Judicial review: the value of the public interest

Martin Edwards reflects on government motives behind proposed changes to judicial review law

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Oscar Wilde once commented, a cynic is "a man who knows the price of everything, and the value of nothing".

It is unlikely he had judicial review in mind at the time, yet his quip seems appropriate to aspects of the government's current proposals for judicial review reform.

Some might express surprise that having commissioned and received the report from the Independent Review of Administrative Law, which suggested some relatively minor changes to current judicial review procedure, the government has decided to press on with more far-reaching changes.

It has certainly attracted criticism from professional bodies such as the Law Society and Bar Council.

The fact the government refused to publish the individual departmental submissions to the review may also arouse suspicion as to its true motives. Instead, it chose to publish a summary of submissions from 14 government departments which it admits did not "necessarily cover every aspect of the government departments' responses".

One area of concern surrounds the issue of costs. The Home Office has recently been criticised for appearing to step on the Ministry of Justice's toes by consulting on extending fixed recoverable costs in immigration judicial reviews, at a time when the changes to be introduced in the Judicial Review Bill, as set out in the Queen's Speech, make no mention of changes to the costs regime.

The summary contains some telling comments regarding government costs in judicial review. It suggests that the cost, resources and time involved in responding to a judicial review may lead to over-cautious advice and decision-making.

It also states that simple judicial reviews can involve costs of up to £100,000 and that departments were rarely able to recover their costs, even if successful. It gave, as an example, the Home Office which it asserted spent over £75m in 2019-2020 defending immigration and asylum judicial reviews.

It went on to suggest that there was costs inflation and there appeared "to be little disadvantage to legal firms in inflating bills and going to costs assessment (they are awarded costs of doing so even if the final sum ordered by the court is closer to the Department's last offer than theirs)" and this "incentivises poor claimant behaviour and penalises departments for acting pragmatically".

The summary added that "the current cost system is not always to the benefit of the Department and the taxpayer".

The reference to the Home Office's immigration judicial review costs may explain why home secretary Priti Patel is standing on Robert Buckland QC's toes on this issue.

However, the comment about driving down claimant costs and possible inflation of bills by some legal firms is difficult to reconcile with two recent cases which suggest that the government itself is not averse to the occasional use of costs as a potential tactical weapon.

In *Good Law Project v Secretary of State for Health and Social Security* [2021] 2 WLUK 336, the claimant had been granted permission to apply for judicial review of the Health Secretary's decision to award covid-19 PPE contracts worth between £400 and £700m.

The government had estimated its costs to be £1m while the claimant estimated their costs to be over £250,000. The claimant applied for a costs capping order under section 88 of the Criminal Justice and Courts Act 2015, otherwise it would have to withdraw from the case. O'Farrell J granted the order and put a cap on both sides of £250,000.

Similarly, in *Good Law Project v Minster for the Cabinet Office* [2021] 4 WLUK 131, which concerned the legality of a covid-19 communications contract awarded by the Cabinet Office, the government estimated its costs as to be more than £450,000.

Once again, the claimant sought a costs cap of £100,000 in respect of each party, otherwise it would be unable to continue with the judicial review. O'Farrell J determined that the appropriate level of costs cap should be £120,000 for each party.

It was clear to the court that the claimant had limited funds but was managing them appropriately and, while the Cabinet Office did not have unlimited resources, it was able to secure funds from the Treasury. Although claims could be expensive to bring, it appeared the defendant's costs were disproportionate for a one-day hearing, even in a complicated procurement case.

The court followed clear guidance found in the decision of Haddon-Cave J in *R (Plantagenet Alliance) v Secretary of State for Justice*[2013] EWHC 3164 (Admin). Here, the court dismissed the justice secretary's application to discharge or vary a protective costs order (PCO) the judge had made when granting permission to apply for judicial review in relation to an exhumation order, granted by the secretary of state in respect of the remains of King Richard III.

As Haddon-Cave J observed: "PCOs are about ensuring access to justice. They are granted in respect of judicial review claims which raise issues of 'general public importance' which it is in the 'public interest' should be determined, but would otherwise be stifled by lack of financial means.

"For the reasons given in my judgment, I decided that this was a paradigm case for the grant of a full PCO in favour of the claimants (ie full protection against the defendant's costs), and directed that there should be a hearing before me to set an appropriate 'cap' on the claimant's own recoverable costs."

However, it appears that there may be a flip side to the government's argument. It was widely reported in May 2021 that East Hertfordshire Council, having settled a judicial review without a hearing, was ordered to pay the claimants almost £83,000 in costs.

A council spokesperson said: "The council did not lose the judicial review instigated by the claimants, it settled early before a judge ruled on whether there was any merit in the claim to allow it to proceed to a full hearing".

DISINCENTIVISING EARLY SETTLEMENT

If so, then it begs the question: why settle? Surely if that amount of money is at stake it would be better to defend the claim? In these circumstances, the prospect of excessive costs may be a disincentive to early settlement.

Any solicitor advising a public authority faced with a judicial review challenge should advise their client to think carefully about settling early (ie without a substantive hearing) without first identifying and agreeing the quantum of the claimant's costs beforehand.

While it may be politically expedient to settle, irrespective of the merits, it can prove costly if the claimant's costs have not been agreed in advance.

Often, the main workload in a judicial review falls on the claimant and so it should not come as a surprise if the claimant's costs are greater than those of the defendant. Nevertheless, the claimant's costs should not be allowed to run out of control.

Some judges can be highly critical of parties who resort to excessive bundles of documents. By the same token, the claimant's solicitor should be suspicious of a defending public authority that suggests that its costs may be inordinately high.

Both parties should also ensure they follow diligently the requirements of the latest version of the judicial review practice direction posted on HM Courts and Tribunals judiciary website on 3 June 2021.

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