

ILPA information sheet

Information sheets provide general information only, accurate as at the date of the information sheet. Law, policy and practice may change over time.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not do so.

The ILPA information service is funded by the Joseph Rowntree Charitable Trust.

An archive of information sheets is available at www.ilpa.org.uk/infoservice.html

Shauna Gillan ILPA Legal Officer 020-7490 1553 shauna.gillan@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Criminal Justice and Courts Bill 2014

March 2014

The Criminal Justice and Courts Bill was introduced in the House of Commons on 5 February 2014. The Government hopes that it will be passed into law by the end of 2014. The Bill affects the immigration field in a number of ways, notably by curtailing access to judicial review and by increasing lawyers' exposure to costs, which may make it harder to find representation. Many of the changes have come about as a result of the *Judicial Review – proposals for further reform consultation*, as to which see ILPA's Information Sheet: [Changes to Judicial Review](#). While the Government has opted to introduce fewer of the damaging changes that were originally proposed, the proposals that have been maintained are likely to reduce access to justice for individuals with meritorious cases.

Limiting access to Judicial Review

Currently, if a Defendant in a judicial review (usually a Government department or a local authority) can show that irrespective of their unlawful action, the outcome would inevitably have been the same, the Court can refuse to grant permission for judicial review, or the remedy sought. The Bill would lower the applicable test to "highly unlikely", meaning that if a Defendant who has acted unlawfully can show that the conduct was highly unlikely to have affected the actual outcome, they will have a defence to a judicial review. This is a fundamental change striking at the heart of judicial review, the primary means of preventing unlawful activity by the State and state bodies. In essence, the change would make it easier for the Government to get away with unlawful acts and omissions. It is likely to mean more lengthy arguments at the initial ("permission") stage of a judicial review, making those hearings more protracted and thus more costly. As explained in our previous Information Sheet on [Legal Aid](#) (December 2014), the Government proposes that lawyers would only usually get paid for the permission stage if permission were granted. The more work involved in this stage, the less likely that lawyers will be willing and able to take on these cases.

Making interventions more difficult

Organisations, such as charities, are on occasion permitted by the Courts to make representations in cases to which they are not a party; this is known as being an 'intervener'. This occurs where the organisation has some special expertise or interest in the area, and can assist the Court. Currently, interveners are in general highly unlikely to be required to pay any costs of the parties or to get any their own costs paid – they often rely on *pro bono* representation. The Bill will establish a presumption that interveners will have to pay the costs of the other parties which have arisen from their intervention. This will not apply if there are 'exceptional reasons' or if they were invited to intervene by the Court. The latter is rare. This change is likely to reduce the number of interventions by

charities and other organisations as they would in general be unable to take the risk of having to pay uncertain and possibly high costs. This is of concern because charities that intervene in important cases are often commended for raising the quality of legal analysis and bringing important information to the Courts' attention.

Limiting access to Protective Costs Orders

The Courts have, over time, developed a mechanism for limiting a party's exposure to the legal costs of the other side, to ensure that important litigation can be heard. This is known as a Protective Costs Order. It limits the maximum sum that one party will have to pay towards the other side's costs if it loses. Such orders are rarely granted in practice, and only granted if certain criteria are met. Their overall aim is to ensure cases concerning matters of important public interest are able to reach the courts without being deterred by financial risk. The Bill aims to replace the Courts' regime with a new statutory framework, which would make it harder for an applicant to be granted a Protective Costs Order. The changes are:

- A new rule that an Order can only be given if permission to apply for judicial review has been granted. This means that a Non-Governmental Organisation seeking to bring a case in the public interest will have to take the financial risk of having to pay the other side's costs of the initial stages. These costs could run into many thousands of pounds.
- A requirement that the person applying for the Order will have to prove that if it is not granted they will not be able to continue the case (and would be acting reasonably in withdrawing).
- If the applicant is granted costs protection, the Defendant will also be granted protection (Mandatory "cross capping").

Increasing the number of 'Leapfrog' appeals

At present, appeals from various first instance courts and tribunals go to the Court of Appeal, and if appealed again, to the Supreme Court. Appeals can in certain circumstances 'leapfrog' the Court of Appeal stage. At the moment this can only happen if all parties and both courts agree and there are limitations on the types of case that can leapfrog. Thus, leapfrogging is relatively rare in practice.

The Bill contains provisions that will make it easier to leapfrog the Court of Appeal. It removes the requirement that both parties consent. It will also allow for appeals from the Upper Tribunal and the Special Immigration Appeals Commission to go directly to the Supreme Court for the first time, if the conditions are met. ILPA considers that leapfrogging should only happen by consent. In addition, ILPA opposes leap-frogging from the Special Immigration Appeals Commission. Unlike other courts and tribunals from which leap-frogs would be permitted, it is hearing the first appeal against a decision and involves consideration of secret evidence from the Government which is not shown to the appellant, therefore removing a layer of appeal is of particular concern.

Stricter rules on Wasted Costs

At present, if a lawyer has acted unprofessionally ('improperly, unreasonably or negligently'), a judge can make an order for costs against the lawyer personally. These orders are unusual in practice (roughly 25 a year in the recent past). This Bill contains provisions that will mean that on handing down such an Order the Court must consider notifying the lawyer's regulatory body (the Law Society or the Bar Council), and, if appropriate, the Legal Aid Agency. ILPA supports these proposals.

You can track the progress of the Bill [here](#). ILPA's briefing on the Bill is available [here](#).