UNITED KINGDOM:

RESPONSE TO GOVERNMENT CONSULTATION "JUDICIAL REVIEW: FURTHER PROPOSALS FOR REFORM"

AMNESTY INTERNATIONAL

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Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

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INTRODUCTION

The introduction to the Ministry of Justice's consultation document "Judicial Review: proposals for further reform" begins by reminding us that judicial review is *"a critical check on the power of the State".*[1] Yet the consequences of the proposals put forward in the document - if implemented - would actually make it far more difficult to hold the government and public bodies to account, effectively insulating executive action from adequate judicial scrutiny, and would significantly impede access to justice. These proposals should also be considered in the context of those made in a government consultation issued earlier this year, *"Transforming Legal Aid"*[2], with which Amnesty International engaged.[3] Taken together, Amnesty International believes that these proposals have the effect of undermining respect for human rights and the rule of law.

Amnesty International would note its fundamental concern from the outset regarding the lack of evidence underpinning the proposals made in the consultation document and the fact that, where evidence is presented, it does not support the case that the government attempts to make (see below 'Evidence: Growth in Judicial Review and Publicity'). Amnesty International calls on the government to reconsider its proposals and to present adequate and relevant evidence for any new proposals made.

This submission focuses specifically on the proposed changes to standing, Protective Cost Orders, and rules on third party interventions. These are the areas where Amnesty International is best placed to contribute to the consultation. Where other proposals are not dealt with in this consultation response, that should not be taken as an indication that Amnesty International agrees with, or is unconcerned by, those proposals.

EVIDENCE: GROWTH IN JUDICIAL REVIEW AND PUBLICITY

Amnesty International is deeply concerned at the lack of evidence in the government's consultation document to support its proposals (or where evidence is presented it does not support the case the government seeks to make).

The government makes two main claims on the basis of the statistics presented: (i) that the use of judicial review has expanded massively in recent years; and (ii) that judicial review is used as a 'campaigning tool', where unmeritorious claims are brought by campaigning NGOs and others simply to attract publicity. The evidence presented does not support these contentions.

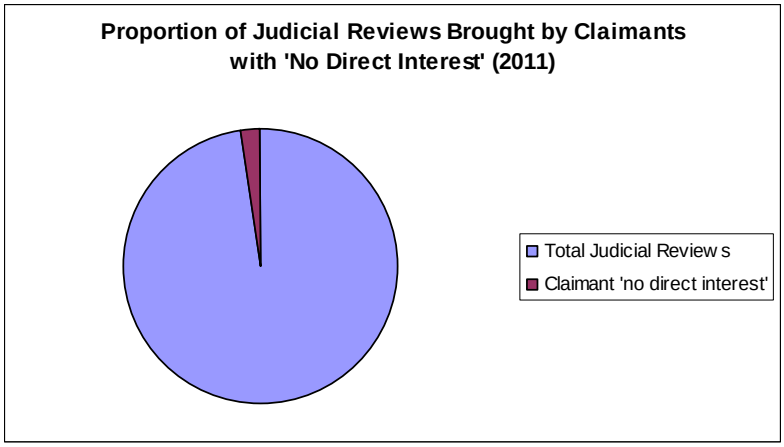
EXPANSION OF JUDICIAL REVIEW

The government's figures and graphs on page 8 of the proposals are presented alongside a statement that "*[t]he number of judicial review applications has more than doubled in recent years*".[4] However, the only significant increase shown is in immigration and asylum cases, which the government recognises are soon to be redirected to the Upper Tribunal and are

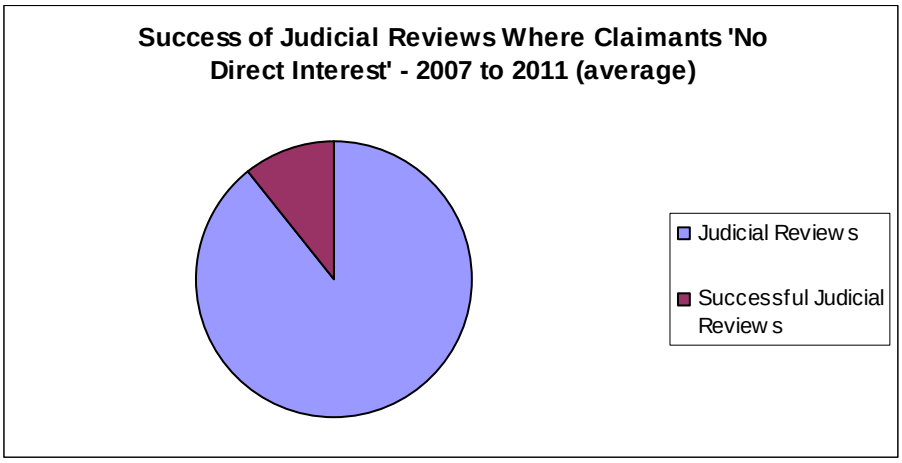
therefore irrelevant to the proposed reforms. The remaining, *relevant* cases show an almost static line, and certainly do not demonstrate the claimed proliferation of judicial review actions; which forms the main basis of these proposals.

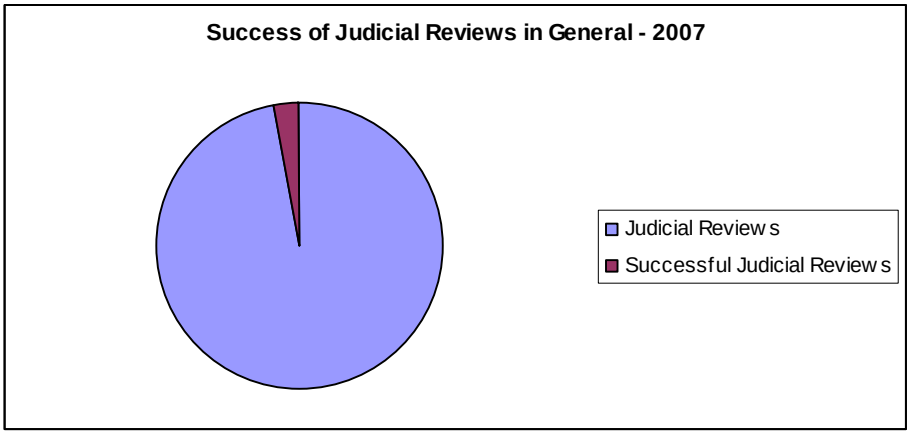
USE AS A CAMPAIGNING TOOL

The government points out in its proposals that between 2007 and 2011, around 50 judicial reviews per year "*appear to have been lodged by… claimants who may not have had a direct interest in the matter at hand"*[5] and expresses its concern "*that the wide approach to standing… [allows] judicial review to be used to seek publicity or otherwise to hinder the process of decision-making*".[6] In 2011, even excluding immigration, asylum and planning cases, these cases 'of concern' represented only two per cent of all judicial reviews.[7] This is shown on the chart below.



Further, these types of cases are disproportionately successful, as the government points out.[8] The government gives average figures for the period 2007 to 2011 of six successful claims in 50 – 12 per cent (see chart below). By contrast, in 2007, only three per cent of all judicial review claims were successful for the claimant (see chart below).[9] These claims (where the claimant does not have a direct interest) appear to be significantly less likely to be unmeritorious than other judicial review claims, and the government's concern that they hinder decision-making appears to be unfounded.





So the government has highlighted a type of judicial review which forms a *small fraction* of all judicial reviews, and which is *disproportionately successful* on the merits. Clearly, this does not appear to justify the government's claimed need to seriously restrict standing on the basis of these cases' demands on the court system. Even accepting the government's approach of judging the value of judicial review on the success rate of cases (an approach with which Amnesty International would have reservations), the relatively successful track record of this type of judicial review would seem to lead to the opposite conclusion; that the broader test for standing should be retained as it allows more meritorious claims to be brought, increasing the 'value for money' of judicial review in terms of court resources.

STANDING: RESTRICTING WHO CAN APPLY FOR JUDICIAL REVIEW

SUMMARY OF THE PROPOSALS

A key issue raised by the proposals concerns who ought and ought not to have "standing" to bring a claim for judicial review. The UK government argues that over time the test for standing in judicial review has been interpreted too widely *"allowing judicial review to be used to seek publicity or otherwise to hinder the process of proper decision-making".*[10] The government therefore proposes restricting the test for standing so that individuals and groups who do not have a "direct" or "direct and tangible" interest in the outcome of the proceedings do not have standing to bring judicial review claims.

Amnesty International is concerned that the government's proposals unnecessarily restrict who is able to bring judicial review claims before the courts.

THE PURPOSE OF JUDICIAL REVIEW

In its consultation document, the government describes judicial review as *"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".*[11] This is accurate. Judicial review focuses on the exercise of, and potential misuse of, executive power. Its focus is *not* primarily the redress of private wrongs or protection of individual rights (although these may be affected).[12] Standing to bring judicial review claims must therefore be wide enough to capture these kinds of cases which concern the wider public interest.

For example, the consultation paper references the case of *R (on the application of Maya Evans) v Secretary of State for Defence* presumably in order to highlight cases where the government thinks it is wrong that a particular person could bring a claim. However, this case is an example of precisely the kind of case which raises issues of fundamental importance to the public interest, namely the UK's policy and practice in relation to the transfer of detainees to the Afghan authorities and the risk of torture and other ill-treatment those individuals would face.[13] Amnesty International is concerned that the restriction on standing to those who have a direct and tangible interest will prevent these kinds of cases from being heard before the courts.[14]

The government continues to misconstrue the purpose of judicial review in its proposals for alternative tests for standing in judicial review claims; particularly its proposal to adopt the test under the Human Rights Act 1998. The Human Rights Act and the European Convention on Human Rights are designed to protect rights. Whilst judicial review may provide a mechanism for enforcing those rights, judicial review's focus is much wider; being on the use of executive power (and may include claims where the status of the claimant is not of central importance). The test for standing under these instruments is therefore an inappropriate comparator.

The proposals also fail to properly consider instances where there are no individuals with a

direct interest in the outcome, for example where an unlawful policy exists but has not yet affected any individuals. It is precisely these kinds of concerns which have led the courts to develop and relax the test for standing in judicial review in the way they have.[15]

EXISTING SAFEGUARDS

The current judicial review system already contains a range of safeguards against vexatious claims and wasting of court time. These include: (i) the unique requirement to obtain permission from the High Court to bring a claim; (ii) a specific pre-action protocol; (iii) the requirement for sufficient interest; (iv) the *Mount Cook* principle that defendants can recover the costs of drafting an acknowledgment of service where permission to bring a claim is refused; (v) the court's ability to make adverse cost orders; and (vi) the requirement to have exhausted all other avenues of redress first (including e.g. internal complaints procedures).

These safeguards, together with judicial discretion, provide a suitable way of limiting any unmeritorious claims.

ENVIRONMENTAL MATTERS AND OTHER CARVE-OUTS

The government notes that judicial reviews relating to environmental matters would have to be approached differently, due to specific rules under EU law and the Aarhus Convention which guarantees rights of standing to NGOs and individuals even in the absence of a direct interest. The government also refers to "*other areas where a body is required by law to be given standing to bring a challenge*", citing the power of the Equality and Human Rights Commission to bring judicial review proceedings in matters relating to its statutory functions, and reassures that it "*is not seeking to overturn these existing arrangements*".[16]

Nowhere in its consultation does the government consider *why* these matters are regulated in this way, or explain whether it agrees with this reasoning or why the same reasoning should not apply to all other judicial reviews (which the government argues should be subject to a stricter test of standing). For example, the Aarhus Convention states in its preamble that: "*citizens must... have access to justice in environmental matters*"; "*citizens may need assistance in order to exercise their rights*"; and "*effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced*". There is no reason why these principles should not be applicable to judicial review more generally.

RESPONSES TO 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?

No. The perceived problems are due to a fundamental misunderstanding or misrepresentation by the government of the purpose of judicial review, and are not adequately supported by evidence. The current test for standing and series of safeguards applicable to the judicial review system, exercised with judicial discretion, provide a suitable approach to standing.

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?

No. Even if there were a need to change the current test, the proposed 'alternatives' would not be appropriate (in particular the test under human rights legislation). This is a result of a misunderstanding or misrepresentation of the purpose of judicial review.

PROTECTIVE COST ORDERS

SUMMARY OF THE PROPOSALS

A Protective Cost Order (PCO) limits the costs exposure of a claimant in a public interest case. In the consultation document the government raises concern that PCOs are being granted in too wide a range of circumstances; in particular that an expanding approach to PCOs *"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"*.[17] The government also questions whether PCOs should be removed for "political" and "campaigning" judicial review claims where there is no claimant with a private interest.

AMNESTY INTERNATIONAL'S CONCERNS

PCOs are an important tool available to the courts to "level the playing field" between the claimants and defendants in order that certain cases can be brought which are in the public interest. Amnesty International is concerned that the proposals concerning PCOs will seriously deter these types of claim from being brought, because the financial risk in bringing such claims will be too high.

The proposals, when read as a whole, also appear fundamentally unworkable. The government proposes to: reform the test for standing to require a "direct interest" or "direct or tangible interest"; and at the same time remove the availability of PCOs for claimants who have a "private interest". In its proposals, the government does not specify precisely what is meant by "direct interest" or "direct and tangible interest" (and invites views on an appropriate test), but if "direct interest" and "private interest" are in effect the same test (which appears likely)[18], then no claimant with standing to bring a judicial review would be able to benefit from a PCO. The effect will not be to limit the availability of PCOs, but to *remove them entirely*. This will prevent many claimants from bringing claims resulting from legitimate grievances, because the financial risk would simply be far too high.

Amnesty International would note that private interests are already taken into account by the courts when determining if a PCO should be granted, but it is important (as the courts have recognized) that on its own this should not prevent a PCO from being granted. The central consideration in granting a PCO is, and should remain, whether the proposed litigation is in the public interest.

RESPONSES TO 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?

If this proposal were introduced together with the proposals on restricting the test for

standing, PCOs would become unavailable to all claimants. This would entirely undermine the purpose of PCOs and prevent less wealthy claimants from bringing claims in the public interest.

INTERVENERS

SUMMARY OF THE PROPOSALS

The government expresses concern that third parties who intervene in judicial review cases may over-complicate matters and unnecessarily add to costs. The government makes three main proposals in this regard: (i) to restrict the test for standing for judicial review claims to exclude these third parties; (ii) to require third party interveners to be responsible in principle for their own legal costs resulting from the intervention; and (iii) to require third party interveners to be responsible for any significant extra costs incurred by the existing parties to the claim.

AMNESTY INTERNATIONAL'S CONCERNS

The government's claimed concerns are unlikely to materialize in practice. Third party NGOs and voluntary sector organizations, such as Amnesty International, do not take lightly the decision to intervene in court proceedings (whether judicial review or other proceedings), and Amnesty International would only do so where: (i) there is an important legal principle at stake; and (ii) the organization is able to bring additional expertise and useful legal arguments. Joining a case as a third party requires considerable commitment in terms of resources (which are often scarce at these organizations). If an intervention were made, this would only be following detailed consideration (with the input of in-house legal experts and possibly external counsel). It is unlikely that any third party would then intervene in a case which it considered to have no prospects of success; losing judicial review claims is not the kind of publicity which helps to generate positive change.

The reality is that, by intervening, these third parties are likely to bring added expertise, which will allow the case to be better argued and considered, and ultimately result in a more just outcome. If there are concerns about third party interveners over-complicating matters or disproportionately adding to costs, it is open to the judge(s) in the case to refuse to allow the third party to intervene. The parties would be asked to make representations on the matter (and this would be an opportunity to object if they considered it would substantially add to costs without contributing to the claim).

It is also misleading to focus on any possible added costs resulting from an intervention in a specific case. It is doubtful whether this will in fact be the reality (given that the third party intervener is likely to bring expertise which allows the issues to be more clearly argued and efficiently dealt with), and this ignores the fact that the case may establish a clear precedent which disposes of the need for numerous other individual cases.

It is also rare in practice that any third party intervener would be awarded their legal costs (and this would not generally be the expectation of the intervener at the outset).

It is unclear why the proposals are therefore necessary, apart from to increase the financial risks for NGOs, charities and other such groups, which will inevitably deter them from intervening and bringing their significant expertise to the benefit of all parties and the court in a case. It is also troubling that these proposals will deter third party interventions from organizations that are unable to take any additional costs risks, whereas interventions will continue to be made by those representing well-resourced interests including companies and the government itself.

RESPONSES TO QUESTIONS

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?

No. This question presumes that there are problems with use of judicial review as a campaigning tool and with third party interveners over-complicating cases. We do not accept these premises, as explained above.

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?

This would ordinarily be the expectation of a third party intervener in any event. Judicial discretion is adequate to deal with unusual cases.

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?

As explained above, these concerns are exaggerated, as it is doubtful whether interventions do cause significant extra costs to be incurred. Existing judicial discretion over the award of costs is adequate to deal with any such concerns.

[1] https://consult.justice.gov.uk/digital-communications/judicial-review
[2] "Transforming Legal Aid: delivering a more credible and efficient system", Ministry of Justice Consultation, April – June 2013
[3] See Amnesty International UK response to the government's proposals to reform legal aid (3 June 2013) and written evidence to the Joint Committee on Human Rights' Inquiry on the implications for access to justice of those proposals (27 September 2013).
[4] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 9.
[5] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 78.
[6] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 79.
[7] The total number of cases was around 2,300. If immigration, asylum and planning cases are included the figure is 0.4 per cent.
[8] See para 77 of the proposals document, "*The identified cases tended to be relatively successful compared to other JR cases"*.
[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207804/court-stats-q1-2013.pdf
[10] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 79.
[11] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 1.
[12] See, for example, *R v Somerset County Council, ex p Dixon* [1998] Env LR 111, "*Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power"*
[13] LJ Richards at paragraph 2 stated that this was a case "*brought in the public interest*", which "*raises issues of real substance concerning the risk to transferees*". Also of interest is the fact that the Secretary of State in this case did not pursue the objection to standing.
[14] See the Public Law Project, *Judicial Review: Proposals for Further Reform*, October 2013. The Public Law Project also highlights two examples of such cases, *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710 and *R v Gloucestershire County Council ex p Barry* [1997] UKHL 58.
[15] See for example R v HM Inspectorate of Pollution, ex p Greenpeace Ltd (No 2) [1994] 4 All ER 329, where the court granted Greenpeace standing to bring a claim for judicial review relating to authorisations for discharge of radioactive waste from a nuclear fuel processing plant. The court considered Greenpeace to be "an entirely responsible and respected body with a genuine interest in the issues raised", and was concerned that its 2,500 supporters in the area might not otherwise have an effective means of bringing their concerns before the court.
[16] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 82.
[17] Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 158.
[18] See for example reference to "personal interest" in Ministry of Justice, Judicial Review: Proposals for further reform, paragraph 74.

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