

Criminal Justice & Courts Bill: House of Lords Committee
Part 4: Judicial Review

July 2014

As currently drafted, this Bill would place severe restrictions on immigration detainees' access to judicial review. Judicial review is a crucial safeguard against unlawful detention and maltreatment.

Clause 68 Stand Part: Protective Costs Orders

Under Clause 68(3), a protective costs order can only be made if permission to apply for judicial review has been granted. However, parties may accrue significant costs, in some cases exceeding £30,000, before permission is granted.¹ If claimant organisations cannot be protected against such financial risk, cases with substantial public interest will not be brought. For example, Medical Justice, a detainee support organisation, obtained a protective costs order and in 2010 successfully challenged the Home Office's policy of giving certain asylum seekers and migrants less than 72 hours notice of their removal from the UK.² This notice period is crucial because it enables people to seek legal advice to challenge their removal, including in cases where removal would be unlawful.

Clause 64 Stand Part: Likelihood of substantially different outcome

Under 64(2), when someone seeks permission to bring a judicial review, the judge may have to look whether it is '*highly likely*' that the outcome for this person would have been similar if the actions they are challenging had not occurred. If the judge determines that this is '*highly likely*', the person must be refused permission to proceed. This matter would be considered at permission stage, when limited evidence will be available to judges. The problem is that what appears '*highly likely*' in the initial stages of a case could later be demonstrated to be very unlikely. Claimants whose cases have merit may therefore be denied the opportunity to properly present them.

Case Study: Single mothers detained unlawfully

In September 2010 and April 2011, following judicial review proceedings the High Court found that two single mothers had been unlawfully held in detention and separated from their children. The detention of these mothers had serious consequences for their children's welfare. In the latter case of 'NXT', one of the children changed foster placements six times during the mother's imprisonment and detention and experienced abuse and neglect.

It often far from clear whether detainees would have been detained anyway if the '*conduct complained of*', such as the Home Office's failure to follow procedures, had not occurred. This question was considered in detail by the judges in both the cases cited above.³ Unlawful detention cases often turn on this issue; it is not one that can be properly examined at permission stage. **The ability to properly access judicial review proceedings was crucial in getting these mothers released.**

¹ Jaffey, B. and Hickman, T. (2014) *UK Constitutional Law Association Blog* 'Loading the Dice in Judicial Review: the Criminal Justice and Courts Bill 2014' <http://bit.ly/U6t61U>

² *The Queen on the Application of Medical Justice v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin)

³ See, for example, para 44 *MXL, R (on the application of) & Ors v SSHD* [2010] EWHC 2397 (Admin); para 124 *NXT, R (on the application of) & Ors v SSHD* [2011] EWHC 969 (Admin)

Clause 67 Stand Part: Interveners and costs

Clause 67 provides that the courts ‘*must order the intervener to pay any costs specified*’ by a party or interested party that have been incurred ‘*as a result of the intervener’s involvement.*’ Interveners may have to pay costs even where they provide evidence of unlawful Government actions. Many charities including Bail for Immigration Detainees could not pay such costs, and would be prevented from intervening.

Currently, interveners must convince the court of the value of their involvement when seeking permission to intervene. The senior judiciary’s response to the Government consultation on Judicial Review reform states: ‘*The court is already empowered to impose cost orders against third parties [interveners]. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties.*’⁴

Case Study: Interventions & detention of children

In 2011, following judicial review proceedings in the ‘Suppiah’ case,⁵ the Administrative Court found that two families had been detained unlawfully. Liberty intervened in this case; BID provided evidence to support their intervention. At paragraph 111, Justice Wyn Williams stated: ‘*On the basis of the evidence adduced by the Claimants and Liberty, no one can seriously dispute that detention is capable of causing significant and, in some instances, long lasting harm to children. That emerges with clarity from the observations of HM Inspector of Prisons, the Children’s Commissioner, Members of Parliament, the Independent Inspector of UKBA and the detailed evidence of Mr Makhlouf [Bail for Immigration Detainees].*’

Since this judgment, there have been improvements to Government policy on child detention, and far fewer children are detained. In this judgment, Justice Wyn Williams is critical of the Home Office’s failure to properly communicate the option of voluntary return to families before their detention. Subsequently, the Home Office changed their policy to ensure that families are given at least 4 weeks to consider returning voluntarily or by ‘self check-in’ before any enforcement action.⁶

The Judicial Review reforms and the Immigration Act 2014

s17(3) of the Immigration Act provides that ‘*foreign criminals.. can be deported first and appeal after, unless that would cause serious irreversible harm.*’⁷ Given that 32% of deportation appeals succeed,⁸ many people with valid appeals may be deported, including where they fear for their safety or return and/or have children in the UK. Judicial Review is offered as a safeguard, and yet the measures set out above would severely limit access to judicial review.

Bail for Immigration Detainees is a charity which provides immigration detainees with free legal advice, information and representation to secure their release.

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⁴ Judiciary of England and Wales (2013) *Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’*

⁵ *R (on the application of) Reetha Suppiah and others v SSHD and Interveners* [2011] EWHC 2 (Admin)

⁶ Home Office *Enforcement Instructions and Guidance* Chapter 45

⁷ Home Office October 2013 *Immigration Bill Factsheet: appeals (clauses 11-13)* <http://bit.ly/1gOp7y8>

⁸ Home Office 15/7/12 *Impact Assessment of Reforming Immigration Appeal Rights*, p7 <http://bit.ly/1cygmWm>