



Public Law Project



JUSTICE

**Judicial Review and the Rule of Law:
An Introduction to the Criminal Justice and Courts Act
2015, Part 4**

Summary for Charities and Not-for-Profit organisations

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Background

Judicial review is a legal process by which individuals can challenge decisions made by public authorities on the basis that they are unlawful, irrational, unfair or disproportionate. It is a directly accessible check on abuse of power, a means of holding the executive to account, increasing transparency, and of providing redress when public agencies and central Government act unlawfully. In a country without a written constitution, it plays a particularly important role.

The Criminal Justice and Courts Act 2015 reforms the arrangements for the funding of judicial reviews, the power of the court to refuse to hear claims and makes provision for the disclosure of information about individuals and organisations which fund judicial review.

These changes must be applied in a manner which preserves the effectiveness of judicial review as a crucial constitutional tool which allows individuals and organisations to hold Government to account. Interpreting the Act in a manner consistent with its purpose and with the rule of law should preserve effective access to the court in practice.

The Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project have produced a full introduction to the Act and its interpretation, aimed at lawyers and judges approaching it for the first time ([Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4](#), October 2015). This paper provides an accessible summary of that work, principally designed for use by civil society organisations who work with judicial review (all paragraph references are to *Judicial Review and the Rule of Law*).

What is judicial review?

This paper has prepared principally for use by charities and not-for-profit organisations who have historically been involved in judicial review, whether bringing cases in their own right or in supporting others to bring individual claims or claims in the public interest. While it assumes a minimum degree of knowledge about existing law and practice, we hope it will be helpful for non-lawyers and trustees involved in discussing how recent reforms may affect future claims.

Judicial review allows individuals and organisations to challenge unlawful actions – and failures to act – by public authorities. It is a remedy of last resort and the court will not entertain a case if there are other means of putting right something which has gone wrong. These challenges are not concerned with whether a decision was ‘right’ but whether it was lawful. The court can look at whether a public body has acted lawfully, rationally and fairly.

Individuals and organisations can bring judicial review claims, but they must show that they have a ‘sufficient interest’ in an issue for a claim to proceed. Any challenge must be brought promptly, and in any event within 3 months (6 weeks in planning cases and 4 weeks in procurement cases). If successful, the court can set aside a decision (“quashing” it) or it may give a “declaration” that the law has been broken. There can be no judicial review without the court’s permission. This first stage hurdle requires all claimants to persuade a judge that their case is “arguable”. In any case, the losing party may usually have to pay for all the costs in the case.

Introduction

Part 4 of the [Criminal Justice and Courts Act 2015](#) (‘the CJCA 2015’) makes a number of changes to judicial review practice and procedure in England and Wales. During Parliament’s consideration of the Act, a number of charities and civil society organisations, and charitable donors, raised significant concern about the Act’s capacity to restrict access to judicial review for people without independent means and charities and not for profit organisations who act in the public interest.

Ministers reassured Parliament that nothing in the Criminal Justice and Courts Act 2015 should undermine the function of judicial review. In so far as possible, the Act should be applied in keeping with that promise and in a way which respects the important constitutional role of judicial review (paragraphs 7 -10).

The “highly likely” test (Section 84) (Chapter 1)

Section 84 of the CJCA 2015 introduces a new ‘materiality’ threshold for judicial review applications. This now requires the High Court to refuse to hear a claim or to refuse hear a case or to grant a remedy “if it appears to the court to be highly likely that the outcome for

the applicant would not have been substantially different if the conduct complained of had not occurred”.

The court has always been able to kick-out cases where it was inevitable that, despite a mistake by a public body, the result would have been the same. The new test changes the test of “inevitability” to a “high degree of likelihood”. However, it remains for judges to decide what this means, and they keep the power to continue to hear a claim or to provide a remedy in cases of “exceptional public interest”.

The new “highly likely” test must be interpreted consistently with the proper role of judicial review (which requires that judges should not replace the original decision maker). The new power to refuse to hear a claim that a public body has acted unlawfully should not be given a broad interpretation that goes further than Parliament intended.

Common law guidance on the proper constitutional roles of public authorities and the courts recognises the vital role that respect for the law plays in promoting good administrative decision-making within public authorities and fostering a sense of justice among those whom they serve:

- It was clear during the Act’s passage that the new “highly likely” test was intended to remain a high standard. Before refusing permission to proceed with a judicial review or a remedy in any individual case, the court will need to be satisfied that the possibility of a different outcome is very remote, i.e. so unlikely that it does not warrant the court’s intervention (paragraphs 1.23, 1.25 – 1.28).
- At permission stage, the need to ensure that the claimant is not put at a substantial disadvantage, so as to be shut out altogether, means the court should take a particularly cautious approach to the “highly likely” test. Permission to go ahead with a judicial review should only be refused if a judge can confidently conclude, without detailed inquiry, that the “highly likely” test is a “knock-out blow” (paragraphs 1.37 – 1.40).
- The court should be especially cautious when applying the “highly likely” test to *substantive* rather than *procedural* mistakes by public bodies. Ministers told Parliament

that these changes were intended to deal with some highly procedural technicalities. It will usually be easier for the court to judge when a failure to follow the right procedure has affected a decision than to second guess how an error of substance has affected a decision in practice (paragraphs 1.22 – 23).

- “Substantially different” requires a change in circumstances important enough to make a noticeable impact on a decision. This should not change the court’s existing practice (paragraphs 1.25 – 1.28).
- Broadly, this power should be limited to minor procedural errors. The public interest in hearing the case should mean that cases proceed in all but the most straightforward of circumstances. Even in claims involving minor procedural defects, there will still be cases where it may be in the public interest for that case to be heard despite the application of the “highly likely” standard. Ministers assured Parliament that obvious failures by public authorities to observe the law should not be rewarded (paragraphs 1.28 – 1.36).

Financial disclosure (Sections 85-86) (Chapter 2)

Sections 85 – 86 CJA 2015 introduce a new requirement for all judicial review claimants to disclose information about how their case is funded, including funding “likely to be available”. The information provided must then be taken into consideration by courts when deciding whether to make a costs order. This is an entirely new requirement for people or organisations bringing judicial review claims to consider.

Section 88 introduces a similar requirement for the disclosure of information by applicants for a costs-capping order. Costs-capping orders are orders made by the court – usually in public interest cases – to limit the costs which a claimant individual or organisation will pay in the event that they lose. They exist to allow public interest cases to proceed in circumstances where a high financial risk might prevent the court from considering an important legal issue. (We return to this issue, below).

However, where the relevant body is a corporate body unable to fund the litigation independently, both disclosure duties may cover information about its members and their ability to fund the claim. These provisions are of particular interest to civil society organisations, charities and not for profit organisations who are involved in judicial review.

The detail of the information to be disclosed will be provided in new rules of court (currently subject to consultation). However, these measures must be applied in a way which is consistent with the constitutional purpose of judicial review, the protection of the right of access to courts protected by the common law, Article 6 European Convention on Human Rights (“ECHR”) and the right to respect for private life protected by Article 8 ECHR:

- Broadly, no information should be required to be provided that is not necessary to meet the purpose for which it is sought. Only where there is a power to make a third party costs order against an individual or an organisation should information be required (paragraphs 2.27 – 2.36, 2.39 – 2.40).
- Courts should be particularly cautious about requiring disclosure about members of corporate bodies, particularly members of charities and not for profit organisations. Piercing the corporate veil raises its own concerns, but requesting untargeted information about individuals simply by virtue of their membership of a body is likely to be disproportionate and subject to legal challenge (paragraphs 2.41 – 2.44).
- Safeguards which provide for non-disclosure to other parties and to the trial judge are welcome. However, in circumstances where disclosure is not necessary, they will not provide an answer (paragraphs 2.46 – 2.47).

If these measures are interpreted consistently with the common law, the ECHR and the intention of Parliament, the risk that a costs order will be made against pure philanthropic funders of public interest litigation should be minimal.

However, further legal uncertainty in the rules of court may have a chilling effect and could act as a deterrent to charities and not for profit organisations seeking to challenge unlawful public action. Unfortunately, the ultimate impact of the disclosure regime will remain uncertain until the rules of court are in place and applied by the court (paragraph 2.45).

Interveners and costs (Section 87) (Chapter 3)

Section 87 introduces a new statutory framework to govern when third party interveners in judicial review cases might have to pay for the costs of their involvement in a case.

Individuals or organisations (such as an NGO or charity or a local authority) with a particular interest or expertise in a case before the court can apply to be a third party intervener - to make submissions to the court - but they must be given permission by the judge in the case.

Such interveners currently bear all their own costs of their involvement. While the court *can* order that an intervener pays the costs incurred by other parties caused as a result of the intervention, these orders are extremely rare.

The new Act confirms the presumption that third party interveners will not generally recover their own costs in any case except in “exceptional circumstances”. However, in a change from existing practice, it creates a new duty to award costs against any intervener in cases where any one of a specific list of conditions is satisfied. These are that:

- (a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
- (b) the intervener’s evidence and representations, taken as a whole, have not been of significant assistance to the court;
- (c) a significant part of the intervener’s evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or
- (d) the intervener has behaved unreasonably.

The duty **will not** generally apply to:

- Interventions in the Supreme Court;
- Actions by third party organisations short of intervention, including the provision of witness or expert evidence to support one side in a case;
- Cases where interveners are *invited* to participate by the Court;
- Cases in which the parties give undertakings not to seek costs;
- Any case where the court makes a prospective costs order.

The provisions are not intended to deter interveners from offering their expertise and assistance to the court in appropriate cases. Instead, these provisions target abuse of

process or unreasonable behaviour by interveners, such that they are not properly able to assist the court or further the public interest (paragraphs 3.10 – 3.14).

In practice, this should mean that costs made against interveners who remain reasonably within the bounds of the permission granted by the court will continue to be rare (paragraphs 3.18 – 3.33).

Where an organisation chooses to proceed with a public interest intervention in a Tribunal, the High Court or the Court of Appeal, they may wish to:

- (a) Consider asking the court to invite them to intervene, rather than making an ordinary application for permission;**
- (b) Seek undertakings from the parties that they will not seek to recover costs from the intervener;**
- (c) Explore whether the court may be willing to make a prospective costs order in their favour (indicating that in this case no order for costs will be made); and**
- (d) Ensure that in any application for permission to intervene, they explain their intended submission, relevance to the issues in the case, and how they may assist the court (paragraphs 3.34 – 3.36).**

The general costs duty will be set aside in “exceptional circumstances”. Exceptional circumstances may be defined in new rules of court. If the conditions identified in Section 87 are applied in a way which is consistent with their limited purpose, interveners might rarely need to rely on the “exceptional circumstances” clause.

If a judge does decide that an intervener should pay, it should not be liable for the whole cost of its intervention. The amount payable may be limited to the costs associated with the unreasonable behaviour which triggers the application of the new rules. In any event, the costs payable will be limited, following the ordinary rules on costs assessment, to those costs a party has “reasonably” incurred (paragraphs 3.36 – 3.38).

The deterrent impact of a new costs risk may affect some would-be interveners more than others. For example, a costs risk will mean less to a large corporate organisation than to a small charity.

Courts will be aware that these new measures could change the number and type of interventions which the courts hear. The resources and expertise of an intervener should continue to be relevant both to the courts' consideration of costs, the question of permission in any application to intervene and any decision by the court on whether to invite an individual or organisation to intervene outside the application of the new rules.

Any application for permission to intervene, or a request to the court for an invitation, should clearly explain the intervener organisation's interest and expertise, whether they are a charity or a not for profit organisation and whether they have limited resources available for their work (paragraphs 3.44 – 3.45).

The scope of the new costs rules for interveners cannot be absolutely determined until they are considered by the courts. However, if they are applied in a manner consistent with the purpose of the underlying legislation, costs orders should remain rare, and will only be made against public interveners who abuse their permission to intervene.

Costs capping orders (Sections 88-90) (Chapter 4)

Over the past decade, the courts have developed a common law practice which allows the court to limit the costs risk faced by individuals and organisations bringing a claim in the public interest. Following a ruling in the famous *Corner House* case, the courts have made a number of protective costs orders designed to limit the risk faced by claimants in order to allow a legitimate public interest challenge to proceed. Charities and not for profit organisations have been among the primary beneficiaries of this kind of protection.

Sections 88-90 place the framework for costs protection in public interest cases on a statutory footing. The protective costs order ('PCO') and the new statutory costs capping framework in the CJCA 2015 serve the same purpose; that is, to ensure that public interest cases which would otherwise not be considered by the courts are heard. The interpretation of the new statutory tests will be informed by the courts' previous consideration of the public interest in PCOs and the statutory tests should not have a more restrictive effect in practice (paragraphs 4.1, 4.10 – 4.13).

The new statutory framework will apply to all applications for costs protection by applicants in judicial review claims (including in appeals). There are circumstances where the new statutory framework may not apply:

- In any claims outside judicial review. Claims for other civil wrongs, including negligence or misfeasance in public office, for example, continue to benefit from the protection of a PCO pursuant to the existing *Corner House* guidance.
- In environmental cases, where claimants are likely to rely on the fixed costs regime in CPR 45 or where they are expected to be exempted by regulations pursuant to Section 90 CJCA 2015.
- Costs protection for third parties, including for Interested Parties and interveners, is outside the scope of Sections 88-90, which apply only to *applicants* for judicial review (paragraph 4.7).

The Act creates a new delegated power for Ministers to further define the circumstances in which costs protection will be available. This must be exercised consistently with the stated purpose of these provisions. Any new criteria which operate to fundamentally undermine the ability of the court to provide costs protection in public interest cases will be subject to question. Any new restrictions must be subject both to the approval of Parliament and oversight in the courts by way of judicial review (paragraphs 4.29 – 4.32).

The new rules prevent judges making costs capping orders until after permission has been granted. This could pose a significant restriction on the utility of costs protection if applied restrictively, fundamentally limiting the purpose of these provisions (paragraphs 4.43 – 4.44).

To respect both the language of the CJCA 2015 and its underlying purpose, the court's approach to permission and to case management may need to be sensitive to the claimant's stated need for costs protection.

In cases where an application for a costs capping order has been made:

- The application for permission and that for costs capping should be considered early and alongside each other;
- The flexible “arguability” test for permission for judicial review – a first hurdle which must be crossed in all judicial review claims – is inevitably fact sensitive. That the claim will not proceed without costs protection may inform the court’s approach to the permission stage;
- In many cases, the consideration of whether the case involves “public interest proceedings” might, in practice, be determinative of whether a claim is considered arguable;
- The existence of a costs capping application should inform both the court’s approach to permission and to case management. For example, a rolled-up hearing – where the court considers whether to grant permission and the merits of the case together – is unlikely to be appropriate in cases involving an application for costs protection.

Access to justice, the public interest and judicial review reform (Chapter 5)

Despite the constitutional significance of judicial review, the remedy cannot be cast in stone. Changes may be necessary to ensure its effectiveness as a tool for individuals to hold public bodies to account and secure redress when public decision making goes wrong.

However, the appetite in Government for reform in the past five years has been unprecedented. The pace of change has been such that the cumulative and individual impact of specific reforms have, as yet, been impossible to measure. However, many of the changes made have been designed to deter claims and to introduce new procedural hurdles for claimants, including by restricting access to legal aid and sources of third party funding.

If further efficiencies are deemed necessary, these must have a proportionate impact on both claimants and respondents.

For example, the deterrent impact of disproportionate costs run up at an early stage by Respondent public bodies is significant for all applicants for judicial review, not only those who might qualify for costs protection (paragraph 5.4).

Serious consideration may be given to the recommendation made by Lord Justice Jackson, in his review of civil litigation costs, that a fixed costs regime should be introduced for judicial review (paragraphs 5.5 – 5.8). Increases in the efficiency and fairness of judicial review could be achieved by implementing the practical recommendations made by the Bingham Centre for the Rule of Law in *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*. Many of these changes could be made without primary legislation and could operate to encourage defendants to adopt a more proportionate approach to permission stage and trial costs (paragraph 5.9).

Any further reform must be evidence based and sensitive to the important constitutional function of judicial review.

For further information, please consult *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4*, or contact the Bingham Centre for the Rule of Law, JUSTICE or the Public Law Project.

This paper is an introduction to the changes to judicial review in the Criminal Justice and Courts Act 2015 and how they might impact on charities and not for profit organisations. It is designed to provide assistance to charities and not-for-profit organisations who conduct public interest litigation and their trustees.

It reflects the law on 20 October 2015. It should not be taken as a substitute for legal advice.

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