, shows a profound misunderstanding of administrative law in practice. As the senior judiciary have themselves explained, many cases are currently settled prior to any

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[2] We consider the full constitutional function of judicial review and its evolution in our Second Consultation Response, at paras 9 – 15.

[3] JCHR Report, para 30

hearing on permission.[4] The ethical position of both solicitors and barristers who accept instructions subject to a legal aid certificate and who subsequently seek to withdraw before issue is far from clear. As cases evolve, the nature of judicial review means that the likelihood that a case will proceed to permission or succeed at that stage may shift dramatically and without forewarning as a result of actions entirely outside the knowledge and control of claimants or their representatives.

9. Given the risks involved, the likelihood that many providers will turn away from providing any public law assistance at all in legally aided cases is high.[5] Yet, despite this risk Parliament has not been invited to debate the detail of these proposals.[6]

10. JUSTICE welcomes the conclusion of the JCHR that these measures have the significant potential to undermine access to justice:

> *"In our view, the reform pushes too much risk onto providers and creates too great an uncertainty about the degree of risk, causing a chilling effect on providers which will have a significant impact on justice because meritorious judicial review cases will not be brought"*[7]

> *"We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. In our view…it constitutes a potentially serious interference with access to justice and, as such, it requires weighty evidence in order to demonstrate the necessity for it – evidence which is currently lacking"* [8]

The scope of the Regulations

11. During the course of consultation on these changes, the Government made a number of commitments:

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[4] See paras 23-25. Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform* (2013) http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

[5] The Public Bill Committee considering the Criminal Justice and Courts Bill recently heard clear evidence from Nicola Mackintosh and Nick Armstrong on the risk facing solicitors and barristers who practice principally on judicial review, PBC Deb, 13 March 2014, Q298 on.

[6] A fuller exposition of JUSTICE's concerns is given in our response to *Judicial Review: Proposals for Further Reform,* available, here: http://www.justice.org.uk/resources.php/359/judicial-review-proposals-for-further-reform

[7] JCHR Report, para 76

[8] JCHR Report, para 79

a. Interim applications – designed to protect clients from irreparable damage, often in emergency circumstances – will continue to be funded in all cases;
b. All work prior to the issue of an application for judicial review will continue to be paid for (albeit that the determination of work done on an application and prior to the issue of an application remains unclear); and
c. Some cases where permission is not granted will be eligible to apply for an ex-gratia payment, in recognition that many cases which do not proceed may secure a valuable result for the claimant in any event.

12. Importantly, there are concerns that the Regulations fail to deal adequately with each of these promises:
    d. **Interim relief:** New Section 5A – which gives effect to the new rule – relates to an "application for judicial review" (thus, applications pursuant to Part 54 of the Civil Procedure Rules ("CPR")). While Part 25 CPR governs interim applications – and thus may not be covered by Section 5A – most applications for interim relief in judicial review are currently made as part of the wider application pursuant to Part 54. For example, the application form associated with judicial review asks claimants to indicate whether they are seeking interim relief. Thus, it is unclear whether all applications for interim relief are intended to be fundable and whether – in future – all applications for such relief must be made independently pursuant to a Part 25 application.
    e. **Preparatory and pre-issue work:** New Section 5A applies when an application for judicial review is "issued". Where applicable, the Lord Chancellor "must not pay remuneration for civil legal services *consisting of making that application*". It appears clear that where proceedings are not issued, Section 5A will not apply, so work will be funded by legal aid (allowing for correspondence between a claimant and a public body and other investigatory work, for example). However, it is less clear what is intended when a claim is issued. What work will be considered as services "consisting of making that application"? This is clearly ambiguous and without clarity will compound the chilling effect of these measures. At best, this could lead to significant disputes between the Legal Aid Agency and providers as it is determined what work can and can't be done.
    f. **The ex-gratia scheme:** The Regulations provide very little detail and the Lord Chancellor is granted a significant degree of discretion as to when payment may be made if a claim ends before permission is granted. No payment is permitted when permission is refused, regardless of whether the reason for refusal is entirely unpredictable or outside the control of the claimant or his advisers (for

example, late disclosure or a change in the practice of the Respondent decision maker). Importantly the guidance includes the discretion for the Lord Chancellor to consider the reason why a case may have settled and to second guess the facts that a provider ought to have known at the time of issue. Recent guidance published by the Legal Aid Agency on how practitioners should apply for consideration is extremely limited and makes no attempt to resolve any uncertainty on the scope of the scheme.[9]

Importantly, the Regulations provide that there will be no route of appeal from a determination not to pay. No consideration beyond the Lord Chancellor – likely the Legal Aid Agency – will be permitted and consideration by the Independent Funding Adjudicator is precluded.

13. The JCHR expressly recognized that uncertainty about the scope of the Regulations and their impact compounds the likelihood that public law practitioners will be unable or unwilling to bear the risk associated with legally aided work in future.[10] Unfortunately, since the Regulations were made using the negative procedure – and introduced shortly before a recess in both Houses – there has been little opportunity for clarification by Parliamentarians.

Parliamentary scrutiny and legal basis

14. JUSTICE is concerned that this major part of the Government's package of proposals for reform of judicial review is subject only to secondary legislation without opportunity for full parliamentary debate. Debate on LASPO and its remaining provision for civil legal aid – including for judicial review – was lengthy and contentious. It seems remarkable that Parliament could have intended the Minister to be able to make such sweeping changes to funding without further primary legislation, let alone by negative resolution, without opportunity for effective parliamentary scrutiny.

15. The JCHR shares these concerns:

> *"In our view, the significance of the measure's implications for the right of effective access to court is such that it should have been brought forward in primary*

[9] http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/judicial-review-discretion-pro-forma-completion-guidance.pdf

[10] JCHR Report, para 76.

legislation, to give both Houses an opportunity to scrutinize and debate the measure in full and to amend it if necessary"[11]

16. At the very least, it is questionable whether these Regulations can be properly made using the negative resolution procedure. Section 1 LASPO places a duty on the Secretary of State to ensure that legal aid is made available consistent with the provisions of the Act. Section 9, by extension, provides that such services as are specified in Schedule 1 (including judicial review, specified at paragraph 19) are to be made available provided the individual concerned qualifies for legal aid. Section 2 LASPO gives the Secretary of State the power to make arrangements for the payment of "remuneration" for legal aid. By way of contrast, Section 9 LASPO permits the Secretary of State to vary or remove services from the scope of legal aid only subject to affirmative resolution. JUSTICE considers that Parliamentarians should question whether the Regulations should have been laid more properly under Section 9 than Section 2.

17. Where an application for judicial review is issued, the Regulations, pursuant to Section 5A(1) will prohibit the Lord Chancellor from making any payment for legal aid services except in cases where permission is granted, or subject to an ex gratia scheme. On any interpretation, this is a significant variation in the legal aid services for judicial review available pursuant to LASPO.

18. JUSTICE encourages Peers to put the recommendation of the JCHR to the Minister. If these reforms are – as suggested by the Lord Chancellor – intended to better protect the integrity of decision made by "democratically elected politicians", then shouldn't Parliament be given a proper opportunity to subject them to scrutiny?

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[11] JCHR Report, para 81