

**EXPLANATORY MEMORANDUM TO**  
**THE CIVIL PROCEDURE (AMENDMENT No. 2) RULES 2016**

**2016 No. 707 (L. 9)**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) (“the CPR”), which apply to civil proceedings in the Civil Division of the Court of Appeal, the High Court and the County Court, to make rules relating to a new type of order within judicial review proceedings (“judicial review costs capping orders”) created by the Criminal Justice and Courts Act 2015 (“the 2015 Act”). These Rules set out the requirements for applications for such orders, including the evidence that applicants must provide in support of an application, to assist the court in determining whether to make a judicial review costs capping order and, if so, what its terms should be.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

*Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

- 4.1 The Civil Procedure Act 1997 established the Civil Procedure Rule Committee and gave it power to make the CPR. The first CPR were made in 1998. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and the County Court, replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC). The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The changes were made, and continue to be made, in response to the report ‘Access to Justice’ (1996) by Lord Woolf, which can be found at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>.
- 4.2 The new judicial review costs capping orders are created by sections 88 and 89 of the 2015 Act and form part of a wider package of judicial review reforms about the financing of judicial review proceedings (amongst other reforms) in Part 4 of the 2015 Act. These Rules implement section 88(4) and (5) of the 2015 Act, which provide that an application for a judicial review costs capping order must be made in accordance

with rules of court and specify some of the types of information which such rules may require an applicant to provide. These Rules come into force on the same date, 8th August 2016, as a number of the provisions in Part 4 of the 2015 Act, including sections 88 and 89 themselves. These Rules are accompanied by the 85<sup>th</sup> Update – Practice Direction Amendments which amend Practice Direction 46 on Costs – Special Cases which can be found at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England and Wales.

## **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

- 7.1 Judicial review is a type of court proceeding in which, on application, a judge reviews the lawfulness of a decision, act or omission made by a public body, including those of Ministers, local authorities and those exercising public functions. Following a period of consultation on proposals set out in “Judicial Review: proposals for further reform” (Cm. 8703), the government introduced clauses in the Criminal Justice and Courts Bill in February 2014 to make a series of reforms to judicial review (the consultation along with the response can be found at <https://consult.justice.gov.uk/digital-communications/judicial-review>). Those reforms included the creation of judicial review costs capping orders in non-environmental judicial reviews, for which Parliament legislated in sections 88-90 of the 2015 Act.
- 7.2 Judicial review costs capping orders are intended to provide a more proportionate approach to costs protection for claimants in judicial reviews. They replace protective costs order which were developed by the court in case law and re-stated by the Court of Appeal in the case of *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. Following the consultation, “Judicial Review: proposals for further reform”, the government concluded that costs protection in non-environmental judicial reviews should be placed on a statutory basis. The position in relation to other civil proceedings remains unchanged.
- 7.3 Judicial review costs capping orders limit or remove the liability of a party to pay another party’s costs within judicial review proceedings in the High Court or Court of Appeal. Pursuant to section 88 of the 2015 Act, to make a judicial review costs capping order the court must be satisfied, amongst other things, that the judicial review proceedings are “public interest proceedings” and that in the absence of a judicial review costs capping order the claimant would withdraw the judicial review and be acting reasonably in doing so. Section 89 of the 2015 Act sets out matters to which the court should have regard when considering whether to make a judicial review costs capping order and, if it decides that such an order is appropriate, what its terms should be. These include the financial resources of the parties, including the resources of any person who is providing or may provide financial support to the parties. The intention is that those who fund and control judicial reviews are not able

to avoid appropriate costs liability arising from their actions and that access to justice is protected.

- 7.4 The government consulted on elements of the approach to the rules to implement judicial review costs capping orders in “Reform of Judicial Review: Proposals for the provision and use of financial information” (Cm 9117), published in July 2015. Further details on the consultation can be found in section 8 below. In the consultation the government proposed (amongst other things) that the applicant should provide a sufficiently detailed picture of their finances to make sure that judicial review costs capping orders are made appropriately.
- 7.5 Having carefully considered the responses, the measures in this instrument set out the process for seeking a judicial review costs capping order. The key measures include:
- a new rule listing the evidence which must be provided in support of the application. This includes evidence setting out why a judicial review costs capping order should be made, a summary of the applicant’s financial resources and the anticipated costs of the proceedings. The court needs this information so that it can decide whether it is appropriate to make an order. It will enable the court to determine whether the requirements in the 2015 Act have been met without placing an unduly onerous burden on the applicant or other persons.
  - a power for the court to direct the applicant to provide additional information or evidence to support its application. The government is of the view that it is not necessary to require applicants to provide supporting documents as a matter of course as this could be burdensome on the applicant, but that the court might consider additional information or evidence to be necessary in a particular case.
  - a new rule which makes provision for applications to vary costs capping orders.
- 7.6 As sections 88 and 89 of the 2015 Act are being brought into force on 8th August 2016 there is not yet data on judicial review costs capping orders. However, the Impact Assessment which accompanied the 2015 Act estimated that the implementation of judicial review costs capping orders would see the number of costs protection orders made for the benefit of claimants in non-environmental judicial reviews fall by around 5 per year.

#### *Consolidation*

- 7.7 No further consolidation of the CPR is planned at present.

### **8. Consultation outcome**

- 8.1 As set out at paragraph 7.4 above, in addition to the consultation in advance of the introduction of clauses into the Criminal Justice and Courts Bill, the government consulted on elements of the policy underpinning this instrument between July and September 2015 in ‘Reform of Judicial Review: proposals for the provision and use of financial information’ (Cm 9117) (the consultation can be found at the following link <https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis>). A total of 39 responses to the consultation paper were received, including from legal practitioners and their representative bodies, charities and their representative groups, the senior judiciary and members of the public. The

majority of responses to the relevant questions agreed on the whole that a relatively detailed picture of the applicant for a costs capping order's finances were necessary.

- 8.2 The government response to the consultation is being published on the same date that this instrument is laid before Parliament, and is available at [www.gov.uk/government/publications](http://www.gov.uk/government/publications) or by writing to the Judicial Review Team at 3.39 102 Petty France, SW1H 9AJ. Having fully considered all the responses to the exercise, the government concludes that these reforms are necessary to tackle the problems identified.
- 8.3 Remaining proposals within this consultation on the financial information required with an application for permission to bring a judicial review claim will be implemented separately and once the government has considered any further views provided on an aspect of its intended approach.
- 8.4 The Civil Procedure Rule Committee must, before making the CPR, consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act 1997). The Committee did not consider that any of the proposals for rules before it required separate consultation by the Committee.

## **9. Guidance**

- 9.1 The forthcoming changes to the CPR will be published on the Civil Procedure Rules pages on the Ministry of Justice website (<http://www.justice.gov.uk/courts/procedure-rules/civil>). The Ministry of Justice will also write to key stakeholders detailing the changes.

## **10. Impact**

- 10.1 The impact on businesses, charities or voluntary bodies is minimal. It will impact on claimants (individuals, businesses, charities or voluntary bodies) who bring a judicial review and apply for a costs capping order. Such an order will only be made after permission has been granted. This could increase the financial risk involved for those who rely upon such an order to bring the claim. Furthermore, in those cases in which previously claimants may have qualified for a protective costs order but costs capping order will going forwards not be awarded, the claimant could potentially have a greater liability for costs. The volume of cases involved is minimal.
- 10.2 The impact on the public sector is minimal. In cases where a judicial review costs capping order is applied for, a public sector defendant could have less liability for a claimant's costs. This is because an order will only be made after permission has been granted and after proper consideration of the claimant's means.
- 10.3 An Impact Assessment has not been prepared for this instrument because the anticipated impact is small. However, Impact Assessments were published alongside the government response to the 2013 consultation and accompany the 2015 Act; they are available at <http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts.html>. Alternatively you can request a hard copy by writing to Judicial Review Team, Post Point 3.39, 3rd Floor, Ministry of Justice, 102 Petty France, SW1H 9AJ.
- 10.4 In summary, the Impact Assessments indicate that the introduction of a codified judicial review costs capping order regime will make sure that claimants who can provide evidence of their suitability for the order will be given an appropriate measure

of costs protection. It was noted that the changes could provide savings to defendants and, ultimately, the taxpayer.

## **11. Regulating small business**

- 11.1 The legislation applies to activities undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 11.3 The basis for the final decision on what action to take to assist small business was made following consultation during the development of these provisions. The reforms apply to any claimants and lawyers bringing a judicial review and this could include businesses, regardless of size. The impact assessments published alongside the consultation and during the Parliamentary passage of the 2015 Act did not identify any reason why the reforms should have a disproportionate effect on small or micro businesses.

## **12. Monitoring & review**

- 12.1 These Rules will form part of the CPR that are kept under review by the Civil Procedure Rule Committee. The Civil Procedure Rule Committee will make any subsequent amendments to the CPR.

## **13. Contact**

- 13.1 James Martin at the Ministry of Justice, Telephone: 0203 334 5022 or email: james.martin@justice.gsi.gov.uk can answer any queries regarding the instrument.