

CLIENT UPDATE

Governmental response on proposed reforms to judicial review

In response to concerns about the growing number of judicial review cases, and fears that these are slowing down the realisation of important infrastructure projects, the Government has recently consulted on proposals for further reforms to judicial review proceedings. The consultation closed in November 2013, and a Government response has now been issued. This sets out the package of reforms that the Government intends to take forward and builds on recent reforms to judicial review that were implemented from July 2013 as a result of an earlier consultation.

The reforms are aimed at drastically reducing the overall number of judicial reviews cases. In his Ministerial foreword to the response, Lord Chancellor and Secretary of State for Justice Chris Grayling specifically states that judicial review is ‘too often... pursued as a campaigning tool’, or ‘simply to delay legitimate proposals’. He further elaborates that judicial review should not be abused in such a way as to ‘act as a brake on growth’. This all makes worrying reading for NGOs, for whom judicial review is an important tool used to challenge the policies or decisions of public authorities, to further their objectives and campaigns, or to intervene in important court cases that raise public interest issues. Continue reading to discover how the proposals might affect your organisation.

The proposed reforms fall under two headings: procedural and financial, including measures relating to costs and scope of legal aid. In terms of procedure, the recent reforms mentioned above have already: (i) reduced the time limits for bringing a judicial review in planning and procurement cases from three months to six weeks and 30 days respectively; and (ii) removed the right to an oral reconsideration of a refusal of permission to bring judicial review where the case is assessed by a judge as totally without merit.

However, the new proposed reforms go further, with a summary of the most important decisions and changes set out below.

PROCEDURAL

- **Standing** – A proposal to tighten up the standing test, which governs whom can bring judicial review proceedings, has been rejected.
- The current test requires a claimant to demonstrate a ‘sufficient interest in the matter to which the application relates’. The proposal to change this test to a ‘direct interest’ test so that a direct interest in the matter is required, thereby reducing the ability of pressure groups and NGOs to bring proceedings in the public interest, has been rejected by the Government. The bringing and

pursuit of ‘weak’ judicial review cases will instead be limited by financial reforms.

- **Procedural defects** – A proposal to lower the threshold for this ground of judicial review is to be taken forward.
- Procedural impropriety is one of the three grounds of judicial review, allowing a claimant to challenge a decision made in breach of the required procedures or rules, such as: (i) inadequate consultation or reasons, (ii) a failure to allow a representations or a case to be put forward, or (iii) a biased decision. This ground is important as it provides an alternative to the ground of irrationality, which is difficult to succeed with.
- At present, the court may refuse to grant permission for judicial review or award a final remedy on this ground on the basis that it is inevitable that a complained of failure would not have made a difference to the original outcome. The Government has decided to press ahead with proposals to lower the threshold to include cases where the alleged failure was ‘highly unlikely’ to have made a difference. The result of this is an increase in the number of judicial review cases which may not be brought under this important ground.

FINANCIAL

- **Financial incentives** – The Government proposes to weed out ‘weak’ cases by forcing claimants in, and interveners and non-parties to, judicial review cases to assume increased financial risk.
- The Government’s proposals are based on the view that those who bring judicial review cases should bear ‘a more appropriate measure’ of the financial risk associated with the bringing of such cases in comparison with that borne by the tax-payer. The Government hopes that this will discourage ‘weak’ cases from being brought and pursued. This is likely to impact particularly severely on NGOs, who will not always have access to sufficient funds to justify a decision to bear the financial risk associated with bringing cases in the public interest.
- The reforms will come as part of a ‘tough’ package to be introduced by new legislation, including the following measures:
- **Legal aid** – The Government will only provide legal aid funding on application for permission. In those cases where an application is successful, the Government will fund the application. In those cases where the application is unsuccessful, the Government will discontinue funding, but will

however fund the failed application for permission itself.

- **Costs at oral permission hearings** – Where an application to reconsider by way of oral hearing a decision not to grant an application for judicial review is unsuccessful, the claimant may be ordered to pay the defendant’s reasonable costs of defending an unsuccessful the application.
- **Wasted Costs Orders (WCOs)** – In the case of WCOs, where a legal representative is made personally liable for some of the costs of litigation which have been caused by its improper, unreasonable, or negligent behaviour, and which it is unreasonable to expect the litigant to meet, the Government is looking into placing an obligation on courts to notify the regulator, and where appropriate, the Legal Aid Agency. This is in order to create the threat of more severe consequences for legal representatives who become the subject of WCOs.
- **Protective Costs Orders (PCOs)** – PCOs, where the unsuccessful claimant is protected from bearing the defendant’s costs, will be overhauled to ensure that they are used only in cases of the ‘highest public interest’. As part of this reform, the Government has decided that PCOs should be awarded only where an application to proceed to judicial review has been successful, and to introduce a cap on the defendant’s liability for the claimant’s costs. In addition, the principle that PCOs will be used only where the claimant would otherwise have *reasonably* decided to discontinue the case, will be firmly re-established.
- **Interveners and non-parties** – the Government has decided to take forward proposals that those who choose to intervene in proceedings should ordinarily bear both their own costs and those of the parties which result from their intervention. In addition, the court will be provided with increased powers to identify non-parties who provide financial backing to claimants, in order that it can impose appropriate costs orders. This would include claimants who form a limited company in order to bring a judicial review case.
- The response also covers: (i) a decision to create a new Planning Court to deal with judicial review cases related to planning matters; (ii) a decision to introduce a permission filter for the bringing of Section 288 Town and Country Planning Act 1990 judicial review challenges (although this will not be removed from the scope of legal aid); (iii) a decision to look into whether cases concerning Public Sector Equality Duty (PSED) may be dealt with via a different route than judicial review; and (iv) some procedural reforms

surrounding ‘leapfrogging’ appeals that will be taken forward.

- Whether these proposals will go ahead in their precise current format is unclear; however, that they will go ahead, and soon, seems highly likely. Mr Grayling has said that the consultation has convinced him both that there is ‘a compelling case for reform’ and that ‘it should proceed at pace’. It may not be long therefore before these proposals have the force of law, and while certain proposals unpopular with NGOs and other organisations have been dropped, the bulk of the reforms relating to financial aspects will be carried forward, resulting in the same outcome. This will doubtless be that individuals and organisations such as NGOs that have access to fewer resources will feel the effects of the reforms the most, with the result that, while the public purse gains, this has the potential to be at the cost of the public interest.

To access the Government response, please go to: <https://consult.justice.gov.uk/digital-communications/judicial-review>.

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