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Judicial Review

Procedure & Practice

Where do we stand?

Will proposals for further judicial review reform make any difference?

Charles Brasted **&** Ben Gaston **Report**

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The government's latest consultation on restricting the availability of judicial review (JR) (*Judicial Review, Proposals for Further Reform*, September 2013) raises further questions about the justification and efficiency of the proposals. Plans to change the rules on standing and the approach to procedural unfairness, in particular, are directed at approaches embedded in the common law jurisprudence, and raise constitutional questions as to the roles of the executive, Parliament and the judiciary in determining the availability of JR to would-be claimants.

Standing in JR

The current "sufficient interest" test for standing (Senior Courts Act 1981 (SCA 1981), s 31(3)) has been the subject of an increasingly liberal and expansive interpretation. The courts have been anxious to see issues of public importance given proper judicial consideration, particularly where allegedly unlawful acts would otherwise be immune from challenge simply because there was no directly affected individual (see *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868 at 170).

At the same time, the courts have conceded that JR is "a field especially open to abuse" and that "[s]trict judicial controls, particularly as regards time, will foster not hinder the development of such litigation" (*R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env LR 415 at 425 *per* Laws LJ).

The standing proposals

The standing proposals centre around a change to the "sufficient interest" test, and consider other standing tests from different areas of law, including human rights, statutory appeals and the test for civil legal aid in JR. They are predicated on concerns that bodies such as NGOs and pressure groups are mounting too many JR claims, and for the wrong reasons (although the court's own statistics show that between 2007 and 2011 only 50 JRs per year were lodged by NGOs, charities, pressure groups and faith organisations; compared with the total 11,360 JR claims lodged in 2011).

Even if there is a real problem in this regard, there appears to be a disconnect between the perceived problem and the rationale behind the reforms. As the consultation indicates, claims brought by NGOs and similar bodies tend to be more successful, meaning that they are inherently more meritorious. Whatever the motive for these claims, the underlying decision-making cannot have been proper and these decisions should be subject to judicial scrutiny.

The stated rationale for the standing proposals is that it is government and Parliament that are best-placed to decide what is in the public interest. Yet ensuring the public interest is preserved, as well as maintaining the rule of law, becomes all the more difficult where potentially flawed decisions cannot be brought before the courts simply for want of an applicant with standing.

Practically speaking, the standing proposals may have limited effect on commercial JR, where claimants are always likely to have a direct commercial interest in the relief sought. The exception may be trade associations,

for whom it may be more difficult to satisfy any new test. Ultimately, however, the effect will turn on judicial interpretation of an amended SCA 1981.

The "victim" test

The "victim" test under the Human Rights Act 1998 (HRA 1998) is narrower than the JR "sufficient interest" test. A person is a "victim" only if he is directly affected by the measure in question (HRA 1998, s 7(7); *Klass v Germany* (1978) 2 EHRR 214). Furthermore, the European Court of Human Rights does not permit organisations to bring public interest claims where they are not directly affected (see *Norris and National Gay Federation v Ireland* (1986) 8 EHRR CD 75). Prima facie, the adoption of a test akin to the HRA 1998 "victim" test could lead to the exclusion of certain claimants who could otherwise pass under the lower "sufficient interest" bar. Crucially, however, the precise scope of a new "victim" test would depend on judicial interpretation of the word(s) in question.

The "person aggrieved" test.

The "person aggrieved" test appears, eg, in s 288 of the Town and Country Planning Act 1990 (TCPA 1990). Like the "sufficient interest" test, restrictive interpretations of "person aggrieved" have now been rejected (see De Smith's *Judicial Review* (7th ed) at 2-064).

Although this test is flexible, the claimant is usually required to have participated in the decision-making process or have an interest in the land in question (see Pill LJ in *Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders Ltd* [2010] EWCA Civ 600; [2011] 1 P&CR 5 at 53). The public interest and access to the courts will also be given weight (*Attorney General of the Gambia v N'Jie* [1961] AC 617; [1961] 2 All ER 504).

The "person aggrieved" test under TCPA 1990 should also be viewed in context (see Lord Reed in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR at 84). In planning cases, stakeholders may have participated in the decision-making process, whereas JR claimants may not be afforded this opportunity. It may, therefore, be difficult to insist upon "participation" as limb of a new JR standing test.

Given the courts' concern for preserving the rule of law and maintaining wide access to JR in cases of public importance, it may be that any new "person aggrieved" test would simply be more widely construed than in other cases, thus limiting the impact of this proposed option.

The civil legal aid test

Applicants are precluded from receiving legal aid for JR claims unless the services to be covered have "the potential to produce a benefit for the individual, a member of the individual's family or the environment" (Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1, part 1, para 19(3)).

Since the reforms to legal aid only came into force on 1 April 2013, there appears to be no case law on the interpretation of this provision. However, were a similar test to be adopted in JR, its scope would ultimately turn on judicial interpretation, which would be influenced by rule of law and access to justice considerations. It is therefore quite feasible that what is meant by "producing a benefit" could be widely construed.

The proposals on procedural defects

Procedural unfairness is a well-established ground of JR, applying, eg, where the decision-maker has failed to consult or give reasons for its decision. However, the courts are alive to the question of whether the alleged flaw was material. In circumstances where, but for the alleged flaw, the decision reached would have been no different, the court may refuse to grant either permission or the relief sought (see *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) at 86).

This is a high threshold of "inevitability": "Probability is not enough. The defendant would have to show that the decision would inevitably have been the same." (*R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291; [2006] 1 WLR 3315 at 10 *per* May LJ).

The government raises concerns with the number of JRs in which the procedural irregularity alleged would have made no difference to the decision made. In summary, two proposals for change are offered in the consultation:

- Option 1—bringing forward the consideration of "no difference" arguments to the permission stage. A defendant would be able to raise the "no difference" argument in its acknowledgment of service, following which (a) the judge would make a decision on the papers (possibly with the aid of further evidence from the parties), and (b) an oral hearing would be held if necessary; and
- Option 2—introducing a new statutory threshold under which cases based on a procedural flaw would be dismissed if it were "reasonably clear", or if there was a "high likelihood", that the alleged flaw would have made no difference to the decision in question.

"Ensuring the public interest is preserved, as well as maintaining the rule of law, becomes all the more difficult where potentially flawed decisions cannot be brought before the courts simply for want of an applicant with standing"

Option 1 would inevitably increase the time and cost spent on the permission stage, as claimants would likely seek to pre-empt the defendant's "no difference" arguments. An additional round of evidence in response to the defendant raising this point, as well as in preparation for an oral hearing (if applicable), would likely further increase costs.

However, it is arguable that option 1, taken in isolation, would make little difference. Defendants can already raise "no difference" arguments from the outset, and the courts can refuse permission on that basis. Further, this proposed change would have no effect on the substantive "inevitability" test.

As for option 2, the imposition of a statutory threshold to overrule the common law-derived "inevitability" test may have more profound implications. It may increase the likelihood that cases founded solely on alleged procedural unfairness are dismissed, either at the permission stage or at a substantive hearing.

If enacted, it would be difficult for the courts to go against clear statutory wording, especially where the mischief behind this wording were to lower the threshold in "no difference" cases. Once again, context may prove to be key, and the policy considerations particular to JR make it difficult to predict how the courts would interpret new statutory provisions. In practical terms, this change would put pressure on claimants to rebut arguments from defendants that, even if a different procedure had been followed, the decision reached would have been identical. This may be problematic from an evidential point of view, since it is difficult to adduce evidence as to hypothetical scenarios. At what stage this would need to be addressed would depend upon whether only option 2 were introduced, or whether it were combined with option 1, above (ie, the "no difference" assessment taking place at the permission stage).

In any case, a key consideration for both options is whether it is even possible to evaluate "no difference" arguments (whether on a "high likelihood" or "inevitability" basis) in anything but the most extreme of cases.

Conclusion

It is not clear from the consultation that the proposals suggested are required or justified, much less whether they can be translated into a workable alternative to the status quo. Even if implemented, it is arguable that there would be little material change to the court's approach to interpretation in JR. In particular, it seems very unlikely that the standing proposals would constrain meritorious applications from parties without a "direct interest" in the relief sought. That said, both these and the proposals on procedural defects may—far from achieving the court's aims of reducing the burden of JR—bring about a further front-loading of issues, and therefore costs, while potentially adding to the initial administrative burden upon the courts in JR.

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