CIVIL JUSTICE COUNCIL (CJC) RESPONSE -

JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM

Opening remarks

The full Council discussed this issue and the CJC's response to the consultation paper at its meeting on 24th October.

Members were extremely concerned at the nature and potential impact of these measures, which appear to have a very limited evidential basis. The process of judicial review is too fundamental, not just to our system of justice, but to this country's functioning as a democratic and accountable society, that it should be reviewed and only amended with enormous care.

Judicial review has expanded, but hand in hand with the development of society and the law. It can be costly and troublesome for public authorities, but it has a vital role to play in ensuring that decisions by public bodies are properly conducted and lawful. We do not agree with the suggestion in the consultation paper that JR has been hijacked by campaigners out to frustrate or derail public policy-making and economic regeneration.

In our response to the earlier JR consultation in January 2013, we accepted the general move to control those cases which are totally without merit. Our fear is that the current measures will deter highly meritorious cases from being brought, with a range of measures making it procedurally very difficult to bring claims, and highly risky in financial terms.

Responses to individual questions

The CJC has not prepared any answers to questions 1—8 as they concern planning and infrastructure projects, which are not a primary focus for the Council.

Standing

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

This question goes to the heart of the Council's concerns on these proposals and it is hard to square the statement in the paper's foreword that JR is a 'crucial check to ensure lawful public administration' with the proposals on standing. JR is not a private right of action; it is a public law remedy, intended to keep a check on the actions of public bodies.

To seek to move JR from being a matter of public law and into the realm of purely individual rights might be described as a misunderstanding of its primary purpose. Even if this shift were desirable, it would be hard for the court to appropriately define who had a direct interest in the decision – we may not live directly on the route for a new airfield, rail line or road, but we are potential users of those facilities, with an

arguable stake. Further, some decisions that are challenged are yet to have an impact on any individual, as they relate to changes that are yet to take place, and would fall outside the ambit of JR entirely were the rules on standing to be changed.

A balance, of course, needs to be struck. There is not and should not be an unbounded right to pursue a claim for JR; instead, it should remain a matter for the court to decide, based on well-established principles of law. The case for reform is not advanced, however, by the paper's arguments that only 50 or so cases a year are brought by groups with 'no direct interest' in an issue, and that there is a high success rate for such cases. This suggests that the process is used rarely and often for meritorious challenges to public body decision making.

There are significant risks inherent in any move to rebalance the test on standing that threaten the concept of the rule of law.

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

We would be opposed to such legislation being brought forward and the current issue of standing being amended in the way suggested. In the circumstances, we do not support any alternative options.

Question 11: Are there any other issues, such as the rules on interveners, we should consider in seeking to address the problem of judicial review being used as a campaigning tool?

The Council is not persuaded that JR is used in the systematic way that is suggested, as a campaigning tool. See also answer to questions 31-34 on interveners.

Procedural Defects

Option 1 - Bring forward the Consideration

Question 12: Should the consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?

Our understanding is that many defendant public authorities will put up a preliminary 'no difference' argument in their defence case at permission stage, and thus the court would already take it into account at that stage. However, if it is to be brought forward as a substantive issue for determination, the prospect of far more lengthy and complex permission hearings will ensue, with the inevitable frontloading of costs that the paper acknowledges is a real prospect.

It is arguable whether that would save costs on a case in the round, and it raises questions on due process being followed.

Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

It is very hard to see how this would be avoided, which undermines any benefits envisaged by this proposal.

Option 2 – Apply a lower test

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

We are firmly opposed to the imposition of a new statutory threshold as proposed. We consider that it would lead to the courts having to interpret and then define what 'highly likely' constituted in terms of a public body decision making, as opposed to the decision process having an 'inevitable' outcome. That may make for longer and more contested hearings than now with accordant higher costs.

This subjectivity is in our view best left to the courts to assess and determine in individual cases, with primary legislation being something of a blunt instrument in this context.

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

Prevention is better than cure, and ensuring that public body decision making processes are refined and rigorous has a large part to play here, so that proper processes are in place and followed and audited.

Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

No.

The Public Sector Equality Duty and Judicial Review

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

We note this primary legislation, enacted by Parliament has only been in force for just over two years, and we are not aware of a high volume of cases demonstrating the need for this proposal. Indeed, the Government's own review[1] comments that "these JRs would have arisen even in the absence of a PSED".

Constriction of an alternative mechanism for resolving such disputes may simply lead to an additional layer of dispute processes, and undermine existing public authority grievance and complaints processes, which may resolve disputes prior to litigation.

The judicial review process offers a comprehensive and appropriate legal framework for the determination of such claims.

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide this.

No, nothing beyond existing readily accessible data sources.

[1] Review of the Public Sector Equality Duty: Report of the Independent Steering Group (Sep 2013)

Rebalancing Financial Incentives

Paying for permission work in judicial review cases

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

We are very concerned about the detrimental effect on access to justice of this proposal, which would serve to penalise meritorious (even if ultimately unsuccessful) JR applications as much as weak ones. Such applications will have passed the LAA's own merits test, which we consider to be the appropriate and a sufficient level of bar for public funding.

Further, as the figures in the paper help illustrate, the very act of bringing of a judicial review claim can have the effect of making the public body reconsider its decision or agree to a settlement between the parties. Many such claimants would have that avenue closed off.

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.

As we disagree with the overall proposal (see answer to question 19) we do not offer any comments on the proposed criteria.

Costs of oral permission hearings

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

Not in our view. The court has discretion on the award of costs and will exercise it appropriately. This proposal has scope to increase satellite wrangling over costs, especially with totally without merit cases not having rights to oral renewal. In any case, since July this year[2] a judge may certify an application for permission to bring judicial review as 'totally without merit' with the claimants then not having the right to an oral 'renewal' or hearing.

Wasted Costs Orders

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?

We are unconvinced of the need for reform of the Wasted Costs Order system, which has developed over time into a well understood system that of itself helps to regulate professional conduct. No real evidence is put forward for the case for reform in terms of existing cases, and we are not persuaded of the suggestion that a wider scope should be applied. Wasted costs exist to deter or punish the most significant improper, unreasonable or negligent conduct by parties and their representatives – to seek to extend it on a broader scale will invite lengthy and costly challenges and inevitable subjectivity on issues such as what is reasonable and improper.

[2] Civil Procedure (Amendment No 4) Rules 2013

Question 23: How might it be possible for the wasted costs order process to be streamlined?

There are very few such orders made, as the paper notes. Streamlining does not seem possible – any party must be able to defend themselves from a charge of wasted costs and so a process conducted entirely on paper does not seem compatible with the interests of justice, especially given the financial consequences. In any event, such a matter would need to be conducted at the close of the main proceedings, so that the conduct could be considered across the totality of the case.

Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?

Such a fee would add still further to the costs of a case, and the CJC questions its necessity.

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

See answer to question 22 – we would not support any such changes to expand the basis for wasted costs orders beyond the current regime. Also, given this consultation is focussed on judicial review, we would be concerned if wider changes are made to the civil justice system based on the responses to this consultation and without wider input from those with a relevant interest.

Protective costs orders

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

Judicial review is a public law remedy, and it does not seem to us appropriate to stipulate that 'PCOs will not be available in any case where there is an individual or private interest' as the paper proposes. The system that has evolved has done so through case law, with careful consideration of the issues involved. In addition to access to justice, there is a need to balance the public interest with the taxpayer interest.

Our understanding is that PCOs are used infrequently, and as with other aspects of these reforms a strong evidence base is not advanced for this being a significant problem that needs addressing. This system would create a misalignment with the approach on judicial review in environmental cases that could itself be challenged and see more cases labelled as 'environmental' to secure a PCO.

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

The current process involves a form of assessment on the financial means of the claimant, so there is a legitimate question on the source of funds to help make that assessment. However, where a third party is supporting an individual (for example a trade union or a support group) this is normally explicit, and there are already checks

and balances built in to the system to encourage disclosure which we think are sufficient. There is a danger that a body supports a claimant in principle, but not in terms of substantial financial backing. In that case, an access to justice issue might arise if the court assumes that funding, including the payment of the defendant's costs if the case is lost, and does not grant a PCO as a consequence.

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

Although the cross cap approach has been adopted in environmental cases we are not persuaded that it should be adopted across wider JR cases. There is an attraction to the notion that public authority costs should be capped generally in terms of taxpayer liability, but the concern is that it is not conducive to good decision making to remove the court's discretion to award costs against a defendant. If a public body has committed a civil tort, should it be any less liable for having costs awarded against it than other civil litigators?

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

We believe that setting fixed limits for both claimant and defendant would fetter the court's discretion to make costs orders that would be appropriate to the features of the individual case and the means of the parties.

Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

Our understanding is that interveners are relatively rare, and the normal practice is for them to bear their own costs. The CJC is very conscious that sometimes the court will itself encourage an intervention from a professional/expert body, and will benefit from the intervention in making a judgment. Such interventions are only made with the court's consent, in any event, and the Civil Procedure Rules[3] Practice Direction 54 makes clear that such applicants have to comply with such conditions and case management directions as the court may specify.

We are concerned at the issues for justice that may arise – for example, Liberty were reportedly deterred from intervening in the case of *S and Marper* (regarding a DNA database) in the House of Lords in 2004 by the threat of an adverse costs order, but were granted leave to intervene in the same case in the European Court of Human Rights.

It appears to us that given the public interest nature of JR proceedings, the court should retain discretion to make costs orders in respect of the costs of intervening parties. Nor would we support the suggestion that extra legal costs incurred by claimants and/or defendants as a result of an intervening party's raising new issues

[3] Civil Procedure Rules, Practice Direction 54.17, section 13.3

should be seen as making that intervener liable for those costs. If the court sanctions an intervention it becomes part and parcel of the litigation. Such a proposal would deter organisations without substantial means from intervening, and (from a taxpayer perspective) mean public authorities that intervene would be at greater risk of adverse costs.

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

Claimants are not generally required to provide details of how they are funding litigation, unless the nature of the action requires the court to take means into account. The court already has powers to award costs against non-parties, and we do not see any evidence for the current approach to be amended.

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

We do not hold such information.

Leapfrogging

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

This proposal appears to risk a significant redrawing of the boundaries for cases going to the Supreme Court as highest appellate court in the United Kingdom. That court is intended to hear appeals on arguable points of law of general public importance. The selectivity is reflected in the Court's Annual report for the 2012/13 period – 83 appeals were heard, and 259 permissions to appeal received.

The possibility of leapfrogging all cases of national importance or raising significant issues raise the prospect of overwhelming the Supreme Court with work it is not designed for, while bypassing the High Court and Court of Appeal which are designed for such cases (and which often narrow the issues in a case so that the Supreme Court would only consider a particular outstanding point of law).

Another problem would be the highly subjective issue of what constituted a case of national significance or raised a significant issue – for a claimant all issues in their case will be significant. Time saved on leapfrogging may be lost in litigation appealing against the decision to issue the certificate for it.

The Council suspects that even if the criteria is broadened and the judge agrees to issue a certificate, as it is proposed (paragraph 194) that the Supreme Court retain their discretion to refuse a leapfrog appeal, in practice many of these cases will simply return to the High Court of Court of Appeal, but after a delay and extra cost.

Our general understanding, in any event, is that cases involving national security and other important public interest matters are already expedited in the High Court and Court of Appeal.

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

We cannot identify any outside the existing established criteria.

Option 2 - Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

Question 38: Are there any risks to this approach and how might they be mitigated?

The Council can see an argument for parties not being able to veto a leapfrogging application where the intention is only to prevent an early determination of a matter. However, there are issues of due process arguably not being followed. In practice, the suspicion would be that removing consent would simply lead to a number of applications being made to challenge the decision to grant a leapfrogging certificate when the party had not consented.

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

Question 41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?

Yes, assuming they meet the correct criteria (see comments above though on reservations about that criteria being widened). We can see the case for the courts and tribunals in Question 39 being subject to a leapfrog procedure given the importance of the cases they hear.

In relation to Question 41, we oppose this suggestion, which would require primary legislation to amend the Administration of Justice Act 1969. The Council considers that the leapfrogging procedure should be restricted to cases meeting the narrow criteria, and making it applicable to all civil cases would be inappropriate and disproportionate. It may lead to wasteful applications by parties to have cases leapfrogged to achieve a quick decision in a case of no legal note, or to try and cause the other party to incur higher costs.

Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment? The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

This is a little hard to answer as the impact assessments cover such broad topics in a highly subjective manner, and are not definitive e.g. 'it has not been possible to monetise the impact of these reforms at this time'. The estimate of £1-3million being saved as a result of the reforms looks optimistic, given our views on the likely increase in other types of application, many of which would be eligible for legal aid funding. We are also concerned on the impact on court resources.

A disappointing feature of the impact assessment is that nowhere does it address the 'bigger picture' questions that arise from the reform proposals in terms of how these may impact on the ability of the citizen or an organisation to challenge the state's exercise of power, which is a basic tenet of the rule of law. An assessment of those issues should surely form part of the 'costs and benefits' of these proposals.

Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

Given that immigration and asylum cases form such a large proportion of judicial review applications it naturally follows that the proposals will have a disproportionate effect on people whose first language is not English and from ethnic minority communities. This particularly applies in the context of plans for fewer oral hearings.

In addition there are fears that groups with protected characteristics as defined in the Equality At 2010 will be particularly adversely affected – to take people with disabilities as an example – judicial review is a form of redress on challenging levels of care or educational provision.

However, like the Government we do not have hard statistical evidence, just a generally held view that these measures have the potential for a detrimental impact on access to justice and this will be keenly felt by vulnerable groups.