

Shelter Response to

Ministry of Justice consultation paper Cm 8703:

`Judicial Review: proposals for further reform`

October 2013

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people a year. This work gives us direct experience of the various problems caused by the shortage of affordable housing across all tenures. Our services include:

- A national network of over 20 advice services with legal aid contracts in housing and community care
- Shelter's free housing advice helpline which runs from 8am–8pm
- Shelter's website (shelter.org.uk/getadvice) which provides advice The government-funded National Homelessness Advice Service, which provides specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, who are approached by people seeking housing advice
- A number of specialist services promoting innovative solutions to particular homelessness and housing problems. These include Housing Support Services which work with formerly homeless families, couples and single people. The aim of these services is to sustain tenancies and ensure people live successfully in the community.

We also campaign for new laws and policies – as well as more investment – to improve the lives of homeless and badly housed people, now and in the future.

Summary

- As the consultation rightly acknowledges, the judicial review process is a critical means of holding public bodies to account and of ensuring that they comply with their statutory duties.
- We question the fundamental assertion which underlies the proposals that there is a problem with unmeritorious cases, or with challenges which are used as a delaying tactic in cases which have little prospect of success. In our experience quite the reverse is true. We encounter cases on a daily basis in which local authorities are flouting their duties to homeless households.
- As the consultation notes (paragraph 74) the courts have recognised that a strong public interest can provide standing even where the claimant has no direct interest. It can in fact be more appropriate and expedient that, where the lawfulness of a particular policy or measure is being called into question, the challenge should be

brought on behalf of a wider group of people, sometimes on the basis of a dossier of different cases, rather than being restricted to the facts of a particular case.

- Obtaining permission for judicial review is an extremely difficult exercise. In our experience, few applications for judicial review rest on a 'mere' procedural defect. In most cases, such a defect is only one of a number of flaws in the decision-making process. Even where an authority has made an error which is procedural in nature, this may have made all the difference to the client's own decision and to the circumstances which have produced the need for judicial review.
- We are opposed to a dilution of the "no difference" test to one of its being "highly likely" that the same conclusion would have been reached. The current burden is heavy, but not impossible. In every application for judicial review the odds are already stacked against the claimant because of the limits of the court's jurisdiction.
- We are opposed to the introduction of any alternative mechanism which might create the impression that the PSED is in some way a lesser duty than other public law duties.
- The threat itself of judicial review in itself is often sufficient to bring about a change of mind and the provision of temporary accommodation, but often not before substantial work has been done. We urge the Government to accept that pre-permission work must be covered by legal aid to avoid serious consequences for homeless households. We encounter families who have slept rough because they have been refused statutory assistance to which they are entitled. The suggestion that payment should be at the discretion of the Legal Aid Agency is completely unacceptable. In our experience, the LAA takes a restrictive and inflexible approach to such matters.
- A consequence of the proposals on costs is that it may become impossible for homeless people to find solicitors to help them obtain legal redress by way of judicial review. The financial risk and uncertainty that the claimant's lawyers will have to bear will be unsustainable.
- In our view, the present approach to wasted costs orders strikes the correct balance, and we do not agree that such orders should be considered in relation to a wider range of behaviour.
- We recommend that there should be a separate consultation on PCOs, in the course of which the issues raised in this consultation can be fully considered.
- We agree with the proposal that there should be transparency as to how litigation is funded. However, we would like to see further consultation on the subject of third party funding and costs orders.

- Any proposals to restrict access to judicial review are bound to affect people with protected characteristics within the meaning of the Equality Act 2010, who are disproportionately represented among homeless households.
- We urge the Government to consider the unintended consequences of these proposals. If implemented, they would undermine the safety net provided by homeless legislation, by making it extremely difficult for homeless people to obtain help in holding local authorities to account.

Introduction

Shelter welcomes the opportunity to respond to this further consultation paper on judicial review. Our solicitors and caseworkers have wide experience of using judicial review proceedings in the context of housing and homelessness cases. We consider that we are well placed to express a view concerning the proposals and the impact they would have on our clients who are homeless or who face other forms of housing need. At a time when so many families are living on a knife-edge, a sudden job loss or serious illness is all it takes to tip them into a spiral that could put them at risk of homelessness. Now, more than ever, we need an adequate safety net to help people avoid becoming homeless.

As the consultation rightly acknowledges, the judicial review process is a critical means of holding public bodies to account and of ensuring that they comply with their statutory duties. Judicial review is central to the rule of law. No system of law could command public confidence if national and local authorities were able to act in ways which are unlawful, unchecked by the supervisory jurisdiction of the courts.

With that in mind, we question the fundamental assertion which underlies the present proposals that there is a problem with unmeritorious cases, or with challenges which are used as a delaying tactic in cases which have little prospect of success.

In our experience, as we explain below, the actual problem, and any corresponding loss of public confidence, are quite the reverse. We encounter cases on a daily basis in which local authorities – both housing and social services – are flouting their duties to homeless persons and families. It is clear to us that those cases that come to our attention are the tip of the iceberg where such unlawful practices are concerned. Many, if not most, homeless people do not have access to a solicitor with a legal aid housing contract who can warn a local authority of judicial review proceedings and if necessary take those proceedings. The danger to public confidence, therefore, lies in the fact that local authorities are able to deploy 'gatekeeping' policies in order to turn away homeless applicants for spurious reasons, when there is no-one on hand to challenge them.

In our experience, the problem is now increasingly acute. We have recently dealt with some appalling cases where local housing authorities have failed to assess the cases of homeless families, leaving them in miserable and dangerous situations. In these circumstances it is even more essential to preserve the availability of judicial review, so that the courts may exercise the necessary scrutiny. The Government must protect the safety net that gives people who fall on hard times the assistance they need to keep a roof over their head.

The premise of the consultation paper is that “the number of judicial review applications has more than doubled in recent years (para 9). Yet, as Chart 1 (showing the number of applications for permission to apply for judicial review between 2007 and 2011) clearly indicates, the increase in applications has been largely attributable to immigration and asylum cases. The numbers of other kinds of cases have remained static. In cases other than immigration and asylum, therefore, there has been no growth in the use of judicial review in recent years.

We turn to the specific questions which the paper asks. We shall answer only those questions that relate to our areas of experience.

1 Planning

Streamlining planning challenges

Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast Track?

Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?

Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and country Planning Act?

Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?

Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?

Local Authorities challenging Infrastructure Projects

Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?

Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?

Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?

We do not respond to these questions, as they are outside our area of practice.

2 Standing

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

No, in our view there is no such problem. The Government perceives that judicial reviews may be brought by claimants (whether individuals or groups) who lack a direct and tangible interest in the subject matter of the claim, sometimes for reasons only of publicity or to cause delay. The legal test is whether the claimant has a "sufficient interest" in the matter to which the application relates (s.31(1), Senior Courts Act 1981). The question of sufficient interest will usually be raised by the defendant in its grounds in response to the claim, and will be considered by the Court both at the time of the grant of permission and then again at the substantive hearing. It is noted (paragraph 74) that the courts have recognised that a strong public interest can provide standing even where the claimant has no direct interest. The consultation paper fairly notes (paragraph 78) that those cases identified as being brought by NGOs, charities and other groups have tended to be relatively successful compared with other judicial review cases.

Clearly, the usual purpose of judicial review in a housing context is to obtain relief for the individual household. However, we do not accept that the sole basis for standing in judicial review claims should be a direct and tangible interest in the decision under challenge. Where a group – whether a campaigning organisation, a charity, a faith group or another unincorporated association – applies for judicial review of a particular decision, it will be on behalf of the people they represent, often people struggling to make ends meet in the face of poor health and other disadvantage. It might equally be possible for one of those individuals to bring the challenge in their own name, but they will often not be in a position to do so. It can in fact be more appropriate and expedient that, where the lawfulness of a particular policy or measure is being called into question, the challenge should be brought on behalf of a wider group of people, sometimes on the basis of a dossier of different cases, rather than being restricted to the facts of a particular case.

In considering this issue from Shelter's perspective, we are both a campaigning organisation and one which provides a comprehensive legal and advice service to

thousands of people in housing need: these are not distinct functions. We consider that we have a sufficient interest, both as a well established and reputable campaigning body and also on behalf of our client group, to justify applying for judicial review, in extreme cases, in our own name where a major point of law or policy is concerned. We have exercised this ability with restraint. In fact we have actually brought judicial review proceedings only once (together with the Refugee Council in 1996, in order to establish that homeless asylum seekers were entitled to a period of basic notice before being evicted from their temporary accommodation). Through our Children's Legal Service we have also intervened in four judicial reviews, details of which are set out in our response to Q.11

We therefore believe that the Government has set up a false dichotomy between individuals who have a "direct and tangible interest" in the outcome of a case and "persons who have only a political or theoretical interest, such as campaigning groups". Organisations who put themselves forward as claimants in judicial review proceedings do so on behalf of their client group. There are often many people – and sometimes an entire class of persons (such as homeless households) - who will be directly affected by the outcome of the proceedings, and whose interests are represented by a particular charity or body.

Where a challenge is brought by a body for political motives, or with only a tangential relationship with the outcome of the case, it is very likely that such an application will not get beyond the permission stage. While the courts have recognised that representative bodies have sufficient interest to bring judicial review proceedings, an Administrative Court judge will not allow an application to proceed where the claimant's motive is political or academic. Ultimately, however, the primary concern should be to challenge breaches of legislation, rather than to question the status of the claimant. The test of sufficient interest has worked well and should be maintained.

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

On the basis of our answer to question 9, we do not favour any of the alternative tests for standing. Each of the suggested alternatives – the ECJ test of a "direct and individual concern; 'victimhood' within the meaning of the Human Rights Act 1998; being a "person aggrieved", as in planning law challenges; or the test of benefit applicable to civil legal aid – is too narrow and would exclude many organisations which have a legitimate and well established interest in the development of the law for the benefit of their client group.

Question 11: Are there any other issues, such as the rules on interveners, we should consider in seeking to address the problem of judicial review being used as a campaigning tool?

Again, we see no reason to change the current rules. Having intervened in four judicial review cases, we are fully aware that the Court is unwilling to entertain an intervention unless it can be shown to offer "added value" and to provide the Court with evidence or submissions that have not been made by any of the existing parties. Shelter's Children's Legal Service (which takes on test cases in the interests of promoting the interests of children in housing need) has intervened in the following cases:

- *Birmingham City Council v Clue* [2010] EWCA Civ 460: requiring a social services authority to provide Children Act accommodation to a destitute family awaiting a decision on their application to the Home Office for leave to remain.
- *R (TG) v LB Lambeth* [2011] EWCA Civ 526: drawing attention to the persistent failures of and lack of co-ordination between housing and social services authorities in dealing with homeless young people. In that case, Lord Justice Wilson commented that the Court had found Shelter's submissions "conspicuously helpful" (para 5).

Our two recent interventions have again been lodged by our Children's Legal Service in the following cases:

- *R (MA & others) v Secretary of State for Work and Pensions*: judicial review of the regulations relating to the under-occupation charge for housing benefit claimants, brought on behalf of disabled children who needed a separate bedroom.
- *R (JS and others) v Secretary of State for Work and Pensions*: relating to the benefits cap, and brought on behalf of families with a particular need to remain in the same locality.

In each of the above cases, we were able to adduce evidence of research carried out for us by Freshfields Bruckhaus Deringer LLP into the availability of discretionary housing

payments in different local authority areas for the benefit of those families affected by the relevant welfare reform measures.

In all these cases, we have extensive experience of the issues in question, through the work of our local housing advice and support services,. We deal on a daily basis with clients who are directly affected by the decisions, measures or policies in question. We restrict our involvement to cases in which, as a charity founded to advance the interests of homeless people and those in housing need, we might be expected to have something to contribute. We believe that the courts have welcomed our participation and that we have provided information and arguments which have assisted the Court in its deliberations.

3 Procedural Defects

Option 1 - Bring forward the Consideration

Question 12: Should the consideration of the “no difference” argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?

Question 13: How could the Government mitigate the risk of consideration of the “no difference” argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

We believe the current system is already sufficiently robust. In our view the question of procedural defects has been over-stated in chapter 5 of the consultation paper. In our experience, few applications for judicial review rest on a `mere' procedural defect. In most cases, such a defect is only one of a number of flaws in the decision-making process. But even where an authority has made an error which is procedural in nature (such as, in the homelessness context, a failure to warn the applicant of the consequences of turning down an offer of accommodation many miles away from their previous home), this may have made all the difference to the client's own decision and to the circumstances which have produced the need for judicial review.

Obtaining permission for judicial review is an extremely difficult exercise. Where the grounds for judicial review rest on a purely procedural defect, the prospects of success are lower. The defendant will often make the "no difference" argument forcibly in its Grounds for contesting the claim and, despite the points made in paras 97 and 98 of the consultation paper, this submission will have some impact on the decision whether or not permission is granted.

As the consultation paper itself envisages, bringing the `no difference' argument forward, with the likelihood of an oral hearing at permission stage, is likely only to add to the length and complexity of the proceedings. We see no need for change in the present arrangements.

Option 2 – Apply a lower test

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

We are opposed to a dilution of the "no difference" test to one of its being "highly likely" that the same conclusion would have been reached. We regard the threshold of inevitability as the appropriate level for application of the test. Procedural rules have been established for a purpose, usually resting on principles of fair dealing and consultation, and that if an authority chooses to ignore or neglect those rules, it should face a heavy burden in convincing the Court that it would inevitably have made the same decision if it had done so in compliance with the rules. The burden is heavy, but clearly not impossible, since the Court may well be persuaded, as in the example given in para 98, that the decision-maker would not have reached a different view even if the procedural requirements had been followed.

We are strongly opposed to any diminishment of the principles of judicial review for two main reasons. Firstly, in every application for judicial review the odds are stacked against the claimant because of the limits of the court's jurisdiction. Secondly, because these same principles are also applied in other contexts. The context with which we are familiar is that of an appeal to the county court (under section 204 of the Housing Act 1996) against an adverse homelessness decision made by the local authority on a statutory review (under section 202 of the Act). Such an appeal is only available on a point of law; that is, on judicial review principles. We would be extremely concerned if local authorities were to be encouraged to argue that a court should not entertain an appeal where the authority has failed to follow the Review Procedures Regulations (eg, by giving the applicant the right to make oral representations where there was a defect in the original decision: reg 8(2)) because it would have been "highly likely" that the same outcome would have transpired even if the regulations had been followed. In homelessness cases, where decisions turn on the interpretation of the evidence by the local authority, it is essential that the few procedural safeguards in favour of the applicant should not be undermined.

4 The Public Sector Equality Duty and Judicial Review

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide this.

It is worth noting that the PSED may be invoked not only on judicial review, but in other kinds of case as well, such as possession proceedings (see *Barnsley MBC v Norton* [2011] EWCA Civ 834) and homelessness appeals (see *Pieretti v LB Enfield* [2010] EWCA Civ 1104), which are admittedly decided on judicial review principles. We contest the implication that, where a public body has failed to comply with the PSED but arrives at the same decision following a reconsideration (having had due regard to the duty) this does not ultimately benefit anyone. The process of reconsideration may well lead to measures being taken to mitigate the impact of the decision or policy; and at the least, should lead to improvements in the practice of the public body in relation to the PSED in future.

We do not have any evidence regarding the volume and nature of PSED-related challenges. However, from our general awareness of cases in which equality issues are raised, believe that the volume and nature of such challenges does not justify a separate mechanism for resolving disputes. We are opposed to the introduction of any alternative mechanism which might create the impression that the PSED is in some way a lesser duty than other public law duties. Any alternative adjudicatory forum would need to be of High Court status. While the Upper Tribunal might conceivably perform such a role, it is not clear that it would be a quicker and more cost-effective forum. In any event, in our experience a PSED challenge is usually only one of a number of grounds on which a decision may be challenged, and could not be dealt with separately from the other grounds.

5 Rebalancing Financial Incentives

Paying for permission work in judicial review cases

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.

The Ministry of Justice consultation paper 'Transforming Legal Aid' proposed that providers should only be paid for work carried out on an application for judicial review if permission is granted by the court. The Government now appear to accept that this

proposal would have very serious consequences, in the light of the fact that many cases settle in favour of the claimant. The Government's further proposal that payment should be dependent on LAA discretion is unworkable and will drive providers out of legal aid work, or at least out of judicial review. We urge the Government to accept that pre-permission work must be covered by legal aid to avoid the serious consequences described below.

At Shelter we depend on our ability to take legally aided judicial review proceedings in order to ensure that local authorities carry out their duties towards homeless people. The most common instances of judicial review in our work are where a challenge is necessary to require a local housing authority:

- to accept an application for housing assistance from a homeless person;
- to provide emergency interim accommodation for a homeless applicant or family who are street homeless;
- to provide or continue temporary accommodation pending a review of an adverse decision; and
- to provide suitable accommodation (where the accommodation provided is manifestly unsuitable, eg, it is infested or it is in a different part of the country).

Much of our work involves emergency homelessness cases. Some local authorities, both housing and social services, routinely operate 'gatekeeping' practices, in which individuals and families who are struggling to find a home in the face of ill health, poverty or other disadvantage are turned away for spurious reasons or sent between departments. We encounter families who have slept in parks, in railway stations or in hospitals or who have been travelling on night buses to keep warm. Where the client is actually or imminently roofless, an urgent application for an interim injunction to accommodate will need to be made: where the client has nowhere to stay that night, the application may have to be made out of hours to the duty judge.

Shelter's Children's Legal Service has a Hardship Fund which enables us in extreme cases to provide one or two nights' accommodation for families who would otherwise be street homeless, where there is insufficient time or capacity to prepare a legal challenge the same day. Only this month we have used the fund to pay for a weekend's accommodation for a couple with a three week old baby who was born two months prematurely. The couple had applied for assistance to the housing authority, which had a statutory duty to provide them with temporary accommodation pending full enquiries into their circumstances. Despite being told that the family had nowhere to go, the council said that they had no appointments for two weeks and that they should make their own arrangements. Upon their baby being discharged from the hospital's intensive care unit, the family spent the night sleeping in a park before being referred to us the following day.

The threat itself of judicial review in itself is often sufficient to bring about a change of mind and the provision of temporary accommodation, but often not before substantial work has been done, including a detailed judicial review pre-action protocol letter and extensive negotiations with housing officers and local authority lawyers. The Government

state (para 119 of `Judicial Review – Proposals for further reform) that "legal aid would continue to be paid in the same way as now for the earlier stages of a case...". It is not clear what this means. It appears to mean that only assistance under the Legal Help scheme will continue to be available "in the same way as now". It presumably does not mean that representation under a full legal aid certificate will continue to be available "in the same way as now": otherwise, para 119 would have said so explicitly.

Legal Help will cover initial negotiations with the local authority and the pre-action protocol letter. It will not include the preparation of court papers where no response is received to the pre-action letter. It is essential that pre-issue work (subsequent to the pre-action letter) is covered by a full legal aid certificate, as is the case now, when the case settles, since it is not covered by the Legal Help scheme.

Where proceedings are started and settled before permission, it is stated (para 119) that payment would be made for work carried out on an application for interim relief, regardless of whether the provider is paid on the substantive claim for judicial review. **This is a totally unworkable formula.** By far the greater part of the work relates to the drafting of grounds for judicial review, and it would be impossible to disentangle the section of the claim form which relates to the injunction application from the main grounds, or, for example, to apportion work done in preparing the witness statement.

Costs orders

We cannot stress enough that judicial review provides the only legal remedy for homeless persons who are faced with the immediate prospect of street homelessness. It is also important to stress that judicial review, alongside the availability of urgent interim orders, is by and large an effective remedy, despite the fact that its cumbersome procedures are not best suited to emergency cases. It is precisely because local authorities are aware of its effectiveness that they concede and settle cases.

Where the authority gives way and provides accommodation on a final warning of judicial review, i.e. before issue of proceedings, even though many hours' work have gone into the preparation of the papers, we cannot claim our costs from the authority. In other cases, where proceedings are issued and are subsequently settled, we will always seek to obtain our costs from the authority. We are obliged to seek costs under the terms of our contract with the LAA, but it is also clearly very much in our interests to do so, as we will recover costs at private rates, four times the legal aid hourly rate. However, the authority will often make it a condition of its accepting a housing duty to the family that we agree to withdraw the proceedings with no order for costs. Our duty to our clients means that we cannot insist on pursuing costs when it is in the clients' best interests to settle the matter on the basis of the terms offered.

Payment at LAA discretion

The Government have made a revised proposal that, where a case settles after proceedings have been started (though not when settlement is achieved before the proceedings begin), payment in such cases should be at the discretion of the Legal Aid

Agency. The LAA's decision would be based on the four criteria which are set out in paragraph 125. Despite the fact that the case has been successful, the provider would have to do yet more work in submitting a request for payment together with evidence in support (paragraph 129), and there is no appeal against an adverse decision, other than an internal review.

The suggestion that payment should be at the discretion of the LAA is completely unacceptable. In our experience, the LAA takes a restrictive and inflexible approach in such matters. It denies payment wherever possible and creates bureaucratic obstacles at every turn. In this instance, the first criterion for the exercise of the discretion is why the provider did not obtain a costs agreement as part of any settlement or did not seek a costs order. We have no doubt that the LAA will ignore a provider's reasons for reaching a settlement without costs, which will invariably be because this was in the client's best interests. It is highly likely that the LAA will too readily conclude that the provider failed to obtain costs as part of the settlement when they could have done (even though, as mentioned above, it is always highly beneficial to the provider to obtain their costs from the other side). The opportunity for an internal review (paragraph 129) is of no comfort whatsoever. No legal aid practitioner could conceivably take on a judicial review in reliance on the discretion of the LAA.

Refusal of permission

If the case does reach the permission stage, and permission is refused, we do not believe the provider should be denied payment for the work involved in bringing the case. Solicitors need to make a decision at the start of a case whether there are grounds for bringing a challenge by way of judicial review. This will often be in an emergency, with a street homeless family in the office. The solicitor will of course need to make an assessment of merit, in order to justify to the LAA why legal aid should be granted at the outset. But whether permission is ultimately granted by the court depends on many factors, including disclosure of the defendant authority's case, which will not have happened until after proceedings are issued. The Government's view that "it is appropriate for all of the financial risk of the permission application to rest with the provider" is lamentably inappropriate in such cases. A consequence of this proposal is that it may become impossible for homeless people to find solicitors to help them obtain legal redress by way of judicial review. The financial risk and uncertainty that the claimant's lawyers will have to bear will be unsustainable. We cannot see how our own service in relation to judicial review on behalf of homeless families, or those of other housing law practitioners, can survive on this basis.

A likely outcome will be an intransigent attitude among many local authorities, who will come to realise that there is no reason to concede even a strong case during pre-action correspondence. Authorities will feel free to turn away homeless applicants, safe in the knowledge that they are either immune from challenge or able to concede in an individual case without any costs consequences. This will potentially destroy the safety net currently available to people facing homelessness.

Case Study

Shelter recently acted for a couple evicted from their assured shorthold tenancy because the landlord wanted to sell the property unoccupied. The wife was suffering from cancer and undergoing treatment. They went to their local authority to make a homelessness application. The local authority refused to provide temporary accommodation for the couple while they made their decision, on the basis that she was not vulnerable (meaning less able to fend for herself than the average person if on the streets) because her husband could care for her. The council stated that since she had her husband to support her (even though he was working), she would not suffer more than the average homeless person if she were street homeless: her husband would make sure she had access to medication and kept her hospital appointments.

We made detailed representations, supported by medical evidence that she needed to be somewhere clean, dry and warm, and that if she was on the streets she would face a very high risk of infection, but the authority still did not change their position. Only when we judicially reviewed the authority's decision did they back down and agree to accommodate the couple.

The local authority's position was entrenched, and it took court action to force them to back down. But their position was untenable and they settled the case quickly, before the permission stage was reached. In future, we would not be paid for the work undertaken for this couple. There is no other adequate source of funding and we cannot see therefore how we would be able to continue to take action in such cases.

6 Costs of oral permission hearings

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

No. In most cases this would be a futile award, as most applicants for judicial review are impecunious or destitute. In principle, moreover, it is desirable that fundamentally important issues concerning a person's life and safety, and whether they have a roof over their heads, should be decided not only on paper, but if necessary after oral submissions, and it would be inappropriate for costs to become a deterrent to a renewal of the permission application.

7 Wasted Costs Orders

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?

Question 23: How might it be possible for the wasted costs order process to be streamlined?

Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

In our view, the present approach to wasted costs orders strikes the correct balance, and we do not agree that such orders should be considered in relation to a wider range of behaviour. The range of behaviour encompassed by the existing test comprises "any improper, unreasonable or negligent act or omission" of a legal or other representative, and this in itself covers a wide spectrum of behaviour. It would be problematic to devise an alternative test which did not carry a high risk of the unintended consequence that legal representatives would be deterred from taking on cases, which by their nature are difficult and challenging.

The proposals to 'streamline' the wasted costs process and to charge a fee to cover the costs of an oral hearing in relation to a wasted costs order seem to us to be an over-reaction to what is a very limited problem. A wasted costs order is a very serious matter, and it should not be made without the most careful consideration. Such an order may well have severe consequences for the professional standing of the person concerned, and it would not be appropriate to impose a further financial penalty in respect of an unsuccessful attempt to oppose the making of the order.

8 Protective costs orders

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?

We consider that it is not appropriate to stipulate that PCOs should not be available in such cases. While we surmise that it would be exceptional for a PCO to be made in a case where the claimant has an individual or private interest, there may be cases in which the wider public interest requires that the issue should be heard, especially where it appears that the challenge could not be brought if a PCO were not in place.

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

We accept that there should be transparency as to who is funding the litigation where a prospective party is asking the Court to make a PCO in its favour.

We also accept that there is a strong argument for a cross cap protecting a defendant's liability to costs where a PCO is made in favour of the claimant. However, we consider that the rules as to Protective Costs Orders require more extensive evaluation than can be achieved as part of a wide-ranging consultation paper such as this. We recommend that there should be a separate consultation on PCOs, in the course of which these issues can be fully considered.

9 Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

We agree that interveners should in principle be responsible for their own legal costs. In our interventions, Shelter has never sought to claim its costs from any other party.

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

We do not agree with a presumption in these terms, and would prefer to leave the determination of this question to the general discretion of the judge. In our experience, interveners focus on particular aspects of the evidence and do not cause the other parties to incur significant additional costs in responding to those points. Even where significant costs are incurred, it is likely that such arguments would need to be addressed in other litigation if they had not been raised during the current judicial review, and there may be certain advantages, even to the other parties, in dealing with all aspects of the matter in dispute at the same time.

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

We agree with the proposal that there should be transparency as to how litigation is funded. We express no view as to whether the courts should be given greater powers to award costs against non-parties. We accept that there may be grounds for extending the circumstances in which such orders can be made beyond the present criteria in s.51 of the Senior Courts Act 1981 and CPR 46.2, but such awards would be rare. We would like to see further consultation on this subject.

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

No, as such cases are limited in number, we have no evidence in this respect.

10 Leapfrogging

Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

Option 2 - Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

Question 38: Are there any risks to this approach and how might they be mitigated?

Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

Question 41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?

We do not respond to questions 35 to 41, as the subject of leapfrog appeals is not directly within our experience.

11 Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

It is self-evident that people in need of help by way of judicial review in the context of homelessness are already in an impoverished and diminished condition. Any proposals to restrict access to judicial review are therefore bound to affect people with protected characteristics within the meaning of the Equality Act 2010, who are disproportionately represented among homeless households. These proposals, if implemented, will have a marked impact on individuals and families who are already at risk of discrimination because of their personal characteristics.

For the reasons set out in our response to question 20, we are not in any way reassured by the proposal that payment of costs where a case is settled before permission should be dependent on the discretion of the Legal Aid Agency, following yet another process of application. The impact of these proposals on vulnerable groups and those with a protected characteristic under the Equality Act will in no way be lessened by the secondary proposal to give the LAA a discretion to award costs.

Conclusion

The net result of the Government's proposals is that it is far less likely that lawyers will be willing or able to bring judicial review cases in meritorious cases. Local authorities and other government agencies will find it easier to escape proper scrutiny and will be able to act unlawfully. Members of the public adversely affected by poor decision making by statutory agencies will have no means of redress.

The Government's premise that the provider should bear the risk of judicial review proceedings in the context of homeless clients is profoundly misconceived and could have very serious consequences for individual families.

Judicial review is not brought lightly or frivolously: it is a vital constitutional safeguard in holding public bodies to account and ensuring that they act lawfully and only within their powers. In the context of local authority decision-making in homelessness cases, it is the last resort standing between a homeless family and the street. These proposals, if implemented, could significantly increase the number of destitute and homeless people and will allow local authorities to adopt unlawful practices without fear of challenge. The proposals would seriously undermine the safety net provided by the homelessness legislation, by making it extremely difficult for homeless people to obtain help in holding local authorities to account.

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