Shelter

The Criminal Justice and Courts Bill 2014

Shelter's concerns with the Bill, case studies and suggested amendments

Introduction: the assault on judicial review

Part 4 of the Criminal Justice and Courts Bill deals with judicial review. It seeks to restrict the jurisdiction of the courts in relation to certain decisions of public bodies; and to make it more difficult for charities and other organisations to bring or take part in judicial review proceedings.

The wider context

These changes must be seen in the context of other measures which the Government has taken to restrict the use of judicial review. In regulations which are due to come into effect on 22nd April 2014, the Government intends to restrict legal aid to only those cases where permission to proceed is granted by a judge. Where the case is settled in favour of the homeless person before the permission stage and the local authority does not pay the legal costs, the provider will only be paid at the discretion of the Legal Aid Agency.

At a time when so many people are struggling and at risk of losing their homes these cuts will further strip away help for people facing homelessness. It will make it even more difficult for a homeless family to find a solicitor able to challenge a local authority's refusal to provide accommodation.

We already encounter families who have slept in parks, in railway stations or in hospitals, or who have been travelling on night buses to keep warm – sadly, these changes will make this a more familiar sight. It could also mean more children being separated from their parents as they are taken into social care, or families disappearing into overcrowded, inadequate and transient accommodation.

These changes come shortly after the implementation of wide-ranging cuts to civil legal aid in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in April 2013. This has resulted in all debt and welfare benefits case, and many housing cases such as disrepair, falling out of scope of legal aid.

At a time of increasing pressure on local authorities and other government agencies it is vital that the protection of judicial review is not lost. Judicial review is not brought lightly or frivolously; it is a vital constitutional safeguard in holding public bodies to account and ensuring that they only act lawfully and within their powers. It is often the only thing standing between a homeless family and the street.

The Criminal Justice and Courts Bill

Part 4: Judicial Review

Preventing challenges to unlawful decisions

We note that the Government does not now intend to alter the rules on charities and other organisations having the 'standing' to bring applications for judicial review (as it proposed at consultation stage), and this change of heart is welcome. But instead, the Bill places various financial obstacles in their path which are designed to deter them from bringing or taking part in judicial review proceedings. The changes seem highly technical in nature: but in fact they amount to **a severe curtailment of the ability of the citizen, or of organisations acting on behalf of vulnerable people, to challenge unlawful decisions by public authorities.**

We shall comment briefly on clauses 64-66 and 68-69 of the Bill. We shall make more detailed comments on clause 67 (Interveners and costs) in order to highlight the cases in which we have intervened and the purposes which our interventions have served.

In relation to clauses 64-66 and 68-69, we have read the Briefing Papers submitted by the Public Law Project and Liberty, and we would endorse the specific criticisms of these clauses made in those papers.

Clause 64: Procedural Defects

"Substantially different" vs. "inevitable" – making courts second guess councils

Clause 64 requires a court to refuse the application if it appears to the court highly likely that the outcome would not have been "substantially different" if the flaw in the public body's decision-making had not occurred; and this judgment will be made at the permission stage, not at the full hearing, as is usually the case now. This contrasts with the present situation, where the Court can refuse to make an order if it is satisfied that the decision would *inevitably* have been the same even if the defect had not occurred (the "no difference" test). The context in which these judgments are made is often where the authority has made an error of procedure in arriving at its decision.

In our experience, few applications for judicial review rest on a `mere' technical defect. But where an authority has made an error which is of a procedural kind, it should be required to revisit its decision in the light of a lawful approach to decision-making, unless it is clear that the outcome could not have been different if the correct approach had been followed. In the homelessness context, for example, in deciding whether someone is 'vulnerable', an authority may have failed to put the contents of an updated medical report to the homeless person for his/her comments. In this situation **it should not be for the court to 'second guess' what decision the authority would have made if it had carried out its investigations correctly. If the decision was made unlawfully, it should be sent back to the authority for full reconsideration.**

In fact the proposed change indicates that the Government has misunderstood the nature of judicial review. By requiring the court to carry out an assessment of the likely outcome, even on the basis of a high likelihood, **the 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.** This creates an unacceptable blurring of the role of the court.

In every application for judicial review the odds are stacked against the claimant because the court is limited to examining the decision-making process and not the merits or fairness of the decision itself. In homelessness cases, where decisions so often turn on the interpretation of the evidence by the local authority – eg. in deciding whether a person has made themselves "intentionally homeless" - it is essential that

the few procedural safeguards which exist in favour of the applicant should not be undermined.

We believe that the current system is already sufficiently robust, and we are opposed to a dilution of the "no difference" test. Procedural rules have been established for a purpose, resting on principles of fair and consistent decision-making. **If an authority chooses to ignore or neglect those rules, the burden should rest with that same authority to convince the Court that it would inevitably have made the same decision if it had approached its task in compliance with the rules.**

To mitigate the impacts of Clause 64 Shelter proposes:

- In Clause 64, page 65, lines 1,12 and 38 leave out “substantially different” and insert “inevitable”

Or

- Page 64, line 35; and page 65, lines 13 and 40, leave out “must” and insert “may”

Clauses 65 – 66: Funding of litigation

Deterring charity funding

The Bill requires any individual or organisation who applies for judicial review to provide information about their financial resources. The Government considers that this information is needed because judicial review are sometimes “driven” by other financial interests. The Court will then be expected to take this information into account when considering who should pay the costs of the case.

We agree with the proposal that there should be transparency as to how litigation is funded. However, the work of many charitable organisations, including court work, is supported by external funders. Our own Children’s Legal Services 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.

We express no view as to whether the courts should be given greater powers to award costs against non-parties. We accept that there may be grounds for extending the circumstances in which such orders can be made beyond the present criteria in s.51 of the Senior Courts Act 1981 and CPR 46.2, but such awards would be rare. We see no reason to change the present arrangements.

To mitigate the impacts of Clause 65 – 66 Shelter proposes to:

- Leave out Clause 65
- Leave out Clause 66

Or

- In Clause 66, page 67, lines 1 and 7, leave out “must” and insert “may”

Clause 67: Interveners and costs
Speaking up in the Public Interest

Organisations such as Shelter and other charities will sometimes seek the permission the Court to intervene in a judicial review. The basis for an Intervention is usually that we have research or other **evidence such as a dossier of similar cases which is relevant to the case and will assist the Court in reaching its decision.** An intervention will typically take the form of submitting written evidence and (where the Court agrees) addressing the Court about our perspective on the case.

When we intervene, it is with the assistance of pro bono Counsel. In some cases, we do so on the basis of written representations only. On other occasions we have been permitted by the Court to address it on our evidence, usually on the basis that Counsel is limited in his or her advocacy to an hour or less.

Shelter has exercised its ability to intervene with restraint, and we have intervened in just five 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**.

We have been permitted to intervene in a number of important cases, as follows:

(a) ***R (Limbuela) v Secretary of State for the Home Department*** [2005] UK HL 66, [2006] 1 AC 396 (denial of all assistance to destitute asylum seekers);

(b) ***Birmingham CC v Clue*** [2010] EWCA Civ 460, [2010] WLR (D) 109 (support for destitute families waiting for the outcome of their applications for leave to remain in the UK);

(c) ***R (TG) v LB Lambeth*** [2011] EWCA Civ 526 (drawing attention to the lack of co-ordination between housing and social services authorities in dealing with homeless young people).

(d) Challenge to the housing benefit social sector size criteria rules / bedroom tax / spare room subsidy: ***R (MA & others) v Secretary of State for Work and Pensions*** [2013] EWHC 2213 (Admin).

(e) Challenge to the benefits cap in ***R (SG & Others) v Secretary of State for Work and Pensions*** [2014] EWCA Civ 156.

Our interventions are founded on the fact that we deal on a daily basis with clients who are directly affected by the decisions or policies in question. **On each occasion we have intervened, we have been able to put before the Court evidence of which it would not otherwise have been aware, and which would have assisted it in understanding the wider context of the issues it was dealing with.**

We restrict our involvement to cases in which we have something substantial to contribute. The Court will in any event not entertain an intervention unless it can be shown to offer "added value" in the form of evidence or submissions that have not been made by any of the existing parties. We believe that the courts have welcomed our participation and that we have provided information and arguments which have assisted the Court in its deliberations.

Four of the five interventions were made by the Shelter Children's Legal Service (***SCLS***) is The SCLS is a specialist service, based within Shelter's legal team in London. It represents young people, children and families with housing problems across the country and seeks to improve policy and practice in relation to homeless and badly housed families and children. SCLS is funded by Freshfields Bruckhaus Deringer LLP (***Freshfields***), and the law firm provides direct assistance with our cases and interventions on a pro bono basis.

When we intervene, it is with the assistance of pro bono Counsel. Sometimes we do so on the basis of written submissions only. Sometimes, we are permitted by the

Court to address it on our evidence, but our Counsel will usually be time limited in his or her advocacy.

We set out below further details of each of the five cases in which we have intervened.

Intervening Case Studies

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 was sought advice from a social worker employed by the YOT because his mother would not have him back.

The social worker identified him 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 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

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

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.

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]

2 Local authority duties under the Children Act 1989 to destitute families awaiting decision on their application for leave to remain in the UK

Birmingham City Council v Clue
Court of Appeal 29 April 2010
[2010] EWCA Civ 460

Ms Clue had come to the UK as a student from Jamaica, but had overstayed her student's leave to remain. She entered into a relationship with a man with whom she had three children. The father was a British citizen, and the three children were also British. She was supported by her partner until the relationship broke down as a result of domestic violence. Subsequently, Ms Clue applied to the UK Border Agency for leave to remain in the UK on the basis that her oldest child had been living here for more than seven years.

As Ms Clue had no accommodation and was not entitled to claim benefits, she applied to Birmingham CC for support for herself and her children. The Council accepted the children were in need but said its powers to assist under section 17 of the Children Act 1989 were limited. It offered to assist C by providing tickets to Jamaica for her and her children.

The Secretary of State for the Home Department was joined as an interested party and Shelter was granted permission to intervene by way of written submissions. Shelter's intervention was in the form of a dossier of similar cases represented by Shelter advisors and solicitors during the previous 12 months. **The purpose of the intervention was to provide the Court with a clearer picture of the scale of this issue and to highlight the need for clear guidance and a co-ordinated decision making process between local authorities and the Secretary of State.**

The Court of Appeal held that the Council's approach had been unlawful. The council had accepted that Ms Clue and her family were destitute, but they had not taken any account of the fact that she was awaiting a decision on her application for leave to remain. Further, in taking the view that the children could accompany their mother to Jamaica, the Council had shown no recognition of the fact that their relocation to Jamaica would interfere with their relationships and social, cultural and family ties in the UK. There had been no indication that the Council understood the private lives of children who were born in the UK or came here at an early age were of particular significance.

In the course of the proceedings the Secretary of State also agreed to review the Border Agency's decision-making processes, having regard to the need to safeguard and promote the welfare of children who are in the UK and having regard to statutory guidance that “every effort must… be made to achieve timely decisions for [children].” (para 85 of the judgment)

3 Destitute asylum seekers: conditions of a severity leading to imminent breach of Article 3, ECHR: Home Secretary had duty to avoid such a breach

R v Secretary of State for the Home Department ex parte Adam, Limbeula and Tessema House of Lords [2005] UKHL 66

In these cases, the applicants were asylum seekers who had applied to the National Asylum Support Service (NASS) for accommodation and support. The Secretary of state decided that they were excluded from all support under section 55 of the Nationality Immigration and Asylum Act 2002 on the grounds that they did not make their claims for asylum "***as soon as reasonably practicable***" after their arrival in the U.K., ie. they had not applied for asylum immediately at the port of entry. As a result, they had to sleep on the streets and were destitute.

Shelter intervened in the case to give evidence of the lack of charitable provision for people in the position of the three men. Referring to Shelter's evidence, Lord Hope said:

"...Shelter's experience is that there is no realistic prospect of a destitute asylum-seeker obtaining accommodation through a charity. Unless he has family or friends to provide him with accommodation or with funds, he will have to sleep rough. Clients in that situation who come to Shelter for advice are frequently cold, tired and hungry and have not had access to washing facilities. They display varying degrees of desperation and humiliation as well as mental and physical illnesses. Mr Hugo Tristram of the Refugee Council described the facilities which are available in the council's day centre. Breakfast and a hot lunch are available on weekdays, except for Wednesdays when there are sandwiches. Four showers provide limited washing facilities. The centre is closed in the evenings and at weekends. Despite extensive inquiries, the Council has had very limited success in obtaining accommodation for asylum-seekers. For the most part they sleep outside their offices, in doorways or telephone boxes with not enough blankets or clothing to keep them warm. They are often lonely and frightened and feel distressed and humiliated." (para.36)

The House of Lords unanimously agreed that the Secretary of State's decision to withdraw basic subsistence and accommodation from the three asylum seekers amounted to inhuman and degrading treatment, and a violation of their rights under Article 3 of the European Convention on Human Rights.

4 Challenge to the under-ocupation penalty (bedroom tax) on behalf of disabled children

R (on the application of MA and others) v (1) Secretary of State for Work and Pensions (2) Birmingham City Council (Interested Party) (3) The Equality and Human Rights Commission (Intervener) (4) Shelter (Intervener)
High Court of Justice 30 July 2013 [2013] EWHC 2213 (Admin)

This case was a challenge by way of judicial review to the application of the under-occupation penalty (the "bedroom tax") to certain households containing disabled children or adults. The families had had their housing benefit entitlement reduced on the basis that they were not allowed an extra bedroom. In each case, the additional bedroom was used for disabled or traumatised children who needed their own room, for example where it would not be safe for a brother or sister to sleep in the same room; or for disabled adults who had a need for space for aids and equipment or whose accommodation has been adapted to their needs.

Shelter's Children's Legal Service and the Child Poverty Action Group were each given permission to intervene in this case. Shelter's intervention was based on extensive research carried out on its behalf by Freshfields which showed that, **contrary to the Secretary of State's assertions, discretionary housing payments (DHPs) could not make up the difference between the full rent and the effects of the under-occupation penalty. Shelter's evidence was also directed towards the inconsistency of decision-making between different authorities.**

Shelter's research also demonstrated that there is a severe lack of smaller (one and two bedroom) properties for families affected by the bedroom tax to move into, even if it were appropriate for them to move.

Although the challenge to the lawfulness of the regulations failed, t**he Secretary of State had conceded that there would be an exemption for disabled children who cannot share a room.** The Court expressed the view that it was improper for the Secretary of State to rely on guidance to introduce this exemption, and that new

regulations were required “very speedily” to introduce the exemption. In view of the fact that its intervention was directed towards the interests of disabled children, Shelter did not pursue its intervention when the case came before the Court of Appeal.

5 Challenge to the benefits cap

R (SG and others) v Secretary of State for Work and Pensions (1) Child Poverty Action Group (Intervenor) (2) and Shelter (Intervenor) (3)
Court of Appeal 21 February 2014 [2014] EWCA Civ 156

This was a challenge by way of judicial review to the benefits cap. The claimants were the mother and youngest child of two families whose welfare benefits were reduced as a result of the benefit cap and for whom the cap had particularly harsh consequences. In neither of their cases did they have any prospect of mitigating the cap’s effect. Discretionary Housing Payments (DHPs) provided only temporary respite; and none of the claimants wanted to move far from their homes for medical, cultural or educational reasons.

Shelter and the Child Poverty Action Group again obtained permission to intervene in the case. **Shelter's evidence and submissions were directed towards the impact of the benefit cap in relation to the families' ability to pay for their accommodation or to move to cheaper accommodation, and the consequent impact which the cap would have on homelessness.**

The Court of Appeal accepted that some families would suffer hardship as a result of the application of the cap, and that the cap would bear particularly harshly on larger families and single parents. However, it concluded that "the cap in its present form reflects the political judgment of the Government and it has been endorsed by Parliament after considerable debate. It is not the role of the court to say whether it agrees with this judgment or not. The court’s sole function is to rule on whether the cap is lawful. On the main issue of whether it unlawfully discriminates against women (including victims of domestic violence) and families, the question is whether the cap is manifestly without reasonable foundation. For the reasons that we have given, we are satisfied that the cap plainly does have a reasonable foundation."

However, both in the High Court and the Court of Appeal, there was extensive discussion about the consequences for families who would find themselves homeless

as a result of the cap, and whether the local authority would be entitled to refuse to assist them on the grounds that they had made themselves "intentionally homeless".

In this respect, the High Court gave this helpful guidance:

"…**it seems to us inconceivable that an applicant, whether already housed or seeking housing, could properly be regarded as intentionally homeless where the rent has become unaffordable simply through the application of the benefit cap.** Moreover, it would no longer be reasonable to expect them to remain in the accommodation. There will of course be cases where the question arises whether the reduced income resulting from the application of the cap is the real reason for being made homeless, but that does not affect the principle." [para. 16]

Further Comment on the proposed change in Clause 67

Clause 67 makes interveners 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. We would wish to leave the determination of costs to the discretion of the judge, as at present.

To mitigate the impacts of Clause 67 Shelter proposes:

- Leave out Clause 67

Or

- In Clause 67(4), page 67, line 31, leave out "must" and insert "may"

- Page 67, lines 34 to 38, leave out subsections (4) and (5)

Clauses 68 – 69: Costs capping orders

Prohibitive conditions and Interference in the powers of judges

In order to limit the financial risk borne by individuals or organisations seeking to challenge the decisions of public bodies, the courts themselves have developed the Protective Costs Order (PCO). This order places a cap on the costs that can be awarded against the person who is applying for judicial review if the case does not succeed. It recognises the fact that the resources of the body being challenged are much greater than those of the applicant, and that the applicant simply could not afford to bring the case if there is a risk that they may become liable for the other side's costs. PCOs are only available where the court considers that it in the public interest for the case to be brought.

The Bill provides for what are now called `costs capping orders'. The court would be able to make a costs capping order, but only where the proceedings are in the public interest; and the applicant would reasonably have to withdraw from the proceedings if the costs were not capped. Clause 68(8) goes to the unnecessary lengths of instructing the court as to the factors which it must consider in determining whether proceedings are considered to be the public interest. Clause 68(9) permits the Lord Chancellor to add, omit or amend matters to which the Court must have regard in making this judgement. This seems to us to be **an unprecedented intrusion into the powers of the judges in determining questions of law of which the courts already have vast experience.**

It is especially troubling that the claimant cannot apply for a costs capping order until after permission has been given for the judicial review to proceed; until then, they will be at risk of being called on to pay the opponent's costs. **This will be a severe disincentive to anyone thinking of embarking on a judicial review**, no matter how great the public interest in the case.

We accept that there should be transparency as to who is funding the litigation where a prospective party is asking the Court to make a PCO in its favour.

We also accept that there is a strong argument for a cross cap protecting a defendant's liability to costs where a costs capping order is made in favour of the claimant.

However, the restrictions which clauses 68 and 69 place on the availability of costs capping orders will inevitably deter claims which should be heard. Again, we would suggest that the present rules are serving their purpose and working well, and there is no good reason to change them.

To mitigate the impacts of Clause 68 Shelter proposes:

- Leave out Clause 68

Or

- In Clause 68(3), page 68, line 16, leave out “only if leave to apply for judicial review has been granted” and insert “at any time after proceedings for judicial review have been issued”

- In section Clause 68(6), page 68, line 30, leave out “The court may make a costs capping order if it is satisfied that” and insert “When deciding whether to make a costs capping order, the court may take into account the nature of the party and its involvement in the case and whether”

- Page 68, lines 36-41, leave out subsection (7) and insert “(7) In deciding whether the proceedings are “public interest proceedings” the court shall consider such matters as it thinks fit, including whether the issue that is the subject of the proceedings is of general public importance”

- In Clause 67(8), page 68, line 42, leave out “must” and insert “may”

- Clause 68(9), page 69, lines 3-9, leave out subsections 68(9), 68(10) and 68(11)

To mitigate the impacts of Clause 69 Shelter proposes:

- Clause 69, page 69, line 30, leave out “must” and insert “may”