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PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty briefing on the Civil Legal Aid
(Remuneration) (Amendment) (No. 3)
Regulations 2014**

May 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

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Introduction

1. Liberty welcomes the opportunity to write to you concerning the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014. The Regulations represent a threat to the constitutional role of the courts in holding the Executive to account for its use of power and form part of a wider series of damaging attacks on judicial review. The effect of the Regulations is that legal aid will no longer be available to fund judicial review cases unless the High Court grants “permission” for the case to proceed. The Legal Aid Agency will retain discretion to grant funding retrospectively for those cases which settle prior to the grant of permission, but firms will not know at the start of the case whether they will be paid. Their enactment would mean that individuals who seek legal advice on the basis of public funding will find it increasingly difficult to find professionals to help them, rendering the courts completely inaccessible to many. This will cause grave injustice for often vulnerable individuals and will serve to insulate the Executive from legitimate challenge simply because individuals cannot afford to bring their claim.

2. Judicial review allows individuals, businesses and organisations to challenge the lawfulness of decisions or actions of the Executive, including Ministers, local authorities and other bodies exercising public functions. In a judicial review process, the court does not make an assessment of the merits of the execution of the Executive’s power nor can it replace the decision of the relevant executive body with its own. Rather, it tests whether a decision was legal, rational and procedurally correct. If the decision did not meet these criteria, the court can order relief but cannot mandate the course of action to be taken by the public body. This narrow and supervisory form of oversight of the legality of executive decision-making is a limited but vital part of our delicate system of checks and balances which protect individuals from the arbitrary exercise of power by the state and which must exist for democracy to flourish. Judicial review also occupies a central place within our framework for the protection of civil liberties, providing an essential means of enforcing human rights standards.

Payment for permission work – proposals and concessions

3. Judicial reviews operate in two phases. The applicant must first receive permission from the court to run a full claim. Permission can be received by a written

or oral process in front of the court. Only once permission has been received can the applicant proceed to a full substantive hearing of the claim.

4. Proposals to change the way permission work is funded in judicial review claims were originally brought forward in the Government's consultation on reform of the legal aid system. The Government argued that representatives should only receive payment for permission work on a claim if a judge finds the case "arguable" and ultimately grants permission to proceed. Permission work, while excluding initial advice taken before a claim, court fees and other disbursements, includes drafting grounds of claim, preparing claim forms for submission and collating bundles of documents; all of which takes considerable time and expertise.

5. The original proposal was tempered in the "Judicial Review – further proposals for reform" consultation paper, which proposed the retention of a discretion allowing the Legal Aid Agency (the LAA) to pay providers for permission work in certain cases which conclude before a permission decision and in which no costs order or agreement has been secured. The consultation paper set out an exhaustive list of factors to be considered by the LAA in determining whether to grant discretionary legal aid. In the Government's response to the consultation, it agreed to make the list of factors to be taken into account non-exhaustive.

6. This concession is an improvement on the original proposals to make permission costs irrecoverable for all cases resolved before permission could be granted. Liberty and countless other organisations with experience of judicial review proceedings made clear that cases frequently settle before the permission stage because a public authority acknowledges wrong-doing and agrees to change its behaviour or to provide redress. It seems that this concession is an attempt to respond to these concerns, but it is at best a partial response, which will leave a great deal of practical uncertainty for practitioners and claimants.

Remaining concerns

7. Even with the concession of a discretionary power for the LAA, the funding for permission work would remain fundamentally uncertain, offering claimant solicitors little comfort or confidence that they will be paid for work they undertake. It will be the

case that solicitors bringing claims for legally aided clients will face a prohibitive cost risk and the impact is likely to be that those claimants struggle to find legal advice for bringing claims.

8. Further, the concession does nothing to deal with the concerns around those cases which may be refused permission, not because they are unmeritorious, but because there are myriad factors which impact on the likelihood of a case succeeding at permission stage. Judicial review is a highly technical and legal process and many of the cases concern the new or disputed borders of the law. It will inevitably be difficult for the representatives involved to assess whether or not the court will grant permission in such cases. In Liberty's experience it is not unusual for defendants to fail to seriously engage with a claim during its very early stages, only producing important evidence or making key arguments when a case comes before the courts. In these cases it is very difficult for a claimant representative to accurately assess the merits of a claim at the outset. In other cases, the law may have moved on by the time a case reaches the permission stage; again the kind of eventuality that is an unavoidable feature of a working justice system.

9. It is worth noting that representatives are already required to determine whether the likely costs of proceeding with a case are proportionate and to assess the prospects of success of a claim to the satisfaction of the LAA, providing substantive protection against unmeritorious or disproportionately costly litigation.

10. Liberty believes the prospect of irrecoverable costs will place an unsustainable burden on claimant lawyers, making it simply too risky to pursue legal aid claims, particularly those in which the law may be uncertain or untested, or in cases where the defendant exhibits a reluctance to disclose relevant material or make its legal arguments at an early stage.

Wider context

11. The Criminal Justice and Courts Bill currently progressing through Parliament would create a number of financial and other barriers to judicial review. Viewed together, these measures would create a situation in which the Executive would be free to act with impunity, knowing that claimants without significant financial means would be effectively unable to challenge even illegal state action. The deleterious

effect of these changes on the quality of decision-making by public bodies and well as on those subject to the power of the state is not to be underestimated.

Parliamentary criticism

12. The Secondary Legislation Scrutiny Committee highlighted these Regulations as a matter of legal importance and public policy interest. The Committee concluded that the fact that the MOJ itself is unclear how many cases would receive a discretionary payment starkly underlined the concerns that the Regulations will have a chilling effect on justice, with claimants unable to find representatives to bring their cases. The Committee was also critical of the fact that the MoJ had done little to present the Regulations in the light of the wider changes to the judicial review system and called on the MoJ to provide Parliament with a better overview of the impact of the set of judicial review changes, and as a minimum recommending that the MoJ provide clarity as to exactly what work will be paid for, or even better, to amend the text of the Regulations.

13. The Joint Committee on Human Rights also produced a highly critical report on the Government's reforms in this area. It concluded that the Regulations would *"push too much risk onto providers and create too much uncertainty as to the degree of such risk, causing a chilling effect on providers which will have a significant impact on access to justice"*. It established that the Government had not adduced evidence to support its case that the Regulations are required because there are too many weak claims and that it had therefore not justified such a serious interference with access to justice. Finally, it concluded that the Government should have brought forward these changes in primary rather than secondary legislation, giving both Houses the opportunity to scrutinise and debate the measure in full.

Conclusion

14. The Government's reforms to legal aid are already having a hugely negative impact on the justice system. On 1 May 2014, a major fraud trial was postponed indefinitely due to the inability of the defendants to find legal representatives following the Government's changes to legal aid funding. The judge concluded:

"I remind myself that it is the duty of the State to provide advocates

at the required level of competence and experience pursuant to the court's interpretation of the government's own legislation. It is not for the defence to cut its just entitlement to representation to suit the State."

15. In a society premised on the Rule of Law, it is imperative that the state does not derogate from its responsibilities to make sure that the law applies equally to all. In practical terms, this includes making sure that those who need to make their case in court, be it defending themselves in criminal trials or challenging the actions of public bodies in judicial reviews, are not prevented from doing so because they cannot afford a lawyer.

16. Liberty strongly encourages parliamentarians to challenge the Government on the unjustified and unconstitutional barrier to proper accountability that these Regulations and the process adopted for introducing them constitute.

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