Young Legal Aid Lawyers

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> **"Judicial review cannot perform its vital function of protecting the individual from abuses of power by the executive if the system is prohibitively expensive for those individuals."**

On 31 July 2017, Jackson LJ published *Review of civil litigation costs: supplemental report – fixed recoverable costs* – the proposals for judicial review are radical (although some might argue not radical enough), with profound implications for access to justice.

Jackson LJ's recommendations follow a series of measures by the government designed to restrict judicial review on the basis that excessive unmeritorious claims were clogging up the courts and delaying decision-making by public bodies. For example, the Criminal Justice and Courts Act 2015 (see ss87–89) exposed interveners to the risk of an adverse costs order and introduced a new system of costs capping orders (CCOs), which, in the authors' experience, provides little assistance to most potential claimants given its uncertain application.

Environmental claims have their own rules. Thanks to the UK's obligations under the Aarhus Convention, which prevent environmental claims from being 'prohibitively expensive' (article 9(4)), until February 2017, a claimant's costs liability was capped at £5,000, with a cap of £10,000 for organisations. The government considered this too generous and therefore changed the rules from February 2017 to require disclosure of a claimant's financial position and to allow the court to vary the caps (Civil Procedure (Amendment) Rules 2017 SI No 95). The new regime was challenged by various environmental NGOs in July 2017 (at the time of writing the judgment had not been handed down).

Recognition of the problem

In stark contrast to the government's attitude, Jackson LJ expressly recognises the importance of judicial review to the rule of law, describing it as 'a crucial means by which citizens can challenge the lawfulness of public authorities' decisions, actions and omissions' (page 126). He goes on to reject submissions from government lawyers that, given the various protective systems in place, there is no access to justice problem in judicial review. In particular, he notes that the strict means test for obtaining legal aid means 'many deserving claimants of modest means do not qualify for assistance' (page 126). Moreover, the Aarhus rules apply to only one per cent of judicial reviews and 'CCOs are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive' (page 129).

The proposed solution

Jackson LJ repeats the recommendation from his 2010 report that qualified one-way costs shifting should apply to judicial review such that the claimant recovers costs if it wins but does not pay costs if it loses. However, as it appears the government rejected this proposal, he also outlines an alternative solution.

In summary, the proposal involves extending a version of the post-February 2017 Aarhus regime to judicial review more broadly. The key features of the proposal are:

- It would be available for claimants without legal aid. It would be optional in that a claimant would be able to opt in.
- Claimants would have to disclose their financial position.
- The default figures of £5,000/£10,000 for claimants and £35,000 for defendants would remain, but could be altered at the court's discretion. The caps would be set at the permission stage, with any subsequent changes only permitted in exceptional circumstances.
- If a claimant's costs liability is increased beyond the default figures, it would be permitted to discontinue the claim within 21 days and only be liable for adverse costs to the extent of the default figures.

The report is now being considered by the government, which is committed to consulting before any proposals are implemented.

YLAL's view

YLAL welcomes Jackson LJ's carefully researched proposals as an important step towards correcting the current imbalance between claimants and defendants in the vast majority of claims for judicial review. Clearly, judicial review cannot perform its vital function of protecting the individual from abuses of power by the executive if the system is prohibitively expensive for those individuals. On the contrary, access to justice requires a system that is practical and effective.

Jackson LJ acknowledges that his proposal is not perfect, but seeks to strike a balance between the need to protect the public purse and the need to hold public authorities to account. We endorse his observation that although public bodies face unwelcome burdens from unmeritorious claims, 'the ready availability of JR proceedings in which public bodies are held to account for their actions and decisions, is a vital part of our democracy. Both JR and a free press are, in their different ways, bulwarks against the misuse of power' (page 129).

For all these reasons, YLAL calls on the government to implement Jackson LJ's proposals and treat this matter as a priority. It is essential that Brexit is not used as an excuse to kick access to justice into the long grass. ■

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