Criminal Justice and Courts Bill:

Judicial Review and Interveners

Government Amendments (Ping-Pong)

4 December 2014

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Summary

1. **JUSTICE supports a crucial series of Lords amendments to Part 4 of the Criminal Justice and Courts Bill which would preserve the discretion of judges to control individual access to the court in judicial review cases.**

2. **The Government has rejected all of the House of Lords changes, with one late change offered on the treatment of interventions. This new proposal would have an equal, if not a more damaging, deterrent effect on the ability of charities, NGOs and other organisations to offer their assistance to the court in public interest litigation. It is no concession.**

3. **Individual judges recognise the real value of interventions and have expressed concern that the assistance offered by interveners might be constrained. The senior judiciary and the JCHR stress that the courts already have plenty of powers to control unreasonable behaviour by interveners in practice. The Government wants to address a problem which simply does not exist. These changes – in the original draft and in the new amendment - are not about judicial control but deterrence.**

4. **We urge all Peers to support the Lords amendments to Part 4, reject the Commons disagreements, and oppose the Government amendments in lieu ((a) – (e)).**

Ending expert support and advice in public interest litigation?

5. The Government's alternative proposal (in amendments in lieu 107 (A)-(E)) would create a mandatory duty on the court to order costs against all interveners in a broad, but ill-defined series of circumstances. In any case where the mandatory duty applies, all costs associated with the intervention would be recoverable by all of the other parties (including losing parties). In certain, ill-defined circumstances, the court would have no discretion to act to prevent an unjust outcome, despite interveners having been granted permission to intervene by the court and encouraged to proceed. In effect, this will have a more damaging impact than the Government's original proposal to create a presumption that costs will be payable, bar in undefined exceptional circumstances.

6. **Subsection (4) creates an <u>absolute</u> duty on the court to award costs which will apply if the conditions in (4A) are satisfied. It would leave an intervener facing substantial costs claims from all parties in any case (including losers and multiple parties in large cases). We are not aware of any similarly broad and compulsory duty placed on the courts against any other class of actor in litigation.**

    a. **Acting "as a party" (4A(a)):** The court already has the <u>power</u> to make a costs order when an intervener steps into the shoes of one of the parties. Making an order compulsory highlights the absurdity of this proposal. Even if a claimant or a defendant behaves appallingly in litigation, the court retains discretion over its costs orders. The presumption, that a loser pays costs for example, remains a presumption, not an absolute duty.

b. **Providing "Significant assistance", "taken as a whole" (4A(b)):** In every intervention, a judge grants permission because they believe that the intervener can assist the court. Despite that initial assessment, this new duty would leave the subjective value of any contribution to argument after-the-event. Argument will invited any every case about precisely how "significant" an intervener's assistance may have been. Predicting how individual submissions will in fact assist the court is exceptionally difficult. Even in cases where interveners' contributions are not mentioned in a judgment; it is often difficult to say that the intervention did not help a judge reach his ultimate conclusion.

   The language of this proposal ("significant" and "as a whole") makes the risk of costs *more* significant. This suggests that an intervener may provide substantial assistance to the court, yet be liable for a costly bill. Is assistance significant if it helps the court exclude an option? What if 5 pages of a 20 page submission are crucial to the courts treatment of the case?

c. **"Matters not necessary to resolve" (4A(c)):** The addition of this provision shows a deep misunderstanding of the conduct of litigation. If the information to be provided is <u>irrelevant</u>, it is open to a judge to refuse permission. It is an ordinary aspect of litigation that the issues before the court may evolve as the case progresses. Equally, while the parties may agree that multiple issues must be determined, it is far from unusual for the court to find that having determined on issue, the others fall away and need no decision. If permission is granted, it would appear unconscionable to punish an intervener after the event if the issues in the case evolve in a manner which narrows the scope of the issues before the court. What if the assistance of the intervener is precisely what narrows the issues under consideration?

d. **Unreasonable behaviour (4A(d)):** The court already has the <u>power</u> to order costs where it considers that an intervener has behaved unreasonably. That this discretion includes acting beyond the scope of the permission granted and stepping into the shoes of a party is confirmed in both case law and the Rules of the Supreme Court governing intervention in our highest court. The inclusion of this final, catch-all <u>duty</u> is particularly worrying.. What is "unreasonable behaviour"? Can an intervener who acts within the bounds of its permission act unreasonably? If counsel speaks for too long, is that unreasonable? If written submissions are overlong, but relevant, is that unreasonable? While this remains uncertain, the risks associated with litigation is likely to deter all but the most wealthy organisations from volunteering to act to assist the court. In these circumstances, somewhat ironically, it is likely that only those organisations with a direct and individual interest in the outcome of the case will be willing to risk the financial penalty. Pure public interest litigation may become a thing of the past.

The uncertainty associated with this compulsory direction on costs is likely to have a devastating, chilling effect.

7. The court is directed to order all costs associated with the intervention to be recoverable not only those costs associated with the allegedly inappropriate behaviour. So, if the court considers an overlong intervention is unreasonable – 25 pages when permission granted for 20 – it is not only the cost of the unreasonable action which attracts liability. A substantial financial risk, particularly in a case involving multiple parties (a common aspect of many important public law and public interest cases).

8. Although the redraft would notionally leave the "exceptional circumstances" discretion intact (Clause 67(5)), by setting such broad and ill-defined statutory bounds to the duty imposed, this may act to increase rather than temper any chilling effect.

9. Punitive and disproportionate, these measures are designed to deter any organisation with limited funds acting as an intervener. In practice, this means that – even in important cases with a constitutional impact which reaches far beyond the immediate interests of the parties - the court will no longer benefit from expert advice and information provided from cash-poor and experience rich charities and NGOs.

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