Judicial review: the wrong steps for the wrong reasons

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It is annoying for the government to be told that its actions are unlawful. It is embarrassing for the Home Office to have the disarray in the immigration system exposed in court. To some in the Conservative party, long hostile to judicial review, the attraction of reducing the availability and effectiveness of judicial review is self-evident. To further this end justice secretary Chris Grayling proposes the wrong reforms, putting forward pretended reasons for doing so, while relying upon distorted evidence.

Misleading justification for the proposals

The proposed curbs are said to stem from 'the government's plans to tackle red tape, promote growth and stimulate economic recovery, [with] reform of judicial review as a key element of this plan'. Tellingly however, only trivial changes are proposed to the two types of judicial review that could plausibly be linked to economic growth – procurement and planning judicial reviews, and even the proposals themselves do not suggest that fewer judicial reviews will result.

The proposals also suggest that the threat of litigation has led to an unduly defensive mindset on the part of public officials. This is a startling claim, especially in the immigration context where the poor quality of initial decisions has been highlighted in report after report. In any event, the fiasco surrounding the Virgin west-coast rail franchise bid suggests that a more careful approach to decision-making could be beneficial.

The true target of the proposed reforms emerges in the discussion of judicial review in immigration and asylum matters, where access to justice is already being undermined through the removal of legal aid for most types of case. The proposals conveniently seek to eliminate some of the more embarrassing types of claim, where the Home Office has persisted in unlawful activity over an extended period.

Dodgy statistics

Unsurprisingly much is made of the growth in the numbers of challenges in this field, especially since 2005. However, the proposals go further and brand the majority of these applications as weak, hopeless or abusive.

At first sight the statistics appear to bear out this description. After all, if only around one in six applications for permission considered by the court are granted permission, then doesn't that imply that the majority of the cases brought are weak at best? However, for those with experience of the system, it is where the figures are silent that is the most telling point.

Firstly, the figures take no account of the fact that the strongest cases will rarely be granted permission. The reason is simple. The claim is dealt with by the defendant's legal department. Where there is a clear error of law they will naturally advise the defendant to concede the claim at the very earliest opportunity rather than mounting a defence and an offer to settle the matter by consent follows: usually in the format that the defendant will withdraw the decision and the claimant will withdraw the claim for judicial review prior to the court considering permission.

However, the fact that these claims were actually successful appears nowhere in the statistics the proposals quote, nor is there any method of calculating their number from the statistics provided. The proposals merely state, rather shamefacedly, 'we do not collect data centrally on these matters'.

Secondly, equating the refusal of permission with a claim that has failed is misleading. Often the defendant will grant the very relief sort (usually the withdrawal of a decision) and successfully seek the refusal of permission on the basis that the claim is now 'academic'. Sometimes the claimant renews the claim following refusal on the papers, and at that point it becomes clear to the defendant that the claim is likely to succeed, and they then propose withdrawal to the claimant. In each case an ultimately successful claim is listed under those refused permission. And once again the statistics provided do not allow us to calculate the percentage of cases that come into this category.

The depressing thing about the reliance upon these statistics is that very similar arguments were recently used by the government in both *Bahta* and *AL (Albania)* (in the context of applications to the Court of Appeal) and the virtually identical objections raised led the Court of Appeal to describe the statistics in open court as 'not helpful' and refuse to place any reliance upon them.

Caseload and delay – the wrong remedy

The proposals are on firmer ground where they raise the sheer number of judicial review claims and the length of time cases can take to conclude. These two issues are interlinked, and the surest way of reducing delay in the court system is to reduce the number of cases, (though claimant solicitors will also be very familiar with receiving repeated letters from the Treasury solicitor requesting more time to respond to a claim).

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Rather than curtailing access to justice through attempting to prevent some claims from being brought by altering limitation defences, and others from succeeding through removing the opportunity to argue the case in court on the basis of evidence it describes as 'anecdotal', the government could simply, cheaply and effectively achieve the same result through two simple steps.

Most obviously, there are whole classes of claim that should never have needed judicial review in the first place. For example, applications are often refused and certified as incapable of success in the tribunal (thereby removing the possibility of appealing to the tribunal). Upon challenge these cases are routinely settled upon the basis that the matter can proceed in the tribunal after all. Given that in virtually all cases this would have led to a cheaper and quicker resolution of the issue, a more realistic attitude at the certification stage would remove whole swathes of claims from the High Court.

Likewise, the concerns expressed about the number of claims brought sit oddly with the actions of the UK Border Agency in 'destination cases'. These are classes of claim that arise from time to time due to international and legal developments, in which there are generic challenges to any enforced removal to a given country.

For example, in the past there have been challenges to decisions to remove to Zimbabwe and Greece, and removals to Italy are a recent example. The essential point is that in all of these cases the administrative court would routinely grant an injunction preventing removal upon the lodging of a claim, pending the resolution of a test case. By persisting in setting removal directions to these countries during these periods, UKBA necessitated the bringing of thousands of claims for judicial review and achieved very little. A voluntary moratorium upon removals in these circumstances would enable UKBA to devote its resources to its numerous other problems (such as the hundreds of thousands of cases that have been awaiting a decision for years) while freeing up the administrative court.

Or perhaps the government is not keen on 'providing an effective mechanism for challenging the decisions of public bodies to ensure that they are lawful'?

James Packer *is a director at Duncan Lewis*