



Supplementary Written Evidence to the JCHR
Inquiry into Judicial Review Reforms

Bingham Centre for the Rule of Law Report 2014/02 February 2014

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INTRODUCTION

1. This document provides further evidence from the Bingham Centre for the Rule of Law. It is written in light of the Government's response (published on 5 Feb 2014) indicating the package of reforms it proposes to take forward and the Criminal Justice and Courts Bill published alongside that response.
2. This document supplements the Bingham Centre's written evidence to the JCHR dated 27 November 2013.
3. Several people have contributed to the preparation of this response: Dr Mark Elliott (Reader in Public Law, University of Cambridge and Fellow of the Bingham Centre), Dr Tom Hickman (Barrister, Reader in Public Law, UCL, and Fellow of the Bingham Centre), Sir Jeffrey Jowell QC (Director of the Bingham Centre) and Stephen Grosz QC (Hon) (Solicitor, Fellow of the Bingham Centre). We are grateful to Mr Ben Jaffey (Blackstone Chambers) who co-authored with Tom Hickman a note published on the UK Constitutional Law Group Blog ("Jaffey & Hickman") upon which parts of this document draw.¹
4. The Bingham Centre for the Rule of Law was launched in December 2010 and is an independent research institute devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute for International and Comparative Law, a registered charity based in London.
5. The Centre welcomes the fact that many of the proposals raised by the Government at earlier stages have been dropped or revised. There are also some welcome reforms. For instance, clauses 32 to 35 of the Bill will make leapfrog appeals to the Supreme Court easier, although will still require the consent of the Supreme Court. For the first time, there will be leapfrogs from SIAC, the EAT and the Upper Tribunal. This, at least, is sensible and welcome. We welcome the ability of the courts to require greater transparency about the funding of judicial review cases and we welcome the recognition of the importance of public interest standing.
6. However, we remain concerned about some of the reforms that the Government proposes to take forward. We address four of particular concern:
 - The "makes no (substantial) difference" principle
 - Protective Costs Orders

¹ B Jaffey and T Hickman, 'Loading the Dice in Judicial Review: The Crime and Courts Bill 2014.' U.K. Const. L. Blog (6 February 2014) (available at <http://ukconstitutionalaw.org>). We also note that Dr Mark Elliott also published an analysis on which this document draws: M Elliott, 'Judicial review reform (again)' Public Law for Everyone blog (6 February 2014) (available at <http://publiclawforeveryone.wordpress.com/>).

- Interventions
 - Funding disclosure, and
 - Permission stage costs
7. We wish also to make clear that while we do not agree with the Government in its assessment of problems with judicial review, we do recognise that judicial review could be improved and that judicial review procedure needs to be able to ensure that:
- Weak cases that will not succeed are capable of being, and are, summarily disposed of at an early stage.
 - Delays in the system are minimised, as they are undesirable and disadvantageous to both Government and claimants.
 - The costs and delays associated with judicial review do not frustrate access to justice.
8. We would like also to flag **the forthcoming report by the Bingham Centre which will examine ways of streamlining judicial review procedures in a manner consistent with the rule of law. The team undertaking this review is led by Michael Fordham QC and will report this month.** We will forward a copy of the report as soon as it becomes available.
9. We turn now to the four matters of concern arising out of the most recent statement of the government’s proposed reforms.
- (A) The “makes no (substantial) difference” principle**
10. The first proposal that warrants mention relates to the “makes no difference” principle. Here, the Ministry of Justice has not accepted what many consultees including the Bingham Centre and the judiciary said in their responses to the consultation. As presently drafted, cl 50 of the Criminal Justice and Courts Bill will insert new provisions into s 31 of the Senior Courts Act 1981 such that relief *must* be refused, “if it appears to the court to be *highly likely* that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.” [Emphasis added]
11. The concept of “*highly likely*” is a novel one and lowers the bar from the test of inevitability that is currently applied at common law as a basis for refusing a remedy. Moreover, the Bill envisages that it will be obligatory for the court to consider this point not only at the substantive-hearing stage, but at the permission stage.
12. Provisions to be inserted into the Senior Courts Act will permit the High Court—and *require* it, if the defendant makes a request—to consider whether the outcome would have been substantially different absent the impugned conduct, and will go on to say that the court *must* refuse to grant leave if it is *highly likely* that the outcome would not have been substantially different. This contrasts with the present position, whereby

courts *may* refuse relief or refuse to grant leave if satisfied that it is *inevitable* that the outcome would have been no different.

13. This proposal is problematic for six reasons.
14. **First**, the proposal flies in the face of the separation of powers and the rule of law. It is not for Parliament to instruct the judges to condone the unlawful application of our laws.
15. **Secondly**, judicial review has developed as a means of ensuring that Parliament's will is adhered to and that when Parliament entrusts a decision to a particular person, such as a Secretary of State, the decision must be made by that person, with an open mind, by reference to all relevant considerations and in accord with the procedures laid down in the governing statute. Hitherto it has only been in the most exceptional cases that judges would refuse a remedy if, for example, the wrong person had made the decision or the decision had not been properly made (most usually where there would be a deleterious impact on third parties or where there had been inconsequential procedural irregularities).
16. Consider for instance if Parliament entrusts an important decision about banking regulation to a particular Secretary of State, but in fact a different person makes the decision, or the Secretary of State allows herself to be improperly influenced by a third party. In our view Parliament should be very concerned about the prospect of the Government having a defence to a judicial review claim based on the argument that such fundamental departures from what it required made no difference to the decision. Even if the individual were to be refused a remedy by the Court because the decision would have inevitably been the same, the court should be in a position to make a declaration about the law which would clarify its scope for the future. To deny the courts this power in our view represents an inappropriate intrusion into the powers of the judiciary to provide remedies for unlawful administrative action and would be likely to lead to confusion as to the consequences of judicial decisions.
17. **Thirdly**, the rule is likely to encourage sloppy decision-making and the cutting of legal and procedural corners because officials will be more inclined to take a risk of illegality which is less than "substantial".
18. **Fourthly**, the "makes no difference" principle presupposes that judicial review is orientated exclusively towards securing the lawfulness of *outcomes*, which in turn assumes that values such as legality and procedural fairness are to be conceived of purely in instrumental terms. This overlooks the fact that such values are *inherently important* by virtue of recognising the inherent right to respect of individuals who may be adversely affected by official decisions.
19. **Fifthly**, the "makes no substantial difference" principle would be very difficult to apply in practice and is likely to lengthen and complicate judicial review proceedings (which is contrary to what the Government says it wants to achieve). This is particularly so because the legislation would require this issue to be looked at the permission stage, which is intended to be a filter that does not require submission of evidence and

consideration of facts. As the Senior Judiciary pointed out in its response to the consultation:

[I]n most cases ... the decision whether a procedural flaw made a difference to the outcome cannot be taken without a full understanding of the facts. At permission stage the requisite full factual matrix is rarely before the court ... [A]n obligation to focus further on the no difference principle at the permission stage would necessarily entail greater consideration of the facts, greater (early) work for defendants, and the prospect of dress rehearsal permission hearings ... A lower threshold than inevitability for the application of the "no difference" principle envisages judges refusing relief where there has been a proved error of law and the decision under challenge might have been different absent that error. The propriety of a different outcome being forestalled by the court's no difference ruling should be closely considered. From a practical perspective, a court could only reach a decision on a lowered threshold as to whether an alleged procedural error made a difference by in depth and detailed consideration of the facts. Dress rehearsal permission hearings (with associated length and expense) would again be a very real prospect.²

20. **Sixthly**, there is a further constitutional difficulty with the proposal. Nothing in the Bill suggests that *unlawful* administrative actions that cannot be successfully challenged due to the "makes no difference" principle (either because leave will be denied or relief withheld) will be rendered *lawful*. The effect of the proposal is not to alter the legal status of the unlawful measure, but merely to shield it from judicial review. In our response to the consultation, we at the Bingham Centre said that:

turning a blind eye [to the unlawfulness of the decision] does not breathe legal life into [it]. Unlawful administrative action is unlawful because it lacks a valid legal basis, having been taken in a way that causes the decision-maker to exceed its statutory authority. The absence of a judicial remedy in respect of such administrative action does not render it valid: at best, it obscures its invalidity. ... [Moreover,] withholding [relief] can only be of limited effect. Whether or not an unlawful decision is quashed, its unlawfulness entitles others to treat it as such and generally demands that other courts acknowledge the illegality through the medium of collateral challenge. The insulation from all legal challenge of decisions rendered unlawful by procedural defects considered ... to be inconsequential would, in effect, require such decisions to benefit from a source of power different from the enabling statute. For a decision to be rendered lawful by the retrospective endorsement of the court, primary legislation would in our view be required. Whilst technically possible according to the doctrine of parliamentary sovereignty, such a step would be highly questionable from a separation-of-powers perspective since it would give courts power to authorise executive action

² 'Response of the Senior Judiciary to the Ministry of Justice's consultation entitled 'Judicial review: Proposals for Further Reform' (1 November 2013), Para 21-22: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf>

in any area in certain circumstances (where in their view an illegality probably made no difference).³

21. In our view, a more effective way of dealing with “no difference” cases would be to incentivise the Government to remake any decision where there has been an error of process as quickly as possible (if the Government is right that the outcome would be the same then this outcome will be the one reached). Instead, there is an incentive to Government to defend such claims.

(B) Protective Costs Orders

22. There will also be codification of the law relating to Protective Costs Orders (“PCOs”) (clause 54). It is welcome that PCOs have been endorsed and will not be abolished.
23. The purpose of the codification seems to be to ensure that claimants make full disclosure of their sources of funding and to ensure that PCO’s are only granted in cases raising points of general public interest. But this disclosure requirement is already the law: the duty of candour in judicial review works both ways. A claimant applying for a protective costs order has always had to make frank disclosure of its actual and potential sources of funding and the costs it expects to incur. (See the cases referred to by Jaffey & Hickman)
24. There is however a serious problem with the PCO codification. As the Bill stands, a PCO could only be made if permission has been granted (clause 54(3)). But defendants and interested parties not infrequently run up massive pre-permission bills, especially where the Defendant is a regulator or private body acting in a public capacity, or there is a private interested party. Cases may have pre-permission costs that comfortably exceed £30,000. The risk of unknown and potentially substantial pre-permission costs is a risk that those who would otherwise qualify for costs protection cannot possibly take. If a PCO cannot be obtained to protect against such a costs risk, very many claims with substantial wider public interest will not be brought. A PCO that cannot be obtained until it is too late to prevent the chilling effect of uncertain and unlimited costs exposure is a pointless PCO: it does not achieve the aim of enabling access to justice for those who cannot expose themselves to substantial costs risk. Here, again, the proposals appear to give with one hand (endorsing PCOs) but take back with the other through hidden financial disincentives that will in practice undermine PCOs and negate the attainment of the purpose they are intended to serve.
25. There is also a Henry VIII provision in clause 54(9) giving the Lord Chancellor power by regulations to add, omit or amend matters “to which the court must have regard when determining whether proceedings are public interest proceedings”. It is not obvious why the Lord Chancellor, rather than the Courts, should have the final say on the principles governing costs orders affecting access to justice and this could also be used as another means of effectively squeezing-out meritorious public interest claims. Parliament needs

³ Bingham Centre for the Rule of Law, ‘Response to *Judicial Review: Proposals for Further Reform* Consultation’, 1 Nov 2013, paras 35-36 http://www.biicl.org/files/6618_bingham_centre_response_jr-pffr_cm_8703_2013-11-01.pdf

to address both of these provisions and ensure PCOs provide a practical and effective access to justice tool.

(C) Interventions

26. We view Clause 53(4) of the Bill as very troubling. It will in our view bring to an end public interest interventions in judicial review proceedings below the Supreme Court.
27. As things stand the court decides whether to allow a third party to intervene, is able to restrict the evidence and submissions made by the intervener, and has a general discretion as to costs. However since the purpose of an intervention is to assist the court, particularly where a case raises wider issues than relate to the parties themselves, the court will generally not order an intervener to pay the costs of its intervention (and *quid pro quo* an intervener will not recover their costs). But if their intervention is unreasonable or misguided they can expect to have a costs order against them. As the Judicial response to the consultation noted, the fact that such orders are rarely made “reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties.”⁴
28. NGOs big and small regularly provide beneficial interventions in judicial review proceedings usually attracting leading solicitors and barristers acting on a *pro bono* basis (eg Amnesty, Bail for Immigration Detainees, Mind, Liberty, PLP, UNHCR, JCWI). The Secretary of State often intervenes, sometimes because the case is important. Often interventions support the position of the defendant (see the cases referred to by Jaffey & Hickman).
29. There are many cases in which courts have expressed gratitude to the assistance provided by an intervening party; see, for example, “the extremely helpful intervention” of UNHCR in the recent judgment of the Supreme Court of IA [2014] UKSC 6.
30. However, if Parliament enacts Clause 53(4) of the Bill it will in our view bring to an end public interest interventions in judicial review proceedings below the Supreme Court. It provides that the High Court or Court of Appeal “must order the intervener to pay any costs specified” by a party or interested party that have been incurred “as a result of the intervener’s involvement”. The court is only permitted to refuse to make such an order in “exceptional circumstances”. Contrast Rule 46(3) of the Supreme Court rules:

(3) Orders for costs will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent).
31. This in our view is the appropriate costs rule.

⁴ ‘Response of the Senior Judiciary to the Ministry of Justice’s consultation entitled ‘Judicial review: Proposals for Further Reform’ (1 November 2013) Para 37: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf>

32. By requiring interveners to pay not just their own costs but the Government's (and other parties') costs too, it is very unlikely that, if clause 53(4) is enacted, the High Court or the Court of Appeal will in future receive assistance from NGO interveners.
33. Unless interveners have something different to say from the parties they will either not be granted permission to intervene or their intervention will be restricted. It follows that an intervener's involvement in proceedings will inevitably result in the parties incurring additional costs.
34. But NGOs and other public interest interveners, who have brought such value to judicial review, will not intervene if there is a significant risk of an adverse costs award – they most often cannot pay for their own legal team who, as noted above, frequently act pro bono. Many will only intervene if the Court grants them costs protection in advance, which it would be prohibited from doing if the Bill is passed in its present form. This is in effect a disguised prohibition on NGO intervention, achieved again through the indirect route of financial disincentives. There is something perverse about recognising the need for costs protection for public interest litigants and, in the same Bill, denying it to public interest interveners. The policy considerations that motivate the first also justify costs protection for interveners.
35. Moreover, as the clause is drafted, claimants, defendants and directly affected parties will all be able to seek costs against the intervener.
36. It is hoped that Parliament will ensure that the power of courts to award costs rests where it properly belongs: in the discretion of the court

(D) Funding disclosure

37. The package includes requiring (by means of an amendment to the Senior Courts Act 1981 to be effected by Cl 51 and 52 of the Criminal Justice and Courts Bill) claimants to inform the court about their financial resources and sources of funding for the purpose of being taken into account when determining whom and to what extent costs should be ordered, so as to ensure that "non-parties who are, in practice, driving litigation should have to face a more proportionate amount of the risk".
38. The detail will be in regulations but the powers set out in the Bill.
39. It is unclear precisely what is envisaged. In principle the Bingham Centre does not object to the courts having a power to require claimants to state who is funding a judicial review case. However an obligation on individuals to do so in all cases might not be justified and certainly restrictions and safeguards would need to be put in place in order to protect personal privacy.
40. We doubt for instance whether disclosure would be required in every case or that in most cases anything more could properly be required than for claimants to declare that they were funding a case.
41. It is only in a small minority of cases in which wider information about the means and funding arrangements of claimants could be justified. In our view the Government

needs to be much more precise about what the objectives of such a requirement is and about what would be required.

(E) Permission stage costs

42. We agree with the response of the judiciary that if a claim is not designated as having been totally without merit there should be no question of the court preventing the lawyers for the individual from being paid out of legal aid funds. As many responses to the consultation pointed out, the permission stage is a substantial hurdle that in reality does not just lead to the summary determination of unarguable claims. It is also very difficult to predict whether many claims will be granted permission or not. In that light:
- (a) The penalisation of lawyers bringing properly arguable judicial review claims is not justified as a matter of principle and could have very substantial impacts on legal aid firms, a number of whom have expressed concerns for their ability to operate public law contracts on such a basis, with associated access to justice implications.
 - (b) The proposal is likely to be counter-productive as it is likely to make judges less inclined to refuse permission and in practice may see a lowering of the permission threshold.

CONCLUDING REMARKS

43. As we have made clear in earlier responses to government and in evidence to the JCHR, we have no problem with reforming judicial review in ways that streamline procedures, as long as reforms are consistent with the rule of law. However, many of the proposed reforms to judicial review, especially when combined with the proposed reforms to legal aid, would have very substantial and detrimental effects. They would have a major impact on access to justice for the purpose of holding public authorities to account and securing legal protection of basic rights and interests, including by compromising, in practice, claimants' capacity to invoke the judicial-review jurisdiction in the service of significant *public* interests.