Judicial Review

Proposals for further Reform

Response by Thompsons Solicitors LLP

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

1) Introduction

The *"Proposals for Further Reform"* follow rapidly after the changes introduced in April 2013 and are on top of the proposals contained in the *"Transforming Legal Aid"* consultation.

The government says that the further reforms are intended to address three issues: (i) the impact of judicial review on recovery and growth; (ii) the inappropriate use of judicial review as a campaign tactic; and (iii) the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.

As has become the norm with consultations on legislative change from the Conservative/Lib Dem government, no adequate evidence base is presented for the proposals. Instead, the rationale is simply presented as incontrovertible doctrine. Isolated case studies are all that is presented.

The closure date for this consultation comes in the same week that:

1. the Court of Appeal upheld the judgment of the High Court[1] that the Secretary of State for Health had exceeded his powers in recommending cuts to maternity and emergency services at Lewisham Hospital, a judicial review brought by the campaign group, Save Lewisham Hospital, alongside the London Borough of Lewisham; and

2. the Supreme Court rejected the Secretary of State for Work and Pensions' appeal against the finding of the Court of Appeal in favour of Cait Reilly's judicial review challenging the "back to work" employment scheme under which she had to work for Poundland for nothing[2].

These are perfect examples of why judicial review is so crucial and of why this government is seeking to restrict its availability.

Judicial review is an essential part of the constitutional settlement to adjudicate upon decisions of Ministers acting in excess of their powers. This is no better illustrated than when Ministers, piqued at having their wings clipped, then pursue unmeritorious appeals which are rejected by the appeal courts.

Our response to the consultation questions are confined to the areas in which we practise[2].

[1] R (oao London Borough of Lewisham and Save Lewisham Hospital Campaign) v Secretary of State for Health and others [2013] EWHC 2329
[2] R (oao Reilly and another) v Secretary of State for Work and Pensions [2013] UKSC 68

2) Planning

Q1-Q8:
We do not practise in this area.

3) Standing

The government consultation states that *"the wide approach to standing has tipped the balance too far, allowing judicial review to be used to seek publicity or otherwise hinder the process of proper decision-making"*.

The underlying rationale for the proposal is summarised at paragraph 80 of the consultation document and is a nonsense:

"The concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest. On that basis, judicial review should not be used to undermine this role by putting cases before the courts from individuals with no direct interest in the outcome….".

In seeking to portray judicial review as an affront to parliamentary sovereignty the underlying rationale ignores the essential constitutional role it plays and the very reason for its existence. Judicial review is an essential tool to challenge overbearing, unjust and ill thought out actions of the state . It is all the more important when the State is making sweeping societal changes using the cloak of austerity.

It is the role of parliament to make law but it is essential that judicial review is available and effective so that the executive and public bodies comply with the law in their decision-making, using principally the standards of illegality, irrationality and procedural unfairness.

That underlying rationale also ignores what the courts have held judicial review to be all about namely *"……not at base about rights, even though abuses of power may and often do invade private rights, it is about wrongs-that is to say misuse of public power"*[3] . Judicial review is the rule of law in action-the means of ensuring that public authorities respect the rule of law[4].

And the focus on "wrongs", in terms of the executive and public authorities acting in ways not authorised by parliament, has an important bearing on the issue of standing. That is because of the public interest in ensuring that public bodies (inlcuding the executive) comply with the law[5].

Section 31(3) of the Senior Courts Act 1981 could very easily have used the expression "person aggrieved", which has a close relationship with what is now proposed by the government and was the test for the prerogative orders before judicial review was introduced. But it doesn't, and very deliberately so.

It is not clear exactly what categories of individuals the government intends to include within its proposed more tightly drawn category for the purpose of standing within the description of *"….a more direct and tangible interest….".* In particular, it is not clear whether the government intends that trade unions, other membership organisations and other NGOs should be excluded. If so, we think that this is wholly inappropriate.

[3] Sedley LJ in R v Somerset County Council ex parte Dixon [1998] Env LR 111
[4] Lord Reed in AXA General Insurance Ltd v HM Advocate [2011] UKSC 46
[5] Etherton LJ in Land Securities Plc v Fladgate Fielder [2009] EWCA Civ 1402

The government's evidence seems to be based on the 50 judicial reviews brought by NGOs, charities, pressure groups and faith organisations between the years 2007 and 2011. Not only is this a very small group of claims to warrant such particular attention but it is significant that nearly 50% 0f them - 20 - were successful and as such found to be entirely justified.

The government may not like the judicial reviews that they cite or approve of those who brought them but our highest courts, no known friend to the protestor and made up of those who by any definition would be deemed to be the establishment, have found regularly in favour of those who have challenged the state.

The government (on no empirical evidence) describes judicial review as a barrier to economic growth. But as the government continues with its austerity measures, the need for close scrutiny of executive (and other public bodies') decision-making against the rule of law is ever more important. The Conservative/Lib Dem government says it holds the rule of law sacrosanct and yet by this consultation it seeks to curtail the circumstances in which its own officers can be held to account against that very standard.

Q9: Is there, in your view, a problem with cases being brought when the claimant has little or no direct interest in the matter? Do you have any examples?
We are firmly of the view is that there is no such problem.

Q10: 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?
The test should not be amended.

The general test on standing to challenge EU measures in the Court of Justice of the European Union under Article 263 Treaty on the Functioning of the European Union ("direct and individual concern") is not an appropriate alternative. The judicial supervision by the CJEU of the exercise of powers by EU institutions is not analogous to the supervision of the executive and public bodies by courts in the UK.

The test under section 7(1) of the Human Rights Act ("victim") is also not an appropriate alternative. That is because the essence of the Human Rights Act, like the European Convention, is to protect personal rights. Whilst those personal rights may often be best protected by curtailing the exercise of State power, the focus is nonetheless on personal rights. For reasons already explained, the focus and purpose of judicial review is different.

We are not familiar with the "person aggrieved" test in planning cases. But that was the formulation used when enforcing prerogative powers before the advent of judicial review. To return to it would be going backwards.

The test for the availability of civil public funding is also not an appropriate alternative. For reasons we have already given, the test should not be restricted to private rights, still less rights associated with a benefit for the particular individual.

Q11: Are there other issues, such as the rules on intervenors, the Government should consider in seeking to address the problem of judicial review being used as a campaigning tool?
The idea that judicial review is being used improperly as a campaigning tool – that that is a 'problem' - reflects a subjective view, unsupported by evidence.

We think that executive decision-makers and public authorities should be held properly to account against the standards they say that they adopt. The Secretary of State for Health and the Secretary of State for Work and Pensions have been held to account in exactly that way this week, and rightly so. We don't think that the government should be considering the rules on intervenors, or any other rules, as a means to curtail the extent to which decision-makers are held to account.

4) Procedural defects

The government claims that judicial review can be used too often to delay perfectly reasonable decisions or actions. The complaint of delay only stands if the challenge is found to have been [unjustified]. The Lewisham Hospital and Cait Reilly' judicial reviews will have resulted in delay but the delay has been to actions of the State that the courts have found were [unreasonable] in the first place. The issue in both those cases is not now one of delay but of compliance with the rule of law.

There already exists a sophisticated set of principles for dealing with the extent to which correction of a procedural flaw would have made any difference. Remedies are, in any event, in the discretion of the court.

Judicial reviews relating to lawful decision-making should not get past the permission stage. It is only in cases where the decision-making is not lawful (and is not therefore "perfectly reasonable") that the "no difference" rule applies.

The "no difference" test is also necessary to accommodate other essential principles of public law. It is virtually never appropriate for the court to investigate the substantial merits of the decision subject to review. Dilution of the "no difference" test would mean that there would be greater need for the court to investigate those merits.

It is almost always gong to be procedurally convenient for issue of remedy to be dealt with at the conclusion of the proceedings.

Q12: Should consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?
No. This would lead to increased expenditure of time and resource (including by the courts) before it is known whether the case is to be granted permission. The proposal would also incentivise Defendants to make "no difference" arguments (or arguments based on whatever lower threshold the government introduces) in their Acknowledgments of Service . This will lead to greater need for consideration by the Judge at permission stage, more oral hearings and more of the delay that the government professes to abhor.

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 extra costs to the proceedings?
We think there is every risk that is what will happen and therefore the only way to avoid this is not to make the change suggested.

Q14: 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?
No.

Q15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?
Our view is that it is inappropriate for the government to consider measures intended to reduce claims brought on the basis of procedural defects. Procedural fairness and compliance is one of the three main pillars of public law. It is one thing to consider the limited categories of claims which may be affected by variants on the "no difference" principle. It is quite another to suggest that the impact of claims based on procedural defects across the board should be reduced.

Q16: 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 (eg cost or delay)?
No.

5) The Public Sector Equality Duty

Q 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.
No. It is essential that the disputes concerning the PSED remain fully justiciable and the Administrative Court is the appropriate forum.

Q18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide it?
We do not have any such evidence.

6) Rebalancing Financial Incentives

Lord Jackson's review of the costs rules in 2009 recommended that there be no change to the special treatment of costs in judicial review claims. The government accepted that review in full and has produced no evidence as to why that position should now be altered.

There are many reasons why a distinct costs regime is appropriate. These include: (i) that a Claimant will be facing a decision-maker with very extensive legal resources; (ii) the very nature and purpose of judicial review; and (iii) the very short timescales for commencing proceedings which make no specific provision for pre-action disclosure.

Q19-20:
We do not have relevant experience in this area.

Q21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?
No.

Paragraph 8.5 of CPR Practice Direction 54A is clear in providing that neither the Defendant nor any other interested party need attend a hearing on permission unless the court directs otherwise. It is a matter for the Defendants and any interested party as to whether they wish to attend. The "exceptional circumstances" factors listed in the Mount Cook[6] case are perfectly adequate.

Q22: 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 do not believe that the provisions relating to Wasted Costs Orders should be changed.

We endorse the comments made by the Public Law Project[7] in relation to these proposals. In summary, these are:

- It is unclear why there is a need for reform of the current system of WCOs and no evidence is provided to illuminate this;

[6] R(Mount Cook Land Ltd) v Westminster City Council [2013] EWCA Civ 1346
[7] In their briefing paper on the consultation, Public Law Project October 2013

- The courts have made it clear that there are important public policy reasons why pursuing a weak case should never-for that reason-result in a WCO; and
- The proposal will have a disproportionate and unfair impact on judicial review claimants of limited means.

Q23-Q25:
See answer to Question 22.

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?
We do not believe that the provisions related to PCOs should be changed.

We endorse the comments made by the Public Law Project in relation to these proposals. In summary, these are:

- The courts have recognised that PCOs are needed so that cases can be brought in the public interest, where the claimant might otherwise be put off by the risk of an adverse costs order if they lose;
- A body of case law has been developed by the courts establishing a comprehensive set of principles that govern when and how PCOs are made;
- The "private interest" test that the Government wants to introduce has been widely criticised; and
- The proposal has not been shown to be proportionate;
- NGOs would be in an invidious position.

Q27-30:
See answer to question 26.

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?
We do not believe that the provisions related to the costs of third part interventions should be changed.

Again, we endorse the comments made by the Public Law Project in relation to these proposals. In summary, these are:

- There is no evidence that interventions generally add much cost if at all to the overall costs of the case;
- Courts have a wide discretion as to the terms on which they allow interventions; and
- An intervenor may have particular expertise to contribute to a case either in specialist legal arguments or in evidence they can provide.

Q32-34:
See answer to Question 31.

Q35-41:
We comment on these proposals only insofar as they relate to appeals from the Employment Appeals Tribunal.

We can see some merit in extending the ability to initiate leapfrog appeals to the Employment Appeal Tribunal. It is possible to identify many cases which come upwards through the Employment Appeal Tribunal on a course which will almost inevitably lead to the Supreme Court. But we think that this prospect, and any proposal to extend the ability to initiate leapfrog appeals more generally in civil claims, is not an issue for consideration in a consultation about judicial review.

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