



Criminal Justice and Courts Bill: Judicial Review

House of Lords Committee Stage Briefing on Amendments

11 July 2014

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JUSTICE regrets that many of the civil justice proposals in the Criminal Justice and Courts Bill are ill-evidenced and ill-advised. Whether by design or coincidence, we are concerned that measures which will change the funding structures for judicial review – together with restrictions on access to legal aid - will significantly limit the ability of those without independent means to hold public authorities to account. Importantly, the Joint Committee on Human Rights (“JCHR”) shares our view that the case for change has not been made.

This briefing focuses principally on Part 4 of the Bill and judicial review. It proposes that Clauses 64 - 69 should not stand part of the Bill. In the alternative, we propose detailed amendments to retain the discretion of the court to control its procedures commensurate with the public interest. We support each of the amendments proposed by the JCHR.

Specifically, we propose that the hands of the court should not be bound to apply the “no difference” test at permission stage in any case where a Respondent asks for it. This test should remain a high hurdle. The alternative – as proposed in the Bill – would see judges stepping into the shoes of decision makers. This would be constitutionally inappropriate and costly as decisions on permission become dress-rehearsals of the merits of a claim.

If the proposals on financial disclosure remain in the Bill, they must be significantly amended to give the court the power to waive the requirements in appropriate cases and to control the processing and storage of the information through the use of reporting restrictions and other safeguards.

JUSTICE considers that the proposals on interveners’ costs are unnecessary and contrary to the public interest. We propose an amendment to reflect the practice of the Supreme Court which leaves adequate discretion with individual judges to control both the scope and cost of any intervention in the public interest. There is no evidence that intervention is anything other than a tool to assist the court predominantly exercised for the public interest alone and entirely controlled by judicial discretion. In the circumstances we urge Parliamentarians to subject this part of the Bill to close scrutiny.

We are concerned that the proposals on costs capping orders in Clauses 68 - 69 will have a significantly chilling effect on the courts’ ability to do justice in public interest cases and recommend significant amendment to maintain the discretion of the court.

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. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law.
2. JUSTICE has worked actively on issues of good administration, oversight and accountability since our inception.¹
3. In this briefing, we suggest amendments to the proposals in the Bill on judicial review and civil appeals. We consider that Part 4 of the Bill is a priority for Parliament and focus on this section primarily. We have produced separate briefings on our concerns about the criminal justice sections of the Bill.

The constitutional significance of judicial review

4. 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
5. 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

¹ See for example, *The Citizen and the Administration* (1961), *The Citizen and his Council* (1969), and *Administration under the Law* (1971) during the early development of modern administrative law in England and Wales. We briefed on the retention of the constitutional duties of the Lord Chancellor in connection with the rule of law, independence of the judiciary and the public interest in the administration of justice, during the passage of the Constitutional Reform Act 2005.¹ We regularly intervene in constitutionally significant proceedings as a third party, including in cases arising by way of judicial review. Most recently, we argued in *R (Cart) v Upper Tribunal*, for the retention of judicial review for the determinations of the Upper Tribunal and other similar specialist tribunals. In that case, Lord Dyson stressed the fundamental nature of the function of judicial review: “*There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review.*” Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122.

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

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.

6. We consider that no reliable evidence has been produced to support the Government's claim that judicial review is open to abuse or that an expansion in the use of judicial review is such that significant restriction is necessary. The financial savings which the Government estimates that these proposals will make are limited. We consider that Government's calculation of these limited savings remains doubtful. Importantly, the likely on-cost associated with reducing access to advice and representation – which will result from the operation of the Civil Legal Aid (Remuneration)(Amendment)(No 3) Regulations - has not been considered. Costs associated with the proposed changes have not been quantified or considered and no estimate of the benefit to the taxpayer of judicial reviews which save public money has been conducted. Alternative suggestions designed to enhance the efficiency of the Administrative Court have been rejected by the Government.³ The bulk of responses to the Government consultation opposed the case for any further change to judicial review. However, the Government has determined to press ahead with these additional changes.
7. JUSTICE is concerned that the Government's approach is flawed for two substantive reasons:
 - a. its proposals are unbalanced, focusing primarily on individuals bringing judicial review, with changes to legal aid and on the face of the Bill likely, by coincidence or design to deter or prevent claims against Government or public agencies;
 - b. it will restrict the discretion of courts to control litigation brought in the public interest.
8. Importantly, the Joint Committee on Human Rights (JCHR) published their conclusions on 30 April 2014. Their report was highly critical of the case made by the Government, including concern about the role of the Lord Chancellor.

³ For example, in the response of the Senior Judiciary, they questioned why the LAA should administer the proposed ex gratia scheme and not an individual judge. See 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>. In JUSTICE's response to the First and Second Consultations on judicial review, we comment on the possibility of using costs orders to deter Respondents from pursuing poor defences or resisting permission in cases where a clearly arguable claim exists.

9. They concluded:

We 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 process taking place, or that the powers of the courts to deal with such abuses are inadequate.⁴

10. On 4 July 2014, the House of Lords Constitution Committee published its report on the Bill. That Committee was also broadly critical, expressing concerns about the implications of Part 4, including for the constitutional function of judicial review and the rule of law.⁵

⁴ 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, para 30 (Herein “JCHR Report”).

⁵ Second Report of Session 2014-15, *Criminal Justice and Courts Bill*, HL Paper 18 (Herein “Constitution Committee Report”)

Part 4: Judicial Review

Clause 64: Materiality

Proposed Amendments

Clause 64 should not stand part of the Bill.⁶

Alternatively:

Page 64, Line 35, leave out “must” and insert “may” (Amendment 70)

Page 65, Line 1, leave out “highly likely” and insert “inevitable”

Page 65, Line 4, leave out subsection (2) (Amendment 72)

Page 65, Line 26, leave out subsection (5) (Amendment 73)

Page 65, Line 38, leave out “highly likely” and insert “inevitable”

Page 65, Line 40, leave out “must” and insert “may”

JUSTICE supports each of the amendments tabled which broadly reflect the recommendations of the JCHR, notably, Amendments 70, 71, 72 and 73. We propose an additional amendment which is also proposed by the JCHR.

Briefing

11. The Bill would restrict the scope of the Administrative Court to consider claims for judicial review which raise questions of procedure. It proposes that in every case where a respondent authority asks, the court must consider whether, had the relevant authority acted lawfully, it would be “highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”

12. JUSTICE considers that Clause 64 is unnecessary and inappropriate and should not stand part of the Bill. Our alternative amendments would place it within the discretion of the court to consider whether to refuse relief in any case where it would be inevitable that the outcome would not differ. Importantly, this would maintain the proper supervisory

⁶ References to Amendment numbers is to the Notice of Amendments given up to and including 12 June 2014.

function of the judiciary on judicial review. If the “highly likely” test is adopted, there is a significant risk that judges will be invited to step into the shoes of an individual decision maker and to second guess how they might have acted had they acted lawfully. In addition, these amendments would leave the timing of the court’s consideration of any “no difference” test to its discretion. The Bill would force the Court to consider this question at permission stage on the prompting of a respondent. This will lead to additional cost and delay as the merits of a decision and its likely outcome are explored at an early stage in the process.

13. The JCHR was not persuaded that there was any need to change the way in which the courts already exercise their discretion to consider this issue.⁷

Background

14. The proposals in Clause 64 illustrate a significant lack of understanding about the purpose of administrative law and the function of judicial review. The Second Consultation asked for examples of cases “brought solely on the grounds of procedural defects” and seemed grounded in the implication that it should be easier for the court to dismiss, or refuse a full hearing in cases which raise issues of procedure. This is reflected in the Impact Assessment which explains: “In some cases, whilst technically successful, some of these challenges may result in no substantive change to the original decision”.
15. Judicial review is a supervisory remedy. One of its core purposes is to ensure that administrative decision makers act within the bounds of the law, including by following fair processes that reflect the principles of natural justice. Where statute or policy requires that a particular process be followed, in order to ensure that a decision takes into account all of the relevant factors deemed necessary by Parliament, administrative law requires that those procedures be followed for good reason. Every lawyer – and every decision maker – has encountered a “cut and dried” case which turns out, after consideration, not to be so straightforward. Just as due process exists in criminal procedure to deal with the risk of wrongful conviction in cases where individuals might be deemed “clearly guilty”; administrative procedures exist to encourage good administrative practice and to ensure that the varied interests of those affected are taken into account. It is extremely difficult to second guess how a disputed decision might

⁷ JCHR Report, paras 54 – 56.

have been different if a lawful procedure had been followed. This is particularly significant where the procedural flaw in play is a failure to comply with an obligation to consult. The lowering of the threshold of “no difference” should not be allowed to undermine the process of engagement in democratic decision making. Where an individual would have had the opportunity to make representations if an authority had acted lawfully, it is difficult to second-guess what would have been said by the applicant – and other respondents to the consultation - but also how the authority might have reacted to the representations made.⁸ The case law is clear. Caution must be exercised in applying the “no difference” test.⁹ In *R v Tandridge District Council ex p Al Fayed* [2000] 1 PLR 58, 63C-D, the Court explained:

Once it is appraised of a procedural impropriety the court will always be slow to say in effect, ‘no harm has been done’. That usually would involve arrogating to itself a value judgement which Parliament has left to others.

16. The JCHR accepted that there were strong principled arguments against the lowering of the threshold:

[I]n our view lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied. It therefore risks giving rise, in particular cases, to incompatibility with the right of practical and effective access to court, with the European Court of Human Rights recognises as an inherent part of the rule of law requiring States to ensure that legal remedies are available in respect of unlawful administrative action determining civil rights or obligations.¹⁰

17. The Lords Constitution Committee reported particular concerns about this clause:

[Clause 64] raises issues both of principle and of practical concern. The issue of principle was expressed in the following terms by the senior judiciary of England and Wales in their submission to the Government's second consultation: "a lower threshold than inevitability for the application of the 'no difference' principle envisages judges refusing relief where there has been a proved error of law and the decision

⁸ See, for example, *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, para 352.

⁹ See for example, *R v Broxtowe Borough Council ex p Bradford* [2000] LGR 386at 387f-g; *R v Life Assurance and Unit Trust Regulatory Organisation Ltd ex p Tee* (1995) 7 Admin LR 289, 307F.

¹⁰ JCHR Report, para 45.

under challenge might have been different absent that error."^[9] In short, lowering the threshold risks unlawful administrative action going unremedied. As such, **the House may wish to consider whether clause 64 risks undermining the rule of law.**¹¹

¹¹ Constitution Committee Report, para 11.

Clauses 65 and 66: Financial Information and Judicial Review

Proposed Amendments

Clauses 65 and 66 should not stand part of the Bill.

Alternatively:

Clause 65

Page 66, Line 10, at end, insert “or the Court has ordered that such prescribed information need not be provided in whole or in part.”

Page 66, Line 15, leave out “likely to be available”

Page 66, Line 16, leave out “and”

Page 66, Line 17, leave out subsection (b)

Page 66, Line 37, leave out “likely to be available”

Page 66, Line 38, leave out “and”

Page 66, Line 39, leave out subsection (b)

Clause 66

Page 67, Line 1, leave out “must” and insert “may”

Page 67, Line 7, leave out “must” and insert “may”

Page 67, Line 11, insert:

(-) Where the information in subsection (2) includes confidential information about the financial position of a natural person, the Court may to the extent necessary to protect the confidentiality of such information –

- (a) sit in private; and**
- (b) impose reporting restrictions**

Briefing

18. The Bill proposes that certain financial information must be provided by all claimants with their application for judicial review before their claim can proceed. Clause 65 provides that a court must always consider whether to make an order for costs against any organisation or individual named in that information, including parties other than the claimant. Very little information has been given about how this information will be processed or how the court will be expected to approach the obligations in Clause 66.

19. The amendments we propose would limit the information to be provided to information about the ascertainable financial resources of the claimant, including any third-party financing. At present it would require any claimant to disclose information about financing “likely to be available”. JUSTICE considers that this test is extremely uncertain and likely to have a chilling and unjustifiable impact on applicants for judicial review. We would remove a specific requirement for bodies corporate to name their members and their ability to resource litigation. Ministers should provide a fuller explanation as to their understanding of this clause and its relationship with the law on the ordinary liabilities of corporate entities and their members. It is as yet unclear how this measure is intended to apply in practice.
20. The other amendments would permit the court to waive the need to disclose financial information at its discretion. Amendments to Clause 66 would permit the Court to take steps to protect such information as is disclosed by use of private sittings and reporting restrictions, if justified and proportionate. At present, it is unclear how claimants who wish to protect information about their finances, including commercially sensitive information, might be permitted to pursue an application for judicial review. These draft safeguards are designed to give the court some flexibility to protect the rights of an individual litigant in practice.

Background

21. While it may appear reasonable for the court to pursue all avenues for the enforcement of costs orders legitimately made against unsuccessful applicants, the requirement for would-be applicants to provide any significant information about their financial information at the outset of a claim is new. In the context of this package of reforms, JUSTICE is concerned that these measures will - by design or coincidence – further deter the use of judicial review by people without independent means.¹² Cumulatively, this approach will limit the ability of groups of people, including vulnerable people, to access judicial remedies for the unlawful activities of Government.
22. It would seem inappropriate in many cases to distribute this information to the parties in a case, particularly where the information is personal or may relate to commercial sensitivities. If the information is to be gathered solely for the purposes of aiding costs

¹² This could prove a general deterrent. If the extent of the information required will involve, for example, disclosure of sensitive financial information, including that which raises commercial sensitivities, this could create a particular hurdle for even corporate litigants.

recovery, Ministers should be asked to explain why this information should be provided at the point of application rather than during the enforcement process after it is determined that an individual party is liable for costs. In this regard, we note that there is already a considerable body of existing law which governs the ability of the court to pursue costs from “unseen” funders and backers of litigation.¹³ We are concerned that measures designed to improve recovery of costs should not ultimately be used to limit access to judicial review only to those with substantial independent means by deterring others from pursuing litigation even where their claims are strong. By proposing to limit the ability to access Protective Costs Orders and by limiting access to legal aid, it is likely that individuals and groups without significant funds will explore other avenues of support for litigation. If the mechanism for the handling of information in connection with the recovery of costs is unclear, or the means by which the court might pursue an individual are uncertain, these avenues are likely to be similarly constrained. For example, if a charity obtains a grant from a third-party organisation for the purposes of pursuing litigation capped at £5,000, will the court be capable of enforcing a costs order against the donor for any sum over that amount? What about a solicitors firm or a law centre that acts *pro bono* where a claimant is unable to secure legal aid? Would family members who support litigation brought by a vulnerable or disabled relative seeking to challenge withdrawal of services be affected? These are questions which have not yet been explored and which should be better defined before Parliament approves the changes proposed in Clauses 65-66.

¹³ See for example, *Hamilton v Al Fayed (No 2)* [2003] QB 1175.

Clause 67: Interventions, costs and the public interest

Proposed Amendments

Clause 67 should not stand part of the Bill.

Alternatively:

JUSTICE supports each of the amendments tabled which broadly reflect the intention of the recommendations of the JCHR, including Amendment 74.

Page 67, Line 31, leave out “must” and insert “may”

Page 67, Line 30, leave out subsections (4), (5) and (6) and insert:

- (-) On an application to the High Court or the Court of Appeal by a relevant party to the proceedings, the court may order the intervener to pay such costs as the court considers just.
- (-) An order under subsection (4) will not be considered just unless exceptional circumstances apply.
- (-) For the purposes of subsection (5), exceptional circumstances include where an intervener has in substance acted as if it were the principal applicant, appellant or respondent in the case.

Briefing

23. The Bill would require the High Court or the Court of Appeal to order costs against an intervener on an application by any party except in exceptional circumstances. Exceptional circumstances are to be defined in the rules of court. The Bill does not distinguish between successful and unsuccessful parties. On application by either, the court would, on the Government’s proposals, generally be bound to make an order against an intervener.
24. These amendments would restore the discretion of the court to control the application of costs against interveners. They reflect the current practice of the Supreme Court (and other domestic courts) as formalised in the Rules of the Supreme Court.
25. The JCHR recommended that “the Bill be amended in order to restore the judicial discretion which currently exists”. Amendment 74, tabled by Lord Pannick and others would broadly achieve this purpose. The alternative language we suggest is designed to

more closely reflect the language of the Supreme Court Rules, where the kinds of circumstances that are considered exceptional are illustrated by the example of an intervener acting as a party to the litigation.

Background

26. Courts currently hold the discretion to make an order as to costs against any intervener. In practice, the general approach of the UK courts has been that the costs which result from an intervention are treated as costs in the case (in practice meaning that the losing party pays their own and the other party's costs of preparation and representation, but not the intervener's costs, who bears their own). This reflects the nature of a public interest intervention being to assist the court and add objective value to the court's determination of a case. It underlines the special position of an intervener, who participates in any case only with the consent of the court. This position has been formalised in the Supreme Court Rules, where Rule 15 provides that there will generally be no order for costs, for or against, an intervener. The court does however retain the discretion to order costs, particularly where an intervener effectively steps into the shoes of one party or another.¹⁴ This reflects earlier practice in the House of Lords and other courts. This settlement reflects the value of reasonable intervention to the court by ensuring that interveners must be in a position to support the costs of their own contribution, yet retains a discretion to act where an intervener imposes an unreasonable burden on the parties to the case.
27. The proposals in Clause 67(2) appear designed to deter any applicant from pursuing an intervention in the public interest, except before the Supreme Court (where it appears

¹⁴Supreme Court Rule 15: "will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent). Courts have been comfortable exercising this discretion in the face of unreasonable behaviour. For example, in *R (Barker) v London Borough of Bromley* [2006] UKHL 52 at paras 32 -33, where Lord Hope ordered costs against the Secretary of State, intervening in the appeal, explaining that the Secretary of State had in fact joined the appeal against the claim that there was a defect in regulations which bound the respondent local authority, but for which the Minister had been responsible. In the event, the Secretary of State ran his intervention as if he had been joined as a party to the case and it was only proper that the costs of the appeal should be met jointly with the local authority. See also, *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 681, para 4. In that case, the United Synagogue was granted permission to intervene, but in practice played the primary role in opposing the claim. The Court of Appeal determined accordingly that it should meet the costs of the case.

that the Rules of the Supreme Court will continue to apply).¹⁵ Requiring the court to order an intervener to pay any costs of the original parties arising as a result of its intervention is likely to act as a significant bar on participation to many third-party interveners. Many interveners – JUSTICE included – operate with very limited resources, and are subject to the oversight of a Board of Trustees, for whom risk management is a primary concern. A significant number are charitable organisations with an obligation to account for their activities to the Charity Commission. The threat of an as-yet-undetermined costs risk will operate as a significant factor in whether to pursue a particular application.

28. By contrast, these changes are unlikely to have a significant impact on interveners for whom a costs risk will not be a major consideration. It is unlikely that Government Departments, major commercial organisations or corporations will be affected.

29. The Government has produced no evidence to support any claim that the current arrangements have caused a significant problem for litigants or the courts. We are concerned that these proposals should not proceed on the basis of a misunderstanding about the role and function of a public interest intervener. In particular:

- **The Court as gate-keeper:** The Government refers to individuals who “choose to intervene”.¹⁶ For example, in its response to the Second Consultation, it explains:

“The Government considers that those who choose to become involved in litigation should have a more proportionate financial interest in the outcome and this should extend to interveners.”

While parties may choose to pursue an intervention, the scope and character of any intervention is ultimately at the discretion of the court hearing the relevant claim. While procedural rules may vary in the High Court, the Court of Appeal and the Supreme Court, in each instance a would-be intervener must make an application to intervene supported by grounds. As we explain in *To Assist the Court*, this will in most cases require an intervener to illustrate that they will bring

¹⁵ See also, Jaffey, B., and Hickman, T., ‘*Loading the dice in judicial review: the Crime and Courts Bill 2014*’, U.K. Const. L. Blog, (6 February 2014). Available at: <http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/>

¹⁶ See for example, Second Consultation, Government Response, page 16.

value to a case not likely to be met by the parties and their contribution will assist the court in its consideration of the case. For example, in the Supreme Court Rules, Rule 15, expressly refers to interventions by individuals with an interest in proceedings brought by way of judicial review, or:

any official body or non-governmental organisation seeking to make submissions in the public interest.

Further guidance is provided in Practice Direction 8, which references the guidance of Lord Hoffmann that:

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything.¹⁷

Although no such specific guidance is given in connection with reasonable intervention in the High Court and the Court of Appeal, it is understood by practice that submissions made must assist the court by adding something tangible to its consideration of the case, in order that such intervention will serve the public interest.

Thus, in the strictest sense, in every case, an intervener is invited by the court to play a role which is defined ultimately by the court.

The Government intends costs to be divided proportionately to the assumption of financial interest in the case. This appears to subvert the role of the traditional public interest intervener, where their involvement has no direct interest for the organisation. In any case, an intervener can neither win nor lose. Instead, their contribution to the case is made in the public interest, to assist the court. They are contributing the cost of their own involvement to assist the court in reaching a conclusion in the case, which is objectively improved by a consideration of the law going beyond the dispute between the parties. In JUSTICE's experience, our interventions generally focus on making good law, consistent with the rule of law, comparative practice and the UK's international obligations.

¹⁷ *In Re A Child (Northern Ireland)* [2008] UKHL 66

- **The public interest in interventions:** The Government recognises that the purpose of most interventions is to serve the public interest by placing information or argument which will add value to a case before the court.¹⁸ It is extremely unusual – but not unknown - for third parties to be granted permission to intervene (rather than be joined) to represent their own personal interests.¹⁹ It is regrettable that neither the Second Consultation document nor the Government's Response attempted to assess or quantify the value to the public interest of interventions undertaken for that purpose. Nor does it consider when an intervention might be beneficial to parties in a case where an intervener addresses issues – such as comparative practice – which the parties might otherwise be invited to consider by the court. The long term benefit to the development of the law of interveners willing to put objectively sourced information and argument before our judges to help ensure that the development of precedent is informed by the wider public interest outside the immediate demands of a case is not explored. Although these benefits may be difficult to quantify in monetary terms, the support of the senior judiciary for reasonable third party interventions is clear. As Baroness Hale recently pointed out:

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. [...]

But from our – or at least my - point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied.²⁰

¹⁸ See for example, Second Consultation, Government Response, page 62.

¹⁹ See for example, *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. In this immigration removal cases, the appellant's 12 year old son intervened to put before the court representation on the impact that removal would have on him personally.

²⁰ Who Guards the Guardians, Public Law Project Conference: Judicial Review Trends and Forecasts, 14 October 2013. <http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians>

Judges have regularly expressed their view – judicially and extra-judicially – that the involvement of third-party interveners in the public interest is beneficial.²¹ In the response of the senior judiciary to the Second Consultation, they explain:

The court is already empowered to make costs orders against non-parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court.²²

In an adversarial system where few resources are allocated towards research facilities and support of our senior judiciary, it is unsurprising that judges, and specifically the senior judiciary, find interventions helpful in determining claims where significant issues of public interest are raised. In this context, it is understandable that the Government was unable to produce any specific evidence in its Consultation of a problem posed by individual interventions, or the role of interveners more generally.

- **The scope of an intervention:** Whether in the Supreme Court, Court of Appeal or the High Court, the scope of an intervention can be controlled by the court, with specific guidance provided by the Supreme Court Rules on the conduct of a reasonable intervener. For example, although the consent of the parties to an intervention is not required, it is always sought before an intervention is pursued. Similarly, the scope of an intervention is expected to be reasonable and proportionate to the value to be added, with specific guidelines offered by the Supreme Court that written submissions should usually be less than 20 pages. It is for the court to decide whether oral submissions from an intervener might assist, and for the court to determine how long those submissions should be. Where an intervener acts unreasonably, it is open to the court to make an order as to costs. We return to this issue below, but the desire to avoid imposing any unreasonable burden on the parties and to avoid increased costs associated with

²¹ *I.A. (Appellant) v The Secretary of State for the Home Department (Respondent) (Scotland)* [2014] UKSC 6 at [25] “Extremely helpful”. Lord Kerr has described JUSTICE’s intervention in *Rahmatullah* as ‘powerful and significant’. <http://www.justice.org.uk/data/files/Rahmatullah JUSTICE PRESS RELEASE FINAL - 311012.pdf> (Lord Kerr)

²² Response of the Senior Judiciary, November 2013, para 37. <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf>

disproportionate additions to a case will be foremost in the mind of a reasonable intervener and their representatives.

30. The JCHR confirms the public value of interventions in strong terms:

Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case. Such interventions already require judicial permission, which may be given on terms which restrict the scope of the intervention. We are concerned that as the Bill stands it will introduce a significant deterrent to interventions in judicial review cases because of the risk of liability for other parties' costs, regardless of the outcome of the case and the contribution to that outcome made by the intervention.²³

31. The Government has given no indication of having considered the practical implications of the costs presumption in Clause 67(2).²⁴ The impact on the initiation of individual interventions aside, the practical implications for the allocation of costs between parties and interveners is yet to be explored. While cases of obvious time wasting by third party interveners are easily addressed under the rules currently in place, how will the court be able to determine whether additional costs are in fact attributable to an intervention? If an intervener acts within the bounds of his permission to intervene, with written and oral submissions made only as directed by the court, will they avoid costs? On the language of "exceptional circumstances" proposed in the Bill, it would appear not. If an intervener provides clear, concise reasoning which clarifies the issues and saves everybody time, will saved costs be deducted from those otherwise payable by the intervener? In fact, it may be the case that, the more useful an intervention, the more costly it will be for the organisation concerned. In any event, the allocation of costs referable to an intervention is unlikely to be straightforward. The implications of this are two-fold – increasing the uncertainty of any potential costs risk for a putative intervener and increasing administrative costs for the court in connection with any intervention it accepts.

²³ JCHR Report, para 92

²⁴ Judicial Review: Proposals for Further Reform, *Consultation Response of the Constitutional and Administrative Bar Association*, [112]. Available at:<http://www.adminlaw.org.uk/docs/ALBA%20JR%20Consultation%2010%202013.pdf>

Clauses 68 and 69: Protective costs orders and the public interest

Proposed Amendments

Clause 68

Page 68, Line 16, leave out subsection (3) (Amendment 75)

Page 68, Line 19, after “judicial review”, insert “or any intervener”

Page 69, Line 3, leave out subsections (9), (10) and (11)

Clause 69

Page 69, Line 30, leave out “must” and insert “may” (Amendment 78)

Page 79, line 1, leave out “must” and insert “should normally”

Page 70, Line 3, leave out subsections (3), (4) and (5) (Amendment 81)

In the alternative, JUSTICE supports the amendments tabled which broadly give effect to the recommendations of the JCHR, including Amendments 75 - 81. We propose an additional amendment which is also proposed by the JCHR.

Briefing

32. The Bill proposes to place the making of Protective Costs Orders (PCOs) on a statutory footing. JUSTICE does not object to codification of this process in principle, although we are not persuaded it is necessary or justified by any evidence that PCO cases are problematic. However, we are concerned that, as drafted, the statute would fundamentally undermine the utility of the PCO to preserve public interest litigation and unduly restrict the discretion of the court to do justice in the limited number of cases where such protection is considered justifiable.

33. These amendments would:

- (a) Allow the court to consider a PCO before permission is granted (in line with current practice);
- (b) Enable interveners to make applications for PCOs (in line with current practice);
- (c) Remove Henry VIII powers which would enable the Minister to revisit the circumstances when a PCO might be available, including when such orders might be in the public interest; and
- (d) Restore the discretion of the Court to consider when a reciprocal order capping the costs of any applicant would be in the public interest (in line with current practice).

34. The JCHR concluded that restricting PCOs to cases where permission for judicial review had already been granted was “too great a restriction and will undermine effective access to justice”. They could not see the “need for the Lord Chancellor also to have the power to change matters to which the court must have regard when deciding whether proceedings are public interest proceedings”. Nor could they see the justification for creating a binding duty to impose a cross-cap in all cases.²⁵

Background

35. PCOs affect a very limited number of cases. This limited number is perhaps explained as PCOs may only be considered in cases where the court determines that there is an especial public interest in the claim being heard.²⁶ In judicial review, and specifically the types of cases in which PCOs are generally sought, the pre-permission hearing costs can be significant. Jaffey and Hickman cite recent instances where the parties have incurred pre-permission costs in excess of £30,000.²⁷ If a PCO cannot be obtained to protect the claimant against the risk of liability for the entirety of unknown and potentially substantial costs, it is very likely that claims that raise issues of wider public interest will not be brought. In addition, the link to permission reflects a misunderstanding of the operation of judicial review more generally. Legitimate claims may settle before permission is granted, securing an effective remedy in practice for the applicant and others and ensuring that a Government decision is retaken within the bounds of the law. Yet, in some public interest cases, without the protection of a PCO, there will be no-one to issue proceedings and no incentive on a wayward Government body or public authority to change its ways. This seemingly minor procedural change could ultimately undermine the purpose of the PCO and its codification.

36. Currently, the determination of whether a PCO serves the public interest remains a matter for the court’s discretion. Following a line of existing case law, the court will consider a number of factors including whether the issue is a matter of public importance and whether the proceedings are likely to proceed otherwise.²⁸ These factors are reflected in Clause 68. Regrettably, Clause 68 provides for the Lord Chancellor to

²⁵ JCHR Report, paras 101, 103, 105.

²⁶ http://www.publiclawproject.org.uk/data/resources/147/PLP_consultation-response_JR_further_reforms_1_11_13.pdf See para 60.

²⁷ Jaffey, B., and Hickman, T., ‘*Loading the dice in judicial review: the Crime and Courts Bill 2014*’ See above.

²⁸ R (Corner House) v Secretary of State for Trade and Industry et seq.

amend the definition of public interest, removing or adding relevant factors in secondary legislation, albeit subject to the affirmative procedure. We can see no justification for permitting the Lord Chancellor to determine the principles applicable to PCOs without the opportunity for full parliamentary oversight. In effect, this measure would displace the power of the court to determine factors relevant to the public interest. If the Bill proposes that this should be the case, Parliament should take full responsibility for setting those criteria. In the majority of cases where a PCO is likely to be sought, a Government Department or public authority is likely to be the respondent.

37. Clause 69 provides for the criteria which the court should apply when considering the terms of any costs cap to be applied to either party's cost liability under a PCO. Again, these broadly reflect a codification of existing rules applied by the courts, including the financial resources of the parties and anyone supporting the litigation and whether the party which benefits from the cap is represented *pro bono*. However, Clause 69(3) provides for the Lord Chancellor to revisit any of these criteria in future regulations, albeit again subject to the affirmative procedure. Changes to these criteria could significantly alter the purpose and scope of any PCO. JUSTICE considers that such changes should be properly subject to parliamentary scrutiny if a new statutory regime is to displace the discretion of the court. The JCHR shares this concern (see above).
38. Clause 69 currently would require the court to make a reciprocal order in every case where a PCO is made in favour of the respondent, to limit the costs recoverable by the claimant in the event that they would win the case. The Government originally proposed that in every case the orders must not only be reciprocal, but mirrored. Existing case law requires the court to consider the necessity for a "cross cap" in every case. JUSTICE considers that the court should retain the discretion to consider when a reciprocal order truly serves the public interest. The JCHR agrees. The level of a PCO is determined in order to ensure that a claimant is able to bring a claim – a claim where there is a public interest in its determination that would otherwise not be brought – and will be set at a level designed to allow the litigation to proceed according to the means of the claimant. The PCO serves the public interest. While a costs-cap ensures that the claimant, benefitting from this exceptional procedure, does not act unreasonably, whether a public body found to have acted unlawfully is to be excused from paying recoverable costs at a reasonable rate raises different public interest questions.

New Clauses – Legal Aid

Amendment 82

Briefing

39. This amendment seeks to restrict the power of the Secretary of State in Sections 2 and 9, LASPO to amend, vary or restrict eligibility for legal aid for services connected with judicial review by secondary legislation.
40. The Secretary of State has recently used delegated powers pursuant to LASPO to remove funding for any judicial review application issued which is not granted permission by the Court. The Civil Legal Aid (Renumeralation) (Amendment) (No 3) Regulations 2014 which give effect to the Government's proposals came into force on 22 April 2014. These Regulations are made pursuant to Section 2, LASPO. This section gives the Secretary of State the power to make arrangements for the payment of "remuneration" for legal aid. Where an application for judicial review is issued, the new Regulations will prohibit the Lord Chancellor for making any payment for legal aid services except in cases where permission is granted, or subject to an ex gratia scheme.²⁹
41. JUSTICE is concerned that this major part of the Government's package of proposals for reform of judicial review was introduced 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.

Background

42. The proposed shift in the burden of risk faced by solicitors providing advice and representation to legally aided claimants in judicial review cases is highly relevant to Parliament's consideration of many of the proposals in this Bill.³⁰ Yet, since these measures will be contained in secondary legislation, Parliamentarians will have no real opportunity to debate the merits of the proposed changes or any proposed alternatives.

²⁹ In light of the nature of judicial review, Parliamentarians may, in due course, wish to consider whether these powers are properly exercised under Section 2, or whether they provide a *de facto* limitation on access to services more properly considered.

³⁰ Also, to Parliament's consideration of numerous other Bills, including for example, the Immigration Bill.

43. The Government has determined 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. The consultation exercise thus far has focused upon this discretion and a promise by the Lord Chancellor that pre-action advice and investigation will continue to be funded, together with any necessary applications for interim relief. JUSTICE considers that these assurances will not resolve the risk which this change will pose to the practice of judicial review. 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 hearing on permission.³¹ 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 actions entirely outside the knowledge and control of claimants or their representatives, the likelihood that a case will proceed to permission or succeed at that stage may shift. 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.³² Yet, despite this risk Parliament is not invited to debate the detail of these proposals.

44. That the scope of the change proposed should be subject to primary legislation is illustrated by the Regulations themselves. Despite commitments made by the Lord Chancellor, they contain very little detail. No clear provision is made to preserve funding for pre-application work, nor for interim relief. No criteria are set for the determination of ex-gratia payments. Perhaps most worryingly, ex-gratia payments are to be made subject to the discretion of the Lord Chancellor with no provision made for independent review or appeal. The implications of this proposal are most stark for cases brought against the Ministry of Justice or its agencies. These and many other concerns raised about the drafting – not the principle – of the changes remain unresolved.

³¹ 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>

³² The Committee 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.

45. The Joint Committee on Human Rights Report on these measures doubted the legality and propriety of the decision to introduce these changes by secondary legislation, recommending that the draft Regulations be withdrawn. It was their view that any changes of this kind should be made by primary legislation.³³

46. In JUSTICE's view, it is clear from the debates on LASPO and the language adopted in the act that these Regulations are outwith the bounds of the delegated powers proposed in the Act as intended by Parliament. However, Peers may wish to use the opportunity raised by this amendment to press Ministers to better explain their view that the Regulations made are lawful. For the avoidance of doubt, Parliament may wish to underline its intention that judicial review claims should remain properly within scope for the purposes of LASPO.

JUSTICE
July 2014

³³ JCHR Report, paras 80 - 82