Briefing

House of Commons Second Reading Debate – Criminal Justice and Courts Bill Part 4 – Judicial Review

24 February 2014

Summary of key points

- The ability to hold government to account for the decisions it takes is fundamental to a healthy democracy. Judicial review is a vital tool to achieve this. Citizens Advice has serious concerns that the provisions set out in Part 4 of the Criminal Justice and Courts Bill will severely undermine the crucial role that judicial review plays as a check on power.
- The combination of provisions in Part 4 of this Bill, along with other proposals being taken forward by secondary legislation, will result in much greater financial uncertainty for claimants considering judicial review and for those who represent them.
- The risk of these proposals is that the potential financial burden will close the door to proper accountability and justice.

About Citizens Advice

- Citizens Advice's charitable aim is to make society fairer by providing the advice people need for the problems they face; and improving the policies and practices that affect people's lives.
- 340 Citizens Advice Bureaux provide advice from 3500 locations across England and Wales
- In the last year Citizens Advice Bureaux helped over 2 million clients to solve over 7 million problems face to face and on the phone.
- Last year 14 million people received advice and information from our advice website Adviceguide.
- Our policy, campaigning and influencing work is a hugely important part of the work we do for our clients. This year alone we estimate that our campaigning work positively impacted on 8.3 million people.

General comments

In the experience of Citizens Advice, the threat of judicial review to a poor decision taken by a public authority can stand between a family and homelessness or ensure the provision of essential services. As the prospect of pursuing a judicial review becomes more challenging, that threat will become weaker, the pressure on public authorities to review their decisions, or to ensure the adequacy of their decision making process, will be reduced, and the standards of public decision making will suffer, as will the individuals affected by those decisions. Judicial review must remain a credible option in order to act as an effective means to encourage public authorities to address problems raised with them appropriately and promptly.

The provisions of Part 4 of the Criminal Justice and Courts Bill, combined with reforms being taken by secondary legislation, seek to place more financial risk on claimants and those who support them, with the purported aims of reducing the number of weak cases taken forward and establishing greater equality between claimant and defendant with regard to costs. But the case for change has not been made. There are already checks in the system to weed out unmeritorious cases. Delays in the Administrative Court have been addressed by removing asylum and immigration cases, which account for the majority of the recent increase in judicial review applications, to the Upper Tribunal. And given that the whole purpose of judicial review is to challenge power, the aim of costs equality between the parties is simply not justified. The nature of judicial review means that from the outset there is generally very great financial inequality between the parties – very much in favour of the public body. People must not be prevented, because the burden of financial risk is just too great, from being able to fight for fair, lawful and reasonable treatment from those who govern them.

During the consultation process on this legislation the Government focused on the need to deal with 'unmeritorious cases which may be brought simply to generate publicity or delay implementation of a decision properly made'. But the Government did not raise the need to improve standards in public authority decision making which in itself would be likely to significantly reduce the number of judicial review applications. Citizens Advice repeatedly sees examples of irrational or ill explained decisions which leave individuals stranded in impossible situations or facing significant hardship as a result.

A Citizens Advice client with multiple sclerosis lives alone in a council property with two bedrooms. He has been assessed as having to pay towards his rent because of the under occupancy test. He has two young daughters who stay with him every other weekend and for some of the school holidays and on this basis applied for a discretionary housing payment but was turned down. This decision will have a major impact. He can only stay where he is, in a flat which has been adapted to his needs and where his daughters can visit him, if he takes money from other essential items such as food in order to pay his rent. Alternatively he would have to move to a one bedroom flat with no such adaptations which would severely affect his quality of life, as well as risk the relationship with his daughters. There is no right of appeal to a tribunal of this decision. The only option would be to consider the appropriateness of a judicial review.

A single mother is receiving help from a CAB following suspension of her tax credits. They have been suspended on the basis that the tax credit office believes her ex-partner still lives with her. The client has provided tenancy agreements, copies of bills and her ex-partner's forwarding address details but has been told these are insufficient. The CAB spoke to the tax office but they would not disclose what information they were relying on. The client has had no tax credit income for six weeks and her housing benefit and council tax support have been

> stopped pending the tax credit review – despite the fact that the local authority is in a better position to verify the details about her ex-partner as he lives in one of their properties. The client has rent arrears accruing, is behind with utility bills and will soon default on her credit card. She cannot prove her case to the tax credit office because she does not know what the case is – the office either cannot or will not disclose the evidence on which their decision is based. The CAB commented that it might be appropriate to consider a judicial review of the way the process works given that so little discretion or empathy is used in its application.

In the experience of Citizens Advice, judicial review is not contemplated to cause trouble or to gain publicity. It is considered in order to challenge unreasonable or poor decision making which can leave people in dire need. We believe that the combined impact of the Government's reforms to judicial review will make it much harder for people to find the advice and support they need to get the justice they deserve.

Impact of the provisions in Part 4 of the Bill

Procedural changes

As things currently stand under case law, a court may refuse to grant a remedy to a claimant if it is inevitable that there would have been no difference to the outcome they have experienced even if the ground for judicial review did not exist. Section 50 of the Bill enshrines this provision in legislation but also reduces the threshold of this test from 'inevitable' to 'highly likely'. It also enables the court to consider this question during the permission stage for judicial review, either of its own volition or at the request of the defendant, rather than at a full hearing as would be the case now.

Bringing forward these arguments to the permission stage will greatly increase the complexity of that stage. It is likely also to increase the need for oral hearings of permission applications. The real danger of this proposal in terms of access to justice only becomes clear however when it is looked at in combination with the Government's proposals in relation to payments to legal aid practitioners, which it plans to introduce through secondary legislation. Under these proposals, legal aid practitioners will only be paid for work done at the permission stage if permission to take a judicial review is granted. The Government has agreed to include a discretionary scheme whereby the Legal Aid Agency can make payment in cases which settle before a permission decision is taken where it judges it appropriate to do so. However, at the time the legal practitioner undertakes the work, there will be no certainty whether or not they will be paid. This in itself is likely to mean that cases with merit will not be pursued because of the unreasonable burden of risk placed upon representatives.

The procedural changes in the Bill will increase the potential work required at permission stage which a legal aid practitioner would have to carry out with no guarantee of payment. This will make it even less likely for practitioners to undertake this work under legal aid. Claimants of limited means wishing to challenge a decision of a public authority will find it even harder than they do now to find a representative willing to take their case, meaning that they will either have to abandon it or handle the permission stage as a litigant in person. They will then potentially face the complex arguments around the 'no difference' test referred to above alone, with no representation.

Costs

The Bill contains provisions which seek to significantly increase the potential cost burden on claimants and on organisations seeking to be of assistance to them in taking forward a judicial review.

First, section 53 provides for a presumption that interveners in a judicial review will have to bear not only their own costs of intervening, which they generally do now in any event, but also any costs to the parties of their intervention. Interveners can be a charity with particular expertise which believes it has evidence valuable to the determination of the judicial review – the impact of a public authority decision on a particular group in society for example. The intervener has to have permission to intervene, and judges have commented on how useful such interventions are to the proper consideration of the case. The provision in the Bill will deter organisations with limited resources, such as charities, from taking this step – however valuable their evidence – because there can be no certainty of what costs they will face as a result. Wealthier organisations with more stable resources, for example those representing commercial interests or government itself, will be in a better position to consider this step.

Second, sections 54 and 55 seek to set out in legislation the circumstances in which a court can limit the costs a party will face as a result of taking or defending a judicial review, with the aim of making this more restrictive than current case law in the process. Protective costs orders, or capping of costs, can be a vital tool for claimants and organisations who represent them to take cases forward in the wider public interest. Without them, the potential costs of a case can be prohibitive, again limiting the likelihood of these cases being pursued. The inclusion in this section of a requirement that a reciprocal protective costs order must be made to the other party fails to take account of the power imbalance that often exists in a judicial review case between the public and the state. These sections also include regulatory making powers which mean that the Lord Chancellor could restrict the court's ability to award these orders even further in the future through secondary legislation.

The power of judicial review

It is not just a successful judicial review that can change a decision. The threat of it, or the issuing of proceedings, can be just as effective in ensuring that public authorities fulfil their responsibilities properly, as the following experiences of Citizens Advice clients show:

> A CAB applied for judicial review on behalf of a client with dementia, who was bedbound and incontinent, because her NHS funded care package refused to allocate incontinence pads according to her need. The care package limited the client to three a day despite the fact she had no money for more. The judicial review application led to a reassessment of her needs and agreement to provide the necessary pads.

> A man came to his local CAB after his homelessness application had been turned down by his council despite the fact he had nowhere to live and was suffering from a serious lung condition. The adviser helped him get a legal opinion from a legal aid lawyer that the council could be challenged by a judicial review. With this additional pressure, the council reviewed the case and found in the client's favour that he needed support to avoid homelessness - without the need to go to court.

> A CAB client, seriously ill with lymphoma, applied for Employment Support Allowance. Despite being so frail that she was discharged from hospital to a nursing home and had to be transported to her chemotherapy appointments, Jobcentre Plus refused to put the client in the support group component of ESA until she had attended an ATOS medical assessment, despite being informed of the circumstances by both the CAB and Macmillan. They then stopped the client's benefit because she was not able to attend the ATOS assessment. The CAB sent a letter of complaint with a threat of judicial review. The client's ESA was reinstated and the client was moved to the support group component and her claim backdated.

This is the value of judicial review – the ability of ordinary people and those who represent them to challenge the fairness, lawfulness or reasonableness of decisions taken by those who hold power. The provisions of Part 4 of the Criminal Justice and Courts Bill will restrict this ability and we urge Members to resist them.

Contact

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