CHILD POVERTY ACTION GROUP

Judicial Review: proposals for reform

Response to the Ministry of Justice Consultation

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Introduction

1. The Child Poverty Action Group (CPAG) promotes action for the prevention and relief of poverty among children and families with children. To achieve this, CPAG aims to raise awareness of the causes, extent, nature and impact of poverty, and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty; and enable those eligible for income maintenance to have access to their full entitlement.

2. In line with our charitable aims, we produce publications, undertake training and second tier advice work, and carry out test case work in social security law. We also undertake policy work and we campaign in this field. We achieve this partly by bringing test cases and we have a legal aid contract in public law.

3. CPAG believes that the proposals in the Consultation will damage access to justice and the Rule of Law, while there is no evidence that they will achieve the Government's aims of reducing the burden on public services or removing the unnecessary obstacles to economic recovery. We are particularly concerned by the heavy reliance on anecdotal and misleading statistical evidence in the Consultation paper and the short timeframe for responding amounting to 24 working days. We request that the time limit be extended to allow other organizations and individuals enough time to respond.

4. The proposal fails to acknowledge the benefits of judicial review in holding the executive to account and ensuring good decision-making across all levels of local and central government. This is surprising given that this was recognised by the Ministry of Justice in its own consultation on legal aid:

   > "*In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means to which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*"[1]

5. CPAG would be happy to discuss with the Ministry of Justice ways of ensuring that the judicial review procedure can run more quickly and efficiently. However, while we agree that "weak and frivolous cases" should be identified and dealt with promptly, the Consultation does not present any convincing evidence that the proposed reforms are necessary.

6. We have had the benefit of seeing a draft of the Public Law Project's response, with which we wholeheartedly agree. We will focus our response on how the proposals will affect the right of social security claimants to seek judicial review.

[1] Proposals for the Reform of Legal Aid in England and Wales. Ministry of Justice Consultation Paper. Cm7967 www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf.

CPAG's test case work

7. CPAG pioneered the strategic use of test cases in the UK, and has been undertaking work in this field since the 1970s. We have found this to be an effective means of promoting social justice through the courts. Low income has been shown to be one of the major indicators for a child's life chances. By helping to get better interpretations of the law relating to social security for claimants, and drawing attention to policy issues facing those in poverty, our test cases promote CPAG's aims of bringing about positive income changes for children in poverty and enabling those eligible for income maintenance to have access to their full entitlement. We would argue that this assists the government in meeting its statutory commitment to end child poverty.

8. CPAG brought the leading case on the standing of organisations to seek judicial review on behalf of groups of claimants; *R v Secretary of State for Social Services ex p Child Poverty Action Group* [1989] 1 AER 1047, and we also brought the first case on the court's ability to grant protective costs orders in public interest cases *R v Lord Chancellor ex parte CPAG* [1999] 1 W.L.R. 347, which remains an important authority.

9. Other judicial review cases brought by CPAG on our own behalf or on behalf of our clients include:

    - *T and S v Secretary of State for Health and Secretary of State for the Home Department* (2002): This case was about whether failure to provide HIV positive asylum seeker mothers with milk tokens infringed the human rights of the mother and her baby. Breastfeeding risked transmitting the virus to the baby, and the only means of support to the mother was NASS payable at 70% of income support, in itself a subsistence benefit. This case, backed by a campaign by CPAG together with partner organisations and Neil Gerrard MP, produced a change in Home Office policy so as to include an additional payment to asylum seeker parents of children under 3.

    - *R(CPAG) v Secretary of State for Work and* Pensions [2010] UKSC 54. This case concerned whether the DWP has the power to recover an overpayment under the common law in addition to their powers under section 71 Social Security Administration Act 1992. The DWP wrote to over 65,000 claimants between March 2006 and February 2007 asking them to repay overpayments. CPAG challenged the lawfulness of this practice by judicial review, arguing that s 71 SSAA was a complete statutory code which did not allow room for recovery at common law. This argument succeeded before the Supreme Court in December 2010.

    - *R(CPAG) v Secretary of State for Work and Pensions and Secretary of State for Education* [2012] EWHC 2579. The court upheld CPAG's claim that the Government's child poverty strategy did not comply with the Child Poverty Act because the Secretaries of State did not obtain the advice of the Child Poverty Commission before producing it. The court held that the executive was not entitled as a matter of law to ignore or fail to comply with legislation that parliament had passed.

Time limits

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

10. As the proposals on reducing time limits are confined to planning and procurement cases we do not intend to respond to questions 1 to 4 of the proposal.

11. CPAG disagrees strongly with the proposal to change the rules so that the time limit for continuing breaches will start from the point where the grounds giving rise to the claim first arose. The scope of the proposed rule change is unclear, but it appears to be aimed at cases where there is a "*delay or failure to take a decision or implement a policy properly*". The proposal would mean that public authorities would escape judicial scrutiny if their unlawful acts or omissions lasted for more than three months.

12. CPAG regularly represents clients who are pushed into poverty because of unlawful delays in the processing of their benefit claims. In 2010 Citizens Advice calculated that almost three hundred and forty thousand claimants were waiting an average of three months for their child benefit claim to be put into payment.[2] The only remedy in such cases is to challenge the relevant authority by judicial review. For example, in the last two years CPAG sent five pre-action protocol letters challenging serious delays.

13. It is not clear how claimants would be expected to know when the grounds for challenging a delay arise. Indeed, it is impossible to ascertain a definitive point after which an acceptable administrative delay on the part of the authority becomes a challengeable one. The absurd result would be that the longer the delay the harder it becomes for a claimant to challenge it. This approach would also be contrary to the principles of good administration and the Rule of Law.

14. CPAG is also concerned that this proposal is intended to limit challenges to government policy and secondary legislation. On one interpretation, an unlawful government policy or piece of secondary legislation will not be amenable to challenge by judicial review if it has been in existence for more than three months. Where an unlawful policy is introduced that has an impact on child poverty, CPAG would have a difficult choice between challenging the policy before its impact can be assessed, or risking the claim becoming out of time. As Question 6 envisages this will lead to an increase in protective claims and unnecessary litigation, the very result the proposals are intended to avoid.

15. There appears to be no justification for this proposal apart from unspecified "anecdotal evidence". The general requirement to bring judicial review cases "promptly" already ensures that cases are not allowed to proceed where there has been unjustifiable delay.

[2] https://www.citizensadvice.org.uk/macnn/child_benefit_delays__the_impact_on_cab_clients-2.htm

Removing the right to an oral renewal where there is a prior judicial process

Question 7: Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a "prior judicial hearing"? Are there any other factors that the definition of "prior judicial hearing" should take into account?

Question 8: Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

Question 9: Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

16. CPAG opposes the proposal to limit the right to an oral renewal hearing. There is no evidence that this is either necessary or desirable. If the proposal is introduced, CPAG does not believe that decisions of the First-tier Tribunal should be included in the definition of "prior judicial hearing". In most cases, unlawful decisions by the First-tier Tribunal (Social Entitlement Chamber) can be challenged by way of appeal to the Upper Tribunal and are therefore outside of the scope of judicial review. Where there is no right of appeal, the need for judicial review may become very important. For example, there is no right of appeal in decisions of the First-tier Tribunal (Asylum Support). The procedure is very short with little time to prepare detailed legal submissions, so in such cases there may be a strong need for an oral hearing before a High Court judge. Equally, where a claimant faces a delay or failure by the FTT to reach a decision their only remedy is judicial review. Their right to bring a claim will be hampered by this proposal and the above proposal on continuous time limits.

Removing the right to an oral renewal where the claim is assessed to be "totally without merit"

Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as totally without merit, there should be no right to ask for an oral renewal?

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

Question 13: Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

17. CPAG opposes the proposal to remove the right to an oral hearing in cases where the claim is assessed to be "totally without merit". The proposal fails to recognise the importance of oral hearings in the English and Welsh justice systems and their role as a

safeguard to ensure that arguable cases proceed. This was emphasised by Lord Justice Laws in Sengupta v Holmes [2002] EWCA Civ 1104, where he stated at paragraph 38:

> "*He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it.*"

18. CPAG has represented cases initially refused on the papers that went on to be successful at a final hearing. For example, in CPAG's overpayments case (*R(CPAG) v Secretary of State for Work and* Pensions [2010] UKSC 54 - see above), permission to apply for judicial review was only granted after an oral hearing. The case was eventually successful in the Supreme Court. This reflects the PLP's findings that over twice as many oral claims are granted permission as are paper claims.

Fees

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

19. CPAG disagrees with the proposal to introduce a fee for an oral renewal hearing. The proposal further limits access to justice at a time when legal aid is being extensively cut and will make it harder for litigants in person to bring claims.

Equality Impact

Question 16: 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 paper?

20. CPAG believes that these proposals would have a disproportionate effect on people with disabilities, and people with mental health problems and learning disabilities in particular. Also it is characteristic of families with children that they lack time and this prevents them from being able to challenge decisions very quickly. These individuals need more time to gather the information necessary to bring a judicial review challenge and would undoubtedly be disadvantaged by shorter time limits.

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