# Correction Slip

## Judicial Review
Proposals for further reform

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Correction to page 22 - wrong paragraph reference in footnote 28

Error: *R v Secretary of State ex p Presvac Engineering Lts* (1991)... at **133-134**

Correction: *R v Secretary of State ex p Presvac Engineering Lts* (1991)... at **145G-146B**

Correction to page 27 - there is a wrong case citation in footnote 54

Error: ***Varma v Duke of Kent***

Correction: ***R (Wainwright) v. Richmond upon Thames London Borough Council* [2001] EWCA Civ 2062**.

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Ministry
of Justice

# Judicial Review

## Proposals for further reform

September 2013


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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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# Contents

# Foreword

Judicial review allows individuals, businesses and others to ask the court to consider whether, for example, a government department has gone beyond its powers, a local authority has followed a lawful process or an arms-length body has come to a rational decision. As such, it is a crucial check to ensure lawful public administration.

But the use of judicial review has expanded massively in recent years and it is open to abuse. The Government is concerned about the time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made. Moreover, a significant proportion of these weak applications are funded by the tax payer – through the expense incurred by the defendant public authority, by the court resource entailed, and in some cases by legal aid or by the public authority bearing the claimant's legal costs. This is unsustainable, particularly when the judicial reviews are brought by groups who seek nothing more than cheap headlines.

We need to think of the impact that these judicial reviews are having on the country as a whole. We need dynamism and growth, not delay and expense. We owe it to taxpayers, we owe it to industry and we owe it to those in search of work. Using court time and public money simply to object to a lawful policy of an elected government or to generate publicity is not acceptable.

On 1 July this year, following my earlier consultation *Judicial Review: Proposals for Reform*, changes to the procedure for judicial review took effect, reducing the time for bringing planning or procurement challenges and providing a way for the courts to filter out totally unmeritorious challenges at the start of the judicial review process. These and other changes, including a new Planning Fast-Track recently put in place by the senior judiciary, are a worthwhile first step in rebalancing the use of judicial review. But it is right to test the potential for further, substantive, reform which seeks to restore and secure judicial review to its proper place as a check on unlawful executive action.

The proposals for reform on which I seek views come in a number of areas: the courts' approach to cases which rely on minor procedural defects; rebalancing financial incentives; speeding up appeals to the Supreme Court in a small number of nationally significant cases, which would extend beyond judicial review; and planning challenges. Also, I am particularly interested in views on the potential for reforming the test as to who can bring a judicial review, as well as whether there are mechanisms other than judicial review for resolving disputes related to the public sector equality duty.

Having listened to concerns raised in the Transforming Legal Aid consultation, which closed in June, this paper also includes a proposal in relation to the payment of legal aid providers in judicial review cases. In addition to our original proposal that providers would only be guaranteed payment for their work on a judicial review where permission is granted by the Court, this consultation proposes that the Legal Aid Agency will have a discretion to pay providers in certain genuinely meritorious cases where the provider has been unable to secure a costs order or costs agreement as part of a settlement.

This is a comprehensive and much needed consultation on further reform, building on the good work the Government has already done in this area. Judicial review is a crucial means of holding Government to account, but the proposals we are putting forward are, I believe, squarely in the national interest. I look forward to receiving views on the Government's proposals and the questions we have set out.

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# 1. Introduction

1. Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. The Government will ensure that judicial review continues to retain its crucial role. The Government is though concerned about the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision making. This is bad for the economy and bad for the taxpayer.

2. In December 2012 the Government launched a consultation, *Judicial Review: proposals for reform*, which sought views on a series of proposals to reform judicial review. On 23 April 2013 the Government published its response to the consultation setting out the reforms it intended to take forward.[1] They were:

   - shortening the time limit for bringing a judicial review from three months to six weeks in certain planning cases and to thirty days in certain procurement cases, bringing them into line with the time limits for statutory appeals;
   - removing the right to an oral renewal where the case is assessed by a judge as totally without merit on the papers; and
   - introducing a fee for an oral renewal hearing, where permission has already been refused by a judge on the papers but the claimant asks for the decision to be reconsidered at a hearing.

3. The first two of these reforms were given effect on 1 July 2013 by an amendment to the Civil Procedure Rules.[2] The Government will seek to implement the fee change as soon as practicable. The Government will also revisit whether judicial review fees are set at the appropriate level as part of a wider review of fees across the civil courts. These procedural measures are targeted at unmeritorious cases, the aim being to filter them out quickly and at an early stage, while ensuring that arguable claims can proceed to a conclusion without delay.

4. Work has recently been completed to transfer immigration and asylum judicial reviews from the Administrative Court to the Upper Tribunal. This should significantly reduce the workload of the High Court and bring about major efficiencies to the system.

5. These measures are an important step forward. However the Government considers that more needs to be done to prevent abuse of judicial review.

6. The Government is concerned that there has been significant growth in the use of judicial review, and that this is sometimes used as a delaying tactic in cases which have little prospect of success. There are more than twice as many applications for judicial review as there were ten years ago. Whilst much of the growth has been in immigration and asylum cases, those cases take up court and judicial resources with consequences for the handling of other cases. Unmeritorious cases in other areas can delay wider government reforms and the progress of major infrastructure projects which are intended to stimulate growth and promote economic recovery. The

[1] Available here: https://consult.justice.gov.uk/digital-communications/judicial-review-reform
[2] http://www.legislation.gov.uk/uksi/2013/1412/made

Government is also concerned that legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility.

7. In this paper the Government sets out a series of further reforms which seek to address three interrelated issues:

   i) **the impact of judicial review on economic recovery and growth**. As set out in the 2013 Spending Review[3], a key part of the Government's economic plan is prioritising capital spending which will boost investment in long-term infrastructure projects to support economic growth. Vital infrastructure projects and projects that matter to the economy in local areas can be delayed by unmeritorious and repeated challenges resulting in extra cost and risk. This reduces affordability and financial viability and hinders both the projects themselves and the growth and economic recovery they should stimulate;

> **Case study: residential development**
>
> In January 2011 planning permission was granted for the development of a residential property which was to comprise 360 homes and would have created 45 construction jobs per year.
>
> A series of legal challenges by opponents to the development led to a two year delay in commencing the project. Permission was initially refused on all grounds and this was maintained at an oral renewal hearing and a paper request to appeal to the Court of Appeal. On an oral hearing of a request to appeal, permission for the judicial review to proceed was granted on two grounds. At the substantive hearing in the Court of Appeal the claimant's arguments were rejected on both grounds.
>
> The developer's legal costs as a result of these challenges were in the region of £100,000, but that represents only a small proportionate of wider costs to them and to the local community. In a study commissioned by the developer the impact to the local economy of the two year delay was estimated to be £3.8 million including loss in revenue to local businesses and in council tax payments.
>
> The assessment that was done on the impact of this case demonstrates that key planning developments which will have a positive economic impact can be delayed by lengthy and repeated judicial review proceedings. This can have negative knock-on effects for developers, local communities and the wider economy.

   ii) **the inappropriate use of judicial review as a campaign tactic.** The Government is concerned that judicial reviews are being used as a means of generating publicity and prolonging campaigns after all proper decisions have been made; and

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209036/spending-round-2013-complete.pdf

**Case study: free school**

The process of developing permanent premises for a Free School was made much more complex and costly by litigation over the decision to grant planning permission.

The Free School, which was occupying temporary premises, acquired a lease of land previously used as a garden centre, which had closed for commercial reasons. A local campaign group opposed to the closure of the garden centre had been formed. With this group's support, a local resident with disabilities applied for a judicial review of the council's decision to grant planning permission for the land to be used for the Free School's permanent premises. The judicial review relied on various grounds, including a breach of the public sector equality duty (PSED). The Council retook the planning decision in order to assuage concerns about the PSED, reaching the same conclusion.

This decision was then subject to further challenge, and three applications for injunctions to stop the Free School proceeding with construction works were rejected by the High Court. After a full hearing, the High Court also rejected the application for judicial review on all grounds, and refused permission to appeal. After a delay of more than three months, the claimant renewed his application for permission to appeal to the Court of Appeal.

The litigation has so far continued for two years. The claimant's stated aim of saving the garden centre could not possibly have been achieved. At most, the litigation could have prevented the Free School being sited there.

The litigation caused uncertainty about the school's move to its permanent site, required the governing body to divert enormous amounts of time to the court process and cost tens of thousands of pounds of public money to defend. The Free School's core purpose of running a much-needed new school for the local community was severely and unnecessarily disrupted.

iii) **the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.** The Government is concerned by the use of unmeritorious applications for judicial review to delay, frustrate or discourage legitimate executive action. In the case of legal aid the Government is concerned that weak judicial reviews are being funded, undermining public confidence in the legal aid system.

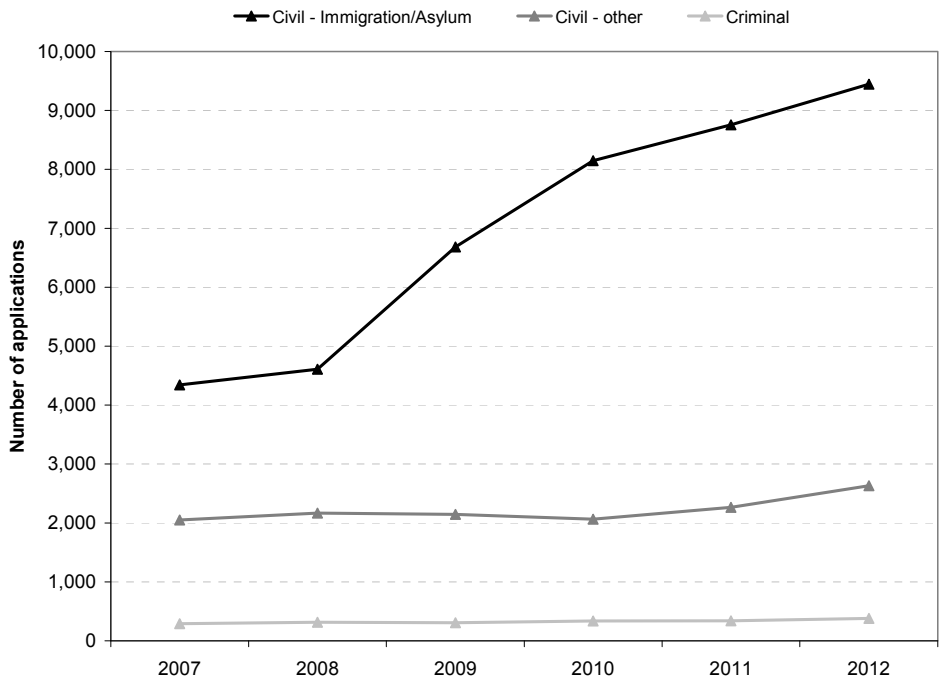
8. The Government wants to ensure that judicial review is readily available where it is necessary in the interests of justice and holding the executive to account, but that it cannot be used simply to campaign against, frustrate or delay decisions. The proposals in this consultation paper are designed to ensure that, taken together with the reforms discussed in paragraphs 3 and 4, people with legitimate legal complaints can have their cases heard quickly but the taxpayer and businesses are protected from the impact of unmeritorious cases.

## Growth in judicial review

9. The number of judicial review applications has more than doubled in recent years. Administrative Court data shows that in 1998 there were over 4,500 applications for judicial review and that by 2012 this had reached 12,400.[4]

10. The main driver of growth in the overall number of judicial review applications has been an increase in immigration and asylum applications, which more than doubled between 2007 and 2012 and made up 76% of the total applications in 2012. The number of judicial review applications in criminal cases, and civil cases other than immigration and asylum, has also increased over the period but at a much slower rate, as shown in Chart 1 below.

*Chart 1: Number of Applications for permission for judicial review by case type (2007 to 2012)*




## Permission to bring judicial review proceedings

11. The data suggests that the majority of applications that are considered by the court are refused permission at the first consideration on the papers. For cases lodged in 2012, only 1 in 6 that reached this stage[5] were granted permission to proceed.

12. However, the data also shows that a large proportion of judicial review applications are withdrawn before any decision on permission is made. For cases lodged in 2012, over 40% of all applications ended by being withdrawn before consideration of permission by the court. Although the reasons for withdrawal are not recorded, there is some evidence that suggests that many of these cases may be settled on terms favourable

[4] Data on Judicial Reviews is available here: https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013. All data is from this source unless separately referenced.
[5] This figure does not include those cases that withdraw before a permission decision is made.

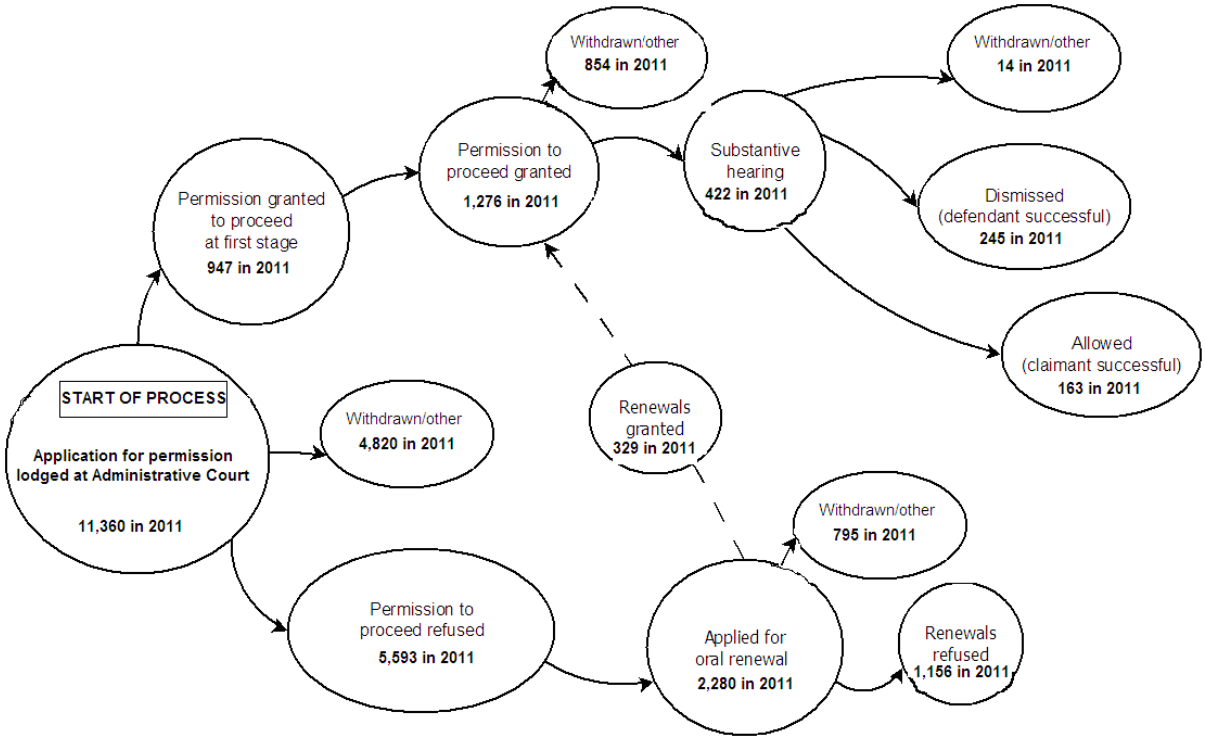
to the claimant.[6] Whilst this may be because the applicant has a legitimate grievance, the Government wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that a prolonged legal battle can involve. That is why the proposals are designed to ensure that challenges can be heard quickly, that there is the right framework for costs in place and why the Government are looking at who should be able to bring challenges.

13. For cases lodged in 2012 an oral hearing was requested following refusal of permission on the papers in about 2,600 cases (around 21% of all applications), and permission to proceed was subsequently granted in around 300 of these cases. The remaining 2,300 cases were either refused permission following the oral hearing or were withdrawn before it.

## Case progression

14. The diagram below provides a high level overview of case progression for judicial review applications. This relates to cases lodged in 2011, which are more likely to have been determined than those lodged in 2012.

*Chart 2: Judicial review process and volumes for cases lodged in 2011 (starting from the left hand side)*




*Note: The large majority of cases in the withdrawn/other categories are withdrawn. Outcomes categorised as "other" include adjourned, discontinued, no order, referred to the Court of Appeal and resubmitted.*

[6] Bondy, V., & Sunkin, M. (2009).The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing.

15. As a result of the large number of withdrawals and the high rate of refusal of permission on the papers and on oral renewal, only a small proportion of judicial review applications reach a final hearing. For cases lodged in 2011[7], around 4% of all applications reached a final hearing (422 cases). Outcomes at the final hearing tend to be more balanced than at the permission stage (reflecting the fact that these cases have passed through the initial filter); for cases lodged in 2011, around 40% of adjudicated decisions at the final hearings were made in favour of the claimant.

## Implications

16. As the data illustrates, there is a large and growing number of judicial review applications. Many such challenges are not successful, which provides the backdrop for the proposals in this consultation. The Government is of the view that the current situation has the following implications:

- unsuccessful judicial review applications can cause delays to the implementation of policies and projects. For cases lodged in 2012 it took, on average, around 83 days for an application to be considered for permission on the papers, and a further 95 days for decision on permission after oral hearing (where there was one). Overall, for applications lodged in 2011 which reached a final hearing, it took on average 313 days for these cases to reach a final hearing from the day they were lodged.
- judicial reviews generate costs to the public sector from defending claims. Illustrative management information from the Treasury Solicitor's Department[8] suggests that, for a defendant, the legal costs alone in non-immigration and asylum cases tend to range between £8,000 and £25,000 and in immigration and asylum cases tend to range between £1,500 and £10,000. Costs in individual cases depend on factors including how far a case progresses and its complexity. Not every case falls within these ranges, and in some instances the legal costs can be much higher. In all cases the unquantifiable additional costs to defendants, such as their own staff costs in defending the case, may be significantly larger than the legal costs.
- judicial reviews can also give rise to costs for third parties. In infrastructure cases, for example, delays in determining challenges against planning decisions may extend project delivery times and result in legal costs, implications for cash flows and borrowing costs. These additional costs and uncertainties might be reflected in the final price paid for the project output in question and can be reflected in initial project bids.
- wider economic costs might arise from judicial reviews in some cases. There may for example be an adverse impact on infrastructure or regeneration projects intended to support market access and economic growth.

[7] 2012 data is used for the number of applications and the permission stage as this is the most recent year available. However, given the potentially long time for cases to reach a final hearing (over 300 days on average) some cases lodged in 2012 will not yet have reached a final hearing and, as such, 2011 data is used for final hearing.

[8] These figures are based on high level management information provided by the Treasury Solicitors Department. They should be considered illustrative only.

## Legal Aid: Judicial Review

17. The Government is concerned that legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility.

### Conclusion

18. The Government believes that judicial review requires further reform. The following chapters contain a series of proposals and issues for consideration. Views on them, on how they might be implemented, and suggestions for additional or alternative options would be welcomed.

19. This consultation requests views in six areas:

- planning challenges;
- the question of standing, i.e. who is entitled to apply for judicial review;
- how the courts deal with minor procedural defects, and whether this can be improved;
- the use of judicial review to resolve disputes relating to the public sector equality duty;
- whether the current arrangements for costs provide the right financial incentives, including legal aid; and
- the scope for making greater use of “leapfrogging” orders, so that appropriate cases can move quickly to the Supreme Court.

20. Our proposals are intended to act as a disincentive to those considering judicial review whose cases have no merit while helping to speed up those cases that proceed through the courts.

# 2. Background

## Judicial Review

21. Judicial review is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions or actions[9] of the Executive, including those of Ministers, local authorities, other public bodies and those exercising public functions. It is a largely judge-developed procedure and can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the executive to account. It is, however, intended to operate quickly and proportionately. It is not a mechanism for challenging proceedings in Parliament – these are not a matter the courts can look at.[10] Likewise, primary legislation and the decision whether or not to introduce primary legislation are not susceptible to judicial review.[11] In relation to secondary legislation, the courts of course have a role in ensuring that Parliament's will in the relevant empowering primary legislation is respected. Judicial review may therefore quite properly be used to ensure that secondary legislation is not outside the powers that Parliament has bestowed on the relevant minister. However, the Government is clear that in other circumstances judicial review should not be used to overturn decisions made by Parliament or to require Parliament to make particular decisions.

22. There are three main grounds on which a decision or action may be challenged:[12]

- **illegality:** for example, it was not taken in accordance with the law that regulates it or goes beyond the powers of the body;
- **irrationality:** for example, that it did not take account of all relevant factors, or that no reasonable person could have taken it; and
- **procedural unfairness:** for example, a failure to consult properly or to act in accordance with natural justice or with the underpinning procedural rules.

23. There is a degree of overlap between the grounds for review and they have continued to develop to take into account the changing legal landscape. The expansion of statutory duties on Government and other public bodies has also led to an increase in judicial reviews based on failure to comply with these duties (for example, duties under the Equality Act 2010).

24. Judicial review is intended to operate quickly and proportionately. Certain protections are in principle provided against spurious claims: only those with sufficient interest are able to bring a case and they must first obtain permission for their case to be heard.[13] It is often described as a remedy of last resort: the courts will normally expect parties to have exhausted all other avenues where they are available, including a right of appeal, internal grievance procedure or where appropriate a complaint to an ombudsman. Parties contemplating bringing proceedings for judicial review are

[9] This may include both action and inaction.
[10] Article 9 Bill of Rights
[11] *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin)
[12] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (Lord Diplock paragraph 410).
[13] Section 31(3) Senior Courts Act 1981 (c. 54).

required to adhere to the relevant Pre-Action Protocol[14], which encourages them to try and settle their differences without reference to the court. However, in urgent matters, the parties can dispense with the Protocol.[15]

25. Some aspects of judicial review are governed by section 31 of the Senior Courts Act 1981 and the procedure is set down in the Civil Procedure Rules (CPR), in particular Part 54 (and the accompanying Practice Directions).[16] Much of the legal framework on the grounds and scope for review, standing, justiciability and costs is established by judicial decision and has changed over time.

26. Applications for judicial review are generally heard in the Administrative Court, which forms part of the Queen's Bench Division of the High Court.[17] They are usually heard by a High Court Judge but on occasion may be heard by the Divisional Court (comprising two Judges).

27. Judicial review is concerned with the lawfulness of the decisions taken. It is not the court's role to substitute its own judgment for that of the decision maker. Where the court concludes that a decision was not taken lawfully it may make one of the following orders:[18]

    - a **quashing order**, setting aside the original decision;
    - a **mandatory order**, requiring the public body to do something or take a particular course of action;
    - a **prohibiting order**, preventing a public body form doing something or taking a particular course of action;
    - a **declaration**, for example, that an act or decision was unlawful; and
    - an **injunction**, for example, to stop a public body acting in an unlawful way.

## The Judicial Review Process

28. Judicial review proceedings must be commenced by filing a claim form at court which sets out the matter the claimant wants the court to decide and the remedy sought. The claim must be submitted promptly and in any event within three months of the grounds giving rise to the claim, apart from in certain planning cases[19] where the claim must be submitted within six weeks, and certain procurement cases[20] where the claim must be submitted within 30 days. The claim form must be served on the defendant, and any other interested party (unless the court directs otherwise) within seven days of issue. If the other parties wish to take part in the proceedings, they are required to file an Acknowledgement of Service within 21 days of the claim form being served on them.

[14] See: http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv (the pre-action protocol does not apply to immigration or asylum judicial reviews).
[15] Where shortened time limits apply to planning and procurement cases the court will not impose normal cost sanctions for a failure to comply with the pre-action protocol though parties are encouraged to comply where possible. The pre-action protocol does not apply in immigration and asylum cases
[16] See: http://www.justice.gov.uk/courts/procedure-rules/civil/rules.
[17] Some Immigration and Asylum Judicial Reviews are heard in the Upper Tribunal.
[18] Section 31(1) and (2), Senior Courts Act 1981.
[19] Where the claim relates to a decision made by the Secretary of State or local planning authority under the planning acts, as defined in section 336 of the Town and Country Planning Act 1990.
[20] Where the claim relates to a decision governed by the Public Contracts Regulations 2006.

29. The court's permission is required for a claim for judicial review to proceed. Decisions on permission are normally considered on a review of the papers filed. Permission may be granted in full, or limited to certain grounds set out in the claim.

30. In cases where the court refuses permission (either in full or in part), it will set out the reasons and serve them on the claimant and the other parties to the proceedings. The claimant may request that the decision be reconsidered at a hearing (referred to in this paper as an "oral renewal"), unless the court refuses permission to proceed and records that the application is totally without merit, in which case there will be no right to an oral renewal. A request for an oral renewal must be filed within seven days of service of the reasons for refusing permission.

31. The renewal is a full reconsideration of the matter, supported by oral submissions. Where permission is granted, the claim will continue as normal. Where it is refused, the claimant may consider whether he or she wishes to apply to the Court of Appeal for permission to appeal.

32. Where permission is granted the court may make directions for the conduct and management of the case, setting out time limits, for example, for the filing and serving of the particulars of the claim, the defence to the claim and any evidence on which the parties wish to rely.

33. Matters may be expedited with the court's permission: for example, the permission and the full hearing may be "rolled up" so that both are considered at the same hearing. The court also has a general power to extend any time limit set out in the rules where it is in the interests of justice to do so.

# 3. Planning

## Streamlining planning challenges

### Introduction

34. In the 2013 budget, the Government committed to streamlining the legal process for determining challenges to planning and major infrastructure projects (either by judicial review or statutory challenge) with a view to them being dealt with in the shortest possible time. This should reduce the extent to which legal challenge unduly hinders economic development and regeneration.

### Current Position

35. Decisions regarding applications for planning permission are usually made at local level by local planning authorities (LPAs), although the Secretary of State has the power to call-in such applications for his own determination, which he does in exceptional circumstances. LPAs also make decisions to commence enforcement action for breach of planning control. Appeals against either of these decisions by an LPA are made to the Secretary of State, with most appeals dealt with on his behalf by the Planning Inspectorate (PINS) unless he decides to recover the appeal for his own determination. A decision made by the Secretary of State (including by PINS on his behalf) may be challenged in the High Court on a point of law only, by way of a statutory appeal by any person aggrieved under section 288 (permission) or by the appellant or LPA or any other person having interest in the land under section 289 (enforcement) of the Town and Country Planning Act 1990. Permissions for nationally significant infrastructure projects are determined by the Secretary of State in accordance with the Planning Act 2008, and may be challenged by judicial review under the narrow provisions of section 118 of the 2008 Act. Any other challenges to decisions by an LPA or the Secretary of State within the planning context can only be made by judicial review.

### Issue

36. Once a development or major project has received planning permission it is important that any further statutory challenges or judicial review are heard as quickly as possible. The Government is concerned that the current system is too slow in determining such challenges, sometimes dragging on for years, and that these delays act as a brake on major infrastructure projects in particular, introducing uncertainty not just for industry but also for residents, businesses and local authorities. The Government therefore wishes to streamline the existing judicial and administrative processes to increase the speed with which statutory challenges and judicial reviews are heard.

37. In 2011 the Administrative Court received approximately 400 planning cases of which between 150 and 200 were applications for judicial review.[21] For judicial reviews, the

[21] Data on Judicial Reviews is available here: https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013. Summary statistics on statutory challenges is available in Table 5.31 – available

average time from lodging an application to a preliminary hearing was around 100 days and 370 days from lodgement to a full hearing. The Administrative Court has for some time operated a system to flag cases of particular significance which require an expedited decision and/or a specialist judge and a number of major planning and infrastructure cases fall into this category. In the last year 15 cases were flagged including statutory challenges under the Town and Country Planning Act[22] and judicial review of major infrastructure projects.

38. Other planning cases which are not flagged may take much longer to be listed and the Government is concerned that these less significant planning decisions - which may nevertheless have major significance for regional development, jobs and economic growth - are subject to unacceptable delay. This can be exacerbated by different challenges being brought at different stages of the process (for example judicial review of consultation procedures and later environmental impact assessment, or judicial review of other consents regimes) which are likely to be heard by different judges. These delays can mean that some developments are deferred indefinitely or abandoned, while the risk of delay and the associated costs can have a potentially chilling effect on development - adding to uncertainty, undermining confidence and acting as a disincentive to investors.

39. Judges sitting in the Administrative Court are deployed on a wide range of cases varying from asylum requests to major planning reviews and review of criminal trials. The fact that their judgments are generally upheld on appeal demonstrates that their decisions are sound, but it is widely accepted by the judiciary and legal representatives that non-specialist judges will take longer to hear and determine planning cases, given the often complex and highly technical issues of both fact and law. It would appear to be an inefficient use of planning judges to have them deployed on more general judicial matters, yet in 2012 around 40 High Court judges heard 120 substantive planning cases in the Administrative Court, most hearing only one case each.[23]

### Recent Improvements

40. To address these issues, in July 2013 a Planning Fast-Track was put in place in the Administrative Court. Of the various considerations in listing planning cases in the Administrative Court there are two which are pertinent to this consultation. The first is the need to identify planning related challenges and judicial reviews at an early stage; the second is to ensure that these cases are referred to the appropriate members of the judiciary. The Planning Fast-Track will deliver significant improvements in both of these, leading to quicker determination of these challenges in line with new targets.

41. Listing is a judicial function and the deployment of judges to the Administrative Court is the responsibility of the President of the Queen's Bench Division who, together with colleagues in the senior judiciary, implemented the changes to listing and judicial deployment for the Planning Fast-Track to significantly reduce the time between application and final determination in challenges to planning cases.

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here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls#'5.30'!A1

[22] Based on indicative management information from Administrative Court.

[23] Based on indicative management information from Administrative Court.

42. The second limb of Planning Fast-Track, which has also been in place since July, is that a specialist Planning Liaison Judge reviews all planning cases to ensure that every major infrastructure case under the 2008 Act is heard by a specialist High Court Judge, sitting in London, the Regions or Wales. In any particular case, the same judge will deal with all aspects of the judicial review from start to finish, making full use of the available case management powers.

43. As part of this measure, there are new procedures within the Administrative Court to identify planning cases as early as possible and to prioritise their management and assure progress in line with the following targets:

- **Paper applications**: applications where permission is required are to be sent for allocation within seven days of receipt of the acknowledgement of service or expiry of the time limit for service. They are then to be sent to a judge within fourteen days of receipt.
- **Section 289** (enforcement) applications for permission: to be dealt with within one month of issue.
- **Oral Renewals**: to be dealt with within one month of receipt of renewal.
- **Section 288** (statutory challenges): to be dealt with within six months of issue.
- **Substantive judicial reviews**: to be heard within three months of notice of a provisional hearing.

44. These improvements have accompanied other initiatives to reduce delay in the overall determination of planning and major infrastructure cases. As noted in the introductory section of this paper, from 1 July 2013 changes to the Civil Procedure Rules have reduced the time within which a challenge to a planning decision by judicial review must be started from three months to six weeks. And from this autumn, as was also noted at the beginning of this paper, immigration and asylum judicial reviews will transfer to the Upper Tier Immigration and Asylum Chamber, a move which is expected to significantly reduce backlogs in the Administrative Court allowing planning cases, amongst others, to be dealt with more swiftly.

45. Many planning applications have a significant impact on local communities and generate intense local interest. In recognition of this, specialist planning judges have been identified in the other centres of the Administrative Court outside London (Birmingham, Cardiff, Manchester, Bristol and Leeds) to hear cases that do not require specialist High Court Judges.

### Proposals

46. The Government expects the Planning Fast-Track to deliver significant reductions in the time taken for judicial reviews in planning and infrastructure cases to be determined, and for these to be clear by the end of the year.

47. However, the Government believes there may be scope to go further and are exploring the potential for further improvements through the creation of a Specialist Planning Chamber in the Upper Tribunal, and the transfer of planning judicial reviews and statutory challenges to it. The Government's view is that this is likely to deliver greater benefit still and, subject to views and the improvements in practice from the Planning

Fast-Track in practice, will seek to deliver the new Chamber as swiftly as possible.[24]

48. This would see specialist planning judges deployed to the Lands Chamber, which is a court of superior record and already has powers in the Tribunals, Court and Enforcement Act 2007 to hear judicial reviews. Its current judges include experts in land, valuation and planning law.

49. The creation of a Specialist Planning Chamber is likely to reassure developers (both national and international) that any challenges will be resolved quickly, particularly if there are accompanying procedural rules which set down specific time limits for determining statutory challenges and judicial reviews, leading to a quicker process overall.

50. Transferring cases to the Lands Chamber should allow planning cases to be better prioritised. It would also allow specialist judges, already appointed to the Lands Chamber, to maximise their specialist skills and knowledge to ensure that cases proceed quickly to a determination. However, it should be noted that all the specialist planning judges of the High Court sit in the Administrative Court and can be deployed in London or out of London as appropriate.

51. It is proposed that if this option were to be pursued the Lands Chamber would be renamed to reflect its wider jurisdictional remit - the Land and Planning Chamber for example.

52. In addition, as a result of suggestions by the judiciary, the Government will consider with the Department for Communities and Local Government whether there is a case for introducing a permission filter in section 288 challenges to restrict weak cases progressing further.

**Questions**

**Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?**

**Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?**

**Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and Country Planning Act?**

**Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?**

**Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?**

[24] Moving statutory challenges under the Town and Country Planning Act 1990 to the new chamber would require primary legislation. Reallocating applications for judicial review to such a chamber could be implemented by a direction of the Lord Chief Justice but changes to procedural rules would take at least six months to develop and implement.

## Local Authorities Challenging Infrastructure Projects

53. The Government is concerned about public money being used to both bring and defend a judicial review. This is a particular concern where the challenges concern infrastructure projects which are essential to drive national economic growth and recovery or projects which are otherwise key to development in a particular area.

54. The Planning Act 2008 created a new streamlined development consent regime for nationally significant infrastructure projects relating to, for example, transport, energy and water. The Growth and Infrastructure Act 2013 allows that regime to be used for other business or commercial projects of national significance.

55. Under the 2008 Act regime, decisions on many of the consents necessary for projects are taken by the relevant Secretary of State, having regard to any relevant National Policy Statement and following a recommendation by an appointed examining authority. The regime operates to a statutory timetable.

56. Challenges to decisions under the regime are brought by judicial review, but with shorter time limits prescribed by section 118 of the 2008 Act.

57. The 2008 Act regime has similarities to the Dutch Crisis and Recovery Act 2010 which also provides a streamlined process for the delivery of key infrastructure projects and for decisions to be made by central government. Unlike the 2008 Act, however, the Dutch legislation restricts the right of any government bodies to challenge decisions under the streamlined regime through the administrative courts. Under that regime, a challenge by such a body, including a local authority, may only be brought where that body is the applicant for planning consent under the Act.[25]

## Rationale

58. Nationally significant infrastructure projects are crucial for delivering the Government's wider economic and infrastructure agenda. By definition, these projects have an impact that goes much wider than just a local authority area or areas. There are already limits on when a local authority (or any other body) can challenge the process for consenting nationally significant infrastructure projects under the 2008 Act, so that judicial reviews of various parts of the process must be brought within 6 weeks of the relevant event, as in section 118 of the Act. However, we are inviting views as to whether this should be further restricted.

59. The Government's view is that all parts of the public sector have a responsibility to spend taxpayer's money wisely, including by using alternative dispute mechanisms wherever possible, rather than recourse to expensive legal proceedings. The Government has already taken steps to encourage all Government departments and agencies to use alternatives such as mediation or arbitration, before taking disputes to court, through the Dispute Resolution Commitment 2011[26], which renewed and strengthened the 2001 Alternative Dispute Resolution Pledge. The Government is interested in whether these principles should apply to local authorities and be strengthened in the case of nationally significant infrastructure projects.

[25] They can still bring civil challenges, under contract law for example.
[26] See: http://www.justice.gov.uk/downloads/courts/mediation/drc-may2011.pdf

60. No challenges have been brought by local authorities to nationally significant infrastructure projects, of which 12 have completed the process since the regime opened in March 2010. However, Government is keen to understand whether there are concerns that this could emerge as a problem in the future taking account of local authority responsibilities relating to applications for nationally significant infrastructure projects under the 2008 Act. The local authority or authorities where a Nationally Significant Infrastructure Project is to be situated and their immediate neighbourhoods are included in the list of pre-application consultees (i.e. the promoter must seek their views on a draft application and take them into account before making their application proper). This gives Local Authorities opportunities to participate in the process.

## Proposal

61. The Government therefore wishes to seek views on whether there should be further restrictions on the extent to which local authorities can challenge decisions on nationally significant infrastructure projects in England and Wales, unless they are the applicant for development consent.

62. Challenges would still be possible from persons and groups able to meet the general test for standing, which would, even if amended as proposed elsewhere in this paper, continue to embody a wide approach in the case of challenges in the environmental field. Government bodies could still influence and challenge relevant projects through routes other than judicial review.

## Questions

**Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?**

**Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?**

## Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

63. The Government is also considering whether it is appropriate for the public purse to continue to fund legal aid for statutory challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act (TCPA) 1990, specifically challenges under these sections where a local planning authority's decision, or non-determination of an application, has already been appealed to the Secretary of State, or he has taken a decision on a called-in application (which will generally involve a public inquiry).

64. Currently legal aid is not generally available for planning cases or statutory challenges under sections 288 and 289 of the TCPA but is available (subject to means and merits) where an individual is at immediate risk of losing their home as a result of the proceedings in question.

65. These challenges are not judicial reviews. The statutory challenges concerned will occur at the end of a robust process, also funded by the public purse, that has already provided individuals with opportunities to put their case, either to a local planning authority and then on appeal to an independent Planning Inspector, or to a public inquiry.

66. In such cases, central government is providing further taxpayers' money to fund legal challenges of decisions made by central government after the case has already been heard by an independent Planning Inspector. In view of this, as well as the particularly strong public interest in planning cases not being unduly delayed by court proceedings, we would welcome views on whether taxpayer funded legal aid should continue to be available for these challenges (other than where the failure to fund such a challenge would result in breach, or risk of a breach, of ECHR or EU rights).

**Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?**

# 4. Standing

## Introduction

67. The issue of standing (or locus standi) concerns who may bring a claim for judicial review. Whether a particular claimant has standing is based on the level of interest they have in the matter to be determined. The Government is concerned that too wide an approach is taken to who may bring a claim, allowing judicial reviews to be brought by individuals or groups without a direct and tangible interest in the subject matter to which the claim relates, sometimes for reasons only of publicity or to cause delay. The Government is seeking views on whether claimants without a direct or tangible interest ought to be able to bring a judicial review or whether reform is needed.

## Current Position

68. The current test for standing is prescribed in section 31(1) of the Senior Courts Act 1981, and requires that the court should not grant leave for an application for judicial review to be made unless the court "considers that the claimant has a sufficient interest in the matter to which the application relates". This test has been interpreted by the courts as including cases where it is in the public interest for an issue to be examined.[27]

69. Part 54 of the Civil Procedure Rules sets out the process for the application for permission. Under Rule 54.8, if the defendant wishes to contest the claim a summary of the grounds for doing so should be set out in the acknowledgement of service and filed not more than 21 days after the claim form was served upon the defendant. These grounds can include a contention that the applicant lacks sufficient interest and so permission should be refused.

70. If the court considers at the permission stage that the applicant has sufficient interest (or standing) and the judicial review proceeds, the extent of the claimant's interest can be looked at afresh as part of the court's subsequent consideration of whether to grant the remedy sought at the substantive hearing.[28]

71. This two stage approach was summarised by Lord Donaldson (when he was Master of the Rolls) as follows:

> "The first stage test which is applied on the application for leave [permission] will lead to a refusal if the applicant has no interest whatever and is in truth no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage the strength of the applicant's interest is one of the factors to be weighed in the balance."[29]

[27] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Lord Rees- Mogg* [1994] QB 552
[28] *R v Secretary of State ex p Presvac Engineering Ltd* (1991) 4 Admin L Rep 121 at 133-134
[29] R v Monopolies and Mergers Commission ex parte Argyll Group [1986], 1 WLR 763 773.

72. At both stages the question of sufficient interest is a mixed question of fact and law having regard to the relationship between the applicant and the matter to which the claim relates including all other circumstances.[30] Standing (and other procedural matters) will be judged in the light of the court's view of the merits and degree of importance of the challenge, the likely absence of any other responsible challenger, the nature of the alleged breach and any role played by the person or group in question.[31] The courts have recognised that a public spirited citizen without any direct legal interest in the outcome of the case may, unlike a "meddlesome busybody", be allowed to seek judicial review in cases which present a serious issue of public importance.[32]

73. The approach to standing in the courts in England and Wales is subject to requirements in EU law which incorporate the Aarhus Convention[33] regarding access to justice in environmental matters. This gives members of the "public concerned" and certain non-governmental organisations access to procedure to challenge environmental matters (subject to requirements of national law). The current interpretation of "sufficient interest" as including those with a public interest provides a more generous approach than is required by Aarhus.

**Issue**

74. Over time, the courts have taken an increasingly expansive approach to the "sufficient interest" test so that now a personal interest in the matters to which the application relates is no longer required. The "sufficient interest" test has become a relatively low hurdle for potential claimants to overcome, so that a strong public interest can provide standing even where the claimant has no direct interest. The Court of Appeal was explicit in setting out the principle of sufficient interest where a person "who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest" in contrast to a person who has no interest in the outcome.[34]

75. Peace activist Maya Evans, for example, was granted standing to challenge the Defence Secretary's practice of transferring to the Afghan authorities suspected insurgents who had been detained by United Kingdom armed forces in the course of operations in Afghanistan. She was not directly affected by the practice but had an interest as a concerned member of the public and that was considered by the court to be a sufficient interest. It was noted by the court that the applicant's standing would at one time have been an issue.[35]

76. Similarly, the World Development Movement (a campaign organisation) did not have members or supporters who were directly affected by a grant of overseas aid to the

[30] *R v Inland Revenue Commissioners Ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617

[31] R(Grierson) v. OFCOM and Atlantic Broadcasting [2005] EWHC 1899; *R v Secretary of State fort eh Foreign and Commonwealth Affairs Ex p World Development Movement Ltd* [1995] 1 WLR 386.

[32] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Lord Rees- Mogg* [1994] QB 552.

[33] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L26/1.

[34] *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] JPL 431 at 132.

[35] *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) per LJ Richards at para 2.

Government of Malaysia but were held to have standing to challenge the decision on the basis of a public interest.[36]

77. Claims may be brought by campaigning groups and unincorporated associations, some specifically formed for the purpose of bringing legal challenges and as a means of avoiding full costs implications.[37] In some cases, neither the group nor its members are directly affected by the decision or action in issue, and their interest is essentially a political one. In paragraphs 167 - 179, the Government is consulting on changes to the rules on the award of costs against third party interveners and non-parties who become involved in a judicial review claim.

78. From Administrative Court records for cases lodged between 2007 and 2011 around 50 judicial reviews per year have been identified that appear to have been lodged by NGOs, charities, pressure groups and faith organisations, i.e. by claimants who may not have had a direct interest in the matter at hand.[38] The identified cases tended to be relatively successful compared to other JR cases; on average around 20 were granted permission per year, around 13 were heard at a final hearing with 6 being successful for the claimant. For the identified cases further inspection suggests that nearly 30% of applications may have been related to environmental matters (see paragraph 81 below).

79. The Government is concerned that the wide approach to standing has tipped the balance too far, allowing judicial review to be used to seek publicity or otherwise to hinder the process of proper decision-making.

80. The concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest. On that basis, judicial review should not be used to undermine this role by putting cases before the courts from individuals with no direct interest in the outcome. The Government considers that people who bring judicial reviews should have an interest in the case and consequently wishes to receive views on whether the test for standing should require a more direct and tangible interest in the matter to which the application for judicial review relates. That would exclude persons who had only a political or theoretical interest, such as campaigning groups.

81. The Government accepts that the requirements of EU law and the Aarhus Convention would mean that cases which raised environmental issues would need to be approached differently. NGOs which campaign for environmental protection are guaranteed rights of standing under the Convention and EU law, even if they are not directly affected. This would not extend to NGOs which do not campaign on environmental matters or which do not have environmental protection as an objective. Certain individuals are also required to have standing on environmental matters where they may not be directly affected. But that might be limited to where the individual can demonstrate that they have both a genuine interest in the environmental matter at issue and that they have sufficient knowledge to be able act on behalf of the public interest.[39] This could be demonstrated by, for example, membership of a society,

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[36] *Ex p World Development Movement Ltd* [1995] 1 WLR 386
[37] *R. v Leicestershire CC Ex p. Blackfordby and Boothorpe Action Group Ltd* [2001] Env. L.R. 2 *per* Richards J
[38] Based on a manual analysis of case level information. Due to uncertainties in recording and interpretation this analysis is largely illustrative.
[39] *Walton v The Scottish Minsters* [2012] UKSC 44

participation in an activity, experience of working in a particular field or suitable academic qualifications. This approach reflects the general principle that those bringing a judicial review should have a strong interest in the outcome.

82. There are other areas where a body is required by law to be given standing to bring a challenge. For example, the Equality and Human Rights Commission has a power to bring judicial review proceedings in matters relating to its statutory functions, including certain equalities examples. The Government is not seeking to overturn these existing arrangements.

### Existing alternatives

83. There are a range of existing alternative tests applied in different areas which could form the basis of a new test for judicial review standing. The tests for standing under EU law, the Human Rights Act 1998 and for statutory planning appeals all require a more direct interest in the case and the civil legal aid test focuses on the relationship between the applicant and the potential outcome. Adopting any of them for judicial review would require amendment of the 'sufficient interest' test in the Senior Courts Act 1981.

84. The general test of standing to challenge EU measures in the European Court of Justice requires a "direct and individual concern".[40] This is a restrictive test requiring that the attributes and circumstances make the claimant in a particular position - as opposed to others - "individually" concerned.[41] This has resulted in, for instance, certain banana traders not having standing to challenge banana import regulations as they failed to make out that they were affected in a way which was peculiar to them (as against other banana traders).[42] The Government considers such a restrictive test would be unlikely to be appropriate in a judicial review case.

85. A narrow, but less restrictive, approach to standing is provided for under the Human Rights Act 1998. Under section 7(1) a person may only bring a claim under the Act if they are or would be a victim of an alleged breach of human rights. This mirrors the approach of the European Court of Human Rights[43] to standing. This restricts the capacity of campaign groups to use human rights violations as grounds of challenge unless they are themselves the victim. Close family relationships have been sufficient to form the basis of victim status though will not necessarily in all circumstances.[44] Some engagement with the right alleged to be violated may be required, for instance early objection during the process which is complained of or evidence of attempting to make a claim for a pension which was said to be discriminatory.[45]

86. In statutory planning challenges, only a "person aggrieved"[46] is entitled to challenge the decision. In most cases, that requires prior participation in the decision making process (for example an active role in the planning process) or a relevant interest in

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[40] Article 230 EC individuals may seek annulment of a Community legal act, provided that it is of direct and individual concern to them.
[41] *Plaumann v Commission* 1963 Case 25/62
[42] *Comafrica SpA v Commission of the European Communities* (T-139/01) (Unreported, February 3, 2005) (CFI)
[43] Article 34 of the European Convention on Human Rights
[44] *Timurtas v Turkey* (2001) 33 EHRR 6
[45] *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272; *Hooper v Secretary of State for Work and Pensions* [2005] UKHL 29
[46] section 288 of the Town and Country Planning Act 1990

the land in question (for example its owner). It has been held in the Court of Appeal that whether a person is "aggrieved" is assessed objectively, and so there is a difference between feeling aggrieved and being aggrieved.[47]

87. The test for the availability of civil public funding for judicial review claims requires a direct interest by the applicant for legal aid and requires there to be:

> "….the potential to produce a benefit for the individual, a member of the individual's family or the environment."[48]

88. For the purposes of the test for civil legal aid, an individual can include other legal persons such as companies. An individual is a member of another individual's family if they are relatives (whether by blood, half blood, marriage or civil partnership), cohabitants or one has parental responsibility for the other.[49] The familial element in the test is important because otherwise, for example, parents could not bring an action over a matter that directly affected their children.

89. The Government is also clear that any new test would not require any actual damage or an interference to have occurred. As is the case at present, a potential future interest would be sufficient.

90. If a tighter test for standing were taken forward, the related question of third party involvement in judicial reviews would need to be considered. The Government recognises that, in certain cases, the court may benefit from the knowledge which expert groups can bring, but would not wish to see judicial reviews over-complicated by increasing involvement of third parties who could not bring the case on their own accord. Existing routes for the court to make use of this knowledge already exist where those groups are not a party to the case. The court may allow third parties to file evidence or appear at a judicial review hearing and, exceptionally, the court can invite third parties to intervene.[50] The Government wishes to receive views on whether, if it were to move forward with a narrower test for standing, it would also need to modify the rules concerning interveners and interested parties, and what those changes might be.

**Questions**

**Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?**

**Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?**

**Question 11: Are there any other issues, such as the rules on interveners, the Government should consider in seeking to address the problem of judicial review being used as a campaigning tool?**

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[47] *Ashton v. Secretary of State for Communities and Local Government and Coin Street Builders* [2010] EWCA civ 600

[48] Paragraph 19(3) of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

[49] Op. cit. para. 9.

[50] See, for example, *Rogers v Merthuyr Tydfil County Borough Council* [2006] EWCA Civ 1134.

# 5. Procedural Defects

### Introduction

91. The Government believes that challenges which relate only to procedural issues could be determined more quickly and with less resource. In some circumstances a case founded on a procedural flaw, whilst technically successful, results in no substantive benefit to the claimant in that the same decision or action is taken again. Consequently, the Government wishes to strengthen the court's powers where a rectification of a claimed flaw would be likely to have made 'no difference' to the original outcome.

### Current Position

92. Procedural irregularity or impropriety is a ground for judicial review. Whilst it may encompass substantive unfairness it may often be that the claimant is arguing that there was simply a failure to follow a certain procedural process.

93. The courts have already established a 'no difference' principle: where the court is satisfied that the outcome would inevitably have been the same even if the alleged defect had not occurred, it can refuse the remedy sought.[51] The court looks beyond the narrow question of whether the decision was taken in a procedurally improper manner, considering the wider question of whether a decision properly taken would or could have benefited the claimant.

94. The courts have founded their approach on the basis that there is no such thing as a technical breach of procedural fairness – there must have been some scope for the outcome to be affected. In such cases, the claimant has to establish that there was a real, as opposed to a purely minimal, possibility that the outcome would have been different had the alleged flaw not occurred.[52]

95. Much of the case law in this area relates to failures over consultation duties.[53] For example, although a local authority had breached its statutory duty to consult by failing to sufficiently notify individual residents of plans to construct a toucan crossing, the decision to approve the crossing could stand because there was no real possibility that the local authority would have reached a different decision had it complied with the duty to consult.[54]

96. In R (Ghadami) v. Harlow District Council[55] an individual was not notified of the detail of a decision-making process. Nonetheless, they were aware of the existence of that process and chose not to participate. The court accepted the argument that, had the flaw not occurred, it was inevitable that the original outcome would have remained.

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[51] *R.*(*Cotton) v Chief Constable of Thames Valley Ex p. Cotton* [1990] I.R.L.R. 344
[52] R (Cotton) v. Chief Constable of Thames Valley [1990] I.R.L.R. 344.
[53] *R ( Smith )and NE Derbyshire PCT* 2006 1 WLR, *R (Dudley) v SoS DCLG* 2012 EWHC 1964; *R v Haberdashers' Aske's Hatcham School Governors Ex p ILEA* The Times March 9, 1989; *R (on the application of Midcounties Co-Operative Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin)
[54] *R (on the Application of Varma) v Duke of Kent* [2004] EWHC 1705.
[55] [2004] EWHC 1883 at [73]

97. It is open to the defendant to argue that a purported flaw made 'no difference' at any stage in the process, including in the Acknowledgement of Service (which includes a summary of the grounds for contesting the claim). However, at the permission stage the court is unlikely in many cases to be able to properly consider such arguments, given the need to understand both the nature of the potential flaw and the factual context in which it took place.

98. However, the court exercises the discretion to dismiss a case on the basis that the flaw would have made 'no difference' with caution. Where decisions on the provision of general practitioner services were challenged on the basis of a lack of proper consultation, despite the first instance judge doubting whether the decision-maker would have arrived at a different decision had it complied with the relevant duty,[56] the Court of Appeal found that a probability that the decision would have been the same was insufficient and that 'inevitability' was required.[57] In a rolled-up permission hearing in a recent case brought by the Association of Personal Injury Lawyers, citing a failure on the part of the Ministry of Justice to consult in relation to a decision in principle about fixed recoverable costs in cases under the Pre-Action Protocol for Low-Value Personal Injury Claims in Road Traffic Accidents, the judicial review application was refused.. The court decided that there was no duty to consult in this case and added that even if there had been, they would not have been minded to quash the decision as it was plain that even if a further consultation exercise had been carried out, it would not have caused the Secretary of State to reach a different view.[58]

### Issue

99. The Government considers that judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality. The Government is considering strengthening the law and practice to enable the Courts to deal more swiftly with applications where the alleged flaw complained of would have made 'no difference'.

### Proposals

100. The Government seeks views on two options in relation to 'no difference' arguments: bringing forward the consideration to earlier in the process and providing for a different threshold of whether the flaw would have affected the outcome. These could be applied to all types of procedural failing.

## Option 1 - Bring forward the Consideration

101. Under this option, the process would be changed to enable 'no difference' arguments to be properly made and tested at the permission stage. In theory, these arguments can already be made on paper at the permission stage but for them to be fully considered oral argument may be needed, supported by fuller documentation. The Government acknowledges that there is a risk that this may add to the length and complexity of the permission stage and consequently the whole proceedings if

[56] R (Smith) v. N.E. Derbyshire PCT and the Secretary of State for Health [2006] EWHC 1338 (Admin).
[57] R(Smith) v. North East Derbyshire PCT 1 WLR 3315 per Lord Justice May at para 10
[58] [2013] EWHC 1358 (Admin).

permission is granted. But where the claim can be dismissed at an earlier stage this will reduce the overall impact of these cases.

102. The Government is proposing that, where the defendant makes the assertion in the Acknowledgement of Service that the flaw would or could not have made any difference to the outcome, it will be possible for the judge to consider the question more fully as part of the consideration of permission. The Government is not currently proposing to place a positive duty on the judiciary to consider in every application whether a flaw complained of could have made a difference but only where the defendant raises the argument and there are no other arguable grounds for the challenge which merit full investigation by the court.

103. In that situation, the Government would propose that there may either be a decision on the papers (requesting further evidence from either party as appropriate) or a determination of the issue at an oral hearing. The oral hearing would be required where the court wished to hear argument on points not adequately covered in the paper application. However, an oral hearing might make the process take longer and be more costly than otherwise.

**Questions**

**Question 12: Should consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?**

**Question 13: How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?**

## Option 2 – A different threshold

104. Under this option the Government would introduce a new statutory threshold to judge whether a case based on a procedural flaw should be dismissed. Rather than the current requirement of inevitability that the same conclusion would have been reached, it would be sufficient that it was reasonably clear that the flaw would not or could not make a difference. This would be a lower test of probability, for example a 'high likelihood'.

105. Such an approach would still see any case where there is real doubt as to whether the result would have remained the same considered by the court, as it is now.

**Questions**

**Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?**

**Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?**

**Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?**

# 6. The Public Sector Equality Duty and Judicial Review

106. Under the Equality Act 2010, the public sector Equality Duty (PSED) requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. An alleged breach of the PSED by a public body can be challenged in the courts by way of judicial review. When considering challenges, the courts are concerned with determining if the public authority has given due regard to the three equality aims, rather than whether a particular outcome has been achieved.

107. In May 2012, the Home Secretary announced a review of the PSED as part of the Red Tape Challenge. The review was conducted by an independent Steering Group, whose purpose was to establish whether the PSED was operating as intended. As part of the review, which reports today, the Steering Group considered the role of judicial reviews brought against public bodies where it has been claimed that they have failed to comply with the PSED. In its report on the findings of this review the Steering Group found that uncertainty as to how the courts would interpret the concept of 'due regard' may have resulted in some public bodies adopting an overly risk averse approach to managing legal risk. The Steering Group has therefore made recommendations to address the issues identified through the review, including enforcement.

108. The review also found that, even where a court has ruled that a public body has failed to comply with the PSED, often it only orders that body to re-take the decision. It is not uncommon for the body to arrive at the same conclusion following further work to demonstrate it had discharged the duty effectively. It is not clear whether this ultimately benefits anyone and the Steering Group has therefore recommended that the Government should consider whether there are quicker and more cost-effective ways of reconciling disputes relating to the PSED.

109. As part of this consultation the Government is interested in seeking views about alternative mechanisms for enforcing the duty other than judicial review. Alongside this, the Government is also conducting work to better understand the volume and nature of PSED-related challenges, and would welcome any evidence in relation to this.

**Questions**

**Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.**

**Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide it?**

# 7. Rebalancing Financial Incentives

### Introduction

110. If a person or organisation is involved in litigation they will incur certain expenses through, for example, instructing a legal representative or having a scientist provide an expert witness report. These expenses are known as 'costs' and are usually determined at the end of the case. Generally in England and Wales the unsuccessful party will be ordered to pay the costs of the successful party.

111. In the last several years there has been concern that the costs of civil litigation have become too high. This led to the review conducted by Lord Justice Jackson, who looked at how costs might be controlled. His recommendations, published in January 2010[59], have largely been taken forward both by the Government and the judiciary. These reforms will go some way to making costs more proportionate and balanced as between claimant and defendant in judicial review cases, as in other proceedings.

112. The Government believes that it is right to go further, particularly in relation to costs for the permission stage in judicial review cases. The current approach does not reflect all of the costs of the proceedings and does not provide the right incentives to prevent the pursuit of repeated and unmeritorious claims often at a cost to the taxpayer. There is a need to consider reforms to rebalance the system so that those involved have a proportionate financial interest in the costs of the case. The new fee for an oral permission hearing which is to be introduced as soon as practicable is a sensible first step to give the claimant a greater financial interest. The Government expects that the combined effect of the new fee and the removal, from 1 July 2013, of the right to an oral renewal hearing in cases certified as totally without merit will be fewer requests for oral permission hearings in the future.

113. Whilst recognising the need to ensure that financial considerations do not provide a barrier to justice, the Government seeks views on how the approach to costs for judicial review can be adjusted to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings. The Government wishes to explore five areas, namely, restricting payment to legal aid providers unless permission is granted (subject to discretionary payment by the LAA) the costs of oral permission hearings, wasted costs orders, protective cost orders and costs relating to third party interventions.

[59] Right Honourable Lord Justice Jackson (2010) *Review of Civil Litigation Costs: Final Report.*

## Paying for permission work in judicial review cases

### Introduction

114. In the recent consultation *Transforming Legal Aid* the Government proposed transferring the financial risk of the application to the provider in order to provide a greater incentive to give careful consideration to the strength of the case before applying for permission for judicial review.

115. The Government subsequently published the response to the consultation which indicated that legal aid should be focussed on those judicial review cases where it is really required.[60] However, the Government has listened to concerns raised by a number of respondents who argued that the original proposal not only targets weak judicial review cases but would also unfairly affect meritorious cases where permission is not granted simply because the case concludes prior to consideration by the court. The revised proposal seeks to address this concern.

### Current position

116. Legal aid is generally available for judicial review cases, subject to merits and means testing, and a number of exceptions.[61]

### Issue

117. The Government considers that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility.

### Proposal

118. The Government proposes that providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the court. However, in light of the concern raised about cases which do not reach a permission decision, The Government also proposes to introduce a discretion to permit the Legal Aid Agency (LAA) to pay providers in certain cases which conclude prior to a permission decision. The discretion would involve the application of criteria (see paragraph 125 below) to cases where the provider has been unable to secure a costs order or costs agreement as part of a settlement. It is not proposed to pay providers in all cases which conclude without a permission decision; the discretionary criteria would be used to determine the meritorious cases in which payment should be made, while maintaining the policy objective not to pay for weak cases.

119. The proposal would only apply to issued proceedings. Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and to engage in pre-action correspondence aimed at avoiding proceedings under the Pre- Action Protocol for Judicial Review. In addition, payment for work

[60] A full summary of issues raised by respondents is set out in Transforming Legal Aid: Next steps. Available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

[61] Under paragraph 19 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

carried out on an application for interim relief in accordance with Part 25 of the Civil Procedure Rules would not be at risk, regardless of whether the provider is ultimately paid in relation to the substantive judicial review claim. Reasonable disbursements, such as expert fees and court fees (but not Counsel's fees), which arise in preparing the permission application, would continue to be paid, even if permission were not granted by the court.

120. In relation to issued proceedings, the claimant also would continue to benefit from cost protection.[62]

121. Under this proposal, all work to bring an application for judicial review in accordance with Part 54 of the Civil Procedure Rules or Part 4 of the Tribunal Procedure (Upper Tribunal) Rules 2008 would be at risk. The proposal would apply to judicial reviews in the High Court and to those cases dealt with under the Upper Tribunal's judicial review jurisdiction. All work on the application for permission to apply for judicial review (including drafting the grounds of claim or instructing Counsel to draft the grounds of claim, preparing the claim form or application for permission and the bundle of documents) would, if proceedings were issued, be undertaken by providers at risk. Any work done for a rolled up hearing would also be undertaken at risk.

122. The Government recognises that the merits criteria are in place to help weed out weak cases. The LAA has also taken steps to ensure greater scrutiny of cases by removing the ability for providers to self-grant emergency representation in most judicial review cases. However, the Government does not consider that these measures are sufficient by themselves to address the specific issue we have identified in judicial review cases. When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the case. The LAA is necessarily strongly guided by the provider's assessment of the prospects of success of the proposed judicial review claim in deciding whether the claim should receive funding.

123. The Government considers that it is appropriate for all of the financial risk of the permission application to rest with the provider. It is legitimate to use the permission test as the threshold for provision of legal aid. The provider is well placed to assess the strength of their client's case and the likelihood of it being granted permission; and thus well placed to make an informed judgement as to whether the permission test is met.

124. However the Government also recognises respondents' concerns about meritorious cases which conclude before a permission decision is made. Where a case settles after the claim has been issued but before it is considered by the court the Government considers that providers should generally agree costs as part of the settlement or seek a costs order from the court.[63] The courts have recently made clear that while the issue of costs is highly fact-specific, the ordinary rule in litigation that the losing party should pay the winning party's costs applies in public law claims,

[62] The principle under which the costs may be awarded against a legally aided party in civil proceedings must not exceed a reasonable amount having regard to the financial resources and conduct of the parties in the proceedings.

[63] Under paragraph 6.58 of the 2013 Standard Civil Contract General Specification providers must endeavour where possible to obtain and pursue a client's costs order or costs agreement, as they would if acting for a privately paying client.

regardless of the fact that the defendant is a public body.[64] However, it is recognised that the court will not always make a costs order in the claimant's favour and in practice settlement may only be achieved with no order as to costs. A case may also be discontinued under Part 38 of the Civil Procedure Rules. In these circumstances the provider will be able to request that the LAA pay their costs[65] at legal aid rates. The LAA will consider carefully the reasons why an order for costs was not made or why a case settled without a costs agreement. Any decisions in the provider's favour would remain subject to costs assessment to ensure all costs were reasonably incurred. As set out above, legal aid costs would not be recoverable in all such cases, but rather whether the provider will be paid will be assessed against the criteria.

125. The Government proposes to determine payment according to the following exhaustive list of criteria:

    i) The reason for the provider not obtaining a costs agreement (whether in full or in part) as part of any settlement, not seeking a costs order, or the court not awarding a costs order (whether in full or part). This will include consideration of the conduct of the provider under the pre-action protocol and in the proceedings;

    ii) The extent to which the client obtained the remedy, redress or benefit they had been seeking in the proceedings;

    iii) The reason why the client in fact obtained any remedy, redress or benefit they had been seeking in the proceedings[66];

    iv) The likelihood, considered at the point the settlement is made (or the case is otherwise concluded), of permission having been granted if the application had been considered, whether from a specific indication in the proceedings by the Court or based on the strength of the claim at that point[67].

126. Decisions on payment will be for the LAA, on the Lord Chancellor's behalf. It is anticipated that the LAA would on application from the provider consider each case by applying these criteria in the round as appropriate on the particular facts. In some cases a number of criteria will be relevant; in others the case may turn on a sole criterion, depending on the circumstances. Although decisions applying the criteria will necessarily turn on the facts of each individual case, the Government intends that the discretion should apply to cases in which the underlying claim was meritorious and there were good reasons why the provider did not obtain a costs order or agreement as part of their settlement, despite making every effort to do so in accordance with the terms of their contract with the Lord Chancellor.

127. One example in which it is envisaged that the discretionary criteria could operate in a provider's favour might be where the claim is strong on its facts (including, potentially, the grant of interim relief) but, prior to permission, a favourable intervention by a third party rendered the claim academic. In this kind of case, the court would not necessarily make a costs order in the claimant's favour, but the claim remained

[64] The principles governing costs orders in judicial review proceedings were set out in *R(M) v Croydon London Borough Council* (CA) [2012] EWCA Civ 595.

[65] The provider will be able to apply for full costs, or as now, for partial costs from the legal aid fund where they have received part of their costs under a costs order or agreement.

[66] For example why the case settled, or whether the client obtained a remedy as a direct result of the proceedings or for some other reason..

[67] For example in the light of the pleadings within the proceedings or correspondence and evidence obtained since the determination was made that the client qualified for legal aid to bring the claim.

meritorious at its conclusion. Similarly, a defendant might settle a case following a decision of a higher court which decides the issue in the case in the claimant's favour - in such a case the Government would expect the claimant to pursue costs, but the claimant would not necessarily receive all of their costs under a costs order. In this case, the claim has been settled in the claimant's favour due to the decision of the higher court making the claim stronger, and so the criteria would apply in the provider's favour. If the court were to make a partial costs order in the claimant's favour, the LAA's discretion would relate to any outstanding costs at legal aid rates.

128. On the other hand, the criteria are also intended to ensure that providers do not receive payment in cases in which the underlying merits are weak at the point at which they end or the provider should properly have pursued and obtained costs from their opponent. Further there may be cases in which the claimant obtains some benefit, but the fact that he does so is unrelated to the proceedings or the way they were pleaded (criterion (iii)). For example, and again depending on the facts provided to the LAA, a claimant may seek to have a public body's decision quashed, and the public body may in fact do so, which benefits the claimant, but the defendant may have reached that decision for reasons unrelated to the claimant's grounds of claim. In such circumstances, where the claimant's grounds have not assisted the public body in identifying the error, the Government does not consider the criteria should be applied in the provider's favour.

129. Providers will need to request that the LAA makes a payment under the criteria, providing evidence in support of their claim by reference to the criteria. The initial consideration of the claim will be undertaken by the LAA. If the provider is not satisfied with the LAA's decision they will have the opportunity for an internal review by the LAA. This will be a prior and separate decision to existing costs assessment decisions.

130. It is not proposed to apply the discretion in any case where permission is refused. The discretion is designed to permit payment in certain cases which settle (or more rarely, discontinue) and which were sufficiently meritorious to justify payment. Where a case has reached the stage of a permission decision and a judge has determined that the case should not proceed further, the Government considers that it is in line with our policy not to fund weak cases not to pay the provider. Where a case is initially refused permission but is then granted permission at a later hearing, for example at an oral renewal, then the provider will receive payment.

131. The Government acknowledges that there are cases in which permission is refused but which are currently recorded by the provider as resulting in a "substantive benefit to the client".. It is important to note that substantive benefit does not necessarily mean that the benefit was proportionate to the costs incurred or that the case was a strong one. The Government does not think it would be appropriate for these cases to continue to receive payment.

**Data**

132. The data[68] relating to this proposal is set out in the impact assessment attached to the consultation paper [69]. In that Impact Assessment the Government has set out in

[68] These are cases which received legal aid, and not all of these were lodged with the Administrative Court, so this data is separate to that relating to court case volumes elsewhere in this consultation.

full the data available to the LAA in both 2011/12 and 2012/13 as recorded by providers in their returns to the LAA in judicial review cases. For the reasons explained in the impact assessment, there is some uncertainty around some of the figures. However, it is considered that the figures nevertheless provide a useful and workable basis on which to identify the potential impact of the proposals on which consultation responses are invited. It is also considered that historic figures will only provide a guide or indication about future impact.

133. In 2012/13[70] there were 3,633[71] judicial review cases which received legal aid for legal representation. Of these 543 cases had permission granted and would continue to receive funding under the proposal. In 597 cases no proceedings were issued. These cases would not be affected by the proposal. In 754 cases permission was not granted. These cases would no longer receive legal aid funding under the proposal.

134. There is a range of further cases (on 2012/13 figures, up to a maximum 1739) which could be affected by the proposal, depending on whether they issue, and if they do so, whether they conclude before or after the permission decision.[72] The discretionary criteria would apply on the basis set out above to those cases within this range which issue and conclude prior to permission.[73]

### Questions

**Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.**

**Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.**

## Costs of Oral Permission Hearings

### Current position

135. A person who wishes to apply for judicial review must first ask permission from the court. They do this by lodging a paper application setting out their claim, to which the defendant responds with an Acknowledgment of Service which will set out their response. If the court does not grant permission on the papers the claimant can

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[69] The data referred to in the last consultation paper has been reconsidered and the results are set out in the IA attached to this consultation paper. The 2012/13 data provides a more comprehensive picture and should therefore be used in responding to this consultation.

[70] Table 1 of the Impact Assessment sets out the figures in full against the relevant endpoint codes. The figures are derived from information provided by providers against endpoint codes set out at the following link: at www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/certificate-outcomes-checklist-version-2.pdf

[71] The 3,633 figure refers to cases which received Legal Representation and does not include cases which received Legal Help. It is not possible to determine how many Legal Help cases involved giving advice on a (potential) judicial review. This also excludes cases lacking any code: 111 in 2011/12 and 232 in 2012/13.

[72] See Impact Assessment, page 7. The number of cases is set out as a range due to the way outcomes are recorded by the LAA.

[73] Compared to 2011/12 during which period there were 4,074 judicial review cases which received legal aid for legal representation. Of these 663 cases had permission granted and in 618 cases, no proceedings were issued. In 845 cases permission was not granted. The range of further cases (see paragraph 134) was up to 1948.

request that the application for permission be reconsidered at an oral hearing where both the claimant and the defendant can make their arguments orally (although the defendant is not obliged to attend unless ordered by the court).

136. At present a claimant who is refused permission to bring a judicial review is liable only for the defendant's costs of completing the Acknowledgement of Service, regardless of whether an oral permission hearing is requested and even if the defendant appears and makes oral representations. The court has a general discretion under section 51 of the Senior Court Act 1981 to deal with costs, but generally the unsuccessful applicant will not be ordered to pay the costs to the defendant - or any other party who attends - in attending the hearing and preparing a defence. Only in exceptional circumstances will the court award costs of permission above the Acknowledgment of Service,[74] for instance where there is abuse of process or where the oral renewal is, in effect, the substantive hearing. Costs are not usually awarded to the claimant when permission is granted (at any stage) since costs can then be dealt with at the substantive hearing.

### Issue

137. In 2012 approximately 12,400 applications for judicial review were issued. In around 2,600 cases the claimant requested an oral hearing of the application for permission after permission had been refused on the papers. The majority of applications that have an oral permission hearing are refused. For cases lodged in 2012 only around 300 that applied for an oral permission hearing were granted permission to proceed while in around 1,200 cases permission was denied for the claimant and around 1,000 (or 38%) were withdrawn before the oral permission hearing decision. Of all the applications lodged in 2012, around 5,000 cases (40%) were withdrawn before the permission stage.[75]

138. Based on immigration and asylum cases (70% of such oral hearings are in immigration and asylum cases[76]) on average it costs the defendant (the UK Border Agency) £1,000 to £1,500 to prepare for and attend an oral permission hearing[77]. The costs in other types of cases will vary dependent on the nature and complexity of the case. The Government attends most oral permission hearings where it is the defendant.

### Proposals

139. The Government seeks views on the introduction of a principle that the costs of an oral permission hearing should usually be recoverable and that it should be possible for an unsuccessful claimant to be ordered to pay the defendant's reasonable costs of defending the unsuccessful application. This might involve the costs of preparation and representation at the oral hearing. The Government considers that a successful defendant should as a general rule not have to bear the costs of defending the claim.

140. It would be for the court, as currently, to determine whether an order for costs should be made in a particular case. This would mean that the courts could make an order

[74] *Mount Cook Land and Another v Westminster City Council* [2003] EWCA Civ 1346 per Auld LJ at para 76.
[75] All figures in this paragraph are from Administrative Court data which is available at: https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013
[76] Based on Administrative Court data: https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013
[77] Based on high level management information provided by the Treasury Solicitors Department.

against the defendant to pay the claimant's reasonable costs should permission be granted. It is likely, however, that in these circumstances the court would make an order of 'costs in the cause' so that the costs of the oral permission hearing will be considered by the court at the conclusion of the case as part of its determination of the overall costs that fall to be met by the unsuccessful party to the main proceedings.

### Question

**Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?**

## Wasted Costs Orders

### Current position

141. Wasted costs orders enable the Court to order that a legal representative is personally liable for any costs of litigation which have been unnecessarily caused ('wasted') to a litigant by the legal representative's conduct where, because of that conduct, it is unreasonable to expect the litigant to pay them. A litigant can seek a wasted costs order against the legal representative of any party including the litigant's own representative.[78] The legal representative must be given notice of an application for a wasted costs order and an opportunity to prepare a defence. The legal representative must have caused the costs which have been wasted by their improper, unreasonable or negligent conduct. The purpose is not to punish the solicitor or other legal representative for their wrong-doing but to protect their client and other parties from the consequences of it. It is a form of compensation – a person seeking wasted costs must show loss.[79] The legal representative is only liable for the element of the overall costs that were 'wasted' by their conduct.

142. The provision for a court to make a wasted costs order is set out in section 51 of the Senior Courts Act 1981 and the Civil Procedure Rules (CPR) Rule 46.8 and Practice Direction 46; how these are applied is governed by case law. The provisions on wasted costs orders are not limited to judicial review cases but apply to all civil litigation. Whilst our proposals are primarily concerned with judicial review the Government wishes to consider also whether there is scope to apply them to a wider range of civil litigation.

143. Section 51(6) and (7) of the Senior Courts Act 1981 provides that:

> "In any proceedings mentioned in subsection (1) [in the Court of Appeal, High Court or County Court], the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.
>
> (7) In subsection (6), "wasted costs" means any costs incurred by a party—

[78] *Metcalf v Mardell* [2003] 1 AC 120

[79] In *Harrison v Harrison* [2009] EWHC 428 QB the High Court held that wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one and thus as a prerequisite an applicant had to show that the conduct complained of had caused them loss – see *Ridehalgh v Horsefield* [1994] CH 205 CA Civ.

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

144. The court also has powers under Rule 44.11 of the Civil Procedure Rules (court's powers in relation to misconduct) to make an order for costs against a legal representative where their conduct was unreasonable or improper. This is a broader power than that under CPR 46.8, under which the court may disallow costs generally as well as order either the party or the legal representative to pay costs which they have caused any other party to incur. The costs judge may make an order at their own initiative or at the request of either party.

145. A wasted costs order is viewed as a serious matter: the courts have interpreted "any improper, unreasonable or negligent act or omission" in section 51(7) as requiring that the conduct of the legal representative is quite plainly unjustifiable[80] and involves breach of the legal representative's duty to the court. The test in section 51(7) has been interpreted strictly by the courts and a legal representative is generally not held to have acted improperly or unreasonably or negligently simply because they acted for a party who pursued a case that was hopeless.[81] The legal representative could advise their client of the weakness but the client is free to disregard that advice and pursue the case. A judge must make full allowance for the difficulties facing a legal representative in court; however a legal representative may not "lend his assistance to proceedings which are an abuse of the process of the court".[82]

146. A wasted costs order may be determined as part of or separately to the substantive claim. Rule 46.8(2) of the Civil Procedure Rule requires (consistently with the seriousness with which a wasted costs order is viewed) that the court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.

### Issue

147. Wasted costs orders are rarely made. Between March 2011 and June 2013 only around 50 such orders were made, all of them in relation to immigration and asylum judicial reviews. Around 95% of these orders were made at the permission stage, in relation to unmeritorious judicial review claims which did not secure permission.[83] The average value of a wasted costs order made between March 2011 and June 2013 was £400.

148. Changes introduced on 1st July 2013 removed the right to an oral permission hearing where the judge certifies an application as totally without merit on the papers. This, together with the forthcoming new fee discussed above, should help bring volumes down.

149. The Government considers that further changes should be made to rebalance the financial incentives which contribute to claimants' decisions whether or not to bring

[80] Ridehalgh v Horsefield as above
[81] Ridehalgh v Horsefield
[82] Ridehalgh v Horsefield
[83] Based on high level management information provided by the Treasury Solicitors Department.

and pursue applications. Claimants and their legal representatives should weigh up the strength of their case against the likely costs.

150. The legal representative is in the best position to advise their client of the likelihood of success, first prior to the initial application on the papers for permission and then again at the oral renewal hearing. Many claimants will make decisions on the basis of that advice. The Government considers that a greater incentive might be beneficial for legal representatives to consider the strength of a case prior to submitting and renewing applications for permission, and that legal representatives should have a greater focus on the appropriateness of putting forward points that have already been considered and dismissed by a judge, particularly when there is not a high likelihood of success.

### Proposals

151. The Government seeks views on whether the current approach to wasted costs orders should be modified to enable the making of such an order to be considered in respect of a wider range of conduct, and on what a modified test would be – for example, whether and if so how it might differ from the test in CPR 44.11 for costs sanctions in relation to misconduct.

152. The Government also seeks views on whether the consideration of an application for a wasted costs order could be streamlined so it is not more time consuming or expensive than the wasted costs which are in issue. One possibility might be greater use of consideration on the papers with written representations, while preserving the court's ability to require an oral hearing if that is in the interests of justice.

153. The Government also invites views on whether legal representatives who contest a wasted costs order and request an oral hearing should be required to pay a fee for the cost of that oral hearing, to properly cover the costs involved in hearing the case, and whether that fee should be contingent on the case being successful.

### Questions

**Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?**

**Question 23: How might it be possible for the wasted costs order process to be streamlined?**

**Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?**

**Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.**

## Protective Costs Orders

### Current position

154. A Protective Costs Order (PCO) limits the costs exposure of a claimant in a public interest case. PCOs are a judge-developed mechanism by which the court sets a cap on the claimant's liability for the defendant's costs and sometimes also a cross cap on the defendant's liability for the claimant's costs. PCOs are generally made at the beginning of a case and set, in advance, a maximum limit on the financial risk of the claimant for the defendant's costs. Ordinarily in litigation, if a claimant loses a claim, they must pay the defendant's costs of successfully defending the claim. However, if there is a PCO in place and the claimant is unsuccessful, the defendant is only able to recover its costs up to the amount of the cap specified in the PCO and would be required to cover the balance of its legal costs itself.

155. The current PCO regime was established by the Court of Appeal in the case of *R (Corner House Research) v Secretary of State for Trade and Industry*.[84] The Court of Appeal considered that Corner House, an anti-corruption NGO, should exceptionally be protected from being liable for the defendant's costs because "the issues of public importance that arose in the case would have been stifled at the outset, and the courts would have been powerless to grant this small company the relief that it sought".[85] It also set out general principles for when a PCO should be granted:

    a. the issues are of general public importance;

    b. the public interest required that those issues should be resolved;

    c. the claimant has no private interest in the outcome of the case;

    d. the financial means of the claimant mean that a PCO is fair and just;

    e. if the order is not made the claimant will probably discontinue the proceedings.[86]

156. In non environmental cases the use of PCOs is not governed by the Civil Procedure Rules. A different costs protection regime (which sets out fixed costs caps) applies in relation to judicial review cases concerning environmental matters within the scope of the Aarhus Convention and is set out in the Civil Procedure Rules. In these cases a claimant's costs are capped at £5,000 where the claimant is an individual and at £10,000 in other cases, and £35,000 for the defendant. In relation to PCOs in environmental cases under the Aarhus Convention, the UK is currently awaiting the outcome of proceedings before the European Court of Justice. The Government does not propose to make changes to that regime ahead of the outcome of those proceedings, but considers it right to look at the use of PCOs in non-environmental cases.

### Issue

157. Following the decision in the Corner House case the courts have taken an increasingly flexible approach to the application of the principles set out above, PCOs are now therefore being granted in wider circumstances than those envisaged in the Corner House case. In particular, there is no longer a requirement that the case be

[84] [2005] EWCA Civ 192
[85] Para 145
[86] Para 75

"exceptional"[87] and PCOs have increasingly been granted where there is a private interest at stake in the judicial review claim.[88]

158. The Government is concerned that this expanding approach has tipped the balance too far and now allows PCOs to be used when the claimant is bringing a judicial review for his or her own benefit. In such a case, the Government questions whether it is appropriate for a PCO to be granted, with the result that the public purse will have to cover the costs of the unsuccessful claim brought by that claimant. The Government suggests that the "usual" costs rule ought to apply, and that the losing party should be required to pay the winning party's costs.

159. As discussed earlier in this paper, the Government is concerned with the use of judicial review as a campaign tool with challenges brought by groups which do not have a direct or tangible interest in the claim. There is a degree of overlap between the issues of standing and the PCO regime. In particular, and to the extent that the standing rules permit "public interest" claims to be brought where there is no claimant with a direct or immediate interest, the Government questions whether it is right – as a PCO will provide - for the public body defendant to be required to fund its own costs of defending that case, if the claim fails.

160. The Government is also concerned with the inequality in the current use of cross caps. By way of balance for the making of a PCO, a cross cap is intended to provide protection for defendants against the claimant's costs. However, in non-environmental judicial reviews cross caps are not made in every case where a PCO is ordered for the claimant. Further, where a cross cap is ordered, there is often disparity between the amounts capped for the claimant and the defendant. In non-environmental cases there is no fixed amount for either the claimant or the defendant but in practice the cap for the claimant is lower than that for the defendant. The Government considers that there should be parity between environmental and non-environmental cases in the use of PCOs.

161. The Government considers that the use of PCOs in non-environmental cases should be rebalanced to encourage better consideration by the claimant on whether to bring and pursue applications for judicial review. The Government wishes to achieve an appropriate balance in the costs regimes to ensure that access to justice is maintained but to ensure that parties are not unduly insulated from the costs of their litigation in inappropriate cases.

### Proposals

162. On a strict application of the principles as set out originally in the *Corner House* case, a PCO would be precluded if the claimant had a private interest or stake in the case. That is not, however, the approach that the courts are now taking when considering the granting of PCOs. The Government therefore seeks views on whether it is right for the courts to provide costs protection to claimants who have a private interest in a judicial review claim.

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[87] *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 para 18.

[88] *R (Compton) v Wiltshire PCT* [2009] 1WLR 1436 Waller LJ at 23; *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209. See also the decision in *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 and, in particular, paragraphs 35 to 40 of the Court's judgment, where the various cases relating to the significance of a private interest (in relation to whether a PCO ought to be ordered) is reviewed.

163. Further, and if "political" and "campaigning" judicial review claims continue to be brought where there is no claimant with a private interest, the Government seeks views as to whether these sorts of claims ought to be given cost protection and whether it is right to remove the use of PCOs in non-environmental claims.

164. As an alternative to removing PCOs, the Government wishes to consider whether the current principles as set down in *Corner House* for awarding a PCO strike the right balance and achieves equality between the parties to litigation or whether they should be modified.

165. As indicated earlier the Government is seeking views on whether to amend the requirements to provide information on how litigation is funded and the power to award costs against non-parties. While it is already a principle that in considering a PCO the court should have regard to the financial means of the claimant, the Government considers this process should be more robust and wishes to seek views on whether when applying for a PCO, it should be mandatory for the claimant to provide details of who is funding the case and a statement of assets including any third party funding. The court would be required to consider these details in deciding whether, based on that information and the proposed cap, it is proportionate to make a PCO.

166. The Government is also proposing that there should be a presumption when making a PCO that the court considers setting a cross cap for a defendant's liability for the claimant's costs. It would remain at the court's discretion to order a cross cap, but this would reflect the general principle of keeping costs in a case to a reasonable level, recognising that public resources are not unlimited.

**Questions**

**Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?**

**Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?**

**Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?**

**Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?**

**Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?**

## Costs arising from the involvement of third party interveners and non-parties

### Current position

167. The Civil Procedure Rules (CPR) require that a person "directly affected" by the remedy claimed in a judicial review, should be served with the proceedings. Such persons will be relatively limited in number.[89]

168. However, other persons/bodies who may be interested more generally in the issues being considered in a judicial review may seek to intervene, by filing evidence or making representations at the judicial review hearing. The Civil Procedure Rules (CPR 54.17) allow such an application to intervene to be made, and it will be determined by the court after it has heard the views of the parties to the litigation. The question of who should bear the costs arising from the intervention of a third party is in the discretion of the court and would typically be dealt with at the end of the case.

169. Section 51 of the Senior Courts Act 1981 and CPR 46.2 enables the courts to make an award of costs against a person that is not a party to a claim. This happens only in certain circumstances, usually where the person is improperly funding or controlling the litigation. Such an award is "exceptional".[90]

### Issue

170. The intervention of additional parties to a judicial review (further to an application under CPR 54.17) has the potential to significantly increase the legal costs of the case. Greater clarity and understanding - at an early stage of the case - of the likely costs implications, following an intervention, would probably be welcomed by all the parties to the litigation.

171. The Government accordingly seeks views on who should bear the costs of intervention by third parties and whether it would be appropriate for the court rules to prescribe and/or provide more guidance as to how costs referable to interventions by third parties ought to be dealt with. The two areas of costs that are particularly relevant are the legal costs of the intervening litigant and the additional legal costs incurred by the claimant/defendant as a result of issues raised/pursued by the intervening party.

172. Additionally, any changes to standing as outlined above could impact on third party and non-party funding in two ways. Firstly, a more focussed rule on standing may lead to an increasing number of applications to intervene. In that event, the question as to who should pay for the costs arising from third parties intervening in judicial review claims may arise more often.

173. Secondly, as discussed earlier, representative bodies may be created, to act as claimants, in order to limit their members' financial risk from bringing a claim (as only the assets of the organisations are at risk, not those of the individuals). Further, funding for a claimant body may also be provided by other individuals or bodies who

[89] See eg *R v Liverpool City Council ex p Muldoon*, [1996] 1 WLR 1103.
[90] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC) and *Arkin v Borchard Lines Ltd* (Nos. 2&3) [2005] 1 WLR 3055.

would not have a sufficient interest to bring a claim, but who are prepared to provide financial support for the claim because they agree with its aims.

174. However, unless the claimant is in receipt of a prescribed funding agreement, such as a Conditional Fee Agreement (under which part of a solicitor's fees will only be payable if the case is successful), there is no provision in the Civil Procedure Rules for revealing the source of funding for litigation. This may mean that costs cannot in practice be enforced against those who have actually funded, and in some cases controlled, the litigation. The Government is concerned that this may not provide claimants (and the non-parties who they represent or who have financially supported them) with the proper financial incentives. Accordingly, it wishes to seek views on how to deal with costs against non-parties.

**Proposals**

*Interveners*

175. The Government seeks views on the principle that, where a party chooses to intervene in judicial review proceedings (further to an application under CPR 54.17), ordinarily that should not result in additional expense for the existing parties to the litigation.

176. The Government's provisional view is therefore that, where a party seeks to intervene in a case, the presumption should be that it should bear its own costs of doing so, whatever the result of the judicial review claim. Thus, whilst an unsuccessful claimant or defendant ought to pay the costs of its litigation opponent, it ought not to also have to pay the legal costs of the third party which voluntarily intervened in the case.

177. Additionally, the Government seeks views on whether there ought to be a presumption that where an intervening party has raised issues that have resulted in the claimant or defendant incurring legal costs, to a significant degree over and above what would otherwise have been required, the intervening party ought to be liable for those additional costs.

178. The Government suggests that those presumptions could be rebutted, and the court would always have a general discretion, but the Government seeks views on whether these approaches ought to be the starting point for the court's decision-making. Further, the Government seeks views generally in relation to the costs issues that arise from the intervention of third parties in judicial review claims.

*Other Non Parties*

179. The Government wishes to receive views on whether to amend the requirement to provide information on how litigation is funded and on the power to award costs against non-parties. These non-parties could include individuals who provided the necessary standing to the claimant body or other individuals or bodies who have provided financial backing to the claimant. However, any change would need to be under the court's control and such awards would not be routine.

**Questions**

**Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?**

**Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?**

**Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?**

**Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?**

# 8. Leapfrogging

## Introduction

180. The Government wishes to receive views on extending the scope of leapfrog appeals, potentially allowing more cases to go to the Supreme Court direct from the court of first instance. The Government's view is that some cases which it is clear will not end in the Court of Appeal but will seek a further appeal to the Supreme Court should get there more quickly. These proposals would apply to leapfrog appeals generally, not only to appeals of first instance decisions in judicial reviews.

## Current position

181. Leapfrog appeals are governed by section 12 of the Administration of Justice Act 1969, which implemented most of the proposed model for such appeals set out in the Evershed Committee's final report of 1953.[91]

182. Section 12 of the Act allows cases to move direct from the High Court, or any Divisional Court in England and Wales, to the Supreme Court. It sets out the circumstances in which this can be done and the process to be followed. A leapfrog appeal will only be possible where there could otherwise be an appeal to the Court of Appeal.

183. A certificate is required for a leapfrog appeal to take place. The application for the certificate should be made to the judge at first instance either immediately on the judgment or, alternatively, within 14 days of it. The judge may, if a sufficient case has been made out, grant the certificate if each of the parties has indicated their consent to the application and a relevant condition is met.[92] A Committee of the Supreme Court must also agree for the leapfrog appeal to take place.

184. The relevant conditions are set out in section 12(3) of the 1969 Act. In brief, the conditions are that a point of law of general public importance is involved, and that the point of law either:

a. relates to the interpretation of a statute or secondary legislation, and has been fully argued in the court of first instance and fully considered in the judgment; or

b. is one where the court of first instance is bound by a previous decision of either the Court of Appeal or the Supreme Court, having been fully considered in the previous proceedings.

185. If a certificate is granted, any party has a month in which to petition the Supreme Court, although that may be extended. The petition will be considered by a Committee of the Supreme Court, who have discretion over whether to grant it.

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[91] 'Final Report of the Committee on Supreme Court Practice and Procedure' (1953, Cmd. 8878) at paragraphs 483 to 504.

[92] The judge has discretion and may, for example, consider whether the application falls within the spirit, as well as the letter, of the law and whether the House of Lords would benefit from consideration by the Court of Appeal – per Megarry J in Inland Revenue Commissioners v. Church Commissioners for England [1974] 3 All ER 529.

### Issue

186. In a small number of significant cases it is clear that leave to appeal to the Supreme Court will ultimately be sought. At present, these cases may take many years to come to a conclusion, delaying matters which the Government regards as important and to which a swift resolution would clearly be desirable, and also harming public confidence in the justice system. A party may have an interest in seeking delay when this is clearly not in the wider public interest. The Government considers that such cases should be determined more quickly with fewer intermediate steps.

### Proposals

187. The Evershed report recommended that the limited leapfrogging model it proposed be "introduced as an experimental first stage and with a view to its further extension if in practice it was found useful and workable".[93] That model was implemented in a modified form in the 1969 Act.

188. The Government is consulting on three changes to the current model, namely:

- extending the conditions which must be met for an application to leapfrog to be allowed;
- removing the requirement for all parties to consent; and
- allowing a leapfrog appeal to be initiated in the Upper Tribunal, Employment Appeals Tribunal and in the Special Immigration Appeals Commission.

## Option 1 – Extending the Relevant Circumstances

189. A leapfrog appeal may only be brought under the 1969 Act if one of the two relevant circumstances (in section 12(3)) is met. As explained above, the process requires a point of law of general public importance where the court is bound by precedent. In both circumstances, the relevant point must have been considered fully by the court at first instance.

190. The Government seeks views on extending the relevant criteria which must be met if a case is to be eligible to move direct to the Supreme Court. The Government wishes to ensure that where a case is of national importance or raises significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) the court can use the power to leapfrog. Whilst there would still be the need for the point of law to be one of general importance the key deciding factor would be whether the case had implications as above.

191. Cases that leapfrog to the Supreme Court are ones which would have reached the Supreme Court anyway under the current law. Our proposed reform would remove an intermediate step, reducing the time needed to resolve the case. The Government's view is that the reform to leapfrogging would not cause cases to reach the Supreme Court which otherwise would not. In some cases the Supreme Court may take the view that the Court of Appeal's consideration would be helpful for them to narrow down the arguments in which case an application to leapfrog would be refused.

[93] Paragraph 497.

**Questions**

**Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?**

**Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?**

## Option 2 – Consent

192. As set out above, at the moment each of the parties must consent to an application to the judge at first instance. The requirement for the parties to consent was, incidentally, rejected by the Evershed Committee.[94] As the consent is required prior to an application to the court, and an application is not made if consent is not given, there is no data available on cases where consent is withheld.

193. In many cases which might benefit from leapfrogging the claimant's desired outcome may simply be delay, so they would not consent to expedite the case through leapfrogging. The Government seeks views on removing the need for all parties to consent to leapfrogging and on alternative processes for determining an application.

194. The court of first instance and the Supreme Court would retain their present role and discretion to refuse a leapfrog appeal where inappropriate. This should ensure that this change would not lead to an increase in the volume of cases moving to the Supreme Court.

**Questions**

**Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?**

**Question 38: Are there any risks to this approach and how might they be mitigated?**

## Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

195. There have been calls in the past for extending the range of courts and tribunals in which a leapfrog appeal can be initiated. For example, the then Senior President of Tribunals proposed an extension to the Upper Tribunal and Employment Appeals Tribunal in July 2008, noting that Lord Bingham, the then senior Law Lord, supported the change.[95]

196. The Government is considering whether there may be benefits to extending the range to include the Upper Tribunal, the Employment Appeals Tribunal and the Special

[94] Paragraph 502(b).
[95] See Annex B to 'Senior President of Tribunals: Third Implementation Review' (July 2009) by the then Carnwath LJ (now Lord Carnwath).

Immigration Appeals Commission, appeals from each of which are considered currently by the Court of Appeal.

197. Tribunals are specialist judicial bodies which determine disputes in particular areas of law. The Tribunals, Courts and Enforcement Act 2007 created two new Tribunals (the First-tier and Upper Tribunals), which are divided into several chambers. Most tribunal jurisdictions sit within the unified structure (the Employment Appeals Tribunal, which has GB-wide jurisdiction, sits outside the unified structure but in a similar two-tier structure with the Employment Tribunal). The Upper Tribunal determines appeals on points of law from the First-tier Tribunal and, in some circumstances, judicial reviews. The Upper Tribunal has UK wide jurisdiction and appeals from its decisions may be made to the most appropriate appellate court - a case relating to England and Wales would be made to the Court of Appeal.[96]

198. The Upper Tribunal comprises the following four chambers. A wide range of cases are heard in each chamber including:

    a. Upper Tribunal (Administrative Appeals), which considers (amongst others), appeals from the (both first-tier) General Regulatory Chamber and the Social Entitlement Chamber. At first instance it considers specified judicial review applications and forfeiture and safeguarding of vulnerable persons cases;

    b. Upper Tribunal (Tax and Chancery), hears appeals from the (first-tier) Tax Chamber. At first instance it considers specified judicial review applications and hears references arising from decision notices issued by the Financial Services Authority and the Pensions Regulator;

    c. Upper Tribunal (Immigration and Asylum), which considers appeals made against decisions of the First-tier Tribunal (Immigration and Asylum); and

    d. Upper Tribunal (Lands Chamber), which considers appeals from the First-tier Tribunal (Property Chamber). At first instance it determines specified disputes concerning land, particularly valuation questions (e.g. compulsory purchase valuation).

199. The Employment Appeals Tribunal hears appeals on points of law from the Employment Tribunal.[97] It will not normally re-examine issues of fact. The Employment Appeals Tribunal's powers are set out in Part II of the Employment Tribunals Act 1996 and the Employment Appeal Tribunal Rules 1993.

200. The Special Immigration Appeals Commission was created by the Special Immigration Appeals Act 1997 and has UK-wide jurisdiction. It deals with appeals against decisions made by the Home Office to deport or exclude someone from the UK on national security grounds or for other public interest reasons. It also hears appeals against decisions to deprive persons of citizenship status.

201. Each of these tribunals considers cases of importance. There is a right of appeal on a point of law from their decisions to an appropriate appellate court (the Court of

[96] Or, in Scotland, the Court of Session.

[97] It also considers appeals from and applications relating to decisions made by the Certification Officer (which has statutory functions with regard to trade unions, as set out in the Trade Union and Labour Relations (Consolidation) Act 1992) and the Central Arbitration Committee (which judges applications relating to the recognition of trade unions). These are infrequent.

Appeal in England and Wales) Onward appeal from the Court of Appeal would be, with leave, to the Supreme Court.

**Questions**

**Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?**

**Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?**

202. Under section 12 of the 1969 Act, any civil proceedings in the High Court can be leapfrogged subject to certain other requirements being met. The Government believes that the rationale for the options above applies to non-judicial review civil business as much as to judicial reviews. Consequently, the Government does not propose to limit its reforms to judicial review.

**Question**

**Question 41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?**

# 9. Impact Assessment and Equality Impacts

## Impact Assessment

203. The Government has published an Impact Assessment to accompany these proposals which sets out the estimated impacts they would have if implemented.

204. The Government will consider responses to the questions set out in this paper, and we intend to publish a Government response which will set out those reforms the Government intends to implement. At that stage the Government also intends to publish a revised Impact Assessment setting out revised estimates of the impacts to take account of any changes in policy, and better information about the anticipated impacts.

## Questions

**Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?**

**The Government would be particularly interested to understand the impact the proposals may have on Small and Medium-sized Enterprises and Micro businesses**.

## Equalities Impact

205. Under the Equality Act 2010[98], public authorities have an ongoing duty to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics. As part of this obligation, the Government has made an initial assessment of the estimated impact of these proposals on people with protected characteristics.

206. Promoting growth and economic recovery is one of the key objectives for these proposals for reform. The Government believes that the proposals will help to reduce delays and weed out weak cases. Therefore they are likely to be of some benefit to businesses and those whose business are the subject of challenges.

207. The Government does, however, acknowledge that it does not collect comprehensive information about court users generally, and specifically those involved in judicial review proceedings, in relation to protected characteristics. This limits the Government's understanding of the potential equality impacts of the proposals for reform.

[98] The general equality duty covers the following protected characteristics: age (including children and young people), disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Public authorities also need to have due regard to the need to eliminate unlawful discrimination against someone because of their marriage or civil partnership status. This means that the first aim of the general equality duty applies to this characteristic but the other two aims do not. This applies only in relation to work, not to any other part of the Equality Act 2010.

208. The Government also acknowledges that there is little collated information about the resolution of those judicial reviews brought on grounds to ensure that public bodies carry out their Public Sector Equality Duties under the Equality Act 2010. More information is being sought, through responses to this consultation and the monitoring being put in place following the earlier reforms to judicial review, to fill this gap and determine whether any of the proposed changes are likely to have a particular impact on judicial reviews brought on these grounds.

209. However, as the majority of judicial reviews relate to immigration and asylum matters, it is therefore reasonable to assume that these proposals have the potential to have a differential (adverse) impact on the characteristics of race and religion/belief. There may also be other differential impacts on protected groups, for example if non-governmental organisations are not able to bring challenges in certain situations that may impact upon those with protected characteristics who might have benefited from the challenges.

## Legal Aid: Judicial Review proposal

210. The Government set out our initial analysis and sought views about the equalities impact of our proposals in the *Transforming Legal Aid* consultation[99]. Respondents raised a number of equality-related issues regarding the original proposal that providers should only be paid for work carried out on an application for permission if permission is granted by the court. A full summary of issues raised by consultees, including in relation to equalities, is set out in the response to that consultation.[100] The main points raised by consultees were that the effect of the proposal (particularly when combined with some of the other proposals in that consultation) would make it very difficult for those who share certain protected characteristics to obtain legal aid to judicially review the state. It was argued that providers being less willing to take on legally aided judicial review cases would impact particularly on the vulnerable, who are more likely to share a protected characteristic. Providers might be even less willing to act at risk where communication issues with the client make it more difficult to predict the outcome; this would affect the disabled and children in particular (who are also less able to litigate in person). Concerns were also raised about the impact on the junior bar, which, it was argued, would disproportionately affect women and those who are BAME.

211. The Government invites further views on the equality-related impacts of the revised proposal in which issued cases would not receive legal aid unless granted permission, subject to discretionary payment in certain cases which conclude prior to a permission decision without a costs order or agreement. The Government invites consultees to consider in particular the effect of availability of discretionary payment on their initial responses regarding equality impact. The proposal set out in this consultation is designed to provide the possibility of payment in those meritorious cases which conclude prior to a permission decision. The Government has in mind that payment may be made, for example, where a provider settles a case against a local authority on behalf of a disabled client or a young person in relation to their housing or care and achieves the clear benefit sought, but is unable to agree costs despite their endeavours to do so. The Government's initial view is therefore that the

[99] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid (Annex K)
[100] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

revised proposal mitigates many of the concerns raised by consultees in the original consultation regarding vulnerable clients who have meritorious cases.

## Evidence

212. To help the Government fulfil its duties under the Equality Act 2010 we would welcome information and views to help us gather a better understanding of the potential equalities impacts that each of the proposed reforms in this consultation might have.

## Questions

**Question 43: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?**

**The Government would welcome examples, case studies, research or other types of evidence that support your views. The Government is particularly interested in evidence which tells us more about applicants for judicial review and their protected characteristics, as well as the grounds on which they brought their claim**.

# 10. Summary of questions

The Government would welcome responses to the following questions set out in this consultation paper.

## Planning

### Streamlining planning challenges

Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast Track?

Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example linked environmental permits) might the new Chamber hear?

Question 3: Is there a case for introducing a permission filter for statutory challenges under the Town and country Planning Act?

Question 4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?

Question 5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?

### Local Authorities challenging Infrastructure Projects

Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?

Question 7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs or delays)?

### Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?

## Standing

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

Question 11: Are there any other issues, such as the rules on interveners, we should consider in seeking to address the problem of judicial review being used as a campaigning tool?

## Procedural Defects

### Option 1 - Bring forward the Consideration

Question 12: Should the consideration of the “no difference” argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgment of Service?

Question 13: How could the Government mitigate the risk of consideration of the “no difference” argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

### Option 2 – Apply a lower test

Question 14: Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to ‘highly likely’ that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

Question 15: Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

Question 16: Do you have any evidence or examples of cases being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

## The Public Sector Equality Duty and Judicial Review

Question 17: Can you suggest any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

Question 18: Do you have any evidence regarding the volume and nature of PSED-related challenges? If so, please could you provide this.

## Rebalancing Financial Incentives

### Paying for permission work in judicial review cases

Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

Question 20: Do you agree with the criteria on which it is proposed that the LAA will exercise its discretion? Please give reasons.

### Costs of oral permission hearings

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

### Wasted Costs Orders

Question 22: How could the approach to wasted costs orders be modified so that such orders are considered in relation to a wider range of behaviour? What do you think would be an appropriate test for making a wasted costs order against a legal representative?

Question 23: How might it be possible for the wasted costs order process to be streamlined?

Question 24: Should a fee be charged to cover the costs of any oral hearing of a wasted costs order, and should that fee be contingent on the case being successful?

Question 25: What scope is there to apply any changes in relation to wasted costs orders to types of cases other than judicial reviews? Please give details of any practical issues you think may arise.

### Protective costs orders

Question 26: What is your view on whether it is appropriate to stipulate that PCOs will not be available in any case where there is an individual or private interest regardless of whether there is a wider public interest?

Question 27: How could the principles for making a PCO be modified to ensure a better balance a) between the parties to litigation and b) between providing access to the courts with the interests of the taxpayer?

Question 28: What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

Question 29: Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

Question 30: Should fixed limits be set for both the claimant and the defendant's cross cap? If so, what would be a suitable amount?

### Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties?

Do you see any practical difficulties with this, and how those difficulties might be resolved?

Question 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

## Leapfrogging

### Option 1 – Extending the Relevant Circumstances

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

### Option 2 - Consent

Question 37: Should the requirement for all parties to consent to a leapfrogging application be removed?

Question 38: Are there any risks to this approach and how might they be mitigated?

### Option 3 – Extending the courts and tribunals in which a leapfrog appeal can be initiated

Question 39: Should appeals from the Special Immigration Appeals Commission, the Employment Appeals Tribunal and the Upper Tribunal be able to leapfrog to the Supreme Court?

Question 40: Should they be subject to the same criteria (as revised by the proposals set out above) as for appeals from the High Court? Are there any other criteria that should be applied to these cases?

Question 41: If the Government implements any of the options for reforming leapfrog appeals. should those changes be applicable to all civil cases?

## Impact Assessment and Equalities Impacts

Question 42: Do you agree with the estimated impacts set out in the Impact Assessment?

The Government would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses

Question 43: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

The Government would welcome examples, case studies, research or other types of evidence that support your views. The Government is particularly interested in evidence

which tells us more about applicants for judicial review and their protected characteristics, as well as the grounds on which they brought their claim.

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

| | |
|---|---|
| **Full name** | |
| **Job title** or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) | |
| **Date** | |
| **Company name/organisation** (if applicable): | |
| **Address** | |
| | |
| **Postcode** | |
| If you would like us to acknowledge receipt of your response, please tick this box | ☐ (please tick box) |
| Address to which the acknowledgement should be sent, if different from above | |
| | |
| | |

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

# Contact details/How to respond

Please send your response by midnight on 1st November 2013 to:

**Judicial Review Consultation**
**Ministry of Justice**
**Administrative Justice**
**4th Floor Postal Point 4.38**
**102 Petty France**
**London SW1H 9AJ**

**Tel: 0203 334 4386/5610**

**Email: admin.justice@justice.gsi.gov.uk**

## Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

## Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from admin.justice@justice.gsi.gov.uk or 0203 334 4386

## Publication of response

A paper summarising the responses to this consultation will be published in January 2014. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

## Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Consultation Principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf


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