



HOUSE OF LORDS

Select Committee on the Constitution

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2nd Report of Session 2014–15

# Criminal Justice and Courts Bill

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### *Committee staff*

The current staff of the committee are Nicolas Besly (clerk), Dr Stuart Hallifax (policy analyst) and Hadia Garwell (committee assistant). Professor Adam Tomkins is the legal adviser to the committee.

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# Criminal Justice and Courts Bill

1. The Criminal Justice and Courts Bill was brought from the Commons on 18 June 2014, having been carried over from the last session.
2. This report brings to the attention of the House provisions reforming the administration of justice and judicial review. Judicial review is the primary means by which parties may challenge the lawfulness of decisions made by government and other public bodies: as such, it is one of the key ways in which the rule of law is protected and advanced. This is the context in which reforms to judicial review must be considered.

## “Leapfrogging” to the Supreme Court

3. Section 12 of the Administration of Justice Act 1969 provides that in certain restrictive circumstances an appeal from the High Court may “leapfrog” the Court of Appeal and go directly to the Supreme Court. Clauses 46–49 of the bill amend section 12 of the 1969 Act by loosening the restrictions, enabling more cases to leapfrog the Court of Appeal. As now, the decision as to whether a case may leapfrog the Court of Appeal will be for the trial judge to make on the application of one of the parties to the case. However, under clause 46, this will no longer require the consent of all parties if the judge is persuaded that the appeal raises a point of law of general public importance and the judge is persuaded that:
  - (a) the proceedings entail a decision relating to a matter of national importance;
  - (b) the result of the proceedings is so significant that a hearing by the Supreme Court is justified; and
  - (c) the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

Clauses 47–49 extend leapfrogging (under the same conditions as will apply to the High Court) to the Upper Tribunal, the Employment Appeal Tribunal and the Special Immigration Appeals Commission.

4. Proposals as to whether and, if so, how leapfrogging should be extended were included in the Government consultation *Judicial Review: Proposals for further reform*.<sup>1</sup> The submission to that consultation made by the senior judiciary of England and Wales stated, “we do not object in principle to the removal of the requirement for the consent of the parties, but suggest that provision is made for the view of the parties to be taken into account.”<sup>2</sup> The bill does not provide in terms for the views of the parties to be taken into account. **The House may wish to consider whether the bill should be amended so that it does so or, alternatively, whether the matter should be left to the judiciary.** On 25 June 2014 the Deputy President of the Supreme Court, Baroness Hale of Richmond, said in evidence to us that “we are

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<sup>1</sup> Cm 8703, September 2013. It is noteworthy that, even though the proposal to amend leapfrogging was in a consultation about judicial review, section 12 of the 1969 Act may apply to any civil proceedings in the High Court: leapfrogging is not restricted to judicial review cases.

<sup>2</sup> *Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’*, 1 November 2013, paragraph 42.

generally sympathetic to attempts to broaden” the leapfrog procedure. Lord Neuberger of Abbotsbury, the President of the Supreme Court, agreed.<sup>3</sup>

### Judicial review

5. Part 4 concerns judicial review. The Government have launched two consultations on reform of judicial review. The first was *Judicial Review: Proposals for reform*<sup>4</sup> and the second was *Judicial Review: Proposals for further reform*.<sup>5</sup> The first consultation focused on the time limit for bringing proceedings, on applications for permission to bring a judicial review claim and on fees. Such changes as resulted from this consultation did not require primary legislation, as the matters are governed by the Civil Procedure Rules.
6. The centrality of judicial review to the rule of law is not questioned by the Government. In the Government’s first consultation paper judicial review was described as “the rule of law in action” and in the second it was described as “a crucial check to ensure lawful public administration”. But the Government have four overlapping concerns about the use of judicial review, which both sets of consultation proposals were expressly aimed at tackling. These concerns have also been expressed in oral evidence to the committee, most recently by the Lord Chancellor on 26 March 2014. As expressed in the foreword to the second consultation, the concerns are:
  - (a) that judicial review has “expanded massively”;
  - (b) that time and money are “wasted in dealing with unmeritorious claims”;
  - (c) that “a significant proportion of these weak applications [is] funded by the tax payer”; and
  - (d) that judicial review is “open to abuse” by parties seeking “cheap headlines”—in short, that judicial review has become too much of a political tool of opposition to government policy rather than a legal tool to secure remedies in the face of injustice.
7. The evidence base for these claims has been questioned by a range of bodies, from the Public Law Project to the Bingham Centre for the Rule of Law. In particular, the claim that judicial review has expanded massively has been questioned. It is true that the number of applications for judicial review has grown significantly in recent years (from 4,500 in 1998 to 12,400 in 2012),<sup>6</sup> but this appears to be almost entirely because of applications concerning immigration decisions (76% of the total applications in 2012 concerned immigration). With effect from November 2013, immigration cases have been removed from the High Court and transferred to the Upper Tribunal. Once immigration cases are removed from the statistics, it can be seen that the number of applications for judicial review has remained relatively stable, at about 2,000 applications annually. More precisely, there were 1,752 such applications in 2000, rising to 2,118 in 2012: that is a rise over 12 years of 21% or 366 cases.<sup>7</sup>

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<sup>3</sup> Unrevised transcript of oral evidence given to the Constitution Committee on 25 June 2014, Q16.

<sup>4</sup> Cm 8515, December 2012.

<sup>5</sup> Cm 8703, September 2013.

<sup>6</sup> *Ibid.*, page 8.

<sup>7</sup> Ministry of Justice, *Statistical Notice: Revision of Judicial Review figures*, November 2013.

8. The proposals canvassed in the Government's second consultation on judicial review reform focused on six issues, four of which are dealt with in the bill. The six issues are:
- (a) reforming the courts' approach to cases that rely on "minor procedural defects";
  - (b) rebalancing financial incentives;
  - (c) speeding up appeals to the Supreme Court;
  - (d) reforming aspects of planning appeals;
  - (e) reforming the test of standing (which determines who may seek judicial review); and
  - (f) reforming the way in which the public sector equality duty is enforced.
9. Only the first four of these are provided for in the bill: there is no provision on reform of standing nor on the public sector equality duty. The bill's provisions on reform of planning law do not raise matters of constitutional concern.
10. Clause 64 deals with the courts' approach to cases that rely on "minor procedural defects". It provides that the court must refuse to grant permission to apply for judicial review or to grant a remedy in an application for judicial review<sup>8</sup> "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." At the moment the courts will exercise their discretion not to grant permission or not to grant a remedy only if satisfied that it was inevitable that the conduct complained of made no difference to the result. Thus, clause 64 changes the current test of inevitability to a new test of high likelihood.
11. This raises issues both of principle and of practical concern. The issue of principle was expressed in the following terms by the senior judiciary of England and Wales in their submission to the Government's second consultation: "a lower threshold than inevitability for the application of the 'no difference' principle envisages judges refusing relief where there has been a proved error of law and the decision under challenge might have been different absent that error."<sup>9</sup> In short, lowering the threshold risks unlawful administrative action going unremedied. As such, **the House may wish to consider whether clause 64 risks undermining the rule of law.** On 25 June 2014 the President of the Supreme Court, Lord Neuberger of Abbotsbury, said in evidence to us:

"If you do not have a healthy and accessible judicial review function for the courts you do not have a satisfactory modern democratic society. Therefore, any interference in or restriction of judicial review has to be

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<sup>8</sup> Judicial review is a two-stage process in the law of England and Wales (the procedural law of judicial review is different in Scots law). In England and Wales the claimant first seeks permission to apply for judicial review (sometimes referred to as "the leave stage"). If granted permission there follows a hearing. If the claimant is successful at the hearing the court will exercise its discretion as to whether to grant a remedy. Thus, under the law as it stands, there is no right to judicial review and there is no right to a remedy even when the claimant is successful: both are matters of judicial discretion. Part 4 of the bill extends to England and Wales only.

<sup>9</sup> *Op. cit.*, paragraph 22.

looked at very carefully. On the other hand, I accept that one cannot just say that anything goes—that anybody should have a right to reply to anything from the courts provided that it can be said to be under the heading of judicial review. ... Some hopeless applications get through, but because judicial review is so important ... one has to accept that it is well worth while and that inevitably that there will be some applications that are unmeritorious but nonetheless get pursued and hold things up. But provided it does not get out of hand—I have no reason to think that it has got out of hand—it is a small price to pay for a healthy judicial review system.”<sup>10</sup>

**The House may wish to reflect on the wisdom of the Government pressing ahead with a reform to judicial process despite such warnings from the judiciary.**

12. The practical concern is that clause 64 is likely to have the effect of turning the permission stage into a full dress rehearsal of the substantive hearing. Indeed, the senior judiciary of England and Wales in their submission to the consultation stated that “it is difficult to see how this ... could be avoided.”<sup>11</sup> Were this to occur it would be liable to increase costs rather than to diminish them, undermining one of the Government’s principal aims in seeking reform to judicial review. However, in evidence to us on 7 May 2014 the Lord Chief Justice, Lord Thomas of Cwmgiedd, stated: “We put in quite tough submissions on the Government’s proposals, which I think they have listened to. It is very difficult for me to predict at the moment the precise effect the changes that remain will have”.<sup>12</sup> When asked whether he saw his position and that of the Lord Chancellor as being far apart, Lord Thomas replied “No. We will wait and see what happens. He has listened to a number of our concerns; he has not listened to others ... The greatest concern probably relates to the availability of legal aid for judicial review”.<sup>13</sup>
13. Clause 67 concerns costs and interveners: it provides for a presumption that interveners in judicial review cases should generally pay their own costs. It also provides that costs incurred by the parties as a result of an intervention will be ordered to be paid by the intervener other than in exceptional circumstances. Such “exceptional circumstances” are not specified in the bill; rather they are to be specified in due course in rules of court. In their response to the Government’s consultation the senior judiciary of England and Wales stated, “caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court.”<sup>14</sup>
14. Clauses 68–70 concern costs capping orders, also known as protective costs orders. Such orders limit or remove a party’s liability to pay another party’s costs. The provisions restrict the circumstances in which the courts may make such orders in judicial review cases. Under clause 68 such an order

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<sup>10</sup> Unrevised transcript of evidence given to the Constitution Committee on 25 June 2014, Q4. This extract is part of a fuller answer given by Lord Neuberger of Abbotsbury.

<sup>11</sup> *Op. cit.*, paragraph 21.

<sup>12</sup> Revised transcript of evidence given to the Constitution Committee on 7 May 2014, Q12.

<sup>13</sup> Legal aid for judicial review was reformed last session by secondary legislation: see the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations (SI 2014/607). See further HL Deb, 7 May 2014, cols 1540–68.

<sup>14</sup> *Op. cit.*, paragraph 37.

may be made only once permission to apply for judicial review has been granted and, even then, only if the proceedings are “public interest proceedings” (i.e. that the issue in the case is of general public importance and that the public interest requires the issue to be resolved). **The House may wish to consider whether the restrictions in clauses 67 to 70 impose too great a limit on effective access to justice.**

15. Matters to which the court must have regard when determining whether proceedings are public interest proceedings are listed in clause 68(8). They are: the number of people likely to be directly affected, how significant the effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance. Clause 68(9) confers on the Lord Chancellor power to amend this list by order: this is therefore a Henry VIII power. Any such order must be made by statutory instrument and is subject to the affirmative resolution procedure. **The House may nonetheless wish to consider whether it is constitutionally appropriate for the Lord Chancellor to have such a Henry VIII power.**