CORRECTION SLIP

Reform of Judicial Review

Proposals for the provision and use of financial information

Session: 2015/2016

Cm 9117

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Correction made to page 15, question 2.

Error: “Do you agree with the government’s proposed approach at paragraph 52(a)-(e)?”

Correction: “Do you agree with the government’s proposed approach at paragraph 51(a)-(e)?”

Correction made to page 15, question 4.

Error: “Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 59 to 61?”

Correction: “Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 58 to 60?”

Correction made to page 27, question 13.

Error: “13 Do you agree with the assumptions and conclusions outlined in the Impact Assessment?”

Correction: “13) Do you agree with the assumptions and conclusions outlined in the Costs Benefit Analysis at pages 24 to 26 of this consultation?”

August 2015

Ministry
of Justice

Reform of Judicial Review

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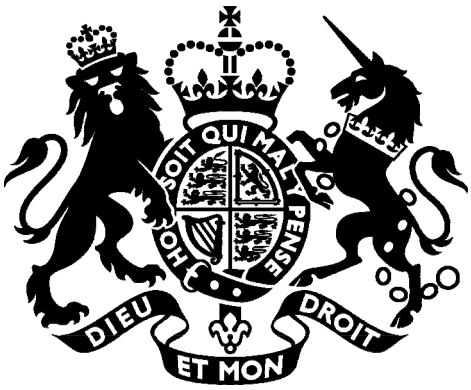

Reform of Judicial Review

Proposals for the provision and use of financial information

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

July 2015

Cm 9117

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About this consultation

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Ministerial Foreword

When I set out the first aspects of my One Nation justice strategy, I made it clear that as Lord Chancellor the thing I will defend, above all else, is the rule of law.

Without the rule of law power can be abused. Judicial review is an essential foundation of the rule of law, ensuring that what may be unlawful administration can be challenged, potentially found wanting and where necessary be remedied by the courts.

Parliament legislated in the Criminal Justice and Courts Act 2015 to protect the judicial review process from misuse.

Critically the courts should have the information they need when deciding how to award costs, and give claimants some immunity from future costs.

The proposals in this paper are designed to ensure the courts have the necessary financial information. I look forward to receiving views on our proposals and, the questions we have set out.

Rt Hon Michael Gove MP

Lord Chancellor and Secretary of State for Justice

1. Introduction

1. Part 4 of the Criminal Justice and Courts Act 2015 ('the 2015 Act') introduced new provisions about the financing of judicial review proceedings (amongst other reforms). To implement these reforms, provision in Civil Procedure Rules and Tribunal Procedure Rules is required. This paper seeks views on proposals for the rules setting out the financial information required at the outset of a judicial review claim and for implementing costs capping orders. In particular, the consultation seeks views on proposals for rules to set out:
   a. that a declaration of funding sources is required on an application for permission;
   b. that details of third party funding or likely funding in connection with an application for judicial review need not be provided where the funding is below a threshold of £1,500; and
   c. that a more detailed picture of the applicant's financial circumstances is required on application for a costs capping order than on application for permission.

2. The consultation is aimed at those with an interest in judicial review and associated reform in England and Wales.

3. Chapter 2 sets out the background to these proposals; Chapters 4 and 5 relate to the provision and use of financial information (sections 85 and 86 of the 2015 Act) and chapter 6 relates to cost capping orders (sections 88 and 89 of the 2015 Act). This paper contains a number of questions which seek specific views on the outlined proposals.

4. Chapter 7 sets out the estimated costs and benefits of the proposals. We invite respondents to provide evidence that could help us consider the potential impact on individuals with protected characteristics, in line with our responsibilities under the Equality Act 2010. We also invite respondents to provide evidence that could help us consider the potential impact on families in line with the Family Test assessment.

5. Details of how to respond are set out above. The deadline for responses is 15 September 2015. The government will consider the responses to this engagement exercise and intends to publish its response in the next parliamentary session.

6. Throughout this consultation, 'claimant' refers to a person making an application for judicial review, and 'applicant' refers to a person making an application for a costs capping order in the course of a judicial review.

7. Copies of the consultation paper are being sent to:

The Judiciary of England and Wales	Amnesty International
The Bingham Centre for the Rule of Law	Age UK
Professor Maurice Sunkin	Shelter
Varda Bondy	Leigh Day
Liberty	Guildhall Chambers
Justice	The Public Law Project

Bar Council	The Howard League for Penal Reform
The Bar Standards Board	Refugee Action
Solicitor's Regulation Authority	Rights Watch UK
The Law Society	The Association of Charitable Foundations
Citizen's Advice	National Association for Voluntary and Community Action
The Planning and Environmental Bar Association	Law Centres Network
The Constitutional and Administrative Bar Association	Legal Wales Foundation
Immigration Law Practitioners Association	Equality and Diversity Forum

8. This list, however, is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

2. Background

9. Judicial review is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions or actions of public bodies, including those of Ministers, local authorities and those exercising public functions. It is a largely judge-developed process and can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the Executive to account.

The judicial review process

10. Judicial review proceedings take place in accordance with section 31 of the Senior Courts Act 1981 and the procedure is set out in the Civil Procedure Rules (CPR), and in particular Part 54 (and the accompanying Practice Directions). They are generally heard in the Administrative Court, which forms part of the Queen's Bench Division of the High Court. Usually, they are heard by a High Court Judge, but on occasion may be heard by the Divisional Court (comprising two or more Judges). The Upper Tribunal may also hear judicial reviews under section 15 of the Tribunals, Courts and Enforcement Act 2007. From 1 November 2013, most immigration and asylum judicial reviews have been heard in the Upper Tribunal.

11. A claim is initiated by the claimant for judicial review filing a claim form with the court. This will set out who the claim is against, the matter the claimant wants the court to decide and the remedy sought. The claim form template includes sections allowing the claimant to set out a detailed statement of the grounds, ancillary applications (such as for a protective costs order) and a statement of facts relied on. The claimant must provide a Statement of Truth, verifying that they believe "the facts stated in this claim form are true" (CPR rule 22.1(5)).

12. The general position is that the claim must be submitted promptly and in any event within three months of the grounds giving rise to the claim, although shorter limits apply to planning and to procurement judicial reviews (CPR 54.5).

13. The claim form must be served on the defendant and any other interested party, unless the court directs otherwise. The defendant and other parties must serve an Acknowledgment of Service in response.

14. The court's permission is required for a claim for judicial review to proceed. Decisions on permission are normally considered on a review of the papers filed. Permission may be granted in full, or limited to certain grounds set out in the claim.

15. In cases where the court refuses permission (either in full or in part), it will set out the reasons and serve them on the claimant and the other parties to proceedings. The claimant may, unless the court when refusing permission certifies that the claim is totally without merit, request that a full or partial refusal be reconsidered at an oral hearing.

Reforms to judicial review

16. Following a consultation which ran between September and November 2013, and which can be found at https://consult.justice.gov.uk/digital-communications/judicial-review, the government committed in its response to introducing a number of reforms, including in relation to the provision of information on the funding of judicial reviews and replacing the protective costs order regime with a new system of costs capping orders. The response can be found at the same link as the consultation.

17. Parliament subsequently legislated for these specific reforms in sections 85 to 90 of the 2015 Act, which received Royal Assent on 12 February 2015.

Provision and use of financial information in the Criminal Justice and Courts Act 2015

18. If a person or organisation is involved in litigation they will incur certain expenses through, for example, instructing a legal representative or having a scientist provide an expert witness report. These expenses are known as 'costs' and are usually determined at the end of the case. The court has discretion as to costs but generally in England and Wales the unsuccessful party will be ordered by the court to pay the costs of the successful party at the conclusion of the case (CPR 44.2).

19. Sections 85 and 86 of the 2015 Act reflect the government's intention to have greater transparency in how judicial reviews are funded and to limit the potential for third party funders to avoid their appropriate liability for litigation costs. The 2015 Act **neither** affects the law on when costs should be awarded against a third party **nor** creates any requirement for a particular level of funding to have been secured before permission can be granted.

20. Currently, the courts do have the power to exercise their general discretion to order a third party, such as a claimant company's member, to pay costs in a judicial review. Each application for such an order will be decided on the facts of the case, but case law requires there to be a strong relationship between the party and the person who is funding their claim, before a court will make this type of order. Doing no more than providing funding for the application will not be sufficient – the third party must be seeking to drive the litigation and to benefit from a potential remedy in the case – but funding can be a strong indicator of that influence. At present, the courts might not have available the information necessary to decide whether it is appropriate to make a costs award against a third party as there is no requirement to provide any information on how an application is or will be funded.

21. Section 85 of the 2015 Act inserts into section 31 of the Senior Courts 1981 and into section 16(3) of the Tribunals, Courts and Enforcement Act 2007 a requirement for a claimant to provide the court or tribunal with specified information concerning the funding for the judicial review proceedings before permission can be given. The information required will be specified in rules of court and Tribunal Procedure Rules. Such rules are made by the Civil Procedure Rule Committee and the Tribunal Procedure Committee, respectively.

22. The information that may be specified in rules includes information about the source, nature and extent of financial resources available, or likely to be available, to meet liabilities arising in connection with the application for judicial review. The intention is to provide the court with a clear picture of the funding of a judicial review application, in order to inform decisions on costs.

23. If the claimant is a corporate body, such as a limited company, and is unable to demonstrate that it is likely to have sufficient financial resources available to meet liabilities arising in connection with an application, rules may specify that it must provide information about its members and their ability to provide financial support for the application for judicial review.

24. Section 85 of the 2015 Act requires rules of court and tribunal rules to provide that only a person whose financial support (direct or indirect) exceeds, or is likely to exceed, a set level has to be identified. In effect a person will only be identified in the information given to the court if their contribution is above a certain level. This requirement for a threshold was introduced in response to concerns about the chilling effect of the provision of information to the court in judicial review proceedings. There were suggestions that too low a threshold could deter small contributions made with no expectation of control of or benefit from the judicial review.

25. In Parliament, the previous government committed to a consultation prior to the implementation of these provisions. The then Secretary of State stated:

    "I am content to say that the government will commit to a consultation on where and how the threshold will be set. I am also content to inform the House that we will approach the consultation with a suggested figure of £1,500 in mind, and we are minded additionally to test a figure of 5% of the available funds." (Official report, 13 January 2015, col. 809)

26. In addition to the consultation on the figure at which the threshold should be set, the government has taken the opportunity to seek views on what financial information should be provided with an application for permission.

27. Section 86 of the 2015 Act provides that when making costs orders under section 51 of the Senior Courts Act 1981 or section 29 of the Tribunals, Courts and Enforcement Act 2007, the court should have regard to the financial information provided by the claimant with their application for permission.

28. Section 86 of the 2015 Act also provides that the court must consider making costs orders against those who are not a party to the judicial review but who have been identified as providing financial support. This does not require the judge to make such an order if they consider that it would be inappropriate to do so but requires them to consider properly the position of those identified in the information provided.

29. Sections 85 and 86 apply to judicial reviews in the Upper Tribunal and the High Court.

Costs Capping Orders in the Criminal Justice and Courts Act 2015

30. Courts sometimes exercise their discretion in relation to costs to protect a party (usually the claimant) from their full liability, should they lose the case. This means that the winning defendant will have to cover any balance of its legal costs itself. The court may make an absolute order which limits recoverable costs to zero (so the winning party has to meet all its own costs).

31. Defendants in judicial review cases are almost invariably taxpayer funded. Where costs protection is given by the court, defendants in those cases will carry a larger share of the litigation risk than they otherwise would, as they will have to meet some or all of their costs, even when they win the case.

32. The principles governing when costs protection may be granted were developed by the courts in case law and re-stated by the Court of Appeal in the case of *R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192.* Such orders were referred to as protective costs orders.

33. The *Corner House* case provides that costs protection should only be granted in exceptional circumstances, usually cases concerning issues of public importance. Over time, however, their use has widened, which means costs protection may be granted in a greater range of circumstances than previously envisaged.

34. Under *Corner House*, it is a requirement that the court consider the financial resources of the applicant before protecting them from their full potential liability. This stems from the purpose of protective costs orders, which is to make sure that meritorious judicial reviews of significant public interest are not discontinued purely on the basis of the availability of resources to the applicant.

35. Following the September 2013 consultation, the government concluded that costs protection in judicial reviews should be placed on a statutory basis. Parliament legislated for costs capping orders in judicial review proceedings in sections 88–90 of the 2015 Act. The position in relation to other civil proceedings remains unchanged.

36. Section 88 of the 2015 Act provides that costs capping orders in judicial review proceedings can only be made in certain circumstances. One requirement is that an order can only be made if the applicant has been granted permission to proceed to judicial review. A second is that a costs capping order may only be made where the proceedings are 'public interest proceedings'. Proceedings are 'public interest proceedings' where the subject is of general public importance, it is of public interest to have the matter resolved and the proceedings are the most appropriate method of doing so. When determining if matters are of public interest, the court must consider how many people will be directly affected by any relief granted, how significant that effect will be and whether the proceedings involve a point of law of general public importance.

37. A further requirement is that a costs capping order may only be made where the applicant would withdraw the application for judicial review if denied one, and it would be reasonable for them to do so.

38. Section 88(5) of the 2015 Act provides that rules of court may specify information that must be contained in an application for a costs capping order, namely:

    a. information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application; and

    b. if the applicant is a corporate body that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

39. This provision describes the information in the same terms as the description of information which may be required with an application for permission for judicial review under section 85 of the 2015 Act.

40. This information is relevant to the court considering whether or not the applicant would withdraw from the proceedings without a cost capping order and whether they would be acting reasonably in so doing. In addition, section 89 requires the court when considering whether to make a costs capping order, and what its terms should be, to have regard to the financial resources of the parties and of any person who might provide financial support to them, amongst other things.

41. Section 90 enables environmental cases to be excluded from the codified regime provided for in these sections as such cases are governed by a separate regime arising from the Aarhus Convention[1] and the Public Participation Directive.

42. We are consulting on the provision to be made in rules concerning financial information in applications for costs capping orders in view of the similarity of the statutory requirements to those in relation to financial information in judicial review applications more generally. The government intends to invite the Civil Procedure Rule Committee to make rules on this subject following the consultation. In this paper we seek views on what type of information should be provided by individuals and companies, as well as the level of detail of financial information required in order to apply for a costs capping order.

43. Sections 88–90 do not apply to judicial reviews in the Upper Tribunal.

[1] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

3. The Proposals

Introduction

44. The following proposals focus on making sure the courts have sufficient information to make the right costs orders so that those who fund and control judicial review applications are not able to avoid the appropriate costs liability arising from their actions and access to justice is protected.

45. Parliament having legislated, as set out earlier, this consultation concerns the approach to the rules implementing three areas of reform, namely:

    a. the mandatory requirement for a claimant for judicial review to provide information on the funding of the case to the court before permission can be granted. The government proposes that the claimant be required to complete a declaration of financial resources, which will not be provided to the defendant or interested parties or made publicly available;

    b. the level at which a threshold for the disclosure of third party funding should be set. The government proposes a figure of £1,500; and

    c. the information which should be required on an application for a costs capping order to assist the court in determining whether such an order should be made and, if so, what terms it should have. The government proposes that the applicant provide a more detailed picture of their finances than on an application for permission to make sure costs capping orders are made appropriately.

4 Financial Information

46. The first area on which the government is consulting is the information to be specified in rules which will be required on all applications for permission to bring a judicial review. The government proposes a declaration model, as set out below, as the most appropriate balance between providing the court with useful information and placing claimants under too onerous a duty to provide details of their and others' finances.

47. As set out above, section 85 of the 2015 Act does not create a requirement for any minimum or specific level of funding to be available to the applicant before permission can be given – simply that the applicant provide the court with the necessary financial information.

Rationale

48. As set out at paragraphs 18–29 above, Parliament legislated to give judges more information on the actual or likely funding of each application for judicial review from the outset of the application. The government's policy aims to provide the court with sufficient information about financial backing for the claim to support the court to make fully informed decisions in respect of how the costs of judicial reviews should be allocated. That may be in conjunction with other information the court might seek, such as on the degree of control an identified third party funder exercises over the direction of the claim.

49. The aim is not, however, to require too much information and inundate the court with unnecessary documentation or to make the process unduly onerous for claimants for judicial review.

Proposal

50. To deliver the required balance between practicable requirements and increased transparency in proceedings, the government proposes a declaration model that provides a summary of the funding position. Rules will require the claimant to declare which of several funding options apply from a multiple choice list, and provide limited further details where required. On reviewing the information provided in the declaration, the judge in the case will be able to seek further information as they consider necessary and desirable at the stage at which they require it.

51. The claimant would be required to declare which of the following applied and provide the additional information (indicated in each case at "i") where applicable:

    a. the claimant is not a corporate body and intends to meet all likely liabilities arising from the claim from their own financial resources;

        i. in which case, no further information would be required;

    b. legal aid has been applied for and the application is pending or has been granted;

        i. in which case, the claimant need not set out further information as a result of these proposals. Where legal aid is granted claimants are (by reference to regulation 38 of the Civil Legal Aid (Procedure) Regulations 2012) already meant to note this on the claim form and provide the certificate to the court when proceedings are, or already have been, issued;

c. the claimant is a corporate body that has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review;

   i. in which case, no further information would be required;

d. funding other than from the claimant's resources or legal aid;

   i. in which case, where the total contribution and/or likely contribution is in excess of the threshold the name and address of the contributor, and the size of the contribution, would need to be provided; and

e. the claimant is a corporate body that is unable to demonstrate that is has or is likely to have sufficient funds to cover liabilities arising in connection with the application for judicial review;

   i. in which case, the names, addresses and interest in the claimant of its members would be required.

52. Where required, it will be for the claimant to estimate the likely total cost of the litigation. The government does not, however, propose that they be required to provide that figure or their justification for it as part of the information. Doing so might place claimants under too significant a burden to discharge, including where they are unrepresented, and delay proceedings. This reasoning is in line with the decision not to apply a mandatory costs management regime to claims under Part 8 of the Civil Procedure Rules, which include judicial reviews.[2] The court would, however, retain a power to request information on estimated costs if it requires it.

53. Alternatively, rules might require the claimant to provide some analysis of the likely cost of the claim on their application for permission, allowing the court to consider whether the declaration was made correctly in all cases. The government welcomes views on this point.

54. The claim form, including the financial statement, would be verified by a Statement of Truth. Statements of Truth are made in line with Civil Procedure Rule 22, and are a statement that the party putting forward the document believes that the facts stated in it are true.

55. Once the declaration has been completed and signed, this would satisfy the financial information requirements for permission to be granted.

56. The government is of the view that the approach to the provision of financial information outlined above is not unduly onerous and is required to make sure that the court is provided with financial information appropriately. Consequently, the government proposes that the requirements should apply in all judicial review applications and to all claimants. It would, however, be interested to receive views on whether that is the case, including whether there should be an amended approach for some types of claimant (such as charities).

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[2] Please see paragraphs 6.1 to 6.3 of http://www.chba.org.uk/for-members/library/consultations/cprc-costs-budgeting-and-costs-management

57. The financial information which will be provided will be available to the court. But it will not be made publicly available or provided to the defendant, in line with existing practice when the courts deal with information which concerns personal finances, or is otherwise confidential.

Duty to Update the Court

58. The government recognises that the claimant's financial circumstances relative to the likely level of liabilities arising from the claim are likely to change during the course of litigation, rendering the original statement out of date. Examples of this might include where:

    a. a claimant's original statement indicated they would receive a significant sum of money from a third party at some future date, but it becomes clear that those funds will not be provided;

    b. the estimated cost of the litigation increases to a level where a claimant company has insufficient funds to meet liabilities likely to arise in connection with the claim; and/or

    c. a third party's financial contribution increased from a level below the threshold to one above it.

59. The government proposes that during the course of proceedings the claimant should be subject to a duty to update the court if there is a material change to their financial circumstances. This will make sure that the court has information which is appropriately accurate when it comes to take decisions on costs. Additionally, it will limit the potential to circumvent the intended effect of sections 85 and 86 by simply obtaining funding after the financial information had been provided.

60. The government, however, accepts that it would be impracticable to include a requirement that each and every change to the relative funding position, no matter how minor, be reported to the court. It proposes that the changes to which the duty would apply would be those which are, in the opinion of the person making the declaration, significant in the context of liabilities arising or likely to arise in the context of the application or judicial review.

Conclusion

61. The government's view is that a relatively simple declaration will strike an appropriate balance between providing the court with adequate information without placing too heavy a burden on a claimant. The duty to update the court would support that.

62. The government seeks views on whether that is indeed the most appropriate approach, including whether it creates the potential for loopholes which can be exploited, and any other practical issues that may arise, including whether the requirements should apply to all types of claimant.

Questions

1) Do you agree that a multiple choice declaration is appropriate? Please provide reasons.

2) Do you agree with the government's proposed approach at paragraph 52(a)–(e)? Please provide reasons.

3) Do you agree that there should be no requirement for the claimant to provide their estimate of costs? Please provide reasons.

4) Do you agree that the claimant should be under a duty to update the court as set out in paragraphs 59 to 61? Please provide reasons.

5) Do you agree that the financial information requirements and approach to service the government proposes should apply to all applications? Please provide reasons.

5. Financial Information Threshold

63. As set out earlier, new section 31(3)(3B) of the Senior Courts Act 1981 and new section 16(3)(b) of the Tribunals, Courts and Enforcement Act 2007 will require court and tribunal rules to set out a threshold in relation to the provision of financial information on third party's contributions. A third party will be any person or company providing the claimant with funding but who is not themselves a party to the judicial review proceedings. Third parties who are or are likely to be sources of financial support lower than the specified threshold will not need to be identified by the claimant when applying for permission.

64. The government proposes a threshold of £1,500 for when the section is first implemented. This means that only third parties whose total contribution exceeds (or is likely to exceed) £1,500 will need to be identified to the court. The threshold applies to the total of all contributions made and/or likely to be made from the same source.

Rationale

65. As a limit on contributions about which details need to be provided, the threshold will both militate against any possible chilling effect on small contributions and guard against providing the court with too much unnecessary information. It should not be set, however, at a level which excludes from the requirement information on contributions by persons of whom the court should be aware when, for example, determining whether to seek further information on third parties in the context of costs decisions.

66. The government's suggested figure has been influenced by the data available on the costs of judicial reviews, which is at paragraphs 67–71. In the light of this data, such as Guildhall Chambers' figure of £5,000 as the bottom of the range, £1,500 appears an appropriately significant sum, particularly as costs may be awarded against a third party before there has been a substantive hearing, such as when permission is refused.

Evidence of Judicial Review Costs

67. The government has basic information on costs data for claimants in judicial review applications. We are requesting further information on costs for claimants that respondents to the consultation may be able to provide in order to make sure the threshold chosen is appropriate and suitable for the policy aim.

68. We take our data on judicial review costs from a range of sources. These include publications by the Public Law Project, Guildhall Chambers and Leigh Day Solicitors, all of whom are independent of government.

69. The data on total cost is not particularly substantial or quality assured, and comes from various sources. The methodologies used are not always clear, and nor is the sample size or approach. The figures, however, tend to put the costs to both sides of a judicial review at between £11,000 and £22,000, adjusted for inflation. Those studies are:

    a. in 2007 the Public Law Project estimated that for a straightforward case that proceeds to a full hearing, costs to a claimant could be in the region of £10,000 to £20,000 (adjusted for inflation this would be around £11,000 to £22,000);[3]

    b. in 2012 Guildhall Chambers estimated this at £5,000 to £10,000;[4] and

    c. Leigh Day Solicitors estimated this at upwards of £30,000 including defendant and claimant costs.[5]

70. Respondents may also wish to note that the court can award costs before a decision has been made, including on the refusal of permission. The government has indicated that it intends to increase the scope for full reasonable costs to be awarded when permission is refused at an oral hearing. Average costs at permission are likely to be significantly lower than those for completed cases (which will have also completed the permission stage).

71. Further evidence of the total costs for claimants, including legal costs and associated matters, would be welcomed. Furthermore, the government would welcome information on typical levels of third party contributions to judicial reviews.

Proposal

72. To achieve the required balance between the court having the information it requires, without having a chilling effect on small contributions made without an expectation of control, or inundating the court with unnecessary information, the government proposes a single threshold of £1,500. In the government's view, a threshold of £1,500 will capture contributions which may be indicative of a degree of third party control of the claim, particularly in lower cost claims such as those which do not get beyond the permission stage, without capturing small contributions made without any real expectation of creating a relationship of control.

73. The figure also provides an appropriate balance because the government proposes that only a limited amount of information will be required, meaning that the duty to declare contributions above the threshold should not be particularly invasive.

74. As the threshold will be implemented in court and tribunal rules, it can be adjusted over time to take account of inflation and other developments affecting court costs. This consultation relates to the appropriate figure for the original implementation.

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[3] http://www.publiclawproject.org.uk/data/resources/118/PLP_2006_How_to_fund_JR_without_legal_aid.pdf, para. 1.

[4] http://www.guildhallchambers.co.uk/files/Making_a_successful_claim_for_Judicial_Review_Notes_Kerry_Barker_Guildhall_Chambers_October2012.pdf, para. 48.

[5] http://www.leighday.co.uk/LeighDay/media/LeighDay/documents/JR-Quicky-and-Easy-Guide.pdf, page 3.

Percentage Threshold

75. The government does not now intend to introduce a second threshold, which would be expressed as a percentage. Whilst that would have the advantage of linking the threshold to the costs in the claim (or the estimated costs), it appears impracticable.

76. As set out earlier, the government does not intend the claimant to provide a detailed statement of the likely costs of the claim on its application for permission, as that might be a difficult process which might delay proceedings (although views are sought on the point). Consequently, the percentage could not relate to the claimant's estimated cost of the litigation.

77. If, however, a requirement to provide those costs was included, the estimate might reasonably grow over time, such as if the claim was granted permission to proceed to a substantive hearing.[6] As a result, applying a percentage figure might mean that those whose contributions were below the relevant percentage amount of the actual final cost but were in excess of that percentage in the earlier estimate might have their information provided.

78. Alternatively, the percentage might be applied to the size of the funds available to meet the costs of the litigation. These costs might be different to the estimated cost of the litigation. That might require a complex estimate of the value of assets potentially available to the claimant, which could capture those who contribute funds for non-litigious uses. There would also be difficult issues concerning how to deal with a group of linked organisations, such as subsidiary companies.

79. Another alternative would be to use the size of any funds held purely for the litigation. This, however, might create an obvious loophole, as a contribution could be to the claimant and potentially be available to meet a costs award, but be formally made as a gift and not held in a specific account.

80. There would also be issues about the level of reassurance any percentage figure would give to those concerned about whether to make a contribution, as they would be unlikely to have much certainty at the time of their decision over whether their contribution would need to be revealed to the court.

81. We would, however, welcome views on whether it would be possible and desirable to include a second threshold, which would be a percentage and, if so, a percentage of what.

Conclusion

82. The government proposes a single initial threshold of £1,500 as an appropriate figure to strike the right balance between making sure that third party contributions indicative of a degree of control over the claim are revealed to the court without causing a chilling effect on small contributions, but would welcome further information and views.

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[6] Alternatively, there may be situations where the estimated cost could decrease, such as when permission is granted to proceed but only on a limited number of the grounds originally argued.

Questions

6) Do you agree with the proposal for a single threshold expressed in monetary terms? If not, please provide reasons and, if possible, an alternative.

7) Do you have any data on typical legal costs in the context of judicial reviews or typical contributions to judicial reviews? Please provide details.

8) Do you agree with the proposed threshold of £1,500? If not, please provide reasons and, if possible, an alternative.

6. Costs Capping Orders

Introduction

83. In judicial review, as with other civil claims, the 'general rule' as to costs is that the losing party will pay the successful party's costs. The court has discretion to depart from the general rule in appropriate circumstances.

84. The courts sometimes use this discretion to make an order limiting or extinguishing an applicant's potential liability to pay other parties' costs in connection with judicial review proceedings, applying the criteria set out in the *Corner House* case. These are called 'protective costs orders'.[7]

85. Parliament legislated at sections 88 to 90 of the 2015 Act to replace protective costs orders in judicial reviews with a new type of order called a costs capping order, which will be subject to a new regime governing when these should be made.

86. Costs capping orders will be similar to protective costs orders in that they will limit or extinguish applicants' liability to pay other parties' costs, irrespective of the outcome of the case. Similarly, they will be made in cases which involve issues of general public importance which the public interest requires to be resolved and where, without an order, the applicant would discontinue or withdraw from the judicial review, and would be acting reasonably if they did so. Where the court makes a costs capping order limiting or removing an applicant's liability to pay another party's costs, the costs capping order will include a 'cross-cap', limiting the other party's liability to pay the applicant's costs. The court will consider the financial resources of the parties when determining whether to make a costs capping order and, if a costs capping order is appropriate, what its terms should be.

87. Where an applicant wants the court to make a costs capping order, they will have to apply to the court, setting out information to support the application, including financial information. This is similar to the current position with protective costs orders, where the court requires the applicant to provide information in order that it can consider whether the criteria from the *Corner House* case have been met. The information requirement for the new costs capping order regime is noted at section 88(5) of the 2015 Act:

    Rules of court may, in particular, specify information that must be contained in the application, including—

    (a) information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application, and

    (b) if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

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[7] *R (Corner House Research) v. Secretary of State for Trade and Industry [2005] EWCA Civ 192*, [2005] 1 WLR 2600; see in particular paragraph 74.

88. The government is consulting here on the financial information which applicants will have to provide when making an application for a costs capping order. This financial information is for a different purpose from, and will be in addition to, the information provided when applying for permission for judicial review. Unlike that information this will be made available to the defendant and, unless the court directs otherwise, interested parties.

89. As set out above, a separate regime exists for costs capping orders for certain environmental judicial reviews at Section VII of Part 45 of the Civil Procedure Rules. The proposals in this part of the consultation only apply to costs capping orders in cases which fall outside this separate environmental regime.

Rationale

90. The government's view is that to enable the court to determine whether the criteria for making a costs capping order are met the court should be provided with a more detailed picture of the applicant's financial situation than with the application for permission. This will enable the court to determine whether it would be reasonable for the applicant to withdraw or cease to participate in the proceedings if there is no costs protection; whether costs protection is otherwise appropriate; and, if so, the terms of the order, including the level at which the parties' costs liability should be capped.

91. The information will be served on the defendant and, unless the court directs otherwise, interested parties so that, if appropriate, they can challenge or make representations on the application for a costs capping order.

92. If insufficient information is provided to the court and the other parties it could result in a costs capping order not being made when it would actually have been appropriate, or to an unwarranted burden being placed on the taxpayer if it means a costs capping order is made inappropriately.

93. Applicants should not be placed under a requirement to provide unnecessarily detailed information which would not be of use to the court. In the government's view, the following proposals achieve the required balance.

Proposals

94. The government proposes that more detailed financial information be required on an application for a costs capping order than it proposes to be required on an application for permission in Chapter 4. This is because of the different purposes for which the information is required. The purpose of the information provided with an application for a costs capping order is to assist the court to determine whether the criteria for making the order have been met and the party should be shielded from some or all of the costs it might otherwise be ordered to pay.

95. The applicant will be required to give information about their financial position, including identifying likely financial support from third parties. This would not include a requirement for the applicant to detail every aspect of their finances no matter how minimal. Instead, the government anticipates that in most situations the information required to provide that picture would include a breakdown of the applicant's significant assets, such as real property, and liabilities, their income and significant regular expenditure.

96. The claim form would, in most circumstances, be the appropriate way of seeking a costs capping order when the application for it is made at the same time as permission is sought.

97. The application for the costs capping order (including the financial information) would be served on the defendant and, unless the court directs otherwise, interested parties. This would allow them to take a decision on whether to oppose or make representations on the application for the order or an aspect of it. The defendant would be able to contest the application in the Acknowledgement of Service or another appropriate way.

98. The government does not propose that there would be a requirement for financial documents themselves to be provided with the application. The applicant would, however, annex documents as it wishes, and the court would be able to order the applicant to provide documents as it deems appropriate, such as when there are questions of detail which the court requires those documents to resolve. The defendant or interested parties on whom the financial information has been served would be able to apply for an order that those documents to be produced.

99. Where the applicant is a corporate body unable to demonstrate that it is likely to have the resources available to meet its liabilities arising in connection with the claim, the government proposes that the body should identify and provide some basic information about its members. The body would not, as a matter of course, provide more detailed financial information on them. This material will be provided to the defendant and, unless the court directs otherwise, interested parties. This information will give the court a clearer understanding of the claimant's members and their interests. The court may order that further information be provided if it deems it appropriate, such as if it wishes to consider whether the claimant might seek further capital from its members if were to face costs at the end of the proceedings.

100. The government proposes that in such situations the information which will be required about members will include:

    a. name;

    b. address; and

    c. interest in and connection to the applicant (e.g. shareholding).

101. This information is similar to that which, for example, companies are required to keep as part of their register of members pursuant to section 113 of the Companies Act 2006, and so it should not be unduly onerous to provide it.

102. The claimant will also be required to provide a schedule of costs likely to arise from the proceedings, which falls outside the scope of this consultation.

103. An applicant for a costs capping order will have to demonstrate that the criteria at section 88 of the 2015 Act are satisfied and provide the information to which the court must have regard, set out at sections 88 and 89 of the 2015 Act. This falls outside the scope of this consultation, but will include the basis upon which the applicant asserts that the claim comprises 'public interest proceedings' and that if the costs capping order is not made they will withdraw the claim, and be acting reasonably in doing so. The applicant might consequently wish to set out details of why it would be unreasonable for specific capital assets set out in the application to be used to fund liabilities arising in connection with the claim.

104. The government is of the view that the approach to the provision of financial information above is not unduly onerous and is required to make sure the court is able to determine whether certain criteria in the 2015 Act are met by the applicant, with the defendant and interested parties able to make informed representations.

105. Consequently, the government proposes that the requirement to provide financial information should apply in all claims, as should the position on serving the information on the defendant. It would, however, be interested to receive views on whether that should be the case. In particular, respondents may wish to consider whether provision should be made to:

    a. allow the applicant to petition the court to consider the application without all of the financial information requirements being met;

    b. allow the applicant to petition the court to not serve some or all of the financial information on the defendant; and/or

    c. exclude certain types of applicant from some or all of the financial information requirements; charities, for example, might find it more onerous to identify all possible sources of financial support than natural persons.

Questions

9) Do you agree with the government's proposal for a more detailed picture of the applicant's finances on an application for a costs capping order than is required with an application for permission? Please provide reasons.

10) Do you agree that the applicant should not be required to provide supporting documents? Please provide reasons.

11) Do you agree with the government's proposal for the information on members which an applicant must provide when it is a corporate body unable to demonstrate that it is likely to have the resources available to meet liabilities arising in connection with the application for judicial review? Please provide reasons.

12) Do you agree that the financial information requirements and the approach to service which the government proposes should apply to all applications? Please provide reasons.

7. Costs Benefits Analysis, Equalities Impact and Family Test

Cost Benefit Analysis

Summary

106. This cost benefit assessment provides an overview of the anticipated impact of implementing the requirements relating to provision and use of financial information proposed in this consultation document number 9117 as set out above.

107. Costs and benefits of the proposals have not been quantified in this analysis as there is limited germane information available. Many of the benefits of the reforms, including increased transparency and a fairer allocation of the costs of judicial review, would be very difficult to quantify. An attempt to calculate an overall representative Net Present Value figure for the reforms might be inaccurate.

Benefits

Benefits to society

108. The introduction of the codified costs capping order regime will make sure that claimants who can provide evidence of their suitability for an order will be given an appropriate measure of costs protection.

109. By claimants for judicial review revealing their funding sources when making an application, the court will be provided with a clearer picture of the applicant's financial situation. Third parties could be liable to meet defendants' costs where it is appropriate, in more cases, although this number is expected to be small. As the defendant in judicial review cases, this would act as a saving to the government and, ultimately, the taxpayer.

Costs

Costs to claimants

110. The costs associated with defending a judicial review can be substantial. Indicative figures from the Government Legal Department (previously Treasury Solicitors) at the time of publication of the Impact Assessment MoJ210[8] was that legal costs for defendants in judicial review cases they have been involved with range from £8,000 to £25,000 for non-immigration and asylum cases and from £1,000 to £15,000 in immigration and asylum cases. We assume that these costs figures still apply, although are seeking information relevant to that assumption.

111. In those cases which previously claimants may have qualified for a protective costs order but a costs capping order will henceforth not be awarded, the claimant would potentially have a greater liability for costs.

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[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277808/reform-judicial-review-rpc-ia.pdf

112. It should be noted that the volume of cases involved is quite minimal. Government Legal Department internal management information suggests that the number of protective cost orders awarded in non-environmental cases is not particularly large:

    a. between January 2010 and August 2013, Treasury Solicitors estimated that in judicial review cases with which they have been involved 17 protective costs orders were awarded. Three related to non-environmental cases. Based on this it has been assumed that around 20% of protective costs orders might relate to non-environmental cases.

    b. an internal MoJ review of a small sample of judicial review case files suggested that protective costs orders are awarded in around 1% of all judicial review cases. They usually do not apply to immigration and asylum cases as protective costs orders are only granted where there is a public interest in the matter at stake. Around 1% of all non-immigration and asylum cases in 2012 would equate to around 25 cases, including environmental cases. If around 20% of protective costs orders relate to non-environmental cases, as mentioned above, in 2012 this would equate to around five cases.

    c. Varda Bondy and Maurice Sunkin[9] responded to the consultation on proposals for further reform of judicial review. In that response they suggested that, in relation to judicial review final hearings between July 2010 and February 2012, seven cases out of 502 final hearings involved protective costs orders of which three cases (less than 1% of all final hearings) were non-environmental.

113. There will be a small increase in the administrative burden on claimants who receive funding of more than £1,500 from a third party. The government is of the view that the number of cases this will affect is relatively small. Where the claimant is a corporate body, it is likely that most of the information that they will be required to provide will already be available through the public accounts so they will incur negligible costs to provide this information. Further, the £1,500 threshold makes sure that a person will only be identified in the information given to the court if their contribution is above a certain level. This requirement for a threshold was introduced in response to concerns about the chilling effect of the provision of information to the court in judicial review proceedings. There were suggestions that implementing too low a threshold could inhibit small contributions made with no expectation of control in or benefit from the judicial review.

114. Under the new regime, a costs capping order will only be granted after permission has been granted. This could increase the financial risk involved in a case for those who may rely upon such an order to bring the claim. Once a costs capping order is awarded that cost capping order may, and will, as now, in many situations apply to all costs from both before and after permission.

Transitional costs for legal services providers and the judiciary

115. The cost to lawyers and judiciary of becoming familiar with the new procedural rules and their implications is assumed to be minimal and could be easily absorbed through common professional development requirements.

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[9] http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

Administrative costs of implementing the procedural rules

116. The cost of reviewing and amending application forms, guidance and legal documents to account for the procedural rule changes are expected to be minimal.

117. The new procedural rules will add an extra burden to the operations of HMCTS administrative staff in the Administrative Court. The changes proposed in the consultation would necessitate some extra administrative duties through the collection of documents and verification of the financial information.

Equalities Impacts

118. Under the Equality Act 2010, public authorities have an ongoing duty to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics. As part of this obligation, the government has made an initial assessment of the estimated impact of these proposals on people with protected characteristics.

119. Whilst there is little centrally held data on court users, the government consulted on the equality impacts of the financial information (although not the proposed threshold) and costs capping orders proposals in the consultation Judicial Review – Proposals for further reform (September 2013). Some general points were made that the proposals (the package as a whole as well as individual proposals) would have a disproportionate impact on those with protected characteristics (such as children, older people and people with disabilities), as these groups tend have more interaction with state services and consequently have greater reliance on judicial review. Some respondents argued that the proposals would threaten those people's access to justice and ability to challenge unlawful decisions which affect them.

120. Specific concerns were raised by respondents over the costs capping order and other financial measures:

    a. on costs capping orders, which it was argued might cause fewer claims to be brought or arguments raised by or on behalf of individuals with protected characteristics. Costs capping orders tend to benefit groups with protected characteristics or organisations which represent them who are considered to be acting in the public interest; and

    b. on reform to other financial measures, which it was argued might disproportionately affect those in lower income groups who tend to have protected characteristics more often than other groups – but the response did not include anything specifically on the financial information proposals.

121. Throughout the passage of the Criminal Justice and Courts Act 2015, concerns were raised that requirement to provide details of financial information in funding the judicial review could have a 'chilling effect' upon those contributing smaller amounts to litigation funds. The financial threshold below which amounts from third parties need not be disclosed was designed to mitigate this chilling effect.

122. In the government's view, as the proposals are intended to limit abuse and evasion of proper costs liability and will apply to all cases whether or not they are brought by those with protected characteristics, they will not have a disproportionately adverse impact. That position remains appropriate.

123. To help the government fulfil its duties under the Equality Act 2010 we would welcome information and views to help us gather a better understanding of the potential equalities impacts that each of the proposed reforms in this consultation might have.

Family Test

124. The Family Test is an internal government challenge to departments to consider the impact of their policies on promoting strong and stable families. Between 2000 and 2010, there were 7854 judicial review cases lodged at the Administrative Court which were based on the topic of 'Family, Children and Young Persons'. We are therefore interested in the views of respondent on the impact these proposals might have on families.

Questions

13 Do you agree with the assumptions and conclusions outlined in the Impact Assessment?

14) Please provide any empirical evidence relating to the proposals in this paper. We are particularly interested in the costs associated with engaging in the judicial review process, the burden that these requirements would place on claimants and information on costs awards in judicial review cases.

15) What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

16) What do you consider to be the impacts on families of each of the proposed options for reform? Are there any mitigations which the government should consider? Please give data and reasons.

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