Criminal Justice and Courts Bill

Consideration of Lords Amendments on 1st December 2014

Shelter

Shelter is calling on MPs to retain three Lords' amendments to the Criminal Justice & Courts Bill

The Bill seeks to restrict judicial review by:

- Making interveners liable for the costs of all parties' responding to their evidence
- Making courts second guess the decisions of public bodies instead of holding them to account where they have acted unlawfully
- Making courts take into account the resources of all parties involved, even where work is carried out on a pro bono (free) basis

Organisations like Shelter intervene in important judicial review cases to provide expert evidence to assist the court's decision.

Although no evidence has been provided, it has been claimed that intervening in judicial review cases has been abused by some organisations.

However, judges already have discretion over who can intervene in cases; they can grant or refuse permission for interventions and award costs against the intervener if they consider it appropriate to do so. These measures are therefore unnecessary and will limit the courts' ability to hold the executive to account.

The bill was successfully amended in the Lords on a cross-party basis, these were amendments 154, 160/161 and 164.

The amendments reintroduced judicial discretion by ensuring judges will retain their discretion over the grounds for judicial review, the costs of an intervention and the funding of cases.

We are now calling on MPs to back these amendments and ensure that judicial review remains an effective means of holding the executive to account.

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Frequently Asked Questions

Intervening in the Public Interest

When does Shelter intervene in judicial proceedings?

Shelter will sometimes be granted permission by the Court to 'intervene' in a judicial review. The basis for an Intervention is usually that we have research or other evidence which is relevant to the case and will assist the Court in reaching its decision through written evidence and (where the Court agrees) addressing the Court about our perspective on the case.

Shelter has exercised its ability to intervene with restraint, and we have intervened in just six cases. In one of those cases, which concerned the failure of many local authorities to provide assistance to homeless young people, our intervention was described as "conspicuously helpful" by the Court of Appeal.

What does the bill try to change?

Without the amendments, interveners will be liable to pay the costs of the other parties to the case in responding to the Intervention. The prospect of interveners being responsible for the additional costs incurred by other parties will be a deterrent to organisations like Shelter in seeking to bring our concerns before the Court.

The Government consider that interveners "should have a more proportionate financial interest in the outcome" of the proceedings. This is to misrepresent the purpose of an intervention. Interventions are not about financial interest, but about assisting the Court to reach the right conclusion on the issues.

We put our own resources into preparing the Intervention and the barristers who appear on our behalf do so without charge. It is unfair and wrong that we should be expected to pay the other parties' costs of dealing with the evidence and arguments which we present.

Procedural errors

What does the bill try to change?

When reviewing public body's decision making, Courts can refuse to make an order if it is satisfied that the decision would "inevitably" have been the same without the error. The context in which these judgments are made is often where the authority has made a procedural mistake but has still arrived at the correct decision.

Without the Lords' amendments, the bill requires the Court to refuse an application if it appears to the court "highly likely" that the outcome would not have been "substantially different" and this judgment will be made at the permission stage, not at the full hearing, as usually happens now.

By requiring the court to carry out an assessment of the likely outcome, the original Bill takes the court away from its role in scrutinising whether a decision was lawfully taken and draws it into the merits of the decision; an unacceptable blurring of the functions of the court.

For example, an authority may have failed to consider a medical report in deciding whether a person is 'vulnerable': it should not be for the court to 'second guess' what decision the authority would have made. If the decision was made unlawfully, it should be sent back to the authority for full reconsideration.

Funding of litigation

What does the bill seek to change?

Without the Lords' amendments, the Bill requires anyone applying for judicial review to provide information about their financial resources in order to consider who should pay costs, to discourage judicial reviews "driven" by other financial interests.

We agree there should be transparency in funding arrangements. However, the work of many charitable organisations, including court work, is supported by external funders. Our own Children's Legal Service is funded by a major law firm. It would be wholly wrong to expose benefactors such as charitable funders to a costs risk if they have contributed financial support or pro bono assistance to a judicial review.

It goes without saying that such benefactors have no personal vested interest in the litigation, but have given their assistance in order to promote the charitable objectives of the organisation.

Call to action

Intervening in judicial review cases benefits the courts' decision making and ensures that the Court has the information it needs to carry out its function of holding public bodies to account.

Please support the Lords' amendments on Part 4 of the Bill on Judicial Review.

For more information, please contact Scott Dawes on 0344 515 2052 or Scott_Dawes@shelter.org.uk.

Appendix

Example of a Shelter intervention

1 Local authorities' failure to deal lawfully with homeless young persons

R (TG) v LB Lambeth
Court of Appeal 6 May 2011
2011] EWCA Civ 526

In this case, TG was a young man aged 17 who lived with his mother, his father having died in violent circumstances. He was sentenced to a supervision order and on release placed under the care of the Youth Offending Team (YOT). He sought advice from a social worker employed by the YOT because his mother would not have him back.

The social worker identified TG as a 'child in need' who required accommodation. She referred him to the Council's Homeless Persons Unit. This was not the correct approach, because case law[1] has established that the primary duty to a homeless young person under 18 belongs with the social services authority, not with Housing[2]. This is because, as the courts have said, a homeless young person's need is for more than a roof over their head: they need support and guidance in making the transition to adulthood.

The issue in the TG case was whether the young man was entitled to ongoing 'leaving care' assistance when he reached 18. This would only be the case if his temporary accommodation had been provided by social services under the Children Act 1989. He drew attention to the fact that the social worker had identified that he was a child in need before referring him to the housing department. The Court of Appeal agreed that, since he had come to the attention of social services, and had been identified as a child in need, the Council was bound to treat him as if they had accommodated him under social services duties.

Shelter's Children's Legal Service intervened in the appeal in order to draw the Court's attention to the absence of protocols or joint working arrangements between housing and children's services departments. With the assistance of research into council policies and practices, Shelter were able to demonstrate:

- the widespread failure by local authorities in England to have joint procedures in place, despite the clear mandatory legal framework requiring co-ordination; and

- the fact that even where local authorities in England had adopted joint procedures, these were often inadequate and failed the young people they were intended to protect .

[1] *R (G) v Southwark LBC* (2009)
[2] This duty is under section 20 of the Children Act 1989.

The Court of Appeal urged all authorities to take steps to ensure that housing departments and children's services departments properly co-ordinate to ensure that homeless children are given appropriate assistance.

In relation to Shelter's intervention, Lord Justice Wilson said:

> "Shelter obtained permission to intervene in the appeal on the basis first that it could file evidence; and second that it could make submissions, albeit only in writing. Its evidence, in the form of a witness statement by Mr Robb, its chief executive, and its written submissions… have proved to be conspicuously helpful… Irrespective of the result of this appeal, I have no doubt that, as Mr Robb argues, a substantial number of vulnerable children are still suffering from a failure of co-ordination between these two departments within a number of English local authorities. Even if it transpires that this appeal should turn on a narrow factual axis, it should serve, as Mr Robb suggests, to advertise the need for all local authorities to take urgent steps to remedy any such failure." [para 5]