

## **CHANGES TO JUDICIAL REVIEW IN THE CRIMINAL JUSTICE AND COURTS ACT 2015<sup>1</sup>**

### **INTRODUCTION**

1. The Criminal Justice and Courts Act (“**the 2015 Act**”) has made significant changes in the field of judicial review. This paper discusses the relevant provisions, and sets out the early case law in their interpretation.

### **THE NO SUBSTANTIAL DIFFERENCE TEST**

#### ***Section 84 of the 2015 Act***

2. Section 84 of the 2015 Act amends s. 31 of the Senior Courts Act 1981 (“**the 1981 Act**”) with effect from 13 April 2015.<sup>2</sup> Thus, subsections (3C) to (3F) provide:

“(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

- a. may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
- b. must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.”

3. Subsections (2A)-(2C) contain similar provisions in respect of relief.
4. In summary, the effect is to require the Court either to refuse to grant permission or to refuse to grant relief following a full hearing if it appears to the court to be “highly likely

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<sup>1</sup> This paper is based on an earlier paper delivered by Philippa Kaufmann QC, and on an earlier paper I delivered with Darryl Hutcheon.

<sup>2</sup> The 2015 Act also inserts new sub-sections 31(3), (3A) and (3B), which relate to the provision of information by applicants about how they are financing the proceedings; but these provisions are not yet in force.

that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”.

5. The key features of these amendments are:-
  - 5.1 The regime applies at both the permission and substantive stages.
  - 5.2 At the permission stage, the Court may apply the provision of its own motion or, when asked by the defendant, it must do so.
  - 5.3 Following a full hearing of the judicial review application the Court must not grant relief if satisfied that the statutory test is made out.
  - 5.4 It can exercise its powers to refuse permission or relief only when it is satisfied that it is ‘highly likely’ that the outcome would not have been substantially different if the conduct complained of had not occurred.
  - 5.5 Even when it is so satisfied the Court can refuse to exercise the available power to refuse permission or relief if it considers that it is appropriate to do so for reasons of ‘exceptional public interest.’ If so it must certify this to be the case.

***Timing issues***

6. CPR 54(8)(4) has been amended. This requires any defendant who wishes to raise the defence at the permission stage to raise it in summary grounds.
7. Where the matter is not raised on permission it would seem that there is no formal time limit on when it can be raised. In *R (Hawke) v Secretary of State for Justice* [2015] EWHC 3599 (Admin) section 31 was only raised by the Secretary of State’s counsel after judgment had been given and the parties had been allowed time out of court to agree an order. However, the Judge was critical of this and stated that defendants should be astute to take the point at an early stage in the proceedings. As the Judge observed not all judges in the Administrative Court sit there regularly and are not necessarily well versed in its applicable law and so may well not take the point themselves (at paras. 52-53).

***Administrative Court themes/known unknowns***

8. A number of issues arise from these provisions. Some of them are considered below with reference to any relevant judicial consideration.

What does “highly likely” mean (and how high a hurdle does it set)?

9. The first question arising is the extent to which the “highly likely” test differs from the previous test of inevitability at common law.
10. Prior to the amendments to the 1981 Act the court had the power not to grant relief if it concluded that, despite an illegality in the decision making process, the same decision would have been taken even if the public body had acted lawfully. In order for a defendant to succeed on a “no difference” argument, it had to show that “the decision would inevitably have been the same”, see *R (Smith) v. North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 per May LJ at para. 10. May LJ stated further “probability is not enough”.
11. There are good reasons for the narrowness of the common law test. Specifically:
  - 11.1 It avoids the Court being drawn into an assessment of the merits (see *Smith*, per May at para. 10). In *R (Cooper) v. Ashford BC* [2016] EWHC 1525 (Admin) John Howell QC sitting as a Deputy Judge of the High Court stated that discharging the section 31 test “will almost inevitably involve the court forming a judgment on what it considers the underlying merits of the case may be in substitution for that of the person in whom legislation has vested the decision” (at para. 86).
  - 11.2 The Court will need to second guess what is in the mind of the decision maker. This is particularly problematic when the consideration that gave rise to the illegality was not considered at all by the decision maker (John Howell QC in *Cooper* noted that requiring a claimant to show, and a judge to decide, what weight might be given to a matter that has not been considered by a decision-maker is to impose a task that both are ill-equipped to discharge (at para. 86)). It might also be problematic when the decision was made by a committee of decision makers, or where the decision was based on a number of factors some of which may not have been separately identified.

12. A powerful case for the “highly likely” test to be interpreted by the courts as narrowly as the common law test was set out in a document produced by the Bingham Centre for the Rule of Law, PLP and Justice, “*Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015 Part 4*” (“**the Rule of Law**”).
13. What have the Courts said that “highly likely” means thus far?
  - 12.1 In *R (Logan) v. London Borough of Havering* [2015] EWHC 3193 Blake J noted that in approaching section 31 care must be taken not to “undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision making by public authorities, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision maker who has failed to obey the law to the effect that obedience would have made no difference” (at para. 55).
  - 12.2 In *R (Enfield LBC) v. Secretary of State for Transport* [2015] EWHC 3758 (Admin) Elizabeth Laing J stated (obiter) that the threshold is “relatively high” (at para. 106) (whilst this comment has often been cited in support of section 31 being inapplicable, it might be argued that “relatively high” puts the threshold too low).
  - 12.3 In *R (DAT) v West Berkshire Council* [2016] EWHC 1876 (Admin) Elizabeth Laing J suggested that she had applied a “balance of probabilities” test to the statutory framework. This test seems fairly convoluted (and arguably at too low a threshold). It involved the Judge deciding whether she was “satisfied to (a balance of probabilities) standard that, had members applied the right test, they might not have decided to vary” their decision.
14. How has “highly likely” been applied in practice (some examples):
  - 13.1 In *R (Noye) v. Secretary of State for Justice* [2017] EWHC 267 (Admin) Lavender J held that the Secretary of State had made errors of fact when refusing to transfer the claimant to an open prison, despite the Parole Board’s recommendation to the contrary. The Judge rejected a submission under section 31, stating that “it is certainly possible that the Secretary of State, if he had not made the error of law which I have identified... might have reached the same conclusion... However, I cannot say that it is highly likely that he would have done so...” (at para. 52).

- 13.2 In *R (DAT) v West Berkshire Council* [2016] EWHC 1876 (Admin) review was sought of two decisions by the defendant council to cut funding to organisations which supported disabled children. It was found that the council had failed to have regard to several mandatory considerations in its first decision, and that the second decision (which effectively rubber-stamped the first) was unlawful because it was predetermined. The Judge went on to conclude that it could *not* be said in respect of either decision that it was highly likely that the outcome would not have been substantially different (at paras. 65-68, 75). In coming to that conclusion the Judge noted that the council had found the decisions to cut funding to be very difficult. Accordingly if they had taken the mandatory considerations into account they may well have reached a different view. This meant that the defendant’s emphasis on the sympathetic and very serious approach it had taken to the decision in question (which was heavily emphasised at the stage of defending the substantive claim) worked against it when the question of the application of section 31 arose.
- 13.3 A lower threshold was applied by Langstaff J in *R (A and B) v Oxfordshire CC* [2016] EWHC 2419 (Admin). The claim challenged decisions by the defendant council to make cuts to the provision of Children’s Centres, on the basis, in particular, of a failure to consult, a failure to comply with the PSED and a failure to have regard to the statutorily required need assessment. In *obiter* comments, Langstaff J expressly affirmed Blake J’s approach in *Logan* and the need for high threshold to be applied (at para. 62). However, when considering whether the fact that the Full Council had not had the results of the public consultation when reaching a decision, concluded in respect of any error of law as as the Council had been told of “the nature of the responses”, the probability of an identical decision in this case was so strong that the high statutory threshold was met (at para. 62).<sup>3</sup>
- 13.4 An apparently even lower threshold was applied by Gilbert J in *R (Wiggins and Jones) v. Neath Port Talbot County Borough Council* [2015] EWHC 2266 (Admin). The Judge J held (*obiter*) that a failure by the Council to consider the redundancy costs incurred in closing a school when assessing the overall costs savings was highly likely not to have made a substantial difference to the outcome.

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<sup>3</sup> Langstaff’s judgment was upheld by the Court of Appeal in December 2016, but the Court of Appeal did not consider section 31. No transcript of this decision is available yet.

What material should the Court consider?

15. In *R (Logan) v. London Borough of Havering* [2015] EWHC 3193 Blake J stated that any consideration of whether the outcome was highly likely to have been substantially the same “should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded” (at para. 55).
  
16. In *Enfield* Elizabeth Laing J said that “a court should normally expect a witness statement or other document with a statement of truth to support a defendant’s reliance on these amendments” (at [106]). She concluded that the lack of any such document in the case before her would by itself have justified a finding that the statutory threshold was not satisfied.
  
17. In contrast, in *DAT*, Elizabeth Laing J stated that it was *not necessary* for a defendant to submit a witness statement in support where it raised the issue of “no substantial difference” at the permission stage (at para. 73). Whether a witness statement is necessary will depend on the facts.

Is there a burden of proof?

18. In *R (Bokrosova) v. London Borough of Lambeth* [2015] EWHC 3386 Elizabeth Laing J noted that as the effect of section 31(2A) is to deprive a claimant of relief to which he or she might otherwise be entitled, although it does not impose a burden of proof on a defendant, “in accordance with general principle, he who asserts must prove” (at para. 88).

Should a different threshold apply at the permission stage?

19. It is arguable that the Court should be particularly cautious about the application of the “highly likely” test at the permission stage. Arguably, the Court should only be refused at the permission stage if the Court can confidently conclude, without detailed inquiry, that the “highly likely” test is a knock-out blow (see the *Rule of Law* at paras. 1.37-1.40).

20. There is some support for this proposition in *Logan*: Blake J state that he did not “rejoice in the prospects of having to make such assessments in cases like the present at the permission stage. It seems to me to have the potential for increasing the length, cost and complexity of the proceedings and bringing an unwelcome constraint on the court’s flexible assessment of the interests of justice. In the absence of clear pointers at the time that the flaw was a technical one that made no difference, the court will inevitably be drawn into some degree of speculation or second guessing the decision of public authority that has the institutional competence to make it” (at para. 59).

Is there a difference between procedural and substantive errors?

21. In *Logan* Blake J stated that section 31 “was only intended to apply to somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made” (at paras. 55, 59). It will plainly be easier for a Judge to review the effect of a procedural error on a decision without stepping outside his or her proper reviewing role.
22. The case law is not consistent on this point, however. In *Hawke*, for example, the facts were as follows: a convicted prisoner and his wife applied for judicial review of the secretary of state's refusal to move the prisoner (a category B prisoner in a long term detention facility) to a short-term facility closer to the wife's home. The wife was disabled and unable to travel to visit her husband in the prison where he was detained. It was argued, *inter alia*, that the Secretary of State had failed to have regard to the public sector equality duty (“the PSED”) under section 149 of the Equality Act 2010.
23. Holman J found there was no evidence that the secretary of state had had regard to the PSED, but invoked section 31(2A) and refused to grant relief, there being no reason to apply the “exceptional public interest” provision in section 31(2B). In deciding that section 31(2A) was met he rejected an argument by the claimants that the provision should not apply where there had been a breach of an important substantive duty such as that contained in section 149 EA as to apply it to such duties would emasculate them (paras. 59-60). The Judge’s attention was drawn to *Logan* but at [61] he noted that Blake J’s observations at [55] were obiter as he found other reasons to refuse relief.

What is meant by a “substantially different” outcome?

24. The Courts have not yet considered this in any detail. But arguably “substantially different” requires a change in circumstance material enough to make a noticeable difference. The Court should assess whether the flaw made a difference of substance, or rather a difference that was material in nature so as to effect the outcome, see *Rule of Law* at paras. 1.25-1.28.

What will constitute “reasons of exceptional public interest”?

25. The Courts have given some consideration as to how to apply it, but have not identified a coherent narrative of when and why the test will be applied.

23.1 In *DAT Elizabeth Laing J* stated that there was “an exceptional public interest in ensuring that when local authorities cut spending in a way which affects vulnerable children, they are seen to observe the relevant legal provisions...” (at para. 68).

23.2 In *Enfield Elizabeth Laing J* (a challenge to a decision not to refurbish a housing estate) held (obiter) conducted a balancing exercise between the general public interest in a public body complying with its promises on the one hand, and the following factors on the other: (i) the Council’s difficult financial position, (ii) the balance to be struck between the interests of the tenants of the specific estate and of the Council’s other tenants and those on the waiting list, (iii) the urgent need for work to be done to the estate, and (iv) the need for residents to be certain about the future of the estate. She held that had she needed to decide the point, she would have decided that it was not appropriate to grant relief on public interest grounds.

What relief does section 31(2A) apply to?

26. In *Logan Blake J* held that “relief” in section 31(2A) of the 1981 Act does not include a declaratory judgment (this not being one of the forms of relief listed in subsection (1)). It followed that whatever the outcome of the “highly likely” assessment, if permission was granted there were no restraints on the Court delivering its judgment on the issue. It would, however, exclude a declaration (see *Hawke*, per Holman J at para. 57).

## **TOWN AND COUNTRY PLANNING ACT**

27. Sections 91-2 and Schedule 16 of the 2015 Act introduced a number of amendments into Part 12 of the Town and Country Planning Act 1990 which came into effect in October 2015. Most important were the amendments to section 288 proceedings (broadly, the statutory appeal against the decision of a planning inspector). The first is that a requirement to obtain leave has been introduced (previously the appeal was of right).
28. The second was to impose a strict 6 week time limit on section 288 proceedings (this brought section 288 proceedings into line with the time limit for applications for judicial review of grants of planning permission by local authorities).

## **INTERVENERS AND COSTS**

29. Section 87 of the 2015 Act has been in force since 13 April 2015. Its effect is to introduce stringent new rules governing the recovery and payment of costs by interveners in High Court and Court of Appeal judicial review proceedings.
30. First, an intervener cannot recover their costs of participating in the judicial review from any relevant party<sup>4</sup> other than in exceptional circumstances (sections 87(3) and (4)).
31. Second, on an application by a relevant party, the court must, other than in exceptional circumstances, order an intervener to pay the costs that party incurred as a result of the intervener's involvement, where any of the following conditions is satisfied:
  - a. The intervener has acted, in substance, as the sole or principal applicant/defendant/appellant/respondent;
  - b. The intervener's evidence and representations taken as a whole have not been of significant assistance to the court;
  - c. A significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the relevant stage in the proceedings; or

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<sup>4</sup> A relevant party means a person which is or has been an applicant/defendant or an appellant/respondent at any stage of the proceedings; as well as anyone else who is directly affected by the proceedings and on whom the application for judicial review was served: section 87(10).

- d. The intervener has behaved unreasonably.
32. These conditions are loosely worded and undoubtedly have had, and will continue to have, a deterrent effect on would-be interveners.

### **COSTS CAPPING ORDERS**

33. On 8 August 2016, sections 88-90 of the Criminal Justice and Courts Act 2015 came into force introducing a new regime governing the grant of protective costs orders, henceforth called costs capping orders, in respect of all judicial reviews commenced after that date. To a large extent they put on a statutory footing the common law principles developed by the courts in and since *Corner House*. But the changes were motivated by a concern that the principles in *Corner House* had been watered down with the effect of making protective costs orders too easily available to claimants. Accordingly the new provisions make some changes which provide public authorities with a greater measure of protection.
34. By section 88(1) CCOs can only be made in accordance with ss. 88 and 89. The key change from the old regime is the introduction of a number of mandatory pre-conditions which must be satisfied before a CCO can be granted. These are as follows:
- 34.1 CCO can only be granted once permission has been granted. This does not mean that parties should wait until a permission decision to apply for a CCO – in fact they are expected to apply on issue (PD46 para 10.2).
- 34.2 CCO can only be granted if an application has been made by the claimant in accordance with rules of court. These are provided for in CPR Part 46, Section VI, rr 46.16-46.19 and require the application to be made on notice in accordance with CPR Part 23; a summary should be provided of their resources, including major assets and likely future contributions from third parties; a summary of the costs the parties are likely to incur through the proceedings; and, if they are a body corporate, whether they can demonstrate they can meet likely liabilities arising from the claim.
- 34.3 The court may make a costs capping order only if it is satisfied that—
- 34.3.1 the proceedings are public interest proceedings,

34.3.2 in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and

34.3.3 it would be reasonable for the applicant for judicial review to do so.

35 The last condition reflects the key factors identified in *Corner House* and applied in subsequent cases. However, setting these down as mandatory conditions reflects a break from the jurisprudence which followed *Corner House* and which tended to emphasise that the guidance in that case had to be applied with some flexibility in accordance with the circumstances of the case: see e.g. *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [23], advocating a “non-rigorous approach”.

36 Section 88(7) provides that proceedings are only ‘public interest proceedings’ where:-

36.1 an issue that is the subject of the proceedings is of general public importance,

36.2 the public interest requires the issue to be resolved, and

36.3 the proceedings are likely to provide an appropriate means of resolving it.

37 In deciding whether the proceedings meet the definition the matters to which the court must have regard include under sub-section 8 —

37.1 the number of people likely to be directly affected if relief is granted to the applicant for judicial review,

37.2 how significant the effect on those people is likely to be, and

37.3 whether the proceedings involve consideration of a point of law of general public importance.

38 Section 89 is concerned to identify some matters to which the court must have regard in determining whether to grant a CCO, which very closely track the relevant issues identified in the *Corner House* line of cases:

38.1 the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

- 38.2 the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
- 38.3 the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
- 38.4 whether legal representatives for the applicant for the order are acting free of charge;
- 38.5 whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

39 Sub-paragraph (2) makes it mandatory for any CCO to include a reciprocal cap on the Respondent’s liability for costs. There is no requirement that the cross caps be the same. It had previously been established, at least as a general rule, that applicants benefiting from protective costs orders should themselves be limited to recovering “reasonably modest” costs, meaning those of an advocate of junior counsel status: *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 at [25]). It seems likely that courts will continue to have regard to that (by no means uncontroversial) principle.

40 By section 90 the Secretary of State is empowered to make regulations whose effect is to dis-apply ss. 88-9 in cases concerning environmental issues. No such regulations have been made.<sup>5</sup> However, the special rules that govern CCOs in Aarhus Convention cases – as set out in CPR Part 45.41 – 45.44 – continue to apply.<sup>6</sup> In those circumstances, section 90 may be of little importance other than in cases (if any) pertaining to the environment which fall outside the scope of the Aarhus Convention.

41 Some outstanding areas of uncertainty in relation to the new CCO rules include:

- 41.1 The status of the procedural guidance in *Corner House* and subsequent cases. The Court of Appeal in *Corner House* suggested that applications for protective costs

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<sup>5</sup> Nor have regulations been made pursuant to sections 88(9) and 89(3), which allow for statutory instruments to make changes to the matters to which the court must have regard when deciding whether to grant a CCO and, if so, on what terms to grant it.

<sup>6</sup> These rules take effect without an order by the High Court or Court of Appeal. Sections 88 – 90 only limit the circumstances in which *orders*, as opposed to rules, can be made: see s 88(1).

orders should ordinarily be dealt with on the papers, and that a rehearing if requested should last no more than an hour: at paras. 78 and 79. See also *Compton* at para. 9. The new provisions in Pt 46 of the CPR do not adopt this guidance.

- 41.2 CCOs in the Supreme Court: sections 88 – 90 do not limit the Supreme Court’s power to make protective costs orders, which is set out at Supreme Court Rules rule 46(1) and in UKSC Practice Direction 13, at para 2.2. The Court will therefore apparently retain its discretion to deal with applications for CCOs/protective costs orders as it sees fit, though no doubt considering the same factors as are now at the heart of the more rigid statutory framework in sections 88 – 90.

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**Matrix**

**5 April 2017**