SUMMARY OF GOVERNMENT'S RESPONSE TO CONSULTATION OF JUDICIAL REVIEW

by Jill Crawford, convenor of UKELA's environmental litigation working party

On 5th February the Government published its response to the consultation on changes to judicial review. On the same day the Government the Criminal Justice & Courts Bill was introduced to the House of Commons. The Criminal Justice & Courts Bill sets out the proposed changes to be implemented to judicial review proceedings in Clauses 50 – 57 of the Bill. The second reading of the Bill took place on 24th February and was passed without division. It will now be considered by a public committee.

KEY ISSUES

- Planning chamber to remain in the High Court

- A lower threshold for the "no difference" test. From now on, the court can refuse permission or a remedy in a case where the alleged failure was 'highly unlikely' to have made a difference (see clause 50 of the Criminal Justice and Courts Bill).

- Government has backed down on any changes to Standing. The Government has said that whilst it is clear that the current approach to judicial review "allows for misuse" "it is not of the view that amending standing is the best way to limit the potential for mischief" and that "the better way to deliver its policy aim is through a strong package of financial reforms to limit the pursuit of weak claims" and "reforming the way the court deals with judicial reviews based on procedural defects". Although the "strong package of financial reform" does not as yet impact upon environmental cases it is clear from the consultation that the Government may well review this and are currently awaiting a decision from the European Courts of Justice.

- No changes to Local Authorities right to challenge

- Extending the scope of leapfrogging appeals for cases that are of national importance; raise significant issues; or involve a point of law that is of general national. Such cases will be transferred straight from the High Court or Upper Tribunal to the Supreme Court, by-passing the Court of Appeal. The parties to proceedings will not need to consent to this.

- Introduce a permission filter in challenges under section 288 of the Town and Country Planning Act 1990

- Strengthening the implications of receiving a Wasted Costs Order by placing a duty on the courts to consider notifying the relevant regulator

and/or the Legal Aid Agency when one is made;

- Setting out the circumstances in which a court can make a Protective Costs Order in non-environmental judicial reviews to ensure they are only used in exceptional cases;

- Establish a presumption that interveners in a judicial review will have to pay their own costs and any costs that they have caused to either party because of their intervention. Whilst the Government acknowledged that "interveners can add value, supporting the court to establish context and facts" this new clause to the bill will no doubt put off a party intervening and this could have a detrimental effect upon judicial review proceedings as even by the Government's own admission "interveners can add value, supporting the court to establish context and facts".

- Introducing new requirements for all applicants for judicial review to provide information about how the judicial review is funded in the courts and Upper Tribunal.

- Relevant clauses of the Bill are 50 – 58. Clause 58 has been described by the Guardian as the usual Henry VIII clause which allows Chris Grayling to basically make such amendments as he sees fit.

A SHORT SUMMARY OF GOVERNMENT RESPONSE

Planning

The consultation proposed establishing a new **Planning Chamber** in the Upper Tribunal, building on the recently established Planning Fast Track (PFT) in the Administrative Court. This has now been abandoned by the Government and instead there will be a new planning chamber within the High Court. Details of the PFT and revised time limits were set out at paragraphs 40–44 of the consultation document.

Permission filter for section 288 Town and Country Planning Act 1990 challenges

Section 288 of the Town and Country Planning Act 1990 provides the only mechanism by which an aggrieved person can challenge certain planning orders, decisions and directions. Challenges may be brought in the High Court on the basis that the order or action concerned was beyond the power conferred by the Act, or that the procedural requirements in relation to the order or action were not complied with.

The Government proposes to introduce a permission filter for these challenges. This would mean that leave of the court would be required for a challenge to be brought, echoing the approach for judicial reviews and restricting how far weak cases could progress. The Government maintains that a majority were in support

of this change on the basis that it would help reduce the burden of weak claims.

Local authorities challenging infrastructure projects

The major infrastructure planning regime is the process through which Nationally Significant Infrastructure Projects (NSIPs) relating to transport, energy, waste, waste water and water get planning permission and other consents.

The Government was persuaded by respondents not to make any changes and to continue to allow challenges to be made by local authorities to NSIPs. The senior judiciary noted that local authorities are already constrained in statute over whether and how they can bring a challenge; and that where local authorities do bring a judicial review it is usually well founded.

Funding for challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

At present legal aid is not generally available in respect of planning cases or statutory challenges under sections 288 and 289 of the Town and Country Planning Act 1990 other than where an individual is at immediate risk of losing their home as a result of the proceedings in question. In the consultation the Government asked whether legal aid should continue to be available (in scope) in those situations, or whether it should only be available where a failure to fund would result in breach, or a risk of breach, of the legal aid applicant's ECHR or EU rights.

The Government has decided not to seek to remove legal aid for these challenges at the present time but intends to introduce a permission filter in section 288 statutory appeals (in line with the filter which already exists in section 289 appeals).

Standing

The present test for standing, set out in section 31 of the Senior Courts Act 1981, requires a claimant to demonstrate a "sufficient interest in the matter to which the application relates".

The suggestion to change the current rules on Standing was largely opposed, particularly by lawyers and their representative groups and NGOs, who argued that claims brought by groups or organisations without a direct interest in the outcome should continue to be possible. Many respondents argued that a change would impact upon meritorious claims which hold the executive to account where it has acted unlawfully, and therefore shield the executive from challenge. There were further arguments that a direct interest test would alter the purpose of judicial review, moving the focus from challenging public wrong to protecting private rights.

The Government was persuaded not to make any changes to the current test on Standing but instead maintained that it would

Procedural Defects

At present, the court may refuse to grant permission or award a final remedy on the basis that it is "inevitable" that a complained of failure would not have made a difference to the original outcome.

The response particularly by legal practitioners had concerns about these proposals for example amending the test would see valid claims and substantive illegality not ventilated or remedied and would encourage public authorities to behave unlawfully, with potential implications for claimants' confidence in the effectiveness of judicial review, the court would stray beyond the present focus of judicial review, which concerns the lawfulness of the procedure, to consider the merits of the original decision.

The Government maintains that it is satisfied that the risk of dress rehearsals is manageable, and that the new test is a reasonable one, given that where there is anything more than minor doubt as to whether there would have been a difference the courts would still be able to grant permission or a remedy.

Public Sector Equality Duty and Judicial Review

The Public Sector Equality Duty (PSED) requires public authorities to pay due regard to its three limbs when performing their public functions. If it is felt that a public authority has failed to comply with the legal duty this can form a ground for bringing a judicial review. The consultation sought views on whether there were any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review.

The Government Equalities Office, which is responsible for equality strategy and legislation across government, is considering the results of the consultation (see summary at

Financial Incentives

The Government intends to bring forward a tough package of reform to financial provisions in respect of judicial review to deter it alleges weak claims from being brought or pursued.

Legal Aid – paying for permission work in judicial review cases

The Government proposed that providers should only be paid for work carried out on application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission to the Court of Appeal) where permission is granted. Following responses to the

Transforming Legal Aid consultation, the Government also proposed permitting the Legal Aid Agency to pay providers in certain cases which conclude prior to a permission decision.

The Government considers that it is appropriate for the financial risk of the permission application to rest with the provider and to use the permission test as the threshold for payment. It is proposed that cases which proceed beyond the permission stage will continue to be paid, regardless of the eventual outcome, and providers will continue to be paid for pre-permission work, whether or not the case is granted permission.

Government will enable the Legal Aid Agency to pay in meritorious cases which conclude prior to a permission decision and, in light of the comments made, will adjust the criteria – or factors – which will be in legislation and which the Legal Aid Agency will apply.

Costs at oral permission hearings

A person seeking to bring a judicial review requires permission from the court to proceed. If that permission is refused on their paper application they are able to request that the decision is reconsidered at an oral hearing. At present, where the claimant is refused permission at an oral hearing, a successful defendant's costs of being represented will only be awarded against the unsuccessful claimant in exceptional circumstances. However, Government intends to revise these rules so that such awards are routine, but this will still be subject to the court's general discretion on costs.

Where an oral permission hearing is successful costs will not be awarded against a party at that stage but will fall to be determined at the end of the substantive hearing. The courts will still have a general discretion in this area, to ensure justice is done. The Government will invite the Civil Procedure Rule Committee to introduce a principle in the Civil Procedure Rules that the costs of an oral permission hearing should usually be recoverable.

Wasted Costs Orders (WCOs)

Where a court makes a WCO it has the effect of making a legal representative personally liable for some of the costs of litigation which they have caused unnecessarily by their improper, unreasonable or negligent behaviour, and which it is unreasonable to expect the litigant to meet. But WCOs are only issued rarely – between March 2011 and June 2013 only around 50 such orders were made – and the Government wished to test in the consultation whether they could be used more effectively.

At present, the Government is content that the best way to improve WCOs' effectiveness is not to amend the existing test, but instead to strengthen the implications for the legal representative where one is made. In many situations

where a WCO is awarded, professional negligence will be at issue and, as many respondents pointed out, independent regulatory bodies should have a role in these situations.

The Government intends to place a duty on the courts in legislation to consider notifying the relevant regulator and, where appropriate, the Legal Aid Agency, when a WCO is made. This duty will apply in respect of all civil cases, not only judicial reviews.

Protective Costs Orders (PCOs) (non-environmental cases)

PCOs protect the unsuccessful claimant – and sometimes a defendant – against some or all of the other side's costs. Developed by the courts, PCOs were originally intended to be exceptional (although this is no longer an explicit requirement) and have the effect of shielding the claimant from some or all of the financial consequences of their decisions.

Concerns were raised about the Governments proposed changes to the rules and in particular removing the ability to award a PCO where there was a private interest, since judicial review is about public wrongs and the proposed reform would leave NGOs and similar groups unable to challenge public interest cases as the potential costs were prohibitive. The point was made that the courts are experienced in balancing private and public rights.

PCOs changes are to be made to ensure that PCO's are reserved for cases where there are serious issues of the highest public interest in cases granted permission and which otherwise would not be able to be taken forward without a PCO. The Government is also persuaded that it is right to ensure that where a PCO is granted to a claimant, the court also caps the defendant's costs, ensuring that the taxpayer has cost protection to ensure that costs overall remain within reasonable limits.

Although the consultation did not suggest any change to PCOs in environmental cases which fall under the Aarhus Convention and the Public Participation Directive, some respondents supported a more restrictive approach to costs protection in environmental cases. The Government is awaiting the outcome of proceedings before the European Court of Justice but, once the outcome is known, intends to examine whether the approach to PCOs in environmental cases should be further reviewed.

Interveners

The consultation looked at whether the revision for the award of costs against parties who choose to intervene in proceedings could be strengthened so that they would bear both their own costs and those of the parties which result from their intervention.

There was limited support for making interveners bear other parties' costs. Concerns were raised over whether this would prevent interveners from being involved in cases, the point being made that this could be to the detriment of the final outcome of the case as interveners bring expertise from which the court and parties will benefit.

The Government still 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.

Non-Parties

The consultation looked at whether the courts should be given greater powers to identify non-parties and ensure that they cannot avoid liability for the costs they should meet.

Having considered the responses, the Government is satisfied that the courts should have greater powers to identify non-parties in order to have the necessary information to make effective costs orders under their existing powers. The senior judiciary argued to this effect in their response to the consultation.

Leapfrogging

Leapfrog appeals are cases which move direct from the court of first instance to the Supreme Court, missing the Court of Appeal. The current approach requires that a case involves a point of law that is of general public importance, and which either relates to statutory interpretation that has been fully argued or is one where the court of first instance would be bound by a superior court. Both the court of first instance and a Committee of the Supreme Court have to agree before a leapfrog can take place, and both parties must also give their consent.

The Government's view is that some cases which it is clear will not end in the Court of Appeal but will involve a further appeal to the Supreme Court should get there more quickly. Therefore the Government intends to make the three changes to the present arrangements to extend the potential for leapfrog appeals:

- allowing a case to leapfrog if it is of national importance or raises significant issues;
- removing the requirement for all parties to consent; and
- allowing leapfrog appeals to lie from decisions of the Upper Tribunal, Employment Appeals Tribunal and Special Immigration Appeals Commission.

These proposals would apply to leapfrog appeals in civil and administrative proceedings generally, not only to appeals in judicial reviews.

Equality Impacts

The consultation set out the Government's obligations under the Equality Act 2010, and specifically the requirement to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics.

It was argued by several respondents that, as the majority of judicial reviews relate to immigration and asylum cases, it was reasonable to assume that the proposals (with the exception of planning) had the potential to have a differential impact on the characteristics of race and religion/belief. The Government recognises that this may be the case, but as the effects of the proposals will be felt only on weak cases it does not accept that the impact will be adverse or that the policy is wrong.

Having had due regard to equalities issues, the Government's view is that it is justified in moving forward with its reform package. It considers that its proposals will limit abuse and affect weak cases whether or not they are brought by those with protected characteristics, not strong cases (including those properly to be considered as in the public interest). The Government has concluded that the benefits of reform are sufficient to justify the potential impacts and, for these reasons, believes that its duties under the Equality Act 2010 have been fulfilled.

The Bill, and the accompanying documents which can be found on the Parliamentary website – http://www.parliament.uk/business/bills-and-legislation/ – set out the detailed form of the reforms.

The Government also intends to work with the Civil Procedure Rule Committee, the Tribunals Procedure Committee and the senior judiciary to urgently take forward:

- the establishment of a new Planning Court; and
- costs to be awarded more often at oral permission hearings.

The Government intends to introduce the proposal in relation to payment for legally aided judicial reviews in secondary legislation in spring 2014.

Consideration of the results of the consultation questions on the Public Sector Equality Duty as part of work to implement the recommendations of the Independent Steering Group will be taken forward by the Government Equalities Office.

The consultation also set out that the Government intends to review the rules on PCOs in environmental cases, to ensure that there is no gold-plating in how the Public Participation Directive has been implemented. This work will be done once we have the judgment of the European Court of Justice.