

# ILPA information sheet

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## Judicial Review: Update 2

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Judicial review is a means for individuals to challenge decision-making by the Government and public bodies. An explanation of what this remedy is, and how it functions in practice, is set out in our Information Sheet: [Judicial Review: how it works](#).

This Information Sheet outlines proposed changes to the remedy of judicial review contained in the *Criminal Justice and Courts Bill*. The changes proposed in the Bill should be viewed within the context of other changes, such as recent rises in Court fees and cuts to legal aid (both recent and pending). See the Information Sheet: [Judicial Review Reform: Update 1](#).

### Raising the threshold for challenge

The *Criminal Justice and Courts Bill*, which is currently in progress in the House of Commons, contains provisions which would restrict the scope of judicial review. At present the Government has a defence to a judicial review challenge if it can show that had the decision been made in a lawful way the eventual outcome would inevitably have been the same. This is called a 'no difference' defence and is illustrated by the below example.

- The Home Office decides to deport someone because of criminal conduct
- The decision fails to take account of the fact the person has a pending Family Court hearing to determine whether he would be able to gain contact with his British child whom he has never met
- The decision is unlawful, because relevant information was not taken into account (this is a common ground for judicial review)
- However, the Home Office can show that, even if it had factored in the custody hearing it would still have decided to deport the person (for example because the application to gain contact was ultimately refused)
- Judicial review will not be granted; the Home Office can rely on a 'no difference' defence and show that the decision was inevitable

The Bill would widen the scope of this defence, such that if the unlawful part of the decision-making process is “highly unlikely” to have affected the outcome, then judicial review will be refused. Thus in cases where there is a possibility of a different result (for example, a possibility that the decision to deport the person would not have been made), the Government will be allowed to rely on the unlawful decision-making. In practice, what this means is that the Government will be insulated from challenges against its unlawful decision-making in a wider range of circumstances than before. This provision is also likely to mean that there will be more protracted argument at the early “permission” stage which is being subjected to legal aid cuts (as explained in [Judicial Review reform: Update 1](#))

### **New costs for interveners**

The Bill also contains provisions on costs which would make it more difficult for charities to intervene in judicial reviews. At the moment, a charity or other group acting in the public interest, may apply to the High Court to intervene in a judicial review: they are then known as an ‘intervener’. The Court will only permit this if it is of the view that the intervener can provide it with useful information which will assist in its determination of the case. For example, the United Nations High Commissioner for Refugees (UNHCR) sometimes intervenes in cases involving important points of refugee law.

The provisions will mean that an intervener may be required to pay the costs of the Government department or public body that arise from their intervention in the case. Charities intervening often rely on lawyers representing them free of charge (“pro bono”) who prepare a written submission on their behalf relevant to the case. These proposals mean that the intervener may have to pay the cost of the lawyers for the parties in the case reading this submission and responding to it. Such costs are difficult to estimate in advance; charities may be unable to afford their own lawyers, let alone be able to pay the costs of expensive Government legal teams. This change is likely to deter charitable interventions in cases with a wider public interest.

### **Further Information**

The Parliamentary Joint-Committee on Human Rights has released a report covering the changes: *“The implications for access to justice of the Government’s proposals to reform judicial review”* (30 April 2014). This report is highly critical of the changes and is available [here](#). It essentially recommends that none of the Government’s planned reforms be implemented, or that, if they are, their impact be mitigated.

ILPA’s Briefings on the Criminal Justice and Courts Bill are available on the Briefings section of our website [here](#).

You can follow the progress of the Bill, currently awaiting its report stage in the Commons, [here](#). The Bill will be moved forward when the next Parliamentary session commences on 4 June 2014.