Judicial Review - Proposals for Further Reform Response

By Bates Wells Braithwaite
Introduction

Bates Wells Braithwaite is law firm regulated by the Solicitors Regulation Authority in England and Wales. Our client base islargely made up of charities and non-for-profit organisations, many of whom will be affected by the proposals for further reform of judicial review. We send this consultation response in conjunction with A4ID, who are a global charity that provide legal support to development organisations all around the world.

We have held a roundtable event where we sought the views of organisations affected by the proposals. The event was attended by over 44 representatives of organisations based largely in the third sector. In this response, we have included a summary of the concerns raised by some of the affected organisations.

Judicial Review is one of the cornerstones of our society. It is the mechanism by which individuals and organisations can hold public decision-makers to account and prevent abuses of power. We have concluded that there are significant constitutional repercussions to the proposed reforms, and we urge the Government to rethink their proposals.

There are certain elements of the consultation which do not affect our client base (for example, the issues covered in Q1-8 of the proposals). We have not responded to those sections.

Our specific concerns are addressed below.

1. The proposals stem from a mistaken premise

Various parts of these proposals give rise to a concern that the basis for the reforms is unsound.

(b) “the use of judicial review has expanded massively in recent years”; “there has been significant growth in the use of judicial review”

The Government’s own figures, included in the chart on p8 of the proposals, shows that this assertion is unsustainable. The number of applications for judicial review in criminal cases was virtually static between 2007 and 2012 and there has been a negligible increase in the number of applications for permission for judicial review in civil cases.

There has been a significant increase in the number of applications for permission for judicial review in asylum and immigration matters but, as recognised by the Government in the introduction to these proposals, immigration and asylum cases are soon to be redirected to the Upper Tribunal instead of the Administrative Court. Therefore the only cases relevant to the proposed reforms are the non-asylum and immigration matters, which have not increased in volume.

There has been no significant growth or massive expansion in judicial review that could justify these reforms.
(c) “unmeritorious cases which may be brought simply to generate publicity...judicial reviews are brought by groups who seek nothing more than cheap headlines”

There is no evidence that judicial review is being misused by campaigning groups for publicity purposes. Excluding immigration, asylum and planning cases (on the basis that they are to be dealt with by alternative Tribunals), there were approximately 2300 judicial reviews brought in 2011. Of these, around 50 were brought by voluntary sector organisations, representing only 2% of all non-immigration, asylum and planning judicial reviews, and 0.4% of all judicial reviews. It cannot be concluded from these numbers that such groups are placing an undue burden on the court system. Furthermore, judicial reviews brought by voluntary organisations are disproportionately successful, disproving any assertion that they are misusing judicial review as a means of generating headlines or publicity.

It is worth noting that political controversy is newsworthy, and a source of controversy may be that there are bona fide legal concerns about a policy. Claiming that judicial reviews are the cause rather than a response to political controversy approaches the issue from the wrong direction. There are various recent examples of controversial areas in which there have been bona fide (i.e. not simply publicity-seeking) legal claims including R (on the application of Friends of the Earth v Secretary of State for Energy and Climate Change [2012] ACD 29, R (on the application of Luton Borough Council) v Secretary of State for Education [2011] EWHC 217, and Burnip v Birmingham City Council [2012] EWCA Civ 629. The publicity that these cases generated was a result of the public maladministration they represented, not a result of the litigation that was brought to correct it.

(d) “using court time and public money simply to object to a lawful policy of an elected government...is not acceptable”; “The Government is concerned by the use of unmeritorious applications for judicial review to delay, frustrate or discourage legitimate executive action.”

We are concerned by the implication in these statements that judicial reviews which are ultimately unsuccessful (i.e. it is decided that the decision challenged is lawful) are “not acceptable” or have the intention of frustrating legitimate action. It is of fundamental constitutional importance that there is a means of challenging perceived abuses of power and that the rule of law is upheld, most importantly by the State. There will obviously be situations where a challenge is appropriate but it is ultimately decided that the executive acted lawfully. The issues are often very finely balanced. These examples should not be assumed to be unmeritorious or having been initiated in bad faith. Nor should they be used to justify unwarranted restrictions on access to the judicial review system.

It should also be borne in mind that judicial review claims are frequently about a public body’s failure to follow the guidance or other policy of central government. In many cases judicial review greatly furthers the consistent implementation of central government policy.

2. The proposals fail to take into account the purpose and nature of judicial review

Standing (Questions 9 and 10)

The proposed reforms to standing seem to misunderstand that the purpose of judicial review is to address matters of public interest, not redress private wrongs. Any change to the rule on standing
that emphasizes a direct and tangible interest (amounting, on the proposals as they stand, to a private interest) would distort the focus of judicial review which is and should continue to be publicly minded and forward looking.

In addition, the proposed changes to the rule on standing fail to account for the fact that there are often no individuals with a direct interest in the outcome who can seek judicial review. The current position allows for appropriate organisations to bring a review in those situations. For example, the organization Medical Justice successfully challenged the UK Border Agency’s policy to deport failed asylum seekers with less than 72 hours’ notice (R (on the application of Medical Justice) v Secretary of State for the Home Department [2011] EWCA Civ 1710). There were no claimants with a direct interest who could bring these proceedings because, as a result of the unlawful policy, they were no longer in the country. Another example was the Child Poverty Action Group judicial review last year, challenging the Government’s decision to prepare a national strategy to tackle child poverty without having requested the advice of the Child Poverty Commission. It had never been set up, despite the terms of the Child Poverty Act 2010. If the rule on standing changed in accordance with the Government’s proposals, there would be no recourse to the courts in situations like this.

As a corollary to this point, because NGOs have diverse and wide-ranging experience, necessarily far more so than individuals, they are often well placed to judge which matters raise points of significant public importance, and best merit the scrutiny of the courts. Where individuals see only their own case, NGOs are able to observe patterns of repeated unlawfulness, which collectively can be of great public importance. It then takes only one Court ruling to bring an end to the widespread unlawfulness. This phenomenon can be seen in a huge number of areas, such as housing, social security and public rights of way.

There are also many areas where regulators make decisions in which both regulated businesses and individual citizens have an interest, the OFT (and its successors) being a prime example. Individuals are extremely unlikely to have the appetite and resources to judicially review such decisions, whereas businesses will be quick to bring in specialist legal teams. Without NGOs being able to bring appropriate challenges to such regulatory decisions on behalf of a large number of affected individuals, scrutiny of regulators’ decisions will inevitably become decidedly imbalanced. That outcome would be very much against the wider public interest.

It is a basic public good that public bodies can be held to account, and that claimants are treated equally before the law. The Government’s proposals on standing cannot apply to environmental claims, which are governed by the Aarhus Convention. Introduction of the proposals will therefore lead to an unjustifiable discrepancy in access to justice for claimants on environmental issues and those seeking review of decisions which impact on other important policy areas.

For the reasons above, our response to the relevant questions posed in the consultation are as follows:

*Interveners (Questions 11, 31, 32)*

The government’s attempt to discourage organisations from intervening in cases by imposing additional cost burdens on interveners also suggests a failure to recognize the public focus of judicial review. Where there are important matters of public policy which go beyond the particular interests of the parties to the claim, interveners bring expertise which assists the court’s consideration of the matter. Far from being a drain on the court’s time and resources, interveners draw attention to the wider implications of a decision and expedite the judge’s decision-making on those issues.

We acted for the People’s Health Trust, a charity which intervened in the judicial review raised by Camelot against the Gambling Commission. Without our client’s evidence as to what the good causes money was being put towards and the mechanism whereby the intervening CIC’s controlled
the eventual distribution of this money, the court could, and in our view would had the case not been refused on timing grounds, have been substantially disadvantaged in its decision making. Our client stood its own costs alone – faced with the potential costs of the other parties, one of which was Camelot and spending a considerable sum on its legal team, this intervention would not have happened.

Thus, the creation of additional costs risks for interveners would discourage their participation in proceedings and reduce the quality of the judgments that result from important judicial reviews. We note that in practice interveners are very rarely awarded costs in their favour and believe that restricting the court’s ability to decide when costs should, unusually, be awarded is excessive and unnecessary.

Recent important and helpful examples of intervention by voluntary sector organisations include Age UK, intervening in the case involving a woman refused overnight care, which went to the Supreme Court; Refugee Action’s intervention in a claim by an individual who was a failed asylum seeker, challenging the provision of support where the person was at risk of being destitute, while their renewed asylum application was being considered.

*The constitutional role of the courts in holding public authorities accountable*

Judicial review is the practical expression of the fundamental constitutional tenet that executive organs should be subject to judicial oversight to ensure the lawfulness of their actions.

The reforms that the government proposes represent a significant restriction on the ability of the judiciary to perform this function by removing certain decisions from the remit of the courts (i.e. any decisions in which there are no persons with direct interest who can bring a claim; any decisions where the persons with direct interest do not have the funds to risk costs exposure in the absence of PCOs; any decisions in which there has been a breach of the public sector equality duty etc.). If implemented, this would represent a major rebalancing of the British constitution in favour of the executive, which would have long-lasting consequences on the ability of civil society to prevent and respond to abuses of power.

The lessons of history tell us that mechanisms whereby there can be a check on abuse of power once removed are rarely put back. Future governmental regimes are unlikely to want to increase the ability of challenge. Cutting into the rights to judicial review would be likely to last for generations to come.

### 3. The judicial review system contains existing adequate safeguards

The public implications of judicial review are well-recognised and the current system contains extensive safeguards against abuse.

Parties to judicial review must engage with a pre-action protocol before proceedings are issued, and it has been our experience that public bodies often reconsider their decision at this stage, removing the need for litigation to continue even where there has been a legitimate challenge. We act for the Ramblers and have many examples of decisions being quashed on the basis of pre-action letters which lead to concessions by the Secretary of State. A recent example involved an unlawful decision taken by the Secretary of State in refusing to designate the Isle of Wight as part of the Coastal Path (incidentally, this is likely to have been one of those cases in which there would have a difficulty in any individual taking this action if the rules on standing are changed).

Removing the ability of voluntary sector organisations to bring judicial reviews would restrict the concomitant pre-action engagement with Government and other public authorities and would result
in the persistence of unlawful decisions which are currently rectified at this stage.

In addition, the existing rules for standing and permission provide a safeguard against vexatious claims. The sufficient interest test that is applied ensures that only proper claimants can bring a judicial review, taking into account the intrinsic public element of judicial review. The unique requirement for permission, coupled with the Mount Cook principle that awards a defendant the costs of drafting their acknowledgement of service if the claimant is refused permission, acts as a disincentive to hopeless cases and a proper hurdle for all claimants to cross. The court has ultimate discretion to ensure that claimants who bring entirely unwarranted claims face heavy adverse costs awards for doing so.

In combination, these features of the existing judicial review system represent significant and appropriate safeguards against any abuse of the system. They strike a proper balance between access to justice and prevention of unmeritorious claims, which would be undermined by the proposed reforms.

4. The proposed reforms fail to distinguish between good and bad claims

Notwithstanding our opinion that the Government is overstating the volume and impact of unmeritorious cases, we are deeply concerned that legitimate challenges and challengers would be affected by the reform intended to discourage unmeritorious or vexatious claims. The Government’s proposals will have the effect of preventing important claims being brought and limiting the ability of the public to hold public authorities to account.

Protective Costs Orders (Questions 26-30, and 34)

The proposed changes to Protective Costs Orders, if introduced alongside the proposed standing reforms, would result in a Catch-22 situation where any claimant with standing to bring a claim would be excluded from the PCO regime. Above this, we are concerned that the proposals would subvert the purpose of PCOs, which were introduced as a means of “levelling the playing field” so that claimants with limited funds would be able to pursue legitimate claims in which the court is satisfied there is strong public interest. With reduced access to PCOs, parties with limited funds would be prevented from bringing legitimate judicial review claims by the fear of the possible cost implications. We are already concerned about NGOs with limited means but good claims being priced out by the costs risk. Reducing the number of judicial reviews by deterring all but the wealthy, regardless of the merits of the claim and the public interest involved, would be a deeply retrograde step.

The Public Sector Equality Duty and Cases of Procedural Defect (Questions 12-18)

The amendments the government proposes to the requirement to have “due regard” to the public sector equality duty and to the assessment of cases raising a procedural defect will seriously limit the ability of claimants to review flawed public decisions. Contrary to the assertion in the government’s report, review of decisions based on a breach of the public sector equality duty or a procedural defect does result in substantively different decisions (e.g. R (on the application of Kaur) v Ealing Borough Council [2008] EWHC 2062 in which the Southall Black Sisters secured funding following reconsideration of a decision whose racial impact had not been properly assessed). The permission stage is not the appropriate time to assess the comparative probabilities of different outcomes of the case. There would be significant cost and time implications of doing so, and there would tend not to have been appropriate disclosure for the issues to be properly assessed. This proposal would have the result of ultimately good claims being barred from proceeding.
We do not accept the government’s position that public bodies “adopt an overly risk averse approach to managing legal risk”. Public bodies are legally accountable for their decisions and it is appropriate that they should be concerned that the decisions they make are lawful. Reducing the legal weight of the public sector equality duty will lead to more discriminatory decisions being made (just as limiting the people who have standing to challenge decisions will lead to more unlawful decisions being made). The incentive provided by the risk of judicial review proceedings to ensure legality of decisions should be preserved. It is vital to recognise that the equality duty is not about ‘box ticking’, but in many cases goes to the heart of high quality and lawful public decision-making.

5. The equality impact of these proposals

We have serious concerns about the equality impact of these proposals. By definition, the public sector has more impact on the most vulnerable in our society, by reason of their greater dependence on state services e.g.: the poor, disabled, the elderly etc.

In relation to the proposed changes in interveners’ costs: this will not constitute a barrier to intervention on the part of business and other wealthy interests. However, it will seriously undermine the ability of third sector organisations to intervene and as such will have a disproportionate effect on the protected or otherwise vulnerable groups who are represented by voluntary sector organisations.

Restricting funding for judicial reviews which do not receive permission will have the effect of putting many specialist lawyers out of business. We believe this to be a draconian proposal which fails to recognise that:

- the question of granting permission may be finely balanced (indeed, there are cases where a judge refuses permission but the Court of Appeal grants permission; if judges are not always right about the granting of permission, it is excessive to expect lawyers to be); and
- permission is often not granted because a settlement has been reached before permission is considered, or some other event (e.g. a higher court judgment that resolves the issue in favour of the claimant) has rendered the claim academic.

If these fee-restricting proposals are introduced and the number of specialist lawyers in practice is consequently reduced, we are concerned about the effect this will have on our clients’ ability to access lawyers and bring claims. Our clients have protected characteristics and we believe the negative effects on them and others sharing their protected characteristic would be disproportionate.
Conclusion

In summary, our answers to the Government’s questions are as follows.

**Q9** 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? No. We believe that application of the current sufficient interest test is an appropriate method of determining whether a person or organization is properly placed to bring a judicial review.

**Q10** If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? No. For the reasons detailed above, the proposed alternatives misunderstand the purpose of judicial review and would disrupt its proper use.

**Q11** 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? No. We do not accept that judicial review is being inappropriately used as a campaigning tool. The proposals in relation to the rules on interveners would be detrimental for the reasons detailed above.

**Q12**: 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? No. There has often not been sufficient disclosure at this stage for a proper assessment of “no difference” to be made, and this proposal would increase the time and cost of permission hearings.

**Q13**: 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? For a proper “no difference” consideration to be made, a full dress rehearsal of the final hearing would inevitably occur. This is a major reason we oppose bringing forward the time that this argument is made.

**Q15**: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects? Procedural defects in decision making render that decision unlawful and, as detailed above, reconsideration of the decision often makes a substantive difference. We do not agree that the Government should be limiting the right to judicial review when there has been a procedural defect.

**Q17**: 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. The PSED is and should continue to be an enforceable legal requirement of any public decision making. It is appropriate that breach of the PSED can be challenged in the courts by way of judicial review. We do not agree that an alternative mechanism should be introduced.

**Q26**: 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? If this is introduced alongside the proposed changes to the standing rule, it will mean that in any case in which a claimant has standing, they will not be entitled to a PCO. This would severely restrict the ability of claimants to bring judicial reviews by exposing them to a financial risk that they are unable to bear.

**Q27**: 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? The existing purpose of PCOs is to reach this balance, and we believe that it is achieved.
Q30: Should fixed limits be set for both the claimant and the defendant’s cross cap? If so, what would be a suitable amount? No. The judge considering the case is in the proper position to decide on what the suitable cap should be.

Q31 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? Ordinarily, interveners do stand their own costs. Judicial discretion over the matter of costs is the correct and proper approach.

Q32 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? No. Judges currently have discretion over the award of costs and this should be maintained. Interveners provide valuable input to cases where matters of significant public interest are in play. Increasing the costs risk of intervening will restrict the ability of expert voluntary sector organisations to contribute to important cases and will diminish the quality of judicial decision-making on these matters.

In summary, we have grave concerns about the potential impact of the Government’s proposals for further reform of judicial review and its impact on our society. In particular, it is our opinion that the proposals:

- Stem from a mistaken premise
- Fail to take into account the purpose and nature of judicial review
- Fail to recognise the existing adequate safeguards in the system
- Fail to distinguish between good and bad claims
- Have a disproportionate effect on members of protected or otherwise vulnerable groups.

We urge the Government to reconsider their proposals.