

ILPA information sheet

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Changes to Judicial Review

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In a recent consultation¹, the Government proposed new limitations on access to judicial review, a legal remedy that individuals or organisations can pursue where they believe that a government department or public body (such as the Home Office) has acted unlawfully (and there is no right of appeal). Judicial review is the main mechanism for ensuring that public bodies act fairly and reasonably.

What follows is an outline of the proposals, which should be read together with the proposed changes to the Legal Aid system (see the ILPA Information Sheet on this topic: [Legal Aid](#)). The combined effect of both would be to greatly reduce the ability of both citizens and non-profit organisations to enforce their rights and to hold public bodies to account for wrongdoing.

The Proposals

- *Changes to the rules on 'standing'*

Currently, organisations or groups who believe that a public body is acting unlawfully may bring judicial reviews in the public interest, if they can demonstrate a "sufficient interest" in the matter. For example, the charity Medical Justice was successful in proving that the government policy of removing people from the UK with less than 72 hours' notice was unlawful². This case could not have been brought by any of the affected individuals, as they were being removed from the jurisdiction before they had time to access a lawyer.

The Government is proposing to restrict the right to bring a case ('standing') so that in future groups or individuals who are not directly affected by an alleged unlawful action will no longer be able to bring a claim for judicial review in the public interest. What this would mean in practice is that if no individual directly affected is willing or able to bring the case themselves, then public wrongdoing will be permitted to continue unchecked.

- *Protective Costs Orders*

Generally speaking, if a person takes a legal case and loses, s/he will be responsible to pay for the legal costs of the other side. However where someone decides to bring a case for the wider public benefit, they may be granted some protection from this liability by the Courts, through the making of a Protective Costs Order. This limits how much they have to pay to the other side if they lose. This is important, as without it, those seeking to bring a case for the greater good may simply not be able to take on the financial risk of being liable for the (perhaps very large) legal fees of the other side. The Government is now

¹ Available at: <http://tinyurl.com/nl7rf9e> [accessed 11 December 2013]

² *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

proposing to limit access to this protection, so that anyone who has a “private interest” in the outcome would no longer be given a Protective Costs Order, effectively tying the hands of the Courts.

This proposal would seriously affect the ability of charities and other non-governmental organisations to take cases in the public interest, as they would be caught between the need to demonstrate a direct interest in the matter (to have ‘standing’ to bring the case), and the need to demonstrate that they have no “private interest” in the matter (to get costs protection). There is a tension between the two requirements which risks nullifying the ability of organisations operating in the not-for-profit sector to protect the public interest via the Courts. By their nature, these organisations operate within very limited budgets and in the majority of cases cannot shoulder the risk of having to pay the legal fees of the government body on the other side (who will in most cases have a much larger budget).

- *Changes to Costs*

It is proposed to increase the financial risk for both claimants and their legal representatives, by restricting payment of legal aid in judicial review cases at an early stage of proceedings (prior to permission to apply for judicial review being granted) and by making claimants liable for the defendant’s costs where permission is refused. This will make lawyers more reluctant to take on this kind of work for those without financial means, yet who have meritorious cases which would expose unfair government decision-making.

- *Effects on Interveners*

Only persons directly affected by a given case are normally involved in a given set of legal proceedings. The exception to this is where a third party group, such as organisation with a special interest or expertise in an area, applies to the Court to permit it to “intervene”, that is, to make some comment on the case to assist the Court (usually in the form of written evidence or argument only). The Court has discretion to grant such an application if it considers that the organisation can bring important material to its attention, which would otherwise not be before it. The government now proposes to limit these interventions, by exposing third parties to costs risks in litigation. This would affect organisations such as the United Nations High Commission for Refugees (UNHCR), who has on many occasions been permitted to intervene in leading cases and been commended by the Courts for so doing. This could undermine the quality of judicial decision-making.

Overall

The proposed changes represent a serious attack on the ability of citizens (both individually, and through interest groups) to access the remedy of judicial review, which is the primary, and often the only, means by which the public can hold the executive to account for public wrongs.

The outcome of the Government’s consultation is awaited. ILPA’s response is online here: <http://www.ilpa.org.uk/resource/21180/ilpa-response-to-ministry-of-justice-consultation-on-judicial-review-proposals-for-further-reform-1->