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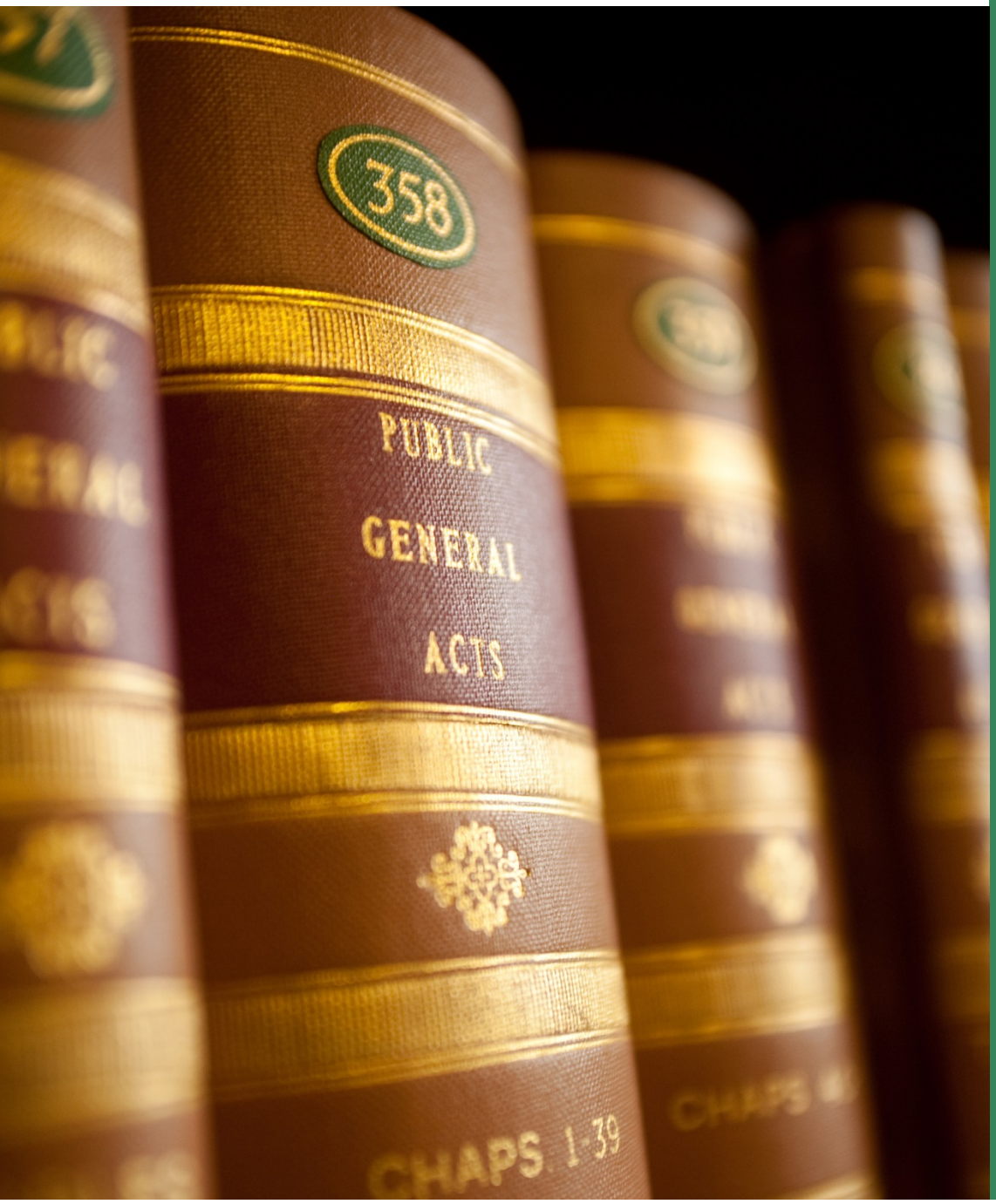
Judicial Review: Government reforms in the 2010-15 Parliament

By Joanna Dawson
Alexander Horne



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Summary

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body.

In December 2012, the Government published a consultation paper entitled Judicial Review: Proposals for Reform which ran between 13 December and 24 January 2013. The consultation sought views on a package of measures to stem the growth in applications for judicial reviews.

In April 2013, the Government published its response to the consultation, indicating that a number of measures would be introduced. These included:

- A reduction in the time limits for bringing a claim from three months to six weeks in planning cases and 30 days in procurement cases;
- The introduction of a new fee for an oral renewal hearing, where the claimant does not accept a refusal of permission on the papers, and asks for the decision to be reconsidered at a hearing (an "oral renewal"); and
- The removal of the right to an oral renewal where the case is assessed as totally without merit on the papers.

These measures were implemented through changes to the *Civil Procedure Rules* in July 2013.

Another consultation, Judicial Review: proposals for further reform, was published in September 2013 and ran until November 2013. It sought to find further ways to reduce time and money spent on unmeritorious judicial review claims.

Following this consultation the Government published the Criminal Justice and Courts Bill on 5 February 2014 which brought forward provisions to implement a number of the proposals contained in the consultation. The Bill gained Royal Assent on 12 February 2015.

1. Background

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision. This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way.[1]

Traditionally, there have been three grounds for bringing judicial review proceedings:

- illegality: for example, the decision was not taken in accordance with the law that regulates it, or goes beyond the powers of the decision making body;
- irrationality: for example, that it was not taken reasonably, or that no reasonable person could have taken it;
- procedural irregularity: for example, a failure to consult properly or to act in accordance with natural justice or with the underpinning procedural rules.[2]

Grounds for review have developed in recent years to take into account the changing legal landscape and also take account of other statutory duties. Further details of these developments can be found in a historic Library Research Paper, Judicial Review: A Short Guide to Claims in the Administrative Court – although it should be stressed that time limits and other rules have changed since that paper was published (see below). Anyone thinking of pursuing a legal claim should seek professional legal advice.[3]

1 See: Judiciary of England and Wales website, Judicial Review
2 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374
3 See also: Treasury Solicitor, The Judge Over Your Shoulder, 4th Edition, 2006

2. Consultation – Judicial Review: Proposals for Reform

In December 2012, the Government launched a consultation entitled Judicial Review: Proposals for Reform. The consultation ran until 24 January 2013, and sought views on new measures to try to minimise the number of applications for judicial reviews. The consultation webpage explained further:

> The Government is seeking views on a package of measures to stem the growth in applications for judicial reviews. The measures aim to tackle the burden that this growth has placed on stretched public services whilst protecting access to justice and the rule of law. The engagement exercise seeks views on proposals in three key areas; reducing the time limits for bringing a judicial review relating to procurement or planning, bringing them into line with the appeal timetable which already applies to those cases.
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> It also seeks views on removing the right to an oral renewal where a judge refuses permission where there has been a prior judicial process, or where the claim was judged to be totally without merit. The right to appeal to the Court of Appeal would be on the papers. Finally, it seeks views on the introduction of a new fee for an oral renewal so that fees charged in Judicial Review proceedings better reflect the costs of providing the service. If the oral renewal is successful, the fee for post permission stages would be waived.[4]

In his foreword to the consultation, the Lord Chancellor, Chris Grayling, indicated that the proposed reforms aimed to filter cases at an early stage:

> The intention of these reforms ... [is] to make sure that weak or hopeless cases are filtered out at an early stage so that genuine claims can proceed quickly and efficiently to a conclusion. In this way we will ensure that the right balance is struck between maintaining access to justice and the rule of law on the one hand, while reducing burdens on public services and removing any unnecessary obstacles to economic recovery on the other.

The consultation was preceded by a speech by the Prime Minister in which he had promised to crack down on "time wasting" caused by legal challenges.[5]

The consultation paper set out the legal framework for Judicial Reviews and the remedies available when a Court concludes a decision was not lawful:

> 15.Judicial Review proceedings are governed by section 31 of the Senior Courts Act 1981 and the procedure is set down in the Civil Procedure Rules (CPR), and in particular Part 54 (and the accompanying Practice Directions). They are generally heard in the Administrative Court, which forms part of the Queen's Bench Division of the High Court. Usually, they are heard by a High Court Judge, but on occasion may be heard by the Divisional Court (comprising two Judges).

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4 See: https://consult.justice.gov.uk/digital-communications/judicial-review-reform

5 *BBC Online*, "PM to crack down on 'time wasting' appeals", 19 November 2012

> 16. Judicial Review is concerned with the lawfulness of the decisions taken. It is not the Court's role to substitute its own judgment for that of the decision maker. Where the Court concludes that a decision was not taken lawfully it may make one of the following orders:
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> - a quashing order, setting aside the original decision;
> - a mandatory order, requiring the public body to do something or take a particular course of action;
> - a prohibiting order, preventing a public body form doing something or taking a particular course of action;
> - a declaration, for example, that a decision is incompatible with the European Convention on Human Rights; and
> - an injunction, for example, to stop a public body acting in an unlawful way.

Responses to the consultation

Responses from practitioners and legal academics were broadly negative. Mark Elliot, (Reader in Public Law, University of Cambridge) argued that the proposed changes would make it harder for some challenges to be made:

> These ostensibly dry proposals do not appear to amount to a "war" on judicial review, not least because there is no attempt to immunize any categories of Government decisions against all judicial scrutiny. But this does not mean that the proposals are trivial. Shorter time limits will undoubtedly make it harder for some challenges to be made, given the time needed to put together some applications. Meanwhile, reducing the scope for challenging initial refusals of permission to seek judicial review arguably assumes that the initial stage is more robust than it actually is.[6]

Barrister, Adam Wagner, questioned some of the underlying assumptions made in the consultation, specifically that there was no analysis showing why numbers of Judicial Reviews had risen over time:

> [T]here is no analysis as to *why* there are so many claims compared to the 1970s. The underlying assumption seems to be that more challenges to public authorities is bad. But why so? There is at least a case for the increase being due to the increase in the size of the state, the growth in EU and human rights law and the huge increase in immigration. Surely any major reforms which seek to reduce something must be supported by at least some substantive analysis of why that thing has increased.[7]

Some respondents questioned whether the statistics provided in the consultation supported the Government's case. The Government had acknowledged that the main growth in judicial review claims had been in the field of asylum and immigration and that it had introduced proposals in the *Crime and Courts Bill* to allow all immigration, asylum

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6 M. Elliott, 'Judicial review – why the Ministry of Justice doesn't get it' UK Constitutional Law Blog (16th December 2012) (available at http://ukconstitutionallaw.org)

7 A. Wagner, 'Quicker, costlier and less appealing: plans for Judicial Review reform revealed', UK Human Rights Blog, 13 December 2012

or nationality Judicial Reviews to be heard in the Upper Tribunal.[8] Nonetheless, the consultation noted that:

> There has been a significant growth in the use of Judicial Review to challenge decisions of public authorities, in particular over the last decade. In 1974, there were 1609 applications for Judicial Review, but by 2000 this had risen to nearly 4,250, and by 2011 had reached over 11,000.

The consultation also provided statistics on success rates. In 2011, 16% of applications were granted permission to bring Judicial Review proceedings:

> 31. In the majority of applications considered by the courts, permission to bring Judicial Review proceedings is refused. Of the 7,600 applications for permission considered by the Court in 2011, only around one in six (or 1,200) was granted. Of the applications which were granted permission, 300 were granted following an oral renewal (out of around 2,000 renewed applications that year).
>
> 32. By the time the case reaches a substantive hearing, case outcomes are more balanced. In 2011, 396 applications for Judicial Review were disposed of, and the claimant was successful in 174 of them. But even where the claimant is successful, it may only result in a pyrrhic victory with the matter referred back to the decision-making body for further consideration in light of the Court's judgment.

Varda Bondy (Director of Research, Public Law Project) and Professor Maurice Sunkin published an article entitled: Judicial review reform: Who is afraid of judicial review? Debunking the myths of growth and abuse. This made use of earlier empirical research carried out by the University of Essex and the Public Law Project, which they described as "probably the most comprehensive independent information on the use and impact of judicial review in England and Wales in recent years." They indicated that their intention was not to provide a detailed response to the consultation, but rather "to question the evidence-base for the proposed reforms and to propose that if the government is genuinely concerned to relieve pressure on the courts and hard-pressed public bodies, these reforms are not the way to go and may well have the reverse effect."

The Immigration Law Practitioners Association said, amongst other things, that:

> There is little or no consideration of the fact that significant numbers of judicial review claims settle pre- and post-permission, suggesting that far from being unmeritorious, or deliberate 'delaying' tactics, the claims were properly and responsibly brought and conducted, and that the parties managed to achieve a resolution of the claim without using further court time and resources.[9]

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[8] See also, *BBC Online*, 'How common are 'time-wasting' appeals against government?', 19 November 2012; V. Bondy and M. Sunkin, 'Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse.' UK Const. L. Blog, 10th January 2013

[9] *Guardian*, 'Legal fee rises will stem 'soaring' judicial review cases, says MoJ', 23 April 2013

Implementation

The Civil Procedure (Amendment No 4) Rules 2013 implemented these changes by way of amendments to Civil Procedure Rules (CPR) 52 and 54, which came into effect on 1 July 2013.[10]

Time limits

Previously, a judicial review claim had to be brought within three months of the grounds for the claim first arising.[11] Under the new rules the claim form for an application relating to a planning decision must be filed within six weeks of the date when grounds for the application first arose, and in relation to a procurement decision,[12] within 30 days. The amendment does not apply to a judicial review application where the grounds arose before 1 July 2013.[13]

One of the effects of this change is greater consistency with statutory time limits. The new planning time limit will now be in line with the right to challenge under the Town and Country Planning Act 1990 (section 288) and the new procurement time limit is consistent with the time limit laid out the *Public Contracts Regulations 2006*, under which most procurement decisions are challenged.

Permission applications

The new rules also amend CPR 54.12 so that where the court refuses permission to proceed and records the fact that the application is totally without merit, the claimant may not request an oral renewal. This amendment does not apply to judicial review claims where the claim form was filed before 1 July 2013.

Fees for claims for judicial review

The consultation paper also proposed the introduction of a new fee, payable when an application is made for an oral renewal of an application for permission, in order to encourage the applicant to weigh up the potential benefits of the application against the costs.[14]

This proposal has now been implemented. From 7 October 2013 where the court, without a hearing, refuses permission to proceed, the claimant may not appeal but may request the decision to be reconsidered at a hearing. If such a request is made, the claimant must pay a fee of £215 when lodging the request within 7 days of the service of the order refusing permission.[15]

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10 For a useful summary of the changes, see: e.g. K. Olley, 'One bite of the cherry, double-quick time (and be ready to pay the congestion charge' *Solicitors Journal*, 12 September 2013

11 CPR 54.5

12 Governed by the *Public Contracts Regulations 2006*

13 The planning decisions affected by this rule change will be any decision made by the Secretary of State or local planning authority under the planning acts. Decisions on planning policy are excluded from the reforms. Procurement decisions governed by the Public Contracts Regulations 2006 for these purposes means any decision the legality of which is or may be affected by a duty owed to an economic operator under Regulation 47.

14 Para 103.

15 See the Judicial Review and Costs section of the Ministry of Justice website [accessed 10 February 2014].

3. Consultation – Judicial Review: proposals for further reform

A subsequent consultation Judicial Review: Proposals for further reform ran from September to November 2013 and examined proposals in six areas with the aim of "reducing the burden of judicial review".[16]:

> [T]he use of judicial review has expanded massively in recent years and it is open to abuse. The Government is concerned about the time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made. Moreover, a significant proportion of these weak applications are funded by the tax payer – through the expense incurred by the defendant public authority, by the court resource entailed, and in some cases by legal aid or by the public authority bearing the claimant's legal costs. This is unsustainable, particularly when the judicial reviews are brought by groups who seek nothing more than cheap headlines.[17]

It sought to address three issues: the impact of judicial review on economic recovery and growth, where unmeritorious challenges can lead to delays and extra costs in infrastructure projects; the inappropriate use of judicial review as a campaign tactic; and the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.

Proposals for reform were put forward in relation to:

- How the courts deal with judicial reviews based on minor defects in the decision making process that would have made no difference to the final outcome;
- Proposals to rebalance the system of financial measures so that those involved have a proportionate interest in the costs of the case, including a limit on payments to legal aid providers for their work on an application for permission to cases where permission is granted by the court;
- Measures aimed at speeding up appeals to the Supreme Court in important cases;
- A new specialist "planning chamber" in the Upper Tribunal for challenges relating to major developments;
- The question of standing, that is, who is entitled to apply for judicial review.

Responses to the consultation

Again, the responses to the consultation were broadly negative.

The legal NGO, JUSTICE, described the proposals as "ill-considered, poorly evidenced and ill-advised".[18] The human rights NGO, Liberty, expressed concern over the future availability of Judicial Review.[19]

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16 Ministry of Justice Judicial Review: Proposals for further reform September 2013 Cm 8703. See also Judicial Review - proposals for further reform: the Government response February 2014 Cm 8811 & Annex A: Summary of responses

17 *Ibid*, Foreword

18 Judicial Review: proposals for further reform – JUSTICE Response November 2013

Law firm Leigh Day (which has often acted for claimants bringing judicial review proceedings) suggested that the changes were mostly political:

> The changes to date, and these further proposals, are not driven by any objective problems with judicial review but by political ideology and an agenda which is inimical to a modern liberal democracy and the rule of law.[20]

The majority of respondents to the consultation opposed the proposals to alter the existing approach to challenges brought on the basis of procedural defects which could not have made a difference to the original outcome. Concerns were expressed that the changes reflected an insufficient appreciation of the importance of decision makers following the correct legal process, regardless of the substantive outcome, and that the procedural changes might lead to an increase in costs incurred at an early stage.

On the various proposals to rebalance the system of financial measures to ensure that those involved have a proportionate interest in costs, the majority of respondents were concerned that the measures would act as a deterrent against legal representatives and third party interveners taking on difficult but important cases, because of the financial risks. There was also broad agreement that the existing procedures work well, the courts are familiar with them, and that the case for reform had not been made.

The majority of respondents were in favour of proposals to speed up appeals to the Supreme Court in important cases.

The majority of respondents were opposed to the proposal to create a specialised planning chamber in the Upper Tribunal, feeling that the Government should first assess the impact of other recent changes to judicial review and the planning fast track before introducing further changes.[21] However, the proposal to introduce a permission stage filter in planning cases attracted the support of the majority.

In response to the proposal to restrict the test for standing – which governs who may bring a judicial review – so that only those with a direct interest would qualify, the majority were firmly opposed. The Senior Judiciary outlined why they did not agree with the Government's proposals in their response to the consultation:

> The test of standing in judicial review must be such as to vindicate the rule of law. Unlawful sue of executive power should not persist because of the absence of an available challenger with a sufficient interest. The existing test of standing meets that requirement and we do not consider there to be a problem with it. We do not agree with the suggestion that standing should be limited in some way to those with a direct interest in the subject matter and that the public interest in vindication of the rule of law

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19 Liberty's Response to the Ministry of Justice's Consultation 'Judicial review: proposals for further reform' November 2013

20 Response of Leigh Day to the Ministry of Justice Consultation Judicial Review: proposals for further reform 28 October 2013

21 Annex A: Summary of responses

> should play no part in the court's determination of whether a person has standing to bring a claim.
>
> Any consideration of a new test of standing must address head-on the effect this may have on the rule of law. The consultation paper fails to do so.[22]

This view was shared by other respondents, including the Bar Council, the Law Society, practitioners, and NGOs.[23]

The Criminal Justice and Courts Bill

On 5 February 2014, the Lord Chancellor, Chris Grayling, explained that the Government intended to bring forward changes in the Criminal Justice and Courts Bill to give effect to several of the proposed reforms.[24] However, some of the more controversial proposals were dropped, including that to limit standing and the availability of legal aid in certain circumstances, and to transfer planning cases to the Upper Tribunal.

Proposals that were taken forward in the Bill included: 'leapfrog appeals'[25]; wasted costs orders; and a requirement that the High Court or Upper Tribunal refuse to grant a remedy or permission on an application for judicial review if it considered it highly likely that the defendant's conduct in the matter in question would not have affected the outcome for the applicant.

It also included clauses about requirements for the provision and use of information about financial resources (so that claims could not be brought in a way that limited a person's proper cost exposure – for example where a claim is funded by an anonymous backer or company created for the purpose)[26]; and proposed changes on interveners' costs.[27] Finally, the Bill sought to remove the ability of the High Court and the Court of Appeal to award costs capping orders (known as Protective Costs Orders, or "PCOs") in a judicial review case unless specified criteria were met.[28]

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22 Judiciary of England and Wales Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform' November 1 2013

23 Para 105

24 HC Deb 5 February 2014 cc WS27-28

25 Leapfrog appeals are cases which move directly from the High Court to the Supreme Court

26 Criminal Justice and Courts Bill, Fact Sheet: Reform of Judicial Review 5 February 2014. Available from www.gov.uk/ government/publications/criminal-justice-and-courts-bill-fact-sheets [accessed 10 February 2014]

27 As introduced, the Bill established a presumption that interveners in a judicial review will pay their own costs and, in addition, any costs incurred by any other party because of the intervention, unless there are exceptional circumstances which justify a different order. The question of who should bear the costs arising from the intervention of a third party is currently in the discretion of the court. By convention, third parties generally bear their own costs, but do not bear other costs, or benefit from costs awards. This reform seeks to ensure that those who choose to become involved in litigation have a more proportionate financial interest in the outcome

28 A cost capping order is an order that removes or limits the liability of a party to the proceedings to pay another party's costs incurred in bringing or defending a judicial review. Such orders would only be available if the judicial review proceedings are "public interest proceedings", meaning that an issue being argued in the case is of general public importance, it is in the public interest for that issue to be resolved, and the judicial review proceedings are an appropriate means of resolving the issue.

A number of the proposals in the Bill were challenged and the government was defeated on a number of occasions in the House of Lords.[29] Following concessions, outstanding issues on the Bill were resolved on 21 January 2015 and the Bill received Royal Assent as the Criminal Justice and Courts Act 2015 on 12 February 2015.

The Labour party objected to many of the government's reforms contained in the 2015 Act and indicated that if elected in 2015, it would repeal them.[30]

A brief technical summary of the changes that were made by Part 4 of the Act (via sections 84-92) is given in paragraphs 93-100 of the explanatory notes to the Act.[31]

29 See: e.g. *BBC Online*, "Peers defeat government over judicial review curbs", 27 October 2014; *The Guardian*, "House of Lords rejects government plans to restrict judicial review access", 9 December 2014; *The Guardian*, "Plans to restrict judicial review face further concessions", 13 January 2015; *Law Society Gazette*, Lawyers and MPs round on 'absurd' JR reforms, 19 January 2015

30 *Law Society Gazette*, "Labour repeats pledge to repeal JR reforms", 20 March 2015

31 Explanatory notes, *Criminal Justice and Courts Act 2015*

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