Ministry of Justice

Judicial Review: Proposals for further reform

A response by the Association of Personal Injury Lawyers

November 2013

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

We welcome the opportunity to comment on the Ministry of Justice's further recommendations for reform of the judicial review process. Judicial review is an important tool in bringing the government to account, ensuring that the decision making process is carried out fairly and justly. We believe that this consultation is founded on numerous misconceptions as to how judicial review currently operates, and there is a lack of evidence to support the Ministry of Justice's assertions throughout. To proceed with reform of such an important judicial safeguard, without a full evidence-based evaluation of the perceived problems, is dangerous, for the proper functioning of Government today and in the future.

APIL is a representative membership association: representing those who provide legal services to injured individuals. As such, we may come within the consultation paper's description of "NGOs, charities, pressure groups" etc. If that is the Government's intention, we dispute that as such we have no direct interest in issues of concern to our members and their individual clients.

Note that we only answer those questions falling into our remit in this consultation response.

General comments

The consultation focuses on reform to reduce the number of "unmeritorious" cases. The government has wrongly suggested that unsuccessful cases are the same as unmeritorious cases. Even a judicial review which is ultimately unsuccessful at the final hearing often results in a number of changes or concessions being made before the final hearing, so becoming successful in partly achieving its intended aims..

Further, this consultation makes sweeping statements which are not supported by evidence. For example, at paragraph 157, the consultation states that "PCOs are now therefore being granted in wider circumstances than those envisaged in the *Corner House* case." No examples are offered to support this statement. Judicial review is important in ensuring accountability and fairness in decision making, and there must be sound reasons to interfere with the current system. It is politically dangerous for the Government to dismantle the apparatus which allows oversight of its decision making processes, especially without providing evidence to demonstrate why such changes are necessary.

Standing

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?

There is not necessarily a problem with cases being brought where a claimant has little or no direct interest in the matter. The current law achieves the balance between preventing spurious and time-wasting cases, whilst remaining flexible enough to allow representative bodies, such as APIL, to bring cases on behalf of those who have a direct interest. The judiciary itself recognises that representative organisations play an important role, not as time-wasters, but as respectable bodies, able to bring judicial reviews and challenge the government on behalf of their members if necessary. For example, when APIL applied to bring a judicial review of the Lord Chancellor's failure to review the discount rate, Mr Justice Holman commented that the Association is a "long established body of repute and

authority…" which had "responsibly drew to the attention of the Lord Chancellor the need for a review". If the government intends to prevent representative bodies from bringing judicial reviews, this will increase delays rather than reduce them. Individual members of the representative bodies will instead each bring a judicial review, with funding and assistance from the representative body. This will cause unnecessary delay and a substantially increased cost on the public purse. For this reason, we believe that changes to the rules would generate further litigation, not reduce it.

There is a noticeable lack of evidence to demonstrate the "problems" caused by cases being brought by those without a direct interest. The statistics that are provided do not suggest that there is a problem, instead demonstrating that the number of judicial reviews brought by representative bodies is very small: "around 50 judicial reviews per year have been identified". Further, the consultation then states that those cases, far from being spurious, "tended to be relatively successful compared to other judicial review cases", with around 40 per cent being successful. It appears, therefore, that the government is trying to solve a problem which does not exist.

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?

We do not believe that any of the existing alternatives could provide a reasonable basis for amendment of the test for standing. For example, adoption of the general test of standing to challenge EU measures, as set out in *Plaumann*, is wholly inappropriate for a number of reasons. The EU has a necessarily stricter approach than that required in domestic law, and the stricter approach is justified because of the "complete system of remedies"[1] that is available to the applicant should they fail the standing test.The applicant has a variety of options for redress, which do not apply in domestic law. Further, the current test for standing in EU law is under criticism for being too restrictive. A stricter test in domestic law is therefore not appropriate, and would prevent access to justice.

If any of the existing alternatives were implemented, representative groups such as APIL and AvMa would be prevented from representing their members correctly. Judicial review is a necessary tool for bringing the government to account, and preventing unjust decision-making. Representative bodies, rather than individuals, are often best placed to issue judicial reviews, as they are more aware of the "bigger picture" surrounding the issues and have the funds and resources to do so. Just because representative bodies lack a direct interest does not mean that they bring unmeritorious cases, with the sole aim of delaying the process or wasting time. Even in unsuccessful cases, the government can be forced to rethink their original decision, making amendments or concessions which result in a fairer outcome.

Q11 Are there any other issues, such as the rules on interveners, the Government should consider in seeking to address the problem of judicial review being used as a campaign tool?

The courts' existing powers are adequate, and already prevent unnecessary intervention and deliberate time wasting. APIL has first-hand experience of these powers, having intervened in the case of *Myatt v NCB (Court of Appeal [2006] EWCA Civ 1017),* on general principles

[1] *Les Verts v European Parliament* [1986] ECR 1339

surrounding before-the-event insurance and conditional fee agreements. Although this was not a judicial review case, the same principles governing interveners apply. Lord Dyson, overseeing this case, was very clear to state that permission was granted to APIL only to make written submissions restricted to points of principle. The court's ability to control who can intervene or become an interested party, and how much a part that intervener/party can play, demonstrates that the courts have control to ensure that intervention is not used as a time wasting tool. On the contrary – relevant interventions can be very useful, ensuring the court is sufficiently informed on wider issues of interest to the case in hand. In *Myatt,* APIL intervened because of concerns that the issues in the case relating to the funding of civil cases under CFAs were of importance to litigants in general.

The court has struck the correct balance by allowing relevant interventions which help the correct decision to be reached, and also avoiding deliberate attempts at delay. The government has not provided evidence to the contrary; therefore we believe that the rules on interveners should remain as they are currently.

Procedural defects

Q12 Should consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgement of Service

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?

We do not believe that consideration of the "no difference" argument should be brought forward to the permission stage. This would effectively bring forward the full hearing to the permission stage, leading to increased front-loading of costs and further delays. We cannot see a way to avoid having a full hearing if the "no difference" argument were to be brought forward as suggested.

Further, we believe that there is no need to introduce a more severe test. The courts are capable of applying the test as it is. There is no evidence in the consultation to suggest that change is needed.

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?

The threshold for assessing whether a case based on a procedural flaw should be dismissed should not be changed to "highly likely that the outcome would be the same". The courts apply the test appropriately, in our view, at present.

Q15 Are there alternative measures that the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

We do not believe that the government should be attempting to reduce the number of judicial reviews brought solely on the grounds of procedural defects. Judicial review of procedural defects is still extremely important – even if the decision would have been the same, the government should follow the correct procedures in order to reach that decision. Further,

judicial review on procedural grounds, even if not successful at the final hearing, can result in concessions being made prior to the hearing, and lead to a fairer outcome overall.

APIL brought a judicial review against the government with regard to fixed recoverable costs in cases under the pre-action protocol for low-value personal injury claims in road traffic accidents. Although there was a "no difference" ruling and the judicial review application was refused, the Government's procedures were scrutinised by the court, and prior to the rolled-up hearing, had made concessions which were of benefit to the APIL membership and their individual clients. This clearly demonstrates our view that where the "no difference" rule is applied, this does not necessarily mean that the judicial review application was unmeritorious.

Again, the government has not provided any actual evidence to suggest that there is a real problem here. It would have been helpful if the government had produced figures to show that the change from "no difference" to "highly likely" would make an impact on the number of time-wasting judicial reviews brought.

Rebalancing financial incentives

Costs of oral permission hearings

Q21 Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

At paragraph 139 of the consultation, the government seeks views on the introduction of a principle that the costs of an oral permission hearing should usually be recoverable, and it should be possible for an unsuccessful claimant to be ordered to pay the defendant's reasonable costs of defending the unsuccessful application. We believe that changes to this practice could have unwelcome consequences for charities and other non-governmental organisations.

If, implemented, those organisations or individuals were unsuccessful in their judicial review and ordered to pay the defendant's costs, smaller organisations or individuals could face insolvency. Those who had meritorious claims would be put off bringing a judicial review at all: there would be a chilling effect, which may lead to unlawful or unfair Government decisions being allowed to stand unchallenged. Even an unsuccessful judicial review subjects Government decision making to judicial scrutiny and can lead to concessions and adjustments to the original decision.

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?

Q23 How might it be possible for the wasted costs order process to be streamlined?

Q24 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?

Wasted costs orders are the product of years of case law, formulated by the courts based on substantial judicial experience. We do not believe that the process needs to be streamlined or modified. The current process works well, and should be left unchanged.

Protective costs orders

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?

APIL agrees with the strict principles set out in *Corner House*, in which a PCO would be precluded if a claimant had a private interest or stake in the case. We do not believe that PCOs should be granted for a personal benefit.

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

The principles for making a PCO currently strike a fair balance between the parties; the provision of access to justice; and the interests of the tax payer. It is, in our experience, very difficult to obtain a protective costs order, and modification of the principles is not necessary. Without the support of actual evidence, we cannot agree with the consultation paper's assertion that "PCOs are now…being granted in wider circumstances than those envisaged in the *Corner House* case". In the MoJ web chat on Tuesday 29th October, it was stated that although no official figures are held, internal government figures suggest that there were 17 protective costs orders since September 2010, of which 14 related to environmental cases to which different rules apply. Since September 2010, therefore, only three protective costs orders have been granted under the *Corner House* rules. These figures do not seem to support the assertion that PCOs are being granted in a wider range of circumstances, and that the principles must be modified.

Further, as stated in the consultation document, PCOs are a judge-developed mechanism. PCOs were created because it was felt necessary in the interests of justice.

Q28 What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

The Government states its intention, at paragraph 165, to ensure that the PCO process is more robust and wishes to seek views on whether, when applying for a PCO, it should be mandatory for the claimant to provide details of who is funding the case and a statement of assets including any third party funding. We agree that claimants should provide funding details, and in practice, this generally happens already.

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

Interveners

Q31 Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs in doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

We agree that interveners should, in principle, be responsible for their own costs. Further, non-parties who provide financial backing should be liable for their costs. In practice, interveners and non-parties providing financial backing are already responsible for their own legal costs.