These notes refer to the Criminal Justice and Courts Act 2015 (c.2) which received Royal Assent on 12 February 2015

CRIMINAL JUSTICE AND COURTS ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – Judicial Review

Judicial review in the High Court and Upper Tribunal

Section 84: Likelihood of substantially different outcome for applicant

631. Section 84 amends section 31 of the Senior Courts Act 1981 ("the 1981 Act"), which sets out the remedies available on judicial review and the requirement to get permission to proceed to judicial review. The amendments require the High Court to refuse a remedy or permission on an application for judicial review if it considers it highly likely that the defendant's conduct in the matter in question would not have affected the outcome for the applicant. Section 84 also amends sections 15 and 16 of the Tribunals, Courts and Enforcement Act 2007 to make similar provision for the Upper Tribunal when it is operating in England and Wales. Section 15 makes provision for the Upper Tribunal's "judicial review" jurisdiction.

632. *Subsection (1)* inserts new subsections (2A), (2B) and (2C) into section 31 of the 1981 Act. New subsection (2A) provides that, subject to new subsections (2B) and (2C), the High Court (a) must refuse to grant a remedy, and (b) may not award damages on an application for judicial review, where it considers it highly likely that the outcome for the applicant would have been substantially the same had the conduct complained of not occurred. For example, a public authority might fail to notify a person of the existence of a consultation where they should have, and that person does not provide a response where they otherwise might have. If that person's likely arguments had been raised by others, and the public authority had taken a decision properly in the light of those arguments, then the court might conclude that the failure was highly unlikely to have affected the outcome. If it did, unless new subsection (2B) applied, new subsection (2A) would mean the court could not grant a remedy, and so the original decision would stand (in the absence of other challenges or factors).

633. New subsection (2B) provides that the court may grant a remedy or an award of damages on an application for judicial review, despite new subsection (2A), where the court considers it appropriate to do so for reasons of exceptional public interest. Where the court applies new subsection (2B) and grants a remedy or an award of damages, new subsection (2C) requires the judge to certify that the condition in new subsection (2B) is satisfied.

634. *Subsection (2)* inserts new subsections (3C), (3D), (3E) and (3F) into section 31 of the 1981 Act. These new subsections will apply to a consideration of whether to grant permission to make an application for judicial review.

635. New subsection (3C) provides that the High Court may of its own motion (without a party requesting it to) or must, on the application of the defendant, consider whether the conduct complained of would have made a substantial difference to the outcome for the applicant when considering whether to grant permission to make an application

for judicial review. If it considers it highly unlikely that there would have been any substantial difference to the outcome, new subsection (3D) requires the High Court to refuse permission save where new subsection (3E) applies.

636. New subsection (3E) provides that the court may grant permission on an application for permission, despite new subsection (3D), where the court considers it appropriate to do so for reasons of exceptional public interest. Where the court applies new subsection (3E) and grants permission, new subsection (3F) requires the judge to certify that the condition in new subsection (3E) is satisfied.

637. *Subsection (3)* inserts new subsection (8) into section 31 of the 1981 Act which provides the meaning of the words "the conduct complained of" which are used in new subsections (2A) and (3C). Broadly, the conduct complained of will be the ground(s) for the judicial review. In the example above (concerning the consultation), the conduct complained of would be the failure to notify the individual.

638. *Subsections (4), (5) and (6)* make parallel provision to subsections (1), (2) and (3) for judicial reviews arising under the law of England and Wales in the Upper Tribunal by amending sections 15 and 16 of the Tribunals, Courts and Enforcement Act 2007.

Section 85: Provision of information about financial resources

639. Section 85 provides that where an applicant applies to the High Court under the law of England and Wales for permission to proceed with a judicial review, permission cannot be granted unless the applicant provides information about the financing of the judicial review.

640. *Subsection (1)* amends section 31(3) of the 1981 Act to prevent the High Court from granting permission for an applicant to proceed to judicial review unless the applicant has provided the court with information specified in rules of court on how the judicial review is financed.

641. *Subsection (2)* inserts new subsections (3A) and (3B) into section 31 of the 1981 Act which make provision about the information that rules of court may require the applicant to provide. Subsection (3A)(a) provides that information that may be required includes the source, nature and extent of any financial support that has been or is likely to be provided to the applicant for use in the judicial review proceedings. Subsection (3B) stipulates that these rules of court may only require the applicant to provide information which identifies a person who has provided financial support, or who is likely to provide it, if that financial support exceeds a level to be set in the rules. Subsection (3A)(b) further provides that if the applicant is a corporate body that cannot demonstrate that it has the financial resources needed to meet its costs liabilities, then rules may require information to be provided about the body's membership and members' ability to provide financial support for the judicial review. The restriction in subsection (3B) does not apply to this information about a corporate body's membership and its members' ability to provide financial support.

642. *Subsections (3) and (4)* amend and insert new subsections into section 16 of the 2007 Act which makes parallel provision about the provision of information about the financing of judicial reviews in the Upper Tribunal.

Section 86: Use of information about financial resources

643. Section 86 applies to the High Court, the Upper Tribunal and the Court of Appeal in deciding liability for costs in judicial review proceedings under the law of England and Wales. The High Court and the Court of Appeal have a broad discretion under section 51 of the 1981 Act which enables them to determine by whom and to what extent costs are to be paid. The Upper Tribunal has similar discretion under section 29 of the 2007 Act.

644. *Subsection (2)* provides that when making costs orders the courts must have regard to information about the financing of proceedings provided pursuant to section 31 of the

1981 Act or section 16 of the 2007 Act, as amended by section 85, and any additional information about financing provided in accordance with rules of court or the Tribunal Procedure Rules.

645. *Subsection (3)* stipulates that when a court or tribunal is considering an order for costs it must consider whether to order costs to be paid by a person who, although not a party to the judicial review, is identified in the information provided under section 31 of the 1981 Act or section 16 of the 2007 Act as having financially assisted the proceedings.

646. *Subsection (4)* defines the types of proceedings which are 'judicial review proceedings' for the purpose of this section, which include judicial reviews being appealed.

Section 87: Interveners and costs

647. Section 87 establishes two presumptions regarding the costs liability of those who voluntarily apply for and are granted permission to intervene in a judicial review. First that they will pay their own costs unless there are exceptional circumstances that make it inappropriate for them to do so. Secondly, that, on the application of a party, where one or more of four specified conditions is met, the court must order the intervener to pay the reasonable costs incurred by that party as a result of the intervention, unless there are exceptional circumstances which make this inappropriate. This applies to judicial review proceedings in the High Court and the Court of Appeal.

648. *Subsection (1)* states that this section applies in judicial review proceedings where a person who is not a "relevant party" to the judicial review (an 'intervener') has been granted permission by the court to either provide evidence or make submissions on the case. The effect is that the section only applies where an intervener applies to the court, since a person or body invited by the court to intervene is not granted permission, and is accordingly not in the same position.

649. *Subsection (3) and (4)* stipulate that a court cannot order a relevant party to the judicial review to pay any costs the intervener incurs unless the court considers there are exceptional circumstances.

650. *Subsection (5)* stipulates that, on application by a "relevant party" (see subsections (10) and (11)) where the court is satisfied that one or more of the four conditions in subsection (6) has been met during a stage of the proceedings that the court deals with, it must order an intervener to pay any additional costs incurred by that "relevant party" as a result of the intervention during that stage of the proceedings.

651. *Subsection (6)* sets out what the four conditions are:

a) the intervener has acted, in substance, as the sole or principal party - for example, where the intervener drives the judicial review taking on the proper role of one of the parties;

b) the intervener's evidence and representations to the court, taken as a whole, have not been of significant assistance to the court - for example, where some of the points the intervener makes are helpful but on the whole the evidence and representations are not helpful;

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 determine the issues in the case - for example, where the intervener uses a significant portion of the time in court to make arguments not related to the issues in the case; and

d) the intervener has behaved unreasonably - for example, where the intervener makes overlong, unnecessary submissions which extend the time taken for the hearing.

652. *Subsection (7)* stipulates that a court does not have to make an order under subsection (5) if it considers there are exceptional circumstances which would make this inappropriate.

653. *Subsection (8)* explains that in deciding whether there are exceptional circumstances where an intervener should have their costs paid, or should not pay costs (as set out in subsections (4) and (7)), the court must have regard to criteria set out in rules of court.

654. *Subsection (9)* defines the types of proceedings which are 'judicial review proceedings' for the purpose of this section. This includes an application for leave to appeal to the Court of Appeal and proceedings on appeal in the Court of Appeal.

655. *Subsection (10)* defines a relevant party as the applicant or defendant or, on an appeal from a judicial review decision, the appellant or respondent, or any other person directly affected by the judicial review who has been served with the application for judicial review or leave to apply for judicial review.

656. *Subsection (11)* provides that if a person who is an intervener in judicial review proceedings subsequently becomes a "relevant party", then they are treated for the purposes of subsections (3) and (5) as if they had at all times been a "relevant party" rather than an intervener. This means that, if an intervener becomes a "relevant party", the presumptions in the clause about the costs liability of interveners will not apply to them.

Section 88: Capping of costs

657. Section 88, along with sections 89 and 90, removes the ability of the High Court and the Court of Appeal to make costs capping orders in a judicial review case unless specified criteria are met. A costs capping order is an order that removes or limits the liability of a party to the proceedings (whether only for the applicant or both the applicant and the defendant) to pay another party's costs incurred in bringing or defending a judicial review. This type of order, as developed in case law, is commonly referred to as a "Protective Costs Order".

658. *Subsection (1)* provides that a costs capping order may only be made in accordance with this section and sections 89 and 90.

659. *Subsection (2)* defines a costs capping order as an order which limits the costs liability of any party to a judicial review.

660. *Subsections (3) and (4)* provide that a costs capping order may only be made when leave to bring a judicial review has been granted and the applicant for judicial review has made an application for such an order in accordance with rules of court.

661. *Subsection (5)* specifies that rules of court may require an applicant for a costs capping order to provide information to the court set out in the rules of court. It makes it clear that this can include information about the source, nature and extent of any financial support that has been or is likely to be provided to the applicant for use in the judicial review proceedings and, if the applicant is a corporate body that cannot demonstrate that it has the financial resources needed to meet its costs liabilities, information about the body's membership and its members' ability to provide financial support for the judicial review.

662. *Subsection (6)* allows a court to make a costs capping order only if it is satisfied that the judicial review proceedings are "public interest proceedings" (defined in subsection (7)) and that, if a costs capping order is not made, the applicant for judicial review would no longer continue with the case and that it would be reasonable not to continue with the case.

663. *Subsection (7)* defines "public interest proceedings". Proceedings are public interest proceedings if – and only if – 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 these judicial review proceedings are an appropriate means of resolving the issue. *Subsection (8)* makes provision about matters which the court must consider in deciding whether the proceedings are public interest proceedings. It sets out a non-exhaustive list of such

matters, including the number of people who are likely to be directly affected if the judicial review succeeds, the likely effect on those people and whether the issues being argued involve consideration of a point of law of general public importance.

664. *Subsections (9), (10) and (11)* allow the Lord Chancellor to amend subsection (8) by adding, removing or amending a matter that a court must consider when deciding whether proceedings are public interest proceedings. Amendment must be made by statutory instrument (subject to the affirmative procedure).

665. *Subsection (12)* defines what is meant by the terms 'costs capping order' and 'judicial review proceedings': in particular, it makes it clear that proceedings on appeal are covered. Furthermore, it specifies that references to the court in this section are only references to the High Court or the Court of Appeal.

666. *Subsection (13)* explains that for the purposes of this section and section 89 the term 'applicant for judicial review' means the person who is or was the applicant who brought the application for judicial review and references to relief being granted include where the decision to grant relief has been upheld on any appeal brought against that decision.

Section 89: Capping of costs: orders and their terms

667. Section 89 sets out the way in which the High Court and the Court of Appeal should approach the decision whether to make a costs capping order and decisions about the terms of the order.

668. *Subsection (1)* requires the court to consider certain matters when considering whether to make such an order and (if it does decide to make an order) the terms of the order. These include the financial resources of the parties, including any third party who has provided or may provide financial support; the extent to which the applicant - or any other person who has provided or may provide funding - will benefit from the costs capping order if the applicant succeeds in the judicial review; whether the applicant's legal representatives are acting free of charge; and whether the applicant is an appropriate person to bring the judicial review on behalf of the wider public.

669. *Subsection (2)* requires that where the court makes a costs capping order limiting the applicant's liability for the defendant's costs in the event of the application for judicial review not being successful, the court must also make an order limiting the defendant's liability for the applicant's costs in the event of the judicial review succeeding.

670. *Subsections (3), (4) and (5)* allow the Lord Chancellor to amend subsection (1) by adding, amending or removing matters that the court must have regard to when considering whether to make a costs capping order and the terms of the order (subject to the affirmative procedure).

671. *Subsection (6)* defines the terms 'free of charge' and 'legal representative'.

Section 90: Capping of costs: environmental cases

672. Section 90 enables provision to be made excluding from the codified regime established under sections 88 and 89 judicial reviews about issues which, in the Lord Chancellor's opinion, relate entirely or partly to the environment. Different considerations may apply in those cases (and a separate costs protection regime, which is set out in the Civil Procedure Rules, already applies).

673. *Subsections (1), (2) and (3)* allow the Lord Chancellor to set out in regulations (subject to the negative procedure) the types of judicial review that are excluded from the costs capping regime set out in these sections. This section does not require all cases which may be argued to relate to the environment to be excluded.

Planning proceedings

Section 91: Procedure for certain planning challenges

674. Section 91 introduces Schedule 16, which contains amendments to provide that challenges to a range of planning-related decisions and actions may only be brought with leave of the High Court. The amendments require applications for leave to be made before the end of the six-week period specified in relation to the decision or action in question.

675. The amendments made by Schedule 16 also provide that costs awards connected with planning and listed building decisions and actions may be challenged in the same way as the substantive action itself – by way of statutory review.

Schedule 16: Procedure for certain planning challenges

676. Paragraph 2 amends section 284 of the Town and Country Planning Act 1990. It inserts new paragraph (g) in section 284(1) to prevent the validity of a relevant costs order from being questioned in legal proceedings other than those brought in accordance with Part 12 of that Act. It also inserts a new subsection (3A), which defines "relevant costs order".

677. Paragraph 3 amends section 287 of the Town and Country Planning Act 1990 to provide that proceedings for questioning the validity of the planning documents to which that section applies may only be brought with leave of the High Court.

678. Paragraph 4 amends section 288 of the Town and Country Planning Act 1990 to provide that proceedings for questioning the validity of a range of planning-related orders and actions may only be brought with leave of the High Court. The new subsection (1A) for section 288 also enables a relevant costs order made in connection with an order or action to which section 288 applies to be challenged under section 288.

679. Paragraph 5 amends section 62 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to prevent the validity of a relevant costs order from being questioned in legal proceedings other than proceedings brought in accordance with section 63 of that Act. "Relevant costs order" is defined in a new subsection (2A) for section 62.

680. Paragraph 6 amends section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to provide that proceedings for questioning the validity of certain orders and decisions made under that Act may only be brought with leave of the High Court. It also inserts a new subsection (1A) to enable a relevant costs order made in connection with such an order or decision to be challenged under section 63.

681. Paragraph 7 amends section 22 of the Planning (Hazardous Substances) Act 1990 to provide that proceedings for questioning the validity of certain decisions of the Secretary of State under that Act may only be brought with leave of the High Court.

682. Paragraph 8 amends section 113 of the Planning and Compulsory Purchase Act 2004 to provide that proceedings for questioning the validity of specified strategies, plans and other documents may only be brought with leave of the High Court.

Section 92: Periods of time for certain legal challenges

683. Section 92 amends provisions allowing for legal challenges to planning-related decisions and other actions brought under:

- section 61N (neighbourhood development orders) and section 106C (development consent obligations) of the Town and Country Planning Act 1990; and
- section 13 (national policy statements) and section 118 (orders granting development consent) of the Planning Act 2008 (national policy statements).

684. The above provisions currently stipulate that a challenge must be made during a period of six weeks beginning with the day on which a particular event occurs in relation to the decision or action being challenged (for example, the day on which the decision being challenged is published). Section 92 provides that the six-week period does not start to run until the day after that on which the event in question occurred.