

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Response to the Ministry of Justice's Consultation '*Judicial review: proposals for reform*'

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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/publications/1-policy-papers/index.shtml>

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Introduction

1. Liberty welcomes the opportunity to respond to proposals with significant implications for the accessibility and operation of Judicial Review (JR) in England and Wales. JR performs a profoundly important constitutional role, allowing individuals and organisations to hold Government to account and ensuring that agencies of the state act rationally and in accordance with the law. Judicial oversight of executive decision making is part of our delicate system of checks and balances which must exist for democracy to flourish. JR also occupies a central place within our framework for the protection of civil liberties, providing a vital means of enforcing human rights standards.

2. Liberty was surprised and concerned to hear the Prime Minister, the Rt Hon David Cameron MP, announce, in his speech to the CBI in November 2012, plans to reduce time limits for bringing JR applications, increase the cost of the process and remove appeal rights.¹ These announcements were made alongside reference to a policy, already implemented, of significantly curtailing the consultation requirements placed on Government Departments. The Prime Minister justified these developments by reference to the economic crisis facing the UK, which he compared to a state of national emergency reminiscent of World War II. We were disappointed to hear the Prime Minister justify the removal of important safeguards against arbitrary executive action by – apparently without irony – invoking a conflict in which this country fought, at great cost, to uphold freedom from tyranny. As discussed in greater detail at paragraph 5 below, the Government has simply not substantiated the claim that JR has any adverse impact on business or innovation. According to statistics published in the journal *Public Law*, in the years 2000-2005, 85% of public authorities only attracted one or two JR challenges per year, with over half of those concerning housing issues.²

3. The present consultation is somewhat more limited in scope than we had feared in the wake of the Prime Minister's speech. However we remain seriously concerned about some aspects of the Government's plans and deeply sceptical about the evidence base offered in support of the proposed changes. We are also concerned that this consultation exercise has given respondents just 24 working days

¹ Prime Minister's speech to the CBI, 19th November 2012: <http://www.number10.gov.uk/news/speech-to-cbi/>.

² Maurice Sunkin etc al, *Public Law* (2007) 545, p. 550.

(taking account of the Christmas break) to respond. The proposals under consideration have far reaching implications and at the very least, expert groups and civil society representatives should have been afforded a reasonable period in which to digest the plans and respond.

The proposals

4. The consultation paper sets out five proposals for the reform of the process for bringing a judicial review:

(i) Time-limits of 30 days or 6 weeks for judicial reviews of procurement and planning decisions respectively.

(ii) An amendment to the civil procedure rules, which would have the effect of requiring cases which involve a continuing breach or multiple decisions, to be brought within 3 months of the first time a breach occurred. This would apply to all areas of judicial review and is not limited to planning and procurement cases.

(iii) Removing the right to oral renewal in cases where either there has been a prior judicial process involving a hearing where '*substantially the same issues*' were raised or where a judge determines that written submissions are completely without merit. A prior judicial process would include any prior hearing by a court or tribunal, including the criminal courts and it would be for the defendant to satisfy a judge that substantially the same matter was aired during a prior hearing.

(iv) Introduction of a fee for an oral renewal of an application for permission to appeal. The fee would stand at the level currently payable for a full JR hearing; however the fee for the hearing will be waived if permission is ultimately granted. The fee will be set at £215, but the Government is currently consulting on proposals which would increase this sum to £235.

Inadequate evidence

5. The consultation paper is riddled with unsubstantiated assertions sitting awkwardly alongside admissions about the lack of supporting evidence at the Government's disposal. At paragraph 3 the consultation, the Government claims that JR can have the effect of:

‘stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery.’

This is a powerful and emotive claim to make in the current economic climate, yet the paper offers no explanation of the ways in which innovation is hampered by JR claims. There is no attempt to give any examples, hypothetical or actual of the impact of claims and certainly no statistical analysis which demonstrates a negative trend overall.

6. The Government claims that there has been a steady increase in the number of judicial review claims over recent decades comparing a statistic from 1974 with figures from 1998 and 2011.³ What may at first seem like a stark increase from the 1974 figure of 160 applications to the 2011 figure of 11,000 is actually attributable to a wide range of factors, including the fact that, until the early 1980s, challenges to administrative decision making could be brought by way of ordinary civil proceedings as distinct from JR.⁴ It is also notable that the increase in JR cases is very substantially due to an increase in asylum and immigration challenges. The Government has already introduced new measures transferring responsibility for dealing with many of these challenges to the Tribunals Service, which is likely to significantly decrease the number of cases reaching the Administrative Courts. Furthermore, according to the Government’s own statistics, the number of full or substantive judicial review hearings heard by the courts is decreasing, with 2011 figures down by 14% from 2010.⁵

7. The Impact Assessment accompanying these proposals makes clear that the Government is not able to provide any sort of estimate of the direct monetary savings it expects to result from these proposals. When considering the impact of the new shortened time-limits proposed for procurement and planning cases, under a section marked *[d]escription and scale of key monetised costs by main affected groups*, the Government concedes that:

³ *Judicial Review: proposals for reform*, Ministry of Justice, paragraph 28.

⁴ It wasn’t until the case of *O’Reilly v Mackmann* [1983] 2 AC 237 that claimants were required to pursue public law matters through Judicial Review.

⁵ *Judicial and Court Statistics 2011*, Ministry of Justice: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-courts-stats-2011.pdf.

*'It has not been possible to monetise the aggregate benefits accurately as it is not known what volume of applications are not made within the proposed new time limits.'*⁶

8. The same form of words is used in the proceeding section which considers the impact of limiting opportunities for the oral reconsideration of applications for permission. The Government accepts that it cannot 'monetise the aggregate benefits' because it does not know how many oral renewals will be effected.⁷ Throughout the Impact Assessment, the only substantial cost projections provided are a calculation of the amount likely to be lost by voluntary bodies and business through the introduction of new fees for oral renewal hearings and a projected saving of £400,000 to the Courts and Tribunals Service through the introduction of fees.⁸ In respect of this later figure, the Government admits it is likely to be inflated as it fails to take account of fee remissions. The Impact Assessment also acknowledges that the collection of new fees will entail additional administrative costs which have not been factored in to the calculations. At paragraph 2.3 of the Assessment, the Government acknowledges that a quantitative assessment of its proposals has not been possible because of *'a lack of detailed financial information on the JR process and because there is insufficient information at this stage to anticipate the extent of potential behavioural responses.'*⁹

9. Significantly, the Government concedes that there are likely to be transitional costs and notes the financial implications of satellite litigation. As discussed in more detail below, Liberty believes extensive litigation to clarify the scope of reform will be an inevitable result of these clumsy proposals. This reality is difficult to square with the Government's apparent commitment to cutting down litigation and reducing costs.

10. At paragraph 35 of the consultation document, the Government outlines a belief that the threat of judicial review is adversely affecting administrative decision making and creating a risk-averse culture. Again no attempt is made to substantiate this claim by reference to statistical analysis, real-life examples or even hypothetical scenarios. By contrast, Liberty is aware of evidence produced by the Institute for Social and Economic Research which suggests that challenges to administrative decision making lead to improvements in performance levels, with better performing

⁶ *Judicial Review Engagement Exercise: Impact Assessment*, Ministry of Justice, p.2.

⁷ *Ibid*, p.3.

⁸ *Ibid*, p.4.

⁹ *Ibid*, p. 10, paragraph 2.3.

public authorities subject to fewer challenges and evidence of improvement in those authorities subject to increased numbers of challenges.¹⁰ The report concludes that:

‘Overall, for most local authorities legal challenge remains a somewhat rare event. But far from being a negative irritant, our research indicated that judicial review may actually help authorities to improve.’¹¹

Liberty is unsurprised at the results of this research. The back-stop prospect of legal intervention is the surest way of securing a society in which respect for human rights and the principles of equal treatment and due process guide the behaviour of decision makers.

11. In the second paragraph of the consultation reference is made to the potential for abuse of the judicial review system, yet again no serious attempt is made to substantiate this claim. The Government asserts that *‘only around one in six’* applications for permission to bring JR proceedings succeed, suggesting that weak or spurious claims account for the majority of applications.¹² On closer analysis and combined with the Government’s concession that it does not retain data about those applications withdrawn because a successful settlement is reached, the Government’s figures create a misleading picture. The statistics provided in the consultation fail to provide for those cases otherwise disposed of, often by way of settlement, in between being issued and the permission stage. Cases which attract an early settlement are likely to be amongst the strongest. Further, according to the research conducted by Public Law Project (PLP) and the University of Essex whilst the overall success rate for written applications for permission stands at 30%, 62% of those applications considered orally are successful.¹³ The Government’s statistics do not take account of those cases which succeed at a later stage following a grant of oral permission.

¹⁰ *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (Non-Technical Summary), Sunkin, Platt and Calvo, Institute for Social and Economic Research, no. 2009-05: www.iser.essex.ac.uk/publications/working-papers/iser/2009-05.pdf.

¹¹ *Ibid*, *Non-Technical Summary*.

¹² *Judicial Review: proposals for reform*, paragraph 31.

¹³ *The Dynamics of Judicial Review Litigation*, Bondy and Sunkin, Public Law Project: www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf, paragraph 3.4, footnote 7: “953 cases were considered for permission; of the 782 paper considerations, 237 were granted permission, of 214 renewed applications 44 obtained permission, and a further 101 cases out of 162 were granted permission following oral-only permission hearings.”

12. The section of the Government's consultation headed *'Impact Assessment and Equality Impact'* provides further evidence that these proposals have been advanced with little consideration of their practical impact. The paper acknowledges that the Government:

*'do[es] not collect comprehensive information about Court users generally, and specifically those involved in Judicial Review proceedings, in relation to protected characteristics. This limits our understanding of the potential equality impacts of the proposals for reform.'*¹⁴

Furthermore, at paragraph 111 the Government references the fact that it does not produce evidence specifically relating to JRs carried out with the aim of ensuring that public bodies comply with the Public Sector Equality Duty.

13. Liberty is concerned at the Government's willingness to embark on proposals for reform without any firm understanding of the equality impact. Of further concern, the present consultation forms part of a wider and disturbing trend which, without justification, pitches basic due process and non-discrimination regulation as the enemy of economic growth. In the same speech to the CBI in November the Prime Minister also announced that the Government will be *'calling time on Equality Impact Assessments'*¹⁵ and the Enterprise and Regulatory Reform Bill, currently in the House of Lords, includes provisions removing requirements on employers to complete equality questionnaires and abolishing the protection offered to individuals whose employer fails to protect them from harassment in the workplace.¹⁶ Liberty is deeply troubled by this Government's willingness to conflate basic fairness and due process protections with unnecessary and overly-bureaucratic red tape.

Time limits

Planning and procurement

14. The consultation paper contains two separate sets of proposals on time limits for JR claims. The first relates specifically to procurement and planning cases, where the Government plans to substantially reduce time limits to a month and six weeks

¹⁴ *Judicial Review: proposals for reform*, paragraph 110.

¹⁵ Also announced in the Prime Minister's speech to the CBI on 19th November 2012.

¹⁶ See the latest version of the Enterprise and Regulatory Reform Bill, clauses 57 and 58: <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0045/2013045.pdf>.

respectively. Liberty does not conduct litigation in these areas and JR applications in planning or procurement cases are unlikely to routinely raise issues going to the protection of fundamental rights and freedoms. That notwithstanding, Liberty has concerns about the impact of these proposals on access to justice and the ability of individuals to hold Government to account. We further understand that planning cases can involve consideration of important environmental issues which generate a wide and pressing social interest. Current requirements to bring claims within a three month period already place a clear and relatively short upper limit on JR applications. It is further important to remember that the current requirement is that such claims be brought *promptly or* within three months, meaning it is open to a judge to determine that a case has not been brought in a timely fashion, even within the space of three months.

15. Liberty believes there is a risk that, by dramatically cutting the limitation period, the Government is decreasing the prospects of early settlements. By forcing claims to the court doors before a defendant has had adequate opportunity to consider the relative merits of proceeding, these reforms could have the effect of perversely encouraging litigation where negotiation and settlement would previously have taken place. We are further concerned that, for inexperienced or vulnerable litigants, these significantly curtailed time-scales may act as an effective bar to the Courts if they are unable to obtain appropriate legal advice in the given time-frame.

Cases of multiple or continuing breach

16. The consultation paper also proposes altering the application of time-scales in cases involving multiple or continuing breach. The Government presents these proposals under a section of the paper headed '*[t]ackling delays in bringing late claims*'.¹⁷ The paper records the Government's belief that:

*'the current law ought to function so that the time within which proceedings must be brought starts at the point where the grounds giving rise to the claim first arose.'*¹⁸

The Government offers no justification for this assessment, but rather refers to what it terms '*anecdotal evidence*' that claimants sometimes argue that time periods should

¹⁷ *Judicial Review: proposals for reform*, p. 16.

¹⁸ *Judicial Review: proposals for reform*, paragraph 64.

run from a date later than the occasion of the first breach. The Government has produced no evidence of, nor even explicitly articulated, a concern that cases are being routinely brought outside of *reasonable* time limits. No mention is made of the complexities involved in cases concerning ongoing or multiple breaches which may make it unjust or unreasonable to expect applications to be brought within a period which refers back to the original incidence of abuse.

17. It is easy to conceive of cases involving ongoing or multiple breaches in which it would be an obvious denial of justice for time periods to run from the date of the first breach. In the case of an unlawful detention, for example, an individual will of course be aware of the date on which he was detained, but may not immediately realise that police have failed to act in accordance with important procedural requirements rendering the detention lawful. Here the breach starts from the point when the individual was first detained, but time should clearly run from the point the individual found out, or could be expected to have known, about a breach. There may be other unlawful detention cases in which the very fact of delay is the issue giving rise to a potential challenge. This potential for injustice also clearly exists in cases where the rationale for an earlier decision emerges at a later point. A decision which might at first seem simply adverse could be revealed to be discriminatory on disclosure of additional correspondence. If strictly applied, the Government's proposals could mean that public authorities which deliberately attempt to cover up illegitimate decisions or abuse of process could benefit from their bad behaviour.

18. This aspect of the Government's reforms is, at the very least, extremely uncertain. What happens in cases where an unlawful policy is not applied to an individual until some significant time after it is implemented? What about cases where you are not aware you may have a successful claim until a reluctant public authority chooses to disclose important information? What about claims involving an omission, when does the omission begin? It is also important to note that in the context of human rights claims brought before the European Court of Human Rights, claimants are deemed to be within the permitted time if a breach is found to be continuing. Below is a recent example of a successful JR brought by Liberty that could have resulted in ongoing unfairness and injustice had the Government's proposals on historic breaches already been in force.

Serious Article 3 violation that included historic breaches

On 9 September 2010 Liberty attended for the first time a gentleman in immigration detention who suffered from major depression and who had been suffering acute stomach pain – the latter for which he had been treated at an outside hospital. He was particularly distressed that he was always held in restraints throughout all medical consultations and treatments and wanted to see if we could do anything about this. There had been a number of times this had happened: on 10th July and from 15th to 23rd July inclusive (almost 9 days); and on 1 September.

A few days after this he was again taken to hospital on 24th September, in restraints. We sent in an expert psychiatrist to report upon the impact of restraints on someone with his mental health problems. We granted ourselves legal aid to prepare the letter of claim.

We sent a letter of claim on 6 October. We received no reply. We chased on 2 November, this time enclosing a copy of the expert report that had by now been prepared. We received no response. The LSC only confirmed the funding position (that we were authorised to issue judicial review proceedings) on 11 November. The claim was issued on 17 November against Serco (who were the company responsible for restraining our client) as well as the Secretary of State. We sought a declaration that the future use of restraints at outside hospital would be unlawful and a declaration that there had been a violation of Article 3 of the *Human Rights Act 1998* (HRA) and a declaration that the policy on handcuffing was unlawful for being insufficiently clear on when and in what circumstances restraints should be used.

Serco argued right from the outset that the claim had not been issued promptly and in any event within 3 months. Therefore, in their submission, the occasions of restraint in July highlighted above should not fall within the challenge. This assertion was clearly rejected by the permission judge who said:

“in determining the lawfulness of the policy on the use of handcuffs based on an alleged breach of Articles 3 and/or 8 ECHR it is appropriate to consider the historic treatment of the Claimant as part of the context: *Somerville v Scottish Ministers* [2007] 1 WLR 2734, R (*Faizovas*) v Secretary of State [2008] EWHC 1197.”

This case indicates several problems with the Government’s proposals:

- 1.) The consultation appears to suggest that a policy challenge may only be able to adduce evidence concerning violations that have taken place within the last 3 months. As the judge in this case observed, an understanding of past alleged breaches may be highly appropriate – and in many cases crucial - in properly examining policy challenges;
- 2.) In a case such as this, you are relying on the ability of a seriously mentally ill man to know that he is being subjected potentially to a violation. There is human rights case law that states you do not have to be aware of a breach in order to be a victim of it (see *Klass v Germany* (1979 – 80) 2 EHRR 214 where the European Court held that it is unacceptable that a person should be denied a remedy for a violation of the European Convention on Human Rights by reasons of the fact that they are unaware of the violation. But the effect of this rule would appear to be that such victims would be less likely to be able to actually pursue a claim;
- 3.) On a practical level, it will be open to an authority to delay responding to a letter of claim as long as possible and then claim that the claimant is out of time. We didn’t receive a substantive response from either defendant in this case before we issued, yet they one of them took a point on limitation;
- 4.) Also on a practical level, there may be funding reasons which cause delay. Under the proposals, such delays could effectively bar worthy claimants from access to justice;
- 5.) Had the proposed strict rule on limitation re historic breaches been applied in this case, our client would have been denied a remedy for the main part of his claim – the 9 day admission when he was unlawfully restrained. Collins J was very critical of that period finding that it had been a serious violation of Article 3 HRA.

19. The potential impact of this proposal on access to justice makes it the most concerning aspect of the Government's proposals for the reform of Judicial Review. If ultimately implemented it can only be hoped that a new provision is interpreted by the Courts in a way consistent with the demands of justice. Leaving it to the judiciary to avert injustice, however, will inevitably create a great deal of uncertainty for individuals and public authorities alike and is liable to generate a significant amount of litigation as the parameters of new requirements are established. For a Government which claims to be committed to reducing the costs and disruption associated with litigation, this could be a remarkable own goal.

Restricting oral renewal

20. The Government's proposals in this area relate to two discreet scenarios. Firstly cases where an oral hearing is sought, but there has already been a judicial process at which '*substantially the same issue*' has been raised. Where a claimant makes an application for an oral permission hearing, it would be open to a defendant to argue that the issues in question have been determined at a prior hearing. It would be for the judge to determine whether the application potentially raises fresh issues not subject to prior judicial scrutiny. There will be an opportunity for claimants to appeal the refusal of permission for an oral hearing to the Court of Appeal, but only on the papers. The most obvious point to make about this aspect of the proposals is that they will cause a great deal of uncertainty and create a significant amount of satellite litigation going to the issue of whether prior consideration has occurred.

21. The second scenario in which access to an oral hearing is to be restricted is in cases where a judge has certified on the papers that a case is '*totally without merit*'. It would be possible to appeal against certification to the Court of Appeal, but, again, such an appeal would only lie on the papers.

22. In addition to the uncertainty and extra litigation these changes are liable to generate, this aspect of the Government's proposals carries serious implications for effective access to justice. There is a clear qualitative difference between an application presented on the papers and an interactive oral hearing in which a claimant or her representative can respond to issues raised by the defendant and address concerns or queries occupying the judge. Liberty believes that oral hearings are an integral part of the judicial review process, providing an opportunity to fully

present the evidence and respond to challenge in a way faithful to our common law, adversarial system of justice.

23. We are further concerned that the present proposals will have a particularly pronounced effect on litigants in person. There is a real risk that, where individuals without legal knowledge and experience present a case on the papers, they will fail to make important points which are relevant to, or even determinative of, an application. In an oral hearing, a litigant can respond to probing questions from a judge as well as addressing challenges from the defendant. Whilst the inclusion of a right of appeal to the Court of Appeal is welcome, the fact that this avenue will not give rise to an oral appeal means that our principal concerns remain. Litigants in person already face significant challenges, often simply as a result of their inability to pay for representation or qualify for legal aid under a system subject to deep and devastating cuts. Liberty believes those forced to represent themselves should not face further disadvantage by the removal of opportunities to apply for permission at an oral hearing.

24. According to a Report published by PLP and the University of Essex, some 62% of applications for permission succeed at an oral hearing, over twice as many as are granted permission on the papers.¹⁹ The Government has given no indication that it is alert to the potential impact of the proposed curtailment of oral renewal on access to justice. Perhaps more surprising, however, is the Government's failure to engage with the financial implications of removing the opportunity of oral renewal in the High Court, but providing further appeal rights to the Court of Appeal. Whilst the Government have not produced the costing which would be necessary to assess the aggregate financial impact of these proposals, it appears that costs will, to some extent at least, simply shift from one area of the Courts and Tribunals Service to another.

Fees

25. The Government's final proposal involves the introduction of a fee for the oral renewal of applications for permission to appeal across the board. The rationale given

¹⁹ Ibid, paragraph 3.4, footnote 7: "953 cases were considered for permission; of the 782 paper considerations, 237 were granted permission, of 214 renewed applications 44 obtained permission, and a further 101 cases out of 162 were granted permission following oral-only permission hearings."

by the Government for this aspect of its plans is that *'fees charged in Judicial Review proceedings do not reflect the costs of providing them.'*²⁰ The Government places the cost of an oral renewal hearing at £475. Whilst the present proposal is for the introduction of a fee of £215, the consultation makes clear that steps have already been taken to increase the level of fees to £235, it appears this figure too may be subject to upward adjustment up to the full cost of the hearing. Where an oral renewal hearing is ultimately successful, a claimant will not be required to pay the cost of the full hearing. On the basis of 2011 figures of 1,700 unsuccessful oral renewals and taking the anticipated figure of £235 into account, the Government's Impact Assessment suggests the Courts and Tribunals Service may recoup £400,000 from claimants. The Impact Assessment quickly qualifies this figure, however, by acknowledging that it does not take account of remissions or the administrative costs of collecting a new fee.

26. Any measure which imposes additional financial burdens on claimants seeking to challenge public authority decision making is a cause for concern. In reality those on extremely low incomes will qualify for legal aid, whilst the fee will provide no obstacle for wealthy people. The individuals starkly affected by these proposals will be individuals on modest incomes, who will likely already be struggling to meet the costs of litigation. The Government's proposals would place an increased financial burden on claimants at an early stage in proceedings, in cases where they may be testing new or contentious legal points. This type of case is inherently uncertain and Liberty is concerned that some claimants may feel unable to proceed with challenges which have important implications personally and wider social significance.

Conclusion

27. Whilst Liberty is relieved that the proposals for reform of JR presented by the Ministry of Justice are not as comprehensive as we had been lead to believe, we remain concerned that these reforms fail to respect the critical role JR plays in our constitutional settlement. The removal of oral renewal rights and attempts to remove vital flexibility in the calculation of time-limits, in particular, will damage access to justice and undermine the ability of individuals to hold agencies of the state to account. Liberty is further astonished at the lack of evidence or reasoned analysis set

²⁰ *Judicial Review: proposals for reform*, paragraph 100.

out in support of these worrying reforms. In particular, and at a time of sustained attacks on law and policy designed to protect individuals against discrimination, the Government has comprehensively failed to engage with the impact of these proposals on disadvantaged groups.

Rachel Robinson