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The Government makes consultation and judicial review political issues

On 19 November 2012, in a speech to the CBI, the Prime Minister, David Cameron identified some of the things which he claimed were holding back the Government in helping British business. Four of the five issues he identified were obligations to comply with the law. Is there really a problem or was this simply a politician telling an audience what they wanted to hear?
The four troublesome areas of law selected by Mr. Cameron are, it is true, all about how the law ensures that decisions by public authorities are taken properly and fairly. Judicial review allows the Court in appropriate cases to check that a public authority has not exceeded its legal powers or behaved so unfairly or irrationally that it should retake the decision. Consultations force authorities to ask those with a particular interest or knowledge of an area to identify issues before a decision is implemented. European legislation is inevitable if the UK remains a member of the EU. Impact assessments including equality require that the wider consequences of any decision are properly considered in advance.

Mr Cameron summarised the position as he saw it:

> "You know the story. The Minister stands on a platform like this and announces a plan then that plan goes through a three month consultation period there are impact assessments along the way and probably some judicial reviews to clog things up further. By the time the machinery of government has finally wheezed into action, the moment's probably passed."

In relation to the large and increasing number of Judicial Review applications Mr Cameron had this to say:

> "Let me say a quick word on each. First, judicial reviews. This is a massive growth industry in Britain today. Back in 1998 there were four and a half thousand applications for review and that number almost tripled in a decade. Of course some are well-founded – as we saw with the West Coast mainline decision. But let's face it: so many are completely pointless. Last year, an application was around 5 times more likely to be refused than granted. We urgently needed to get a grip on this. So here's what we're going to do. Reduce the time limit when people can bring cases. Charge more for reviews, so people think twice about time-wasting. And instead of giving hopeless cases up to four bites of the cherry to appeal a decision, we will halve that to two."

So Mr Cameron does not seem to be against judicial review itself but would like to reduce the number of cases which might interfere with business orientated decisions. As might be expected the position is not quite as presented. The majority of judicial review applications (77%) relate to immigration and asylum decisions and a further 3% relate to criminal matters. Of the remaining 20% the great majority relate to decisions which primarily concern public authorities other than Central Government and individuals rather than large businesses. They are about things like planning or licensing decisions. They may be of vital importance to an individual or a small group of individuals but have little broader economic significance. The number of cases which have a broader economic significance are relatively few and it is likely

that the benefit of the scrutiny will outweigh the delay in many of them. The examples of the West Coast Mainline and PPI insurance come immediately to mind.

So what of Mr. Cameron's proposed changes? These include a shorter time limit, increased fees and reduce avenues for appeal.

The law already requires cases to be brought promptly and in any event within three months of the relevant decision. This is quite tight particularly as the proposed applicant must first comply with a pre-action procedure designed to allow litigation to be avoided if at all possible. This means that the more time critical the decision, the more quickly a claim has to be brought if the risk that the Court will say that it is not brought promptly is to be avoided. It is hard to see how reducing the three month time limit will add anything. Numerous claims brought within three months are already liable to be rejected. Bringing the claim within the three month period is no guarantee that it has been made promptly.

Since the parties cannot agree to extend this time limit there may be a risk, where time limits are reduced, that a potential claimant will issue their application as soon as possible. This may in turn have an effect on the operation of the pre-action protocol which ordinarily involves the claimant to sending a letter of claim and a response expected within 14 days.

However, the court's rules (CPR rule 54.5(3)) provide that the promptness requirement and the three month longstop do not apply where another enactment has specified a shorter time limit. It is possible that the government could legislate to provide that certain government decisions, aimed at boosting British business, could be subject to a reduced time-limit.

As of April 2011, the current fee for an application for Judicial Review is £465. This court fee can be compared to the fees charged on other civil claims which range from £25 for claims issued through money claim on-line to £1670 for a claim issued at court for £300,000 or more. Whilst there is no similar sliding scale for Judicial Review fees, there may be scope for an increase in the current fee charged without a significant contrast with other court fees.

However, an increase in fees is a bar to access to justice, particularly in relation to public law matters. Many of the applicants have no means to pay any fees, which may therefore end up being publicly funded. It remains to be seen what level of fee is considered to be sufficient to deter frivolous applications yet low enough to allow claimants of limited means or priorities to pursue meritorious claims. For those that cannot afford court fees there is process for applying for a fee remission. Requiring this to apply to more cases is unlikely to streamline the process.

In terms of deterrence, unsuccessful parties already face the prospect of adverse costs orders at the permission stage so any increased fee may be unlikely to deter the majority of claimants. This could easily run to thousands of pounds so it is hard to see why a fee increase would have much effect.

Mr Cameron referred to the fact that claimants have up to four bites of the cherry to proceed with a Judicial Review application. Given the number of appellate courts this requires further analysis.

No Judicial Review proceedings can be brought without the Court's permission. The permission stage is ordinarily dealt with on paper, although the Claimant has a right to have any refusal reconsidered at an oral hearing. The permission stage also ensures that those applications without prospect of success are removed at an early stage in the court procedure. In R v IRC ex p. National Federation of Self-employed and Small Businesses Lord Diplock explained that the permission stage was to:

> "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative

action while proceeding for judicial review of it were actually pending although misconceived"

An applicant is entitled to make oral representations to the court if permission is refused on the papers. It is hard to see how a case can be thrown out without an open public hearing unless the applicant accepts an un-argued paper based decision. Further appeals to the Court of Appeal and the Supreme Court are already highly restricted by the need for permission at each stage and the requirement to identify arguable and particular legal points of error in previous decisions. These are likely to involve applicants (without the resources of government) in great expense. It is unclear why Mr. Cameron considers court fees may be a sufficient deterrent but not adverse cost orders. In other jurisdictions litigation may not involve the risk of paying the other side's costs.

A decision made without consulting those who may be well informed about the issues involved or considering properly the impact of the decision on broader policy objectives or other issues is less likely to be a good decision. Decision makers who feel less susceptible to the scrutiny of the Courts will inevitably tend to make decisions with less care or regard for their actual legal power to do what is proposed. It may be thought that the problem is not slow decisions but bad decisions. The law and the Courts may seem like a nuisance but restricting access to them is undoubtedly to be approached with great care.

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