

Judicial Review: proposals for reform
Consultation Paper CP25/2012

Response from Justin Leslie, barrister

Introduction

1. This is a response to the Ministry of Justice's public engagement exercise concerning proposals to reform the judicial review process.

Qualifications

2. I am a pupil barrister currently based at 42 Bedford Row. In this response, I draw on the following experiences:
 - a. Working at the Public Law Project, a national legal charity concerned with access to public law remedies. During this time I was involved in numerous judicial review cases.
 - b. Advising Medical Justice, a charity that enables immigration detainees to access independent medical advice. In this role I lead the Strategic Litigation Group, which has been involved in a number of judicial review cases challenging Government policy.¹
 - c. Working in the public law team at the Law Commission, where I developed legal policy and undertook consultations (which included drafting impact assessments).
3. I have an LL.M in Public Law from University College London, and have been published in the journals *Public Law*, *Legal Studies* and *Judicial Review*.² I am also a contributor to Jordans' *Public Law Online* service and I convene the Public Law Forum.³

Observations on the Government's basis for reform

4. The Government's basis for this consultation requires some scrutiny. The publicly stated basis for the proposals was set out by the Prime Minister in a speech to the Confederation of British Industry (CBI). He said, in the context of helping British business thrive, that judicial review was "a massive growth industry" and that many applications are "completely pointless".⁴
5. The Lord Chancellor went on to state that organisations "often use JR for PR purposes" and that proposals would be brought forward that would prevent JR being "abused by people who just want to generate publicity".⁵
6. From the consultation paper, it is apparent that the thrust of the proposals are to save the time and resources of public bodies as:

¹ For instance, see: *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

² For a full list of qualifications and publications, please see <http://www.linkedin.com/pub/justin-leslie/3a/403/441>

³ See: <http://www.jordanspubliclaw.co.uk/> and <http://publiclawforum.wordpress.com/>

⁴ <http://www.number10.gov.uk/news/speech-to-cbi/>

⁵ <http://www.justice.gov.uk/news/features/unclogging-the-courts>

“...proceedings create delays and add to the costs of public services, in some cases stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery.” (Consultation Paper at paragraph 3).

7. However, the consultation paper itself does not support these assertions.
8. For example:
 - a. At figure 1 at page 10 of the consultation paper, the number of judicial reviews that might impact British business could only be contained in the “Other” category. This category would include planning, procurement and other commercial judicial review matters, as well as further categories of judicial review such as community care law, housing law and education law. However, this “Other” category has remained at a constant and relatively small level over several years. Accordingly, figure 1 demonstrates that is inaccurate to describe such judicial reviews as a “growth industry” in the context of cases that might affect British business.

Furthermore, it should be noted that the workload of the Administrative Court is likely to diminish when immigration judicial reviews are transferred to the Upper Tribunal.⁶
 - b. No evidence is presented in the consultation paper regarding the alleged misuse of judicial review by organisations, as suggested by the Lord Chancellor. Indeed, there are no proposals that would directly restrict judicial reviews bought by organisations – for instance, there is no proposal to change the “sufficient interest” standing test.⁷
 - c. There is no evidence in the consultation paper, or the impact assessment, that quantifies the alleged delays and costs of judicial review to public services. There is also no further evidence concerning how judicial review stifles innovation or frustrates reforms.
9. I note these aspects of the consultation paper at the outset in order to highlight that the basis of the purported basis for the proposals has not been established.⁸

My starting points

10. I should briefly make clear my starting points:
 - a. A hallmark of judicial review procedure is the permission stage. This is in contrast to most other forms of civil litigation where a Claimant is entitled to bring their claim. In judicial review, the requirement for

⁶ See Senior Courts Act 1981, section 31A and Letter from Lord McNally to the Joint Committee on Human Rights (dated 22 June 2012). Available at: http://www.parliament.uk/documents/joint-committees/human-rights/Lord_McNally_supplementary_memorandum.pdf

⁷ See *R v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617

⁸ Further work has been done by Bondy and Sunkin which focuses on the basis of the proposals in the consultation paper. See: 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) (available at <http://ukconstitutionallaw.org>)

permission has been considered necessary to protect public bodies from unwarranted and costly challenges, as well as maintaining the efficiency of the courts.⁹

- b. The permission stage is just one procedural safeguard for public bodies. Others include:
 - i. The need for the Claimant to have a sufficient interest;¹⁰
 - ii. The need to issue a claim promptly;¹¹
 - iii. The need to exhaust alternative remedies before bringing a claim;¹²
 - iv. The limited grounds on which a judicial review claim can be based – judicial review is not a *de novo* appeal.¹³
 - v. The court's overall discretion as to remedy.¹⁴
- c. Many applications for judicial review are settled between the parties before the final hearing.¹⁵
- d. The Administrative Court is alive to the potential abuse of its procedures, especially in cases of urgent applications.¹⁶
- e. Judicial review plays a vital constitutional role. It is the primary mechanism by which the judiciary can exercise supervision over the executive.¹⁷ This may create inconveniences for the executive – however, this is the price of a constitution governed by the rule of law.¹⁸ On this basis, it is not clear why the consultation paper asserts that judicial review has gone “far beyond the original intentions of the remedy” (at paragraph 26).
- f. Judicial review does not pose a threat to the principle of parliamentary sovereignty.¹⁹

11. In short, it is clear that public authorities already benefit from a number of protections inherent in the judicial review process. The requirement of permission is an efficient method of filtering cases, and often encourages settlement. Given the important constitutional role of judicial review, imposing any further restrictions on access to judicial review calls for extremely close scrutiny.

⁹ See: A Le Sueur and M Sunkin, ‘Applications for judicial review: the requirement of leave’ [1992] Public Law 102–129, esp. pp. 107–111. On the Bowman reforms, see T Cornford and M Sunkin, ‘The Bowman Report, access and the recent reforms of the judicial review procedure’ [2001] Public Law 11–2

¹⁰ Senior Courts Act 1981, section 31(3)

¹¹ Civil Procedure Rules, rule 54.5

¹² *Kay v Lambeth London Borough Council* [2006] UKHL 10 at [30]

¹³ *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839, 857C

¹⁴ See: *Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers* [2011] UKPC 4 at [40]

¹⁵ Bondy and Sunkin, *Dynamics of Judicial Review Litigation* (2009) pp 37 - 39

¹⁶ See both *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin); *R (Awuku) v Secretary of State for the Home Department* [2012] EWHC 3298 (Admin) and *R (B and J) v Secretary Of State For The Home Department* [2012] EWHC 3770 (Admin). See also: J Leslie, “Urgent JRs: A shot across the bow” Public Law Online (16 November 2012) available at: <http://www.jordanspubliclaw.co.uk/articles/urgent-jrs-a-shot-across-the-bow>

¹⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408E

¹⁸ *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [37], [64] and [122]

¹⁹ *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) at [38]

TIME LIMITS FOR BRINGING A CLAIM

Proposals 1 and 2

The Government proposes to invite the Civil Procedure Rules Committee to amend the Civil Procedure Rules so that they provide that:

- claims for Judicial Review in procurement cases should be brought within 30 days of when the Claimant knew or ought to have known of the grounds for the claim. “Procurement cases” are proceedings which are based on decisions or actions within the ambit of the Public Contracts Regulations (whether or not the Claimant is an economic operator or the public contract is excluded from the regulations); and
- claims for Judicial Review of planning decisions of the local authority should be brought within six weeks of when the Claimant knew or ought to have known of the grounds for the claim.

Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

12. My answer to this question is: no.

13. This is because:

- a. Procurement and planning appeals are different in nature to judicial review challenges;
- b. There is a risk that shorter time limits would encourage premature judicial review challenges; and
- c. Although there might be a discretion to extend the time limit, relying on such a discretion would create uncertainty for the parties.

(a) Appeals are different in nature to judicial review challenges

Procurement cases

14. Part 9 of Public Contract Regulations 2006 governs procurement appeals. As noted at paragraph 50 of the consultation paper: “generally these cases are rare”.
15. There are several points of contrast between an appeal brought under these Regulations as opposed to a judicial review challenge.
16. First, standing. An action under Regulation 47 is typically characterised as a matter of private law. This is because the right to bring under the Regulations is limited to “economic operators”. However, standing in judicial review proceedings in this context is wider – the test was stated by Arden LJ in *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1 at [77]:

“...an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way”

17. Although, this is a tighter standing test than the test applied in 'normal' judicial cases it is clear that judicial review proceedings can be brought by a wider category of Claimants than just economic operators. This might include regular suppliers of an economic operator, who might himself or herself be significantly affected by the grant or withholding of a particular public contract or a trade association that might need to take steps in a case in which there had been discrimination against a class of economic operators.²⁰
18. The reason this is significant is that whilst economic operators will be well aware of the progress of a procurement exercise, other parties will not necessarily have access to the same amount of information. It may take longer for such parties to find out about a decision and to collect together enough information to launch judicial review proceedings.
19. In this regard, the position of the parties in procurement appeals and procurement judicial review challenges are quite different.
20. Secondly, there is no permission stage in procurement appeals. The wording of the Regulations is such that an economic operator is entitled to bring proceedings if there has been a breach of Regulation 47A or 47B. By contrast, any judicial review challenge requires permission from the court. Therefore, the Defendant in a procurement judicial review currently has two opportunities defeat a claim before a final hearing (on the papers and on oral renewal). This points towards a longer time limit in judicial review proceedings given the procedural protections already afforded by CPR Part 54.
21. Thirdly, in terms of delay, at the grant of permission in judicial review proceedings in the procurement context the court is typically receptive to arguments concerning timing. Given the nature of judicial review proceedings in this context, it is relatively easy for a Defendant to rely on the practical difficulties that might arise from the award of relief in order to persuade the court to exercise its discretion to refuse permission under section 31(6) of the Senior Court Act 1981.²¹
22. Finally, some of the remedies in procurement appeals are mandatory. For instance, Regulation 47J(2) states that the court *must* make a declaration of ineffectiveness if the court is satisfied that there has been a breach of Regulation 47A or 47B (subject to the provisions in Regulation 47L, which relates to general interest grounds for not making a declaration of ineffectiveness). Furthermore, there is no discretion in relation to ordering a civil financial penalty, which *must* be ordered when a declaration of ineffectiveness is made (Regulation 47N).
23. By contrast, remedies in judicial review proceedings are by their nature discretionary (see section 31(6) of the Senior Court Act 1981). In this way, the court is entitled to take into account the public interest when notwithstanding that a decision is held to be unlawful.²²

²⁰ For a discussion of this, see *R (Unison) v NHS Shared Business Services Ltd* [2012] EWHC 624 (Admin)

²¹ See *R (Unison) v NHS Shared Business Services Ltd* [2012] EWHC 624 (Admin) at [17] – [52]

²² See *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815, 840B

24. The following factors illustrate that procurement appeals are different to judicial review challenges in certain key respects. Therefore, it does not follow that the time limit for procurement judicial reviews should mirror procurement appeals. Indeed, the fact that the Claimant in a procurement judicial review is unlikely to have full awareness or information of a relevant decision suggests that a longer time limit is appropriate in order to prevent premature applications.

Planning cases

25. Many of the reasons stated above apply in the planning context.
26. Planning appeals are brought under Part 12 of the Town and Country Planning Act 1990. The consultation paper focuses on applications brought under section 288 to question the validity of certain orders or decisions, such as challenging decisions made under section 78 by the Secretary of State. Importantly, section 288 does not apply to most decisions by local authorities that, in practice, make the majority of planning decisions.
27. There are a number of points of contrast between applications under section 288 and judicial review of planning decisions.
28. Firstly, the standing test for a section 288 challenge is that a person must be “aggrieved”. The person aggrieved test is narrower than the standard “sufficient interest” test as shown by the factors outlined by Pill LJ in *Ashton v Secretary of State for Communities & Local Government* [2010] EWCA Civ 600 at [53] – participation in the planning process and substantive interest in the outcome are both important factors.
29. This links with the manner in which most section 288 appeals arise. An appeal under section 288 will often follow a refusal by a local planning authority to grant planning permission for a development or to grant it subject to conditions; a subsequent appeal being made to the Secretary of State against the authority’s decision; and then the determination of that appeal by the Secretary of State.
30. Therefore, an individual wishing to pursue a section 288 appeal will have been involved in a thorough and complicated procedure and well aware of the progress of the issues involved.
31. By contrast, a Claimant in judicial review proceedings might be unaware of the progress of the substantive issues and may need time to formulate a challenge to the relevant planning decision. As noted previously, this extra time can also allow a Claimant the opportunity to take stock rather than hastily issuing a premature claim.
32. Secondly, the time limit in section 288 is deliberately very strict and cannot be extended.²³ The reason for this is that the decisions to which section 288 applies have usually been through several processes and the section 288 challenge represents the final possible stage for such decisions. These decisions often relate to large scale planning decisions that are “called-in” by the Secretary of State.

²³ *R v Cornwall County Council, ex parte Huntington* [1992] 3 All ER 566

33. By contrast, the decisions to which many judicial review challenges apply have not been through these multi-layered decision-making processes and are not always large-scale planning decisions. In this context, an extremely strict time limit does not appear to be appropriate – the requirement for promptness provides the necessary discretion to allow the court to make a decision about whether a challenge has been brought sufficiently quickly and mitigate some of the prejudice to any of the parties.
34. Furthermore, it is right to say that the practice of the courts in relation to planning cases is to adopt a relatively strict approach to timing. Indeed, at one point it was thought that there was a “six week rule” for planning judicial reviews,²⁴ although this was later corrected by the House of Lords in *Burkett*.²⁵ However, the approach of the courts remains firm in relation to planning challenges, as noted by Keene LJ in *R (Finn-Kelcey) v Milton Keynes Borough Council* [2008] EWCA Civ 1067 at [22]:
- “The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission.”
35. Fourthly, there is no permission stage in section 288 challenges. Repeating the point made above, the Defendant in a planning judicial review currently has two opportunities defeat a claim before a final hearing (on the papers and on oral renewal). This points towards a longer time limit in judicial review proceedings given the procedural protections already afforded by CPR Part 54.
36. Fifthly, the remedies in section 288 appeals are limited to just quashing orders (see section 288(5)), whereas judicial review remedies are wider and include quashing orders, mandatory orders, injunctive orders and declaratory orders.
37. In summary, it is plain that section 288 appeals are quite different to judicial review claims. In particular, section 288 relates to decisions that are likely to have large-scale impact and have already been through lengthy processes (including a prior appeal) – in that context, a strict six-week time limit can be justified.²⁶
38. However, in the judicial review context more flexibility is required in order to give Claimants who may not have been fully aware of the planning permission process more time to formulate their cases and seek legal advice. Any legal advice would emphasise the importance of acting promptly and might advise against pursuing the claim.
39. The reasons stated at paragraph 56 of the consultation paper for shortening time limits in judicial review cases suggest that appeals and judicial reviews are both different routes that a Claimant can use to challenge a decision. This is not the case: in both contexts, a limited number of parties can make an appeal; whilst appeals can relate to different issues to those brought by way of judicial review.

²⁴ See *R v Ceredigion County Council, Ex p McKeown* [1998] 2 PLR 1

²⁵ *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23 at [53]

²⁶ In this regard, it is unfortunate that the consultation question refers to bringing judicial review “into line with the time limits for an appeal against the same decision” because JR and section 288 appeals focus on different kinds of decision.

40. The suggestion is that Claimants opt to use judicial review because it has a more generous time limit to the statutory appeals. However, a potential appellant could not pursue a judicial review as an alternative because of the need to avail oneself of any alternative remedy.
41. For these reasons, it is too simplistic for the Government to proceed on the basis that all procurement and planning challenges should have six-week time limits.

(b) There is a risk that shorter time limits would encourage premature judicial review challenges

42. I consider this in more detail in relation to Question 2. However, the risk of premature challenges goes to the appropriateness of imposing shorter time limits. As mentioned above, there would be an increased likelihood of premature challenges.
43. If time was tight and a client sought advice about whether to challenge a procurement or planning decision, some lawyers would recommend issuing a claim form with truncated or general grounds. Assuming permission was refused, these grounds could then be later developed at oral renewal.
44. This is unsatisfactory given the importance of the pre-action protocol and the need to reduce litigation costs.

(c) Although there might be a discretion to extend the time limit, relying on such a discretion would shift the onus onto the Claimant and is otiose

45. I consider this in more detail in relation to Question 3. However, relying on a discretion to extend a time limit is uncertain for both parties and shifts the onus onto the Claimant to show why the time limit should be extended.
46. Currently, the onus is on the Defendant to show why a claim was not brought promptly. The Defendant can raise the issue if it chooses, or not raise it because of the limited prejudice that is likely to be caused by a particular challenge.
47. By shifting the onus, Claimants may have to argue points unnecessarily in order to protect their position, which could lead to the unnecessary use of court time.
48. Furthermore, such a discretion is also otiose because the requirement to act promptly already contains within it a judicial discretion to refuse permission for late claims.

Question 2: Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol? If not, how should these arrangements be adapted to cater for these types of case?

49. My answer to the first part of the question is: no.
50. The Pre-Action Protocol requires a letter before claim to be sent by Claimants to the Defendant public authority. The letter usually sets out the essence of the claim and the Defendant is then obliged to respond within 14 days of receiving. After the 14-day period has expired, the Claimant is then permitted to issue proceedings and remain in compliance with the protocol.
51. It should be recorded that the introduction of the pre-action protocol in judicial review has been largely welcomed.²⁷ Benefits of the protocol include greater understanding of the issues at an earlier stage as well as focusing the minds of the parties. Furthermore, the likelihood of settlement or negotiation without the need for proceedings is increased, thereby saving time and costs.
52. In these respects, having time to complete the steps of the protocol is important – indeed, failure to do so can have cost consequences.²⁸
53. Having a six-week period to complete the pre-action protocol before issuing proceedings would be tight for many Claimants. Using a practical example:
- a. A resident may find out that planning permission has been granted for a development one week after the decision was made.
 - b. The resident may take one or two weeks to realise that the decision is susceptible to legal challenge and assess the viability of challenging the decision. For most Claimants this will involve deciding to find and visit a solicitor, as against and making a decision to use their own finances to fund the litigation.
 - c. Then the solicitor may take one week to make an initial assessment of the challenge and instruct counsel. At this point a letter before claim may be sent. This is four weeks after the decision was made.
 - d. Two weeks later, the reply should be received from the Defendant. At this point six weeks would have elapsed, and so the Claimant would be forced to issue proceedings notwithstanding the prospect of settlement or negotiation.
54. These time-scales are indicative of the processes that a would-be Claimant needs to go through before issuing proceedings in a normal case.²⁹ The combined effect of a six-week time limit for a judicial review challenge *and* the requirement to complete the pre-action protocol is likely to negate the value of both: needless and hastily brought claims that are time consuming for the Defendant to manage and lost opportunities for the parties to settle or engage in the issues prior to the issuing of proceedings.
55. In order to avoid this problem, there are two options: maintain the “promptly and in any event within three months” time limit or abandon the pre-action protocol. Merely altering a feature of the pre-action protocol – such as

²⁷ Bondy and Sunkin, *The Dynamics of Judicial Review Litigation* (Public Law Project: 2009), pp 25 – 27

²⁸ *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895

²⁹ Urgent judicial review claims can be pursued more quickly, using Form N463. However, in these cases (which are often immigration removal cases) solicitors often have delegated legal aid powers, the use of generic grounds is not unusual and counsel may not be instructed.

tightening the response deadline for Defendants to 7 days – is only likely to produce more problems such as increased pressure on the public authorities. However, abandoning the protocol would mean losing the current benefits it affords – early recognition of issues and a valuable means of keeping cases from being litigated if at all possible.

56. It is for this reason that a six-week time limit is likely to be self-defeating as a means of reducing the time and resources spent by public bodies dealing with legal challenges.
57. Accordingly, arrangements under the pre-action protocol could not be adequately altered to allow the benefits of the protocol *and* achieve the policy aims behind the proposal to shorten the time limits of either planning or procurement judicial reviews.

Question 3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

58. On balance, my answer to this question is: no.
59. As noted in my answer to Question 1, the reliance on a discretion to extend time shifts the onus onto the Claimant to argue why an extension of time should be granted.
60. Ultimately, whether such a discretion would ensure access to justice depends on how the discretion is interpreted. Many discretions in the CPR are qualified by the requirement that an extension should be “just and equitable”.
61. My principal concern is that a Claimant seeking to bring entirely legitimate proceedings and who has entirely blameless reasons for not being able to issue proceedings within six-weeks faces the uncertainty of permission being refused on a timing basis alone. This may be a problem of “bedding-in” a new legal rule, and case law would be required to give lawyers and clients guidance.
62. However, my view is that this is largely unnecessary because the requirement to act promptly already contains the necessary discretion to refuse permission for claims that are brought late. Any procurement or planning lawyer advising a client to bring judicial review proceedings after six weeks have elapsed would advise the client that there is a risk of the court holding that there has been a lack of promptitude (see the *Unison* and *Finn-Kelcey* cases cited above).
63. I can appreciate that from a perspective of a public authority, shifting the onus onto the Claimant in this manner would provide a further layer of procedural protection from some judicial review claims. However, the layer is “thin” because of the uncertainty inherent in a discretion of this nature.
64. The reason my position on this question is “on balance” is that I can foresee that if a six-week time limit *plus* a discretion were introduced in planning and procurement cases, the position on timing may well be identical to the current position – i.e. late claims that are prejudicial to the public interest would be filtered out. However, if that was the case – and nothing were to change in substance – the case for reducing the time limit falls away.

Question 4: Are there any other types of case in which a shorter time limit might be appropriate? If so, please give details

65. My answer to this question is: no.
66. I can understand that the reason why procurement and planning judicial reviews have been chosen by the Government. These are categories of case that may have an effect on business. In both categories, third parties such as suppliers and contractors may be inconvenienced by having to wait for the resolution of legal proceedings.
67. These sorts of cases are often described as being “polycentric”, which means that they touch on complex matters of policy and resource allocation that courts are not best placed to deal with. The courts are alive to this and typically exercise restraint in these areas.³⁰
68. An area similar in substance to procurement and planning is what could be called “commercial” judicial review. Such cases often have a polycentric aspect to them – see for instance: the challenge to the Digital Economy Bill,³¹ the challenge to the ban on cigarette dispensers;³² and the PPI litigation.³³ The outcome of each of these cases had the potential to have an impact on British business. On the underlying logic of the proposals, it therefore follows that such claims should also be subject to a six-week time limit.
69. There are two difficulties with this:
- a. Unlike procurement and planning, there is no statutory structure for appeals in the commercial context. Accordingly, making such challenges subject to a six-week rule would be arbitrary.
 - b. There is a difficulty of defining what is a “commercial” judicial review. On a wide reading, it might be possible to characterise an immigration judicial review as “commercial” given that private sector contractors perform many functions of the UK Border Agency.
70. The above is notwithstanding my overall view that a six-week time limit is inappropriate for procurement and planning judicial review challenges.

³⁰ See *De Smith's Judicial Review* (6th ed) (Sweet & Maxwell: 2007) at 1-033 – 1-036

³¹ *R (British Telecommunications Plc) v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin)

³² *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437

³³ *R (British Bankers Association) v The Financial Services Authority* [2011] EWHC 999 (Admin)

Proposal 3³⁴

We propose to invite the Civil Procedure Rules Committee to review the current wording of the Civil Procedures Rules, and in particular Part 54.5, to make clear that any challenge to a continuing breach or cases involving multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

71. There may be a “continuing breach” in many public law contexts – such as a continuing breach not to provide an individual with a community care assessment, or a continuing breach not to treat an individual as homeless. Until such breaches are remedied they are continuing.³⁵ This can provide a basis that any delay might be disregarded.
72. However, in this answer I focus on a specific form of continuing breach that arises from unlawful policies or practises.
73. In my work with Medical Justice, I have been involved in challenging policies and practises by way of judicial review. These cases are:

- a. *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710.

In this case we challenged a policy that enabled certain categories of immigration detainees to be removed from the UK with less than the normal 72-hour notice period. We successfully argued that this “zero-notice” policy abrogated the constitutional right of access to justice because an individual subject to the policy would find it extremely difficult to mount an effective legal challenge with no notice of being removed.

The policy under challenge was adopted on 11 January 2010.

The claim was filed on 6 April 2010, i.e. just over 3 months from when the policy was adopted.

- b. *R (MD (Angola)) v Secretary of State for the Home Department* [2011] EWCA Civ 1238

We intervened in this case which concerned the treatment of immigration detainees with HIV. Part of the case concerned whether there was an adequate system in place for the treatment of HIV in Immigration Removal Centres (IRCs). As interveners, part of our case was that the arrangements in IRCs for those with HIV was (and is) extremely poor, with missed medication being a common occurrence as well as

³⁴ The substance of this part of my response has also been submitted as part of Medical Justice’s consultation response (which I was responsible for drafting).

³⁵ See for instance *R (H) v London Borough of Brent* [2002] EWHC 1105 (Admin)

routine failures to comply with the guidance of the British HIV Association (BHIVA).

This part of the case therefore was a challenge to the overall practice of providing adequate healthcare in IRCs.

- c. *HA (Nigeria) v Secretary of State for the Home Department* (Court of Appeal proceedings ongoing).

In this case, we have jointly intervened with MIND. The case concerns an immigration detainee with severe mental health problems and his poor treatment whilst held in detention. The judge at first instance found that there was a violation of Article 3 ECHR and that relevant policy concerning the detention of those who are mentally ill was unlawful. That policy was adopted in 26 August 2010.

Part of our submissions to the court relate to the unlawfulness of the policy as well as the general practises of IRCs to the treatment of those with mental illness.

- d. *R (RAN and others) v Secretary of State for the Home Department* (Administrative Court proceedings ongoing)

In this case, we are supporting several claimants who have been subject to mistreatment in their home countries. It is their case that they have independent evidence that they were victims of torture. Accordingly, the effect of the relevant rules and policy is that these individuals should not be detained. It is our case that systemic failure in how these rules are applied has created a continuing state of illegality.

Accordingly, an important part of our case relates to the systemic failures in the system and amounts to a continuing breach.

74. I have set these cases out to demonstrate that in the litigation in which Medical Justice is often engaged we are normally concerned with a continuing state of affairs brought about by (a) unlawful policies or (b) unlawful practices.

75. It is clear from paragraphs 61 – 65 of the consultation paper that the Government intends to prevent such cases from being heard because these cases are “essentially frustrating the application of the three month time limit”.

76. In my view, this would be a highly retrograde step for the following reasons:

- a. Negotiations: Litigation is always a last resort for a small charity like Medical Justice. It is better to initially seek to negotiate improvements directly with the Home Office or the UK Border Agency. Occasionally, they are receptive to our input. Changes arrived through negotiation can be better in terms of outcomes and implementation. However, such negotiations can be extremely time consuming. The negotiations prior to the proceedings in *RAN and others* have occurred over several years. If we were forced to issue proceedings by reason of a

change in approach to the time limits in CPR Part 54, we would lose the opportunity to meaningfully engage and may be forced to litigate unnecessarily.

- b. Effective scrutiny: It is the experience of Medical Justice that consultation with the Home Office or the UK Border Agency is often an tokenistic exercise, where legitimate concerns are not taken on board or addressed. These concerns frequently concern the legality of changes in policy, such as in the *HA (Nigeria)* case. Recourse to the courts is often the only opportunity to have a policy change subject to effective and independent scrutiny.
- c. Evidence necessary: The evidence necessary to bring an effective challenge to a policy or practise is often significant. This takes time to gather and compile. For instance, in the *MD (Angola)* and *RAN and others* Medical Justice's position was supported by dossiers that were created as the result of painstaking research and analysis. It would severely compromise our ability to construct a proper evidence base if we were limited in cases of continuing breaches to a 3 month time limit.
- d. Efficiency: Furthermore, such test cases are a more efficient way of resolving commonly occurring issues. In *RAN and others* it is our hope that our client group would benefit from an authoritative judicial ruling which will prevent an ongoing wave litigation which concerns the failures to properly implement Rule 35 of the Detention Centre Rules 2001. A single test case can obviate the need for other would-be claimants to pursue proceedings. On this basis, the proposal may increase costs overall.
- e. Impact on client group: The issues we choose to litigate are chosen carefully and typically have a wide impact on our client group, immigration detainees. Our cases highlight the systemic failings in aspects of the immigration detention system. For instance in *Medical Justice* we were able to vindicate the constitutional right of access to justice for a number of vulnerable groups including those at risk of suicide and unaccompanied minors. We seek to shine a light into dark and remote corners of the state's control over vulnerable individuals. In principle, we would object to any proposal that sought to prevent this.
- f. Rule of law: The notion that such cases might be prevented from being heard on the basis of a technicality is objectionable to the constitutional role of the court in supervising the actions of the executive.³⁶
- g. Artificiality: Finally, there is a degree of artificiality in requiring a particular date to be identified in cases where such a date does not exist. In cases where there is a challenge to certain practises, these often develop over time – there is no single point where the practise suddenly “appears”. In *RAN and others* and *MD (Angola)* there was no point where the practises in question could be said to have simply

³⁶ By analogy see: *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644E-G

begun. In these cases, there is no attempt to frustrate the time limit in CPR 54.5 – instead, these cases simply illustrate that in cases of continuing breaches, the wording of CPR 54.5 does not accommodate the issues raised.

77. These factors demonstrate that if there is a problem with the wording of CPR 54.5, this problem is because it does not sufficiently take into account cases where there are continuing breaches. Accordingly, it is my view that if CPR 54.5 is to be amended, any change should take account of this problem.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

78. The factors noted above represent the possible risks of taking forward the proposal regarding continuing breaches.

79. In summary:

- a. Premature claims are more likely as organisations may be forced to issue proceedings rather than engage in negotiations. These claims may also suffer from an impoverished evidence base.
- b. It would be inefficient to prevent test case litigation that obviates the need for numerous claims raising similar issues. In this way, resources may be needlessly expended.
- c. There is a risk that vulnerable client groups that rely on the strategic litigation of organisations like Medical Justice may suffer the effects of unlawful policies or practises that may not be challenged by way of judicial review.

APPLYING FOR PERMISSION

Proposal 4

Our proposal is that, in cases where the claimant has been refused permission on the papers, and the matter is one which has been the subject of a prior judicial hearing, the claimant's right to ask for an oral renewal of the application for permission should be removed.

Basis of the proposals

80. Before addressing the specific questions in relation to the Government's proposals to change the approach to oral renewals, it is important to scrutinise the principles behind restricting this crucial part of the permission stage.
81. As noted above, the permission is stage is perhaps the hallmark of the judicial review process. As well as providing a significant level of procedural protection for public authorities, it also determines much of the pre-litigation dynamic of the parties (along with the pre-action protocol).
82. There appears to be a supposition in the consultation paper that because there is a 'right' to an oral renewal, all claimants refused permission on the papers exercise this right. This is incorrect. As research by Bondy and Sunkin shows, the figure of oral renewals was only 45% of those applications that were refused on paper.³⁷
83. This highlights a failure of the consultation paper as a whole to appreciate the complex factors that lead claimants to make litigation decision in judicial review cases. The consultation paper appears to assume that all claimants in non-successful judicial review claims have only embarked on litigation as a form of tactical device to delay or obstruct decisions by public bodies. This is worryingly simplistic – three obvious factors that influence litigation decisions in judicial review claims include:
- a. Prospects of obtaining relief – if a judge comments when refusing permission on the papers that a case is hopeless, few claimants would be advised to renew their application orally.
 - b. Likelihood of settlement – settlement is much more likely after the grant of permission (or even at the hearing itself, as this is when the parties meet face-to-face).
 - c. Costs – the prospects of a costs bill of over £1000 may deter many claimants from pursuing an oral renewal.
84. Furthermore, the success rate of permission applications made at an oral hearing is significantly higher than when the decision is just taken on the papers.³⁸ The consultation paper overlooks this and appears to suggest that applications that fail on the papers will gain little from a further oral application. But this overlooks the importance of oral argument and that a case which on the papers looks hopeless may contain a significant legal error buried in the paper work that can only be effectively teased out in open

³⁷ Bondy and Sunkin, *The Dynamics of Judicial Review Litigation* (Public Law Project: 2009), p 56

³⁸ *Ibid*

court.³⁹ This is even more likely to be the case when litigants are representing themselves.

Reliance on Cart

85. It is particularly concerning that *Cart* is prayed in aid of tightening the permission stage. The issues in *Cart* arose due to the Government's desire to oust judicial review of the Upper Tribunal with the coming into force of the Tribunals, Courts and Enforcement Act 2007. This was initially argued on the basis that the 2007 Act defined the Upper Tribunal as a "senior court of record" – an argument that was firmly dismissed by the Divisional Court.⁴⁰

86. As *Cart* proceeded up to the Supreme Court, the central issue was how to come to a pragmatic solution that balanced an observance for the rule of law and the policy intention behind the 2007 Act. The pragmatic solution was to rely on the second appeals criteria contained in r52.13 of the CPR. The Civil Procedure Rules Committee developed this, and now we have the paper-only procedure for most judicial review challenges of the Upper Tribunal.

87. The reason for setting out this history is that the *Cart* approach was developed in the specific context of the Upper Tribunal and the purported policy intention behind the 2007 Act. Although a judicial review challenge to a judicial body, such as the Lands Tribunal⁴¹ or the County Court,⁴² must cross a high threshold, this does not imply that a similar approach should be taken to the procedure and so limit consideration to the papers-only.

Question 7: Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a "prior judicial hearing"? Are there any other factors that the definition of "prior judicial hearing" should take into account?

88. In relation to the first part of this question, my answer is: no.

89. The wording of Question 7 is rather confused when read alongside the text of the consultation paper. Question 7 states that the definition of a court would determine whether there had been a "prior judicial hearing". This relates to the Contempt of Court Act 1981 and the Freedom of Information Act 2000. The definition of 'court' contained in these Acts is "any tribunal or body exercising the judicial power of the State".

90. However, it is important to note not to overlook the word "hearing" in the proposal. A court can come to decisions without a hearing – i.e. on the papers and without the benefit of oral argument. But Question 7 seems to suggest that using the definition of a "court" would *determine* whether there had been a "prior judicial hearing". Clarification on this point is required because the extent of the proposal is currently unclear.

91. Furthermore, the definition of a "court" in the Acts mentioned is not as straightforward as the consultation paper appears to assume:

³⁹ See *John v Rees* [1970] 1 Ch 345, at 402 for Megarry J's famous warning about "open and shut cases".

⁴⁰ *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin)

⁴¹ *R (Sinclair Investments (Kensington) Ltd) v The Lands Tribunal* [2005] EWCA Civ 1305

⁴² *R (Strickson) v Preston County Court & Ors* [2007] EWCA Civ 1132

- a. First, it resurrects a problem similar to the pre-*Anisminic* state of affairs where there were continual problems concerning the distinction between “administrative functions” and “judicial functions”. This has been largely swept aside because of the difficulty the courts had in refusing to accept jurisdiction for technical reasons in cases where there had been clear breaches of natural justice.⁴³ Adopting the definition suggested may well give rise to satellite litigation on the question a claimant has a right to an oral renewal. In my view, this would be wholly disproportionate.
- b. Secondly, such a definition does not provide assistance in relation to the many bodies that often subject to judicial review proceedings. The definition of “court” obviously includes the Crown Court, County Court and so on – but it is unclear whether it includes the following:
 - i. Disciplinary tribunals;⁴⁴
 - ii. Local authority licensing committees;
 - iii. Local authority planning committees;
 - iv. Reviews under section 202 of the Housing Act 1996;
 - v. The Independent Police Complaints Commission;
 - vi. The Parking Adjudicator;
 - vii. The Parole Board;
 - viii. The Council for Licensed Conveyancers;
 - ix. The Special Immigrations Appeals Commission (SIAC);
 - x. The Investigatory Powers Tribunal;
 - xi. The Criminal Injuries Compensation Authority; or
 - xii. The Coroners Courts.

This list is not exhaustive but in relation to each of the above, it is perfectly possible to have arguments about whether these bodies are “courts”. I would also note that many of these bodies make on-paper decisions – and I repeat that it is unclear whether such decisions are within the scope of this proposal.

92. On this basis, using the definition of a “court” as mentioned carries with it several problems.

93. In relation to the second part of this question, in my view a “factor based” approach to the definition of a court carries with it the possibility of uncertainty and the problems noted above. The only alternative is to have a list of bodies that the proposal relates to, much like Schedule 1 of the Freedom of Information Act 2000.

Question 8: Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

94. My response to this question is: no.

⁴³ See *Leech v Parkside Prison Deputy Governor* [1988] AC 533 and *De Smith’s Judicial Review* (6th ed) (Sweet & Maxwell: 2007) at Appendix B

⁴⁴ Such as the Fitness to Practice Panels of the healthcare regulators such as the General Medical Council (GMC) or the Nursing and Midwifery Council (GMC)

95. This is because the wording of the proposal is unclear. There are two possible readings of the proposal:

- a. A narrow reading, whereby “substantially the same matter” means the question of the illegality, reasonableness or procedural fairness of a decision has *already* been the subject of a court-based process.

If this were correct, then the proposal would serve little purpose, as all properly made judicial review applications are challenges to the legality of a prior decision. The application is brought because the claimant believes that something went wrong with the prior decision – and so, every application for judicial review raises a “new” issue.

- b. A wide reading, whereby “substantially the same matter” means that the same basic factual background has already been the subject of a judicial decision, and so should not be subject to a further judicial process (whether or not a new issue has arisen).

If this were correct, then the proposal would serve to prevent a large number of judicial review applications benefiting from the oral renewal process. This is because a wide reading would allow Defendants to argue that a Claimant is seeking to re-litigate an issue that has already been decided – such as whether an individual should stay in the UK, or whether an individual is entitled to a certain form of welfare benefits.

96. It is unclear precisely which reading of “substantially the same matter” the Government is proposing. The consultation paper states that the Government does not intend to prevent consideration of “genuinely” new legal issues. This suggests that the Government’s intended approach is somewhere in between the narrow and wide readings, and that a judge will have to divine whether a challenge brought by a Claimant is “genuinely” new.

97. On all these fronts, the phrase “substantially the same matter” encounters problems. On a narrow reading, it would serve no purpose. On a wide reading, it would illegitimately prevent Claimants from raising new points. On an intermediate reading, a judge would be left to guess the Claimant’s intentions in raising a matter and whether the issue is “genuinely” new.

98. It is for these reasons that I consider this proposal both unclear and inappropriate.

Question 9: Do you agree it should be for the Defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

99. The burden to show that a Claimant should not be afforded a procedural benefit should always be on the Defendant. This is the case in ordinary civil litigation, and should be the case in judicial review proceedings.

100. As noted above, I do not agree with the current proposals to remove the right to an oral renewal. However, were these proposals to be adopted, it should be the case that the Defendant is required to raise such issues in the Acknowledgement of Service (AOS). This is already the case, as Defendants

often use the AOS to put certain knockout points, such as delay or the availability of an alternative remedy.

101. However, whilst issues raised in the AOS may lead to permission being refused on the papers, such issues can currently be ventilated at an oral renewal, where a Claimant can respond to the Defendant's knockout points.

102. For instance, in relation to matters such as delay, this can be a relatively simply factual enquiry – when was the decision under challenge made and when were proceedings issued. However, in relation to the issue of whether a decision has been subject to a “prior judicial process” that has considered “substantially the same matter” there is likely to be arguments arising from the uncertainty of these terms, as noted above.

103. Therefore, the difficulty of this approach is that were a Defendant to file an AOS raising these issues, the fairest way to resolve whether the challenge was to “substantially the same matter” would be via an oral renewal hearing. Indeed, a judge might consider it necessary to order an oral renewal simply to get to the bottom of the issues raised in the AOS.

Proposal 5

Our proposal is that the Judge reviewing whether to grant permission may, if he or she considers that no arguable case is made out, also decide that it is totally without merit.

Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as totally without merit, there should be no right to ask for an oral renewal?

104. My answer to this question is: no.

105. This is because the designation that a case is “totally without merit” crosses a line from legitimate observations by a judge, to a conclusion with severe procedural consequences reached without the benefit of full argument.

106. When a judge refuses permission on the papers, the refusal is usually accompanied by “Observations”. These observations sometimes make reference to a case being “hopeless”.⁴⁵ However, such an observation does not carry the consequence of depriving the Claimant of the right to renew his claim orally.

107. Bondy and Sunkin note that half of the on-paper refusals that were described as “hopeless” were brought by litigants in person.⁴⁶ This highlights the concern that a poorly prepared and argued, albeit legitimate, claim for judicial review might be filtered out before the oral renewal stage. However, it is at the oral renewal when the judge would be able to test and explore whether the Claimant's case has a legitimate basis.

108. Furthermore, one of the cases in Bondy and Sunkin's study was described as being “totally without merit” when considered on the papers but was successfully renewed and was eventually successful at the substantive

⁴⁵ Bondy and Sunkin, *The Dynamics of Judicial Review Litigation* (Public Law Project: 2009), p 58 – 59

⁴⁶ *Ibid*, at p59

hearing.⁴⁷ This case demonstrates the risk of the proposal that a “totally without merit” designation carries. In my view, this risk is unacceptable.

109. The benefit of the observations by judges when refusing permission on the papers is that it gives the parties an impression of the strength of their case and whether it is worth seeking an oral renewal. As noted above, less than half of claimants choose an oral renewal, due to complex litigation decisions involving factors such as costs and the likelihood of settlement.

110. I would note two further points about this proposal:

- a. First, given the procedural consequences of a “totally without merit” designation it is likely that some judges will be reluctant to classify a case in this manner, especially without the benefit of oral argument.
- b. Secondly, the notion that a Claimant would have to go to the Court of Appeal to challenge the “totally without merit” designation is wholly disproportionate. The most efficient avenue to demonstrate that a case has merit is via the normal, streamlined process of an oral renewal.

111. For these reasons, it is my view that this proposal carries with it an unacceptable level of risk and should not be implemented.

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

112. It follows from my answer to Question 10 that, in my view, the consequences of the “totally without merit” designation should not be applied to any category of judicial review case.

113. Each judicial review case potentially contains an error of law. It is the role of the High Court in its supervisory capacity to identify and correct these errors of law. The current approach of the two-part permission stage contains necessary and proportionate tools to enable the High Court to carry out this task.

114. Removing any of these tools is illegitimate; and seeking to identify categories of cases which may or may not benefit from a proper consideration at the permission stage is arbitrary.

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

115. It follows from my answer to Question 10 that, in my view, an oral renewal should be allowed in all cases no matter what observations have been made by the judge on the papers.

116. This is particularly the case in cases that raise important points of principle or have the potential to cause extreme hardship to an individual. Such cases

⁴⁷ Ibid

might include removals from the UK to an country where an individual may be the subject of torture or mistreatment.

117. Furthermore, in cases where there is a factual dispute that may require an order for disclosure, it would be particularly important to have an oral renewal hearing as this would allow the court an opportunity to consider the issues more fully.

Question 13: Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

118. In response to the first part of this question my answer is: no.

119. For the reasons stated above, both proposals currently contain real problems of principle and practice.

120. Neither option would be more effective in filtering out weak or frivolous cases early than the current permission procedure. In my view, the effectiveness of such a procedure is a function of its balance between enabling litigants an opportunity to have access to the court as against the time and resources of the court.

121. The research in this area shows that the dynamic created by the current permission procedure allows for many judicial review challenges to be resolved early and without the need for a full hearing. Furthermore, the Government is unable to point to figures that would justify limiting the permission stage.

122. In light of this, the case simply has not been made that either option would be “more effective” than the current state of affairs.

FEES

Proposal 6

We propose to introduce a new fee, payable when an application is made for an oral renewal.

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

123. My answer to this question is: no.

124. I have found the Government's case for introducing a fee for an oral renewal difficult to follow.

125. It is stated that fees should be set at a level to cover the costs of providing the service. The cost of an oral renewal hearing is estimated to be, on average, £475.

- a. First, I would be interested to see what evidence there is to support the conclusion that an oral renewal hearing costs £475. None is provided in the consultation paper.
- b. Secondly, it is eventually accepted that the proposed fee level for an oral renewal is below the full estimate costs of the proceedings to which it relates. This appears to contravene the Treasury's *Managing Public Money* guidance.
- c. Thirdly, it is suggested a claimant who is successful in obtaining permission at an oral renewal hearing would have the fee for the full hearing waived. I am unclear why this is proposed. Not only does it contravene the principles in the *Managing Public Money* guidance, but it suggests that the proposed fee for oral renewal is in fact being used as a form of gate-keeping device. If this is the case, the Government should make this explicit.
- d. Fourthly, it is stated that an applicant should have a financial interest in the application for permission. However, it is plain that an applicant will often have a financial interest in the application – namely, the potential liability to pay the costs of the Defendant, in addition to their own costs.
- e. Fifthly, it appears to be suggested that the fee level of £235 should be introduced to create parity between the High Court and the Court of Appeal. This is not a reason for raising the fees to bring a judicial review claim as the procedure is quite different, such as the requirement for permission (cf: High Court) and the role of evidence in first instance proceedings (cf: Court of Appeal).

126. Therefore, the Government's basis for seeking to introduce a fee for an oral renewal hearing is somewhat unclear. It seems that the underlying logic of the proposal is actually to provide a disincentive to Claimants who may be considering to renew an application for permission orally.

127. However, the increased fees are unlikely to change the current dynamic in the numbers of Claimants who seek oral renewal. This is because:

- a. For legally aided Claimants, the issue fee is paid for out of central funds, along with the other litigation costs.
- b. For privately funded Claimants, the principal financial concerns relate to the Defendant's costs. When Claimants are refused permission at an oral renewal hearing they are often made subject of cost orders of at least £2,000.

128. Accordingly, my reasons for disagreeing with this question are that the proposed fee seems to be actually targeted towards reducing the number of oral renewals, which is likely to be ineffective, and the rationale behind the proposed fee level is not clear, apart from an unreasoned desire for parity between different courts.

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

129. My answer to this question is: no.

130. As noted above, it is clear that the Government has a desire to achieve parity between the fees paid for a High Court action, judicial review proceedings and an appeal to the Court of Appeal.

131. I also note that this question is unfortunately worded because it suggests that a Claimant would have to pay a fee for a full hearing, when it is in fact proposed to waive this fee if permission is successful.

132. The nature of the cases that cases before the Administrative Court and the Court of Appeal can be quite different, in that the Court of Appeal is not able to normally consider fresh evidence (subject to *Ladd v Marshall* principles). Furthermore, a full panel of the Court of Appeal consists of three judges whereas the Administrative Court usually consists of a single judge.⁴⁸

133. I reiterate my concern that underlying this question appears to be the same objective of seeking to discourage Claimants from applying to renew applications for permission.

134. In those circumstances, I am not fully convinced that the fee for an oral renewal should be the same level as the fee payable for a full hearing.

⁴⁸ The Divisional Court typically sits as a panel of two judges. Some Administrative Court proceedings have more than one judge, but these are exceptional cases.

IMPACT ASSESSMENT AND EQUALITY IMPACTS

Equality Impacts

Question 16: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

135. My principal area of experience is with those who have come from outside the UK and are challenging their treatment within the immigration system. In my view, there is no doubt that this group would be negatively affected by these proposals to tighten access to judicial review.
136. Furthermore, a theme that is largely unaddressed in the consultation paper is the impact of the proposals on litigants in person. In my view, it is litigants in person who are likely to be most affected by the negative impacts of these proposals. This is because litigants in person are less likely to be able to put together their case cogently on paper and may be denied the right to an oral renewal on that basis.
137. In my experience, a significant proportion of litigants in person are from outside the UK.
138. Accordingly, it is my view that the protected characteristic of “race” will need to be given particular due regard as the proposals in the consultation paper are developed.
139. Of course, given that some of the proposals in the consultation paper would apply to all categories of judicial review, other protected characteristics are vulnerable to the affects of the proposals. This would include “age” and “disability”, such as in the context of decisions made regarding community care, social security and housing.
140. The Government must be careful not to further disenfranchise groups of individuals that already find it difficult to assert their rights against public bodies.

Economic Impact Assessment

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

141. I would like to comment on the economic Impact Assessment (IA) that accompanies the consultation paper. I have experience of drafting similar documents having worked at the Law Commission.⁴⁹
142. The IA is very disappointing. I am surprised that more effort has not been made to monetise the costs and benefits. In my experience, when producing

⁴⁹ See

http://lawcommission.justice.gov.uk/docs/cp202_regulation_of_healthcare_professionals_impact_assessment.pdf and
http://lawcommission.justice.gov.uk/docs/lc326_adult_social_care_impact_assessment.pdf

a consultation paper, it is advisable to calculate some indicative figures that have suitable caveats around the core assumptions and then ask consultees for further information where necessary.

143. A properly constructed IA is a basic requirement of evidence-based policy making. I am particularly surprised that this has not been supplied given that the proposals are intended to save time and resources.

Policy Option 1 (Shortening time limits in procurement and planning cases)

Best estimates

144. It would be perfectly possible to monetise the costs to the public sector of shortening the time limits in procurement and planning cases.

145. For both categories, one would identify:

- a. The number of judicial review challenges brought within a certain period of time (for example, a year).
- b. Of those challenges, the number of judicial review challenges that were brought beyond six weeks from the original decision. (*figure n*)
- c. The average cost of such challenges. (*figure c*)
- d. Multiplying figure n and figure c would then give an indicative figure for the amount of money that would be saved. (*figure s*)
- e. Then, applying reasonable assumptions – such as, potential claimants might bring their claims more promptly – revise *figure s* downward by an appropriate percentage.

146. Both *figure n* and *figure s* would be relatively straightforward to determine – *figure n* could be determined by reference to a sample of cases found on bailli.org, whilst *figure s* could be determined by consulting with the Treasury Solicitor.

Assumptions

147. I note that the following assumptions have been made:

- a. *“It has been assumed that there will be no impact on the volume of cases brought by claimants, as the time limits are assumed not to have an impact upon the volume of applications for JR but only upon when they are made”.*

In my view this is a weak assumption, given that some claimants will undoubtedly find it more difficult to bring a challenge within a shorter time period, due to issues such as locating and funding legal representation.

- b. *“It has been assumed that no extra resources would be required to bring cases more quickly and the outcome of JR proceedings would remain unchanged, including at the pre-action stage.”*

In my view this is a weak assumption because instructing lawyers on an urgent basis is often more expensive than in normal circumstances. Furthermore, the outcome is unlikely to

remain unchanged given that the pre-action stage would be truncated, leaving less opportunity to settle the proceedings.

- c. *“There is a risk that case volumes might be higher if pre-action engagement is less successful in future if less time is available, and conversely a risk that case volumes might be lower if there is insufficient time for claimants to apply for JRs in future.”*

This assumption makes it clear that the Government is quite unclear about the possible consequences of bringing in this proposal. Furthermore, this assumption appears to conflict with the assumption noted at *b* (above).

- d. *“There is a risk of increased costs to claimants and Defendants associated with preparing cases more quickly, generating associated increased levels of business for legal services providers, and conversely a risk that cases might be prepared in less depth in future, with the opposite implication for legal services providers.”*

This assumption appears to conflict with the assumption noted at *b* (above), namely that more resources would not be required as a result of this proposal.

- e. *“There is a risk that claimants might apply for more extensions to the time limit in future. There is a risk that claimants may incur increased costs of monitoring Government decisions and a risk that public bodies may devote more resources into clarifying decision making processes.”*

This assumption appears to conflict with the overall policy aim of reducing costs.

Policy Option 2 (Restricting oral renewals)

Best estimates

148. It would be perfectly possible to attempt to monetise the costs and benefits of restricting oral renewals.

149. The following method could be adopted:

- a. Identify the total number of applications for judicial review in a given time period (for example a year).
- b. From these applications, identifying which cases were:
 - i. Subject to a prior judicial process of substantially the same subject matter (*figure n1*)
 - ii. Classified as “hopeless” or similar in the Observations made by the judge refusing permission on the papers (*figure n2*)
- c. Calculate the average overall additional cost of an application for permission that is renewed orally (*figure c*)
- d. Multiply *figures n1* and *n2* by *figure c*, to calculate an indicative level of saving.

150. Both *figures n1* and *n2* could be calculated by working with the Administrative Court Office, whilst *figure c* could be calculated by liaising with the Treasury Solicitor.

Assumptions

151. I note that the following assumptions have been made:

- a. *“It has been assumed that the proposals would reduce the volumes of oral renewals but that the eventual outcomes of the JR process would be the same, i.e. oral renewals which are no longer heard would not have been successful.”*

This is a weak assumption given that it is perfectly possible for cases that appear weak on paper to be granted permission on an oral renewal.⁵⁰

- b. *“There is a risk that fewer opportunities for claimants to apply for oral renewals may encourage them to devote additional resources to their initial application for permission to proceed with a JR, which may offset resource savings to them from the reduction in oral renewals. There is a risk that in turn this may require Defendants to devote more resource to initial stages of the JR process.”*

This assumption appears to conflict with the overall policy aim of these proposals.

- c. *“If more resources shift to the initial stages then any potential impact on legal services providers might be diminished.”*

The basis of this assumption is unclear.

Policy Option 3 (New fee)

152. The maximum potential benefit is calculated as being £400,000. However, the basis of this calculation is not given.

153. The maximum potential cost to business and voluntary bodies is calculated as being £120,000. However, the basis of this calculation is not given.

154. I would note that this is the only benefit identified in the IA and, by itself, does not amount to a strong business case for reform.

Policy Option 4 (Implementation of Options 1 to 3)

155. The following points are made:

- a. *“There may be transitional costs from familiarisation and any satellite litigation to determine how the new provisions work.”*

This is correct but has not been monetised. These costs may outweigh any benefits.

⁵⁰ Bondy and Sunkin, *The Dynamics of Judicial Review Litigation* (Public Law Project: 2009), p 59

- b. *“Legal aid costs may rise with the introduction of the oral renewal fee, which would represent a transfer between the LSC and HMCTS”*

This would represent a zero saving to the public purse.

Conclusion

156. In principle, I am not opposed to change of the judicial review process. However, any proposed changes must be carefully scrutinised to see whether there is evidence of a problem, and whether the proposed changes would provide an appropriate remedy. On both these points, the Government's consultation falls far short of what should be expected.
157. I have sought to address each proposal and question in detail, in order to carefully consider the merits the possible changes. Some of the proposals are either confused or unclear, or do not appreciate the specific litigation dynamic of judicial review proceedings. Furthermore, virtually no evidence is cited to support any of the proposed changes.
158. On this basis, it is with regret that I am unable to support the Government's proposals. I am willing to engage in further consultation and discussion if the Government chooses to develop these proposals further.

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