ILPA Briefing for House of Commons Second Reading of the Criminal Justice and Courts Bill, 24 February 2014

The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA has worked with parliamentarians of all parties and none on successive immigration legislation and give oral and written evidence to parliamentary committees since its inception.

ILPA responded to the Ministry of Justice consultation *Judicial Review: proposals for further reform*[1] and our interest in this bill lies in the following proposals:

Part 3: Appeals in civil proceedings
Part 3: Costs in civil proceedings
Part 4 Judicial review

Part 3: Appeals in civil proceedings

This part concerns the leap-frogging of appeals to the Supreme Court. ILPA's particular interest is in **Clause 32,** appeals from the High Court, **Clause 33,** appeals from the Upper Tribunal and **Clause 35,** appeals from the Special immigration Appeals Commission to the Supreme Court. The judge or tribunal judge provides a certificate and a party can then ask the Supreme Court for permission to appeal. That application is to be determined by the Supreme Court without a hearing.

We have no objection to leapfrog appeals where both parties consent and where the permission of the courts is given in the appropriate form[2] provided that the criteria for leap-frogging are objective and uncontentious or that the power is at large. Given the nature of the proceedings before the Special Immigration Appeals Commission we consider it highly unlikely that either the parties would consent or the courts give permission for such an appeal to be leapfrogged.

The clauses do not require the consent of the parties and clause 32 amends the Administration of Justice Act 1969 so that the need for the consent of the parties will be dispensed with in all cases. This we oppose. The parties are giving up a hearing before a court and should not be forced to do this. There are plenty of incentives for the parties to consent, including cost, speed and ensuring that the case is heard by the Supreme Court. Of particular concern would be cases where one party consents and the other does not.

[1] See http://www.ilpa.org.uk/resource/21180/ilpa-response-to-ministry-of-justice-consultation-on-judicial-review-proposals-for-further-reform-1- (accessed 20 February 2014).
[2] See Supreme Court Practice Directions 1, paragraph 1.2.17 and 3, paragraph 3.6.1.

As to matters of case management, there is a risk of lengthy and protracted debate about the merits and demerits of leapfrogging a particular case. Requiring consent is procedurally more straightforward and more efficient.

Although provisions that the application for permission is to be determined by the Supreme Court without a hearing replicate existing provisions in section 13 of the Administration of Justice Act 1969 we do not consider that they are appropriate in cases where the parties have not expressly consented to the leap-frogging and where the criteria for the issuing of a certificate are not objective and not uncontentious.

As to **Clause 32**, we suggest that questions of whether a matter is of national importance may be uncontentious but may in some instances involve political decisions and that it is not therefore a suitable criterion.

As to Clause 33, ILPA's interest lies primarily in appeals from the Immigration and Asylum Chamber although we also have an interest in other appeals that touch on immigration and free movement law, for example in social security appeals that determine certain points of European free movement law.

It is desirable that the issues in a case have been narrowed as far as is possible before they reach the Supreme Court, so that the court can provide a clear, accessible and authoritative judgment that will assist judges, tribunal judges and other decision-makers in the future. There is a risk that without the winnowing that very often takes place in the Court of Appeal, considerable time and expense will be spent before the Supreme Court narrowing issues and clarifying questions. We recall Lord Neuberger's warning:

> *…we Judges could do better…We are often pretty prolix. … when Judges deal with the law, we are often setting out principles which strangers to the particular case, lay people, lawyers and other judges, should be able to understand and apply. We seem to feel the need to deal with every aspect of every point …and that makes the judgment often difficult and unrewarding to follow. Reading some judgments one rather loses the will to live – and that is particularly disconcerting when it's your own judgment that you are reading.*[3]

Issues are not always clearly identified in the tribunals, as the Court of Appeal has highlighted[4]. Determinations are often prolix and the precise approach to points of law difficult to isolate. It is arguably not in anyone's interest that the Supreme Court be involved in extensive preliminary work prior to isolating the point of law it is to determine. Where there is binding Supreme Court authority on a point it may be to everyone's advantage to have a judgment of the Court of Appeal that applies that authority and sets out the results to which it leads, before the Supreme Court considers whether it should depart from that authority. It is not obvious that it is more efficient to roll those tasks into one.

We do not consider that the criteria proposed in the Bill are objective and uncontentious. We consider that there is scope for dispute as to whether a case has been fully argued in the proceedings and fully considered in the judgment. We are mindful that in very many immigration, as opposed to asylum cases, there is now no legal aid and the person under immigration control or asserting free movement rights will have been unrepresented. We

[3] Justice – Tom Sargant Memorial Lecture 2013 Justice in an Age of Austerity Lord Neuberger, President of The Supreme Court Tuesday 15 October 2013.

[4] A recent example is *ML (Nigeria) v SSHD* [2013] EWCA Civ 844

do not consider that the Upper Tribunal could assert that a case had been fully argued where a party before it was unrepresented.

We consider that is for the superior courts rather than the Tribunal itself to determine whether the Tribunal has considered a point of law fully.

New clause 14A(4)(b) inserted into the Tribunal, Courts and Enforcement Act 2007, which provides for cases to be leap-frogged where the Upper Tribunal is bound by a decision of an appellate court appears on its face to create a possibility of a case on which there is settled law being leap-frogged.

ILPA opposes **Clause 35**. The Special Immigration Appeals Commission is a first-instance tribunal and primary finder of fact. Proceedings before the Commission are complicated by the withholding of information and evidence from a party to the proceedings, which are weighted against the appellant. Removing a tier of judicial scrutiny risks compounding, or at least removing opportunities to mitigate, this prejudice. All our comments on Clause 32 apply, save that there is legal aid for proceedings before the Commission. There is a risk that attempts could be made to rely upon proposed new section 7B(5)(a) concerning 'national importance' as a matter of routine in such cases given that they transfer to the Commission because they concern questions of national security.

Part 3: *Costs in civil proceedings*

Clause 36 Wasted Costs in certain civil proceedings

Clause 36 provides that where a court makes a wasted costs order it "must inform such of the following as it considers appropriate" and then names an approved regular or the Director of Legal Aid casework. The explanatory note interprets this to mean that the court must consider notifying a regulator and/or the Director. ILPA has no quarrel with this save to ask whether the drafting could be improved to remove a potential ambiguity and make clear that it is for the Court to decide whether to make any referral.

Part 4 Judicial review

It is somewhat bewildering for ILPA to be responding to a Bill that aims to reduce the number of applications for judicial review[5] at the same time as working on a bill that will increase substantially the number of such applications. It is said in the Appeals Impact Assessment produced for the Immigration Bill currently before parliament that displacement onto judicial review resulting from the abolition of appeal rights in immigration cases cannot be quantified and therefore costs cannot be estimated. But the "sensitivity analysis" in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission. This appears to be an under estimate, since the calculation that produces it takes as its starting point the number of appeals allowed by the Immigration and Asylum Chamber of the First-tier Tribunal, rather than the total number of appeals started. Even with the erroneous basis of calculation, we should be looking at an extraordinary

[5] See the Ministerial foreword to *Judicial review – Proposals for further reform, the Government response.* Ministry of Justice, Cm 8811, February 2014.

increase. In 2011 there were 8,711 immigration and asylum judicial reviews[6] *in toto* and only 4,630 reached the stage of a decision on permission. Judicial reviews cost more than appeals, costs can be sought from the other party, and damages may be claimed. Even as the Lord Chancellor protests that there are too many judicial reviews[7] the Home Office moves to increase the number.

Part 4 Judicial Review

Clause 50 Likelihood of substantially different outcome for applicant

This prohibits a grant of leave to bring an application for judicial review or for relief to be granted and/or damages awarded where an application has been brought if it appears to the court or Upper Tribunal to be "highly likely" that the outcome for the applicant would not have been "substantially different" if the conduct complained of had not occurred. The point is one that the court /Upper Tribunal can take of its own motion, as well as on application by the defendant.

ILPA considers that this clause should not stand part of the Bill. Judicial review is a procedural remedy. The Administrative Court hearing a judicial review is not exercising an appellate jurisdiction but looking at the lawfulness, including the procedural propriety, of the decision-making. Procedural defects are the proper subjects of judicial review. Substantive merits may be examined only insofar as a decision is irrational. A "no difference" principle has been expressly disapproved in certain areas, the scope of which are unresolved – see *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269). In *AF (No 3),* following the judgment of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625, the House of Lords confirmed that the 'no difference' principle does not apply to the non-disclosure of security-sensitive material containing the case against an individual (at least in the context of control orders).

It is possible to argue "no difference" as early as in the Acknowledgment of Service letter. We have seen permission refused on the basis of "no difference" where it is clear that a procedural flaw has had no impact on outcome and there is no other reason, i.e. no general point of principle, to hear the claim.

We consider that in general the balance is struck correctly in the courts' present treatment of the 'no difference' principle. In the leading case in the immigration and asylum context – *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 the inevitability threshold was satisfied. Whilst rare, it is by no means an anomaly and reflects the efficacy of the current position. Maintaining the status quo avoids the undesirable position in which the permission hearing becomes a dress rehearsal for the substantive claim but still permits recourse to 'no difference' arguments in clear-cut cases.

The costs of disputes over procedural defects could often be avoided if procedural disputes were resolved at a stage prior to litigation with improved procedures, at the outset or following the problem's being highlighted by a pre-action protocol letter if a government

[6] See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

[7] *Judicial Review: proposals for further reform*, Ministry of Justice 6 September 2013.

department is willing to respond at this stage.

The status quo provides the possibility of a 'no difference' challenge at the permission stage. It strikes the correct balance. It permits obvious cases to be decided at the permission stage. However, for cases where the question of whether the decision would have inevitably been the same absent the procedural irregularity is anything less than clear cut, or where other issues are raised by the challenge, the question should be heard at a substantive hearing. For a judge to undertake a full assessment at the permission stage, in particular an assessment that respects the requirements of anxious scrutiny[8] necessary in the immigration and asylum field, full disclosure and evidential preparation would be necessary. Effectively, this would amount to a mini-hearing, which would add to cost and delay of procedural challenges rather than mitigate the problems identified in the Consultation.

The drafting of the Bill is broad enough for "no difference" to encompass actual and/or apparent bias; and/or failure to apply a relevant and binding policy.

A test of "highly likely "would require the court or Tribunal to overstep its constitutional limits and engage in an assessment of the substantial merits of the decision. The point is made by Lord Bingham in *R v Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344:

> *[i]n considering whether the complainant's representatives would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.*

It is re-iterated in *R (Smith)* [2006] EWCA Civ 1291, [2006] 1 WLR 3315, in which the Court of Appeal said the following (at 3320-3321):

> *Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.*

And by Maurice Kay LJ in *R (Shoesmith) v Ofsted et ors* [2011] EWCA Civ 642 (at para 72):

> *…this is not such a clear case that I feel able to say 'no difference' without risking inappropriate encroachment into "the forbidden territory of evaluating the substantial merits of the decision".*

The clause has the potential to produce the opposite outcome from that which is intended. It invites a court to get involved in the merits of administrative decision-making.

For the court to make a decision about what outcome was likely, or would have occurred, will require a detailed assessment of underlying evidence (which may be very extensive), which is at present not required. This will fundamentally alter the nature of the judicial review process, increasing the length and cost of proceedings considerably.

The application of the 'no difference' principle requires a court to second-guess the outcome of the case had the procedural irregularity not taken place. This is a process that is notoriously prone to error. The well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402 makes the point:

> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an*

[8] *R v SSHD, ex p Bugdaycay* [1987] AC 514.

> *opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

As at present, the principle in *John v Rees* should be reflected in the threshold for assessing whether a procedural defect has made a difference.

Appearances matter and justice should be seen to be done. The words of Lord Widgery in *R v Thames Magistrates' Court, ex p Polemis* [1974] 1 WLR 1371 are instructive:

> *It is…absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me to be no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same.' This is mixing up the doing of justice with seeing that justice is done.*

If a court cannot be sure that an individual is not prejudiced, it should not withhold a remedy. Lord Donaldson MR in *R (Barrow) v Leicester City Justices* [1991] 2 QB 260 (at 290):

> *Any unfairness, whether apparent or actual and however inadvertent, strikes at the roots of justice. I cannot be sure that the applicants were not prejudiced and accordingly I have no doubt that the justices' order should be quashed.*

Rights to procedural protection are not to be lightly denied. The propriety of lowering the threshold from inevitability to "highly likely" has not been tested against the requirements of Article 6 of the European Convention on Human Rights and, for matters within the scope of EU law, Article 47 of the Charter of Fundamental Rights of the European Union. Although Article 6 does not apply to decisions on the entry, residence and expulsion of migrants,[9] there is no such restriction on Article 47. Moreover Article 5(4) of the European Convention on Human Rights provides protection to persons in immigration detention and there are implied procedural rights in Articles 3 and 8 of the Convention. Clause 50 is unlikely to be immune from challenge on EU and/or Strasbourg human rights grounds.

Prompt and detailed acknowledgements of service and by the early provision of all relevant information can result in a matter being resolved before it reaches the courts. Where it is clear that there has been non-compliance with a procedural requirement, the relevant department should set out at the earliest possible stage how it intends to address the error and within what timescale and give such undertakings as it is in a position to give as to its future conduct. This is far more likely to result in the matter being resolved pre-permission or, if it reaches the permission stage, to matters being clear-cut by then.

The Government continues to miss opportunities for early settlement of claims by its failure to provide instructions to her own lawyers and allow them to keep to deadlines for acknowledgment of service. In the recent case of *Kadyamarunga v SSSHD* [2014] EWHC 301 (Admin) (14 February 2014) Mr Justice Green stated at para 20:

> *…it is now more or less a notorious fact that the Defendant is overwhelmed by both applications for leave to remain and disputes over such decisions this is not in and of itself an excuse for not complying with the procedural rules governing judicial reviews. I acknowledge that lawyers acting for the Defendant (both in-house and external) may be under considerable strain in cases of this sort.*

[9] See *Maaouia v France* (2001) EHRR 42.

However, it is not acceptable for the internal problems of the Defendant or her advisors to be visited upon the judicial system.[10]

This clause places a further burden on claimants and their representatives while the State continues to increase the burden on the justice system through its conduct in litigation.

Procedural failings can make a difference to the substantive outcome in a case. In the *Rodriguez*[11] case on the proper application of a Home Office policy on evidential flexibility the Secretary of State's failure to apply binding policy was found to be unlawful in public law terms. The Upper Tribunal concluded at paragraph 28 that had the policy been applied, the application would have been successful. Similarly, *Thakur (PBS – common law fairness)*[12] is an example of a case in which a procedural defect (failure to provide an opportunity to make representations) led to a different substantive outcome.[13] See also *Walumba Lumba (Congo) v SSHD; Kadian Mighty (Jamaica) v SSHD* [2011] UKSC 12.

Further, this clause would raise the potential for complicated arguments at permission stage when a legally-aided claimant will have no guarantee of payment. The Ministry of Justice has decided to remove the guarantee of payment in legal aid cases before permission stage. This clause introduces a further disincentive for claims as it increases the costs risks. The senior judiciary has already warned about the "chilling effect" that could arise from removing the guarantee of payment in legal aid cases and the Ministry of Justice ignored the judiciary's proposal for judges to have control of decision making in discretionary payment system[14].

Parties that do wish to obtain legal aid will be reliant on a positive decision at permission or they will be subject to a discretionary assessment about payment by the Legal Aid Agency on behalf of the Lord Chancellor. This clause will increase the likelihood that those claimants who pursue legal aid cases will have no incentive to settle at an early stage and will contest any application brought by the Defendant under clause 50, thus increasing costs all round.

Clause 51 Provision of information about financial resources and Clause 52 Provision of information about financial resources

Clause 51 requires an applicant applying for permission for judicial review to provide information about the financing of the judicial review. Clause 52 requires the court or tribunal to have regard to such information when determining costs at the end of the case and to consider whether costs should be ordered against a person other than a party who is identified in the information provided as giving financial support for the proceedings "or is likely or able to do so". As we understand the drafting, the person "likely or able" is also person identified in the information provided, but this would be worth clarifying.

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[10] http://www.bailii.org/ew/cases/EWHC/Admin/2014/301.html
[11] [2013] UKUT 00042 (IAC).
[12] [2011] UKUT 00151 (IAC).
[13] See also *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC) and *R (Kizhakudan) v SSHD* [2012] EWCA Civ 56.
[14] See http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf - paras 24-26, accessed 19 February 2014.

We, and we suspect others, had misunderstood the proposal on this point in the Government consultation and thought that it would concern only cases involving a protective costs order. In our experience, those trying to obtain such an order would be likely to disclose much of this information anyway. Much funding that charities and non-governmental organisations receive will be restricted funding, only to be spent for the purposes for which it is given. Those purposes will not normally include litigation since it is not straightforward for a funder to reconcile respect for its own charitable purposes and proper use of its funds, with the 'hands off' approach required of a pure funder.

There is a substantial body of case law to address the question of funders. A commercial funder will be expected to meet adverse costs, see for example *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055. But the situation is different where a "pure funder", assisting out for compassionate or charitable reasons, is concerned. The court retains a power to order a contribution but this will be rare. See *Hamilton v Al Fayed* (No. 2) [2003]QB 1175. A fighting fund had backed Mr Hamilton's libel action. Mr Hamilton lost and Mr Al Fayed sought to pursue contributors to the fund for costs. Nine settled, the rest contested liability. The court held that as "pure funders" they were not liable and the reasoning is instructive and very pertinent. It was held (per Simon Brown LJ) that:

> *… the pure funding of litigation…ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to a relative but rather should extend to anyone…whose contribution (whether described as charitable, philanthropic…) is animated by a wish to ensure that a genuine dispute is not lost by default…or inadequately contested.*

Some MPs will have experience of having acted as pure funders in this manner.

Those without legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 are increasingly reliant upon friends, family, church members or other supporters to help them fund judicial reviews. This is all the more the case with increased restrictions on getting legal aid, including as a result of the proposed residence test (if introduced) and the proposal that all legal work on the permission stage of a judicial review be "at risk". The clause may discourage such people from helping in cases where it would be both appropriate and desirable that they do so.

Clause 53 Intervenors and Costs

Clause 53 provides that where a person applies to intervene, as opposed to being invited to do so by the court then, save in exceptional circumstances, the court may not order a party to pay the intervenor's costs and must order the intervenor to pay costs a party has incurred because of their intervention. The former reflects the normal current position. The latter does not. At the moment, the courts have powers to depart from the usual "no order as to costs" when permitting an intervention[15] and have all their usual wasted costs powers against intervenors.

It is our experience that the usual approach is indeed "no order as to costs". Indeed, the Supreme Court Practice Directions provide at paragraph 6.9.6 "Subject to the discretion of

[15] See e.g. Rules of the Supreme Court, rule 46.3.

the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal".

There are good reasons for not turning these into rigid rules. An intervener intervenes to assist the court. The rules of the Supreme Court make express reference to "submissions in the public interest"[16]. It is only if they are going to do so that their intervention is permitted. It is not desirable to set liability for costs at a level where the court will not benefit from that assistance. The intervention may well save time and money both in the instant case and those that will come after which will benefit from the clearest and most informed judgment in the lead case[17]. We concur with the analysis given by the senior judiciary in its response[18] to the Government consultation:

> *37. The court is already empowered to impose cost orders against third parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court. Views may legitimately differ on the propriety of a presumption that interveners should be liable for the costs of parties, if costs can be shown to have been increased by their intervention, unless there is a corresponding possibility of their seeking costs.*

Lady Hale said in her speech to the Public Law Project Conference on 14 October 2013:

> *As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own, unless they have effectively been operating as a principal party (rule 46): if they behave properly, the principle that costs follow the event should not apply to them. But of course there will be some additional costs caused by the parties having at least to read and think about what the interveners have to say, so responsible moderation is called for.*

Lady Hale drew attention to a number of ways in which the courts act to keep the costs of such interventions down. The court has powers to limit the amount of evidence the intervener is allowed to adduce and can confine an intervener to written argument, both of which can be used to keep additional costs under control. Rule 6.9 of the Rules of the Supreme Court limits interveners' written submissions to 20 pages.

She highlighted that in the case of an intervention by a public body such as the Equality and Human Rights Commission, or a non-Governmental organisation such as Liberty, their intervening rather than acting for the claimant may make it easier to disentangle the private interests of the client from the broader public interests. ILPA intervenes very rarely indeed. ILPA will normally give consent for its information to be used by members in litigation and similarly will provide witness statements on matters of fact or settled policy to them.

Decisions as to whether to intervene are taken on the basis that we consider that we are in a position to assist the court with material that cannot or will not be put before it by the parties, that is relevant to the decision. We consider our own objects and purposes in deciding whether or not to do so.

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[16] The Supreme Court Rules 2009 (SI2009/1603) (L. 17), Rule 15(1)(a). See also Supreme Court Practice Direction 3.

[17] See e.g. *Lassal* C-162/09.

[18] Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf (accessed 20 February 2014).

The United Nations High Commissioner for Refugees has intervened in a number of cases before the UK courts. These interventions are often acknowledged by the courts as having been of tremendous benefit to them. The interventions and the way in which the courts deal with them are often closely studied around the world[19].

An intervener that will struggle to bear its own costs may for that reason be reluctant to intervene if it has no prospect of recovering them and this may lead to the most useful and desirable intervener being reluctant to participate. The courts should retain powers to allow interveners to claim their costs.

In cases where one of the parties is unrepresented, an intervention may make it unnecessary to appoint an 'advocate to the court', appointed by the Attorney General at the behest of the court to assist the court[20].

It may be difficult to disentangle in a particular case whether costs would have been incurred in any event. If the intervener had said less, might the claimant or defendant have needed to say more, or put in more evidence, etc? We do not consider that the question of "additional" costs is straightforward and the time that could be spent trying to sort it out to give rise to costs comparable to, or in excess of, those that are the subject of dispute. The current approach is pragmatic and efficient.

The result of this clause will be that only the wealthy and those such as Government departments able to commit significant funds to the intervention[21], will be able to intervene.

Clause 54 Capping of Costs and 55 Capping of Costs: orders and their terms

These clauses concern general civil proceedings rather than environmental and planning cases: judicial reviews in the high court and as they progress on appeal. Costs capping is the successor to the "Protective Costs Order". Clause 54 provides that a costs capping order may be made only if leave to apply for judicial review is granted, if the Court is satisfied that the proceedings are of general public importance, the public interest requires that they be resolved and the proceedings are an appropriate means of resolution. The court must look at how many people will be affected, the effect, and whether a point of law of general public importance is involved. The Lord Chancellor may by order, subject to the affirmative procedure, amend these criteria. In addition the court must be satisfied that absent the order the party would withdraw and that this would be reasonable. There is provision for rules of court to provide that a body corporate applying for an order must provide information about its members' ability to pay.

Clause 54 addresses the terms of a costs capping order. The court must have regard to the financial resources of the parties and those providing or who "may provide" support to them, to the extent to which the party applying for the order and any person providing financial support will benefit if relief is granted to the applicant for judicial review, to

[19] See e.g. *RT (Zimbabwe) & Ors v SSHD* [2012] UKSC 3, *Al- Sirri v SSHD* [2012] UKSC 54, *HJ (Iran) & HT (Cameroon) v SSHD* [2010] UKSC 31 (07 July 2010). For further examples see http://www.refworld.org/type,AMICUS,UNHCR,GBR,,,0.html#SRTop21 (accessed 27 October 2013).
[20] See e.g. Rules of the Supreme Court, rule `35.1.
[21] See e.g. R*(G) v LB Southwark* [2009] UKHL 26 *(SS for Children, Schools and Families intervening), Birmingham City Council v Ali et ors* [2009] UKHL 36 (*SS for Communities and Local Government intervening).*

whether lawyers are acting pro bono and whether the applicant is an appropriate person to represent the interests of others or the public interest. The Lord Chancellor may amend this list by regulations subject to the affirmative procedure.

In all cases where an order is granted, a cross order must be granted limited the liability of the other party to pay the costs of the person benefitting from the costs capping order.

Research by the Public Law Project and University of Essex, found that between July 2010 and February 2012 there were only seven cases decided by the Administrative Court at final hearing in which a protective costs order had been granted. Only three were not environmental cases. The organisations concerned were Child Poverty Action Group, Medical Justice and Children's Right Alliance, all respected organisations and all working with individuals ill-placed to bring a challenge themselves. This does not suggest that there is any widespread problem or indeed that there is a problem at all. The senior judiciary said in its response[22] to the consultation:

> *32. Our experience is that use of Protective Costs Orders (PCOs) is not widespread in areas other than Aarhus environmental claims … the consultation paper does not contain an estimate of the total costs which public authorities have been unable to recover as a result of PCOs following the successful defence of a judicial review claim, and hence no estimate of the magnitude of the issue being addressed.*
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> *33. To the extent that PCOs are made, they function to protect access to justice. A body of rules and guidance on their application has been developed by the judiciary seeking to strike a balance between fairness to the defendant, the potential costs to the taxpayer, and the public interest in cases being brought. We would be concerned if this careful balance were to be undermined by rule change.*

If permission to claim judicial review is obtained, it means that the public authority has arguably erred in law. No public interest would be served and indeed it would be contrary to the public interest to deter, obstruct or preclude the bringing of such claims. It is in the public interest that where the court, at whoever's behest, has identified an arguable error of law the claim should be fully considered by the court. Judicial review is not primarily concerned with private interests, but public wrongs [23]. Where a public wrong is at issue then whether the individual claimant wins or loses, his or her case may clarify the law for everyone. There may also be cases where costs protection is necessary for a State to give effect to its positive obligations under, for example, Articles 2, 3 and 13 of the European Convention on Human Rights.

Currently, a protective costs order is just that. It is set at a level that an organisation can pay and if it loses the organisation will be liable to pay the other sides costs up to the sum of the order. A protective costs order makes it possible for a would-be claimant to litigate, but generally ensures that s/he is remains concerned about losing and paying costs. We see no reason why an organisation that has shown a government department to have been acting unlawfully should be worse off for having done so.

A wide range of orders can be given: there may be costs protection but permission to recover costs from the other party in the event of losing, or the order may be that there be

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[22] Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf (accessed 20 February 2014)

[23] *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 at 121.

no order as to costs. Or the costs a party is required to pay if it loses may be capped. In *Compton* [2009] 1 WLR 1436, a hospital closure case, the protective costs order required the claimant to seek pledges from the local community. Protective costs orders are a flexible tool.

In challenges in the field of immigration and asylum it is our experience that Government deploys strong teams, suggesting that it considers that it faces a strong and credible challenge. We are aware of no evidence that Government is deterred from fighting a case or is more prone to settle when the other side has costs protection and indeed from the cases we have seen in the field of immigration and asylum our experience is to the contrary.

In February 2011 ILPA responded[24] to the Ministry of Justice consultation *Proposals for reform of civil litigation funding in England and Wales.* We supported qualified one-way costs shifting being extended to judicial reviews and we also supported non-governmental organisations bringing challenges in the public interest being eligible for such qualified one-way costs shifting. That continues to be our position.

It is necessary to disclose who is funding the litigation when applying for a protective costs order. A witness statement indicates that, for example, lawyers are acting pro bono or that a charitable funder has agreed to cover disbursements. If a funder is offering to indemnify the claimant against the other side's costs if the claimant loses, this would have to be disclosed. The court may consider that the proposed claimant and/or any funder could offer more and press them on this.

We oppose the mandatory imposition of a cross cap. It is of course open to the defendant in any case to ask for a cross cap. We consider that there are circumstances where it is not appropriate to cap the defendant's costs liability. The imbalance of power and resources between the parties when one is a Government department and the other has been able to satisfy the court that it is sufficiently at risk for a protective costs order to be justified, is very great. The claimant is limited by what they can afford and the protection they can secure. A defendant Government department is in a position to incur costs that it cannot recover. Further protection against paying the other side's costs increases this imbalance.
We are aware that there is a cross cap in Aarhus Convention claims, where the defendant's liability is capped at £35,000[25] and the claimant's at £5,000[26]. It would be instructive to look at the costs incurred by claimants and defendants in these cases, to understand how the caps have influenced their behaviour.

For further information please get in touch with Alison Harvey, Legal Director, alison.harvey@ilpa.org.uk, 0207 251 8383

[24] See http://www.ilpa.org.uk/data/resources/4120/11.02.502.pdf
[25] Civil Procedure Rules Rule 45.43.
[26] *Ibid.*