Why the Government's Judicial Review Reform Consultation should matter to you - and those you represent

Introduction

The judicial review process - the means to hold Government to account - lies at the heart of our system of public law and is central to the practical application of the rule of law in the UK.

Restrictions on judicial review are therefore of constitutional importance, and should not be confused with measures to cut red tape. Reform has in the past been carried out cautiously following careful and detailed consideration by experts, most recently by the Law Commission, and following the Law Commission's report, an enquiry led by Sir Geoffrey Bowman. The Bowman Committee's report led to the last major reform of the judicial review process, in 2000.

In December 2012 the government launched a consultation on Reforming Judicial Review:

> http://www.justice.gov.uk/news/press-releases/moj/judicial-review-consultation

The closing date for responses is 24 January 2012.

PLP is concerned at the apparent haste with which the new proposals have been introduced, the lack of evidence justifying the need for the proposed changes, and the short period (straddling the Christmas and New Year vacation, leaving only 24 working days for people to write their responses) during which consultation has been permitted, in breach of the Compact. If you or your organisation has been unable to engage properly with the proposals because of the short time-frame, you should raise this in your response to the consultation and you could ask the Ministry of Justice for an extension.

The consultation has already received some attention from legal commentators and bloggers, which might be of interest:

- http://ukhumanrightsblog.com/2012/12/13/quicker-costlier-and-less-appealing-plans-for-judicial-review-reform-revealed/
- www.newlawjournal.co.uk/nlj/content/judicial-review-reform

- www.planningportal.gov.uk/general/news/stories/2012/dec12/201212/201212_5
- www.edf.org.uk/blog/?p=22431
- http://ukconstitutionallaw.org/blog/

This note explains why the consultation should matter to all those concerned about preserving judicial review as one of the most important checks on the abuse of state power. When carefully analysed, it emerges that the key proposals could seriously damage access to justice if implemented in their current form – it is vital that these implications are understood, and, where appropriate, the proposals are resisted.

The Justice Secretary Chris Grayling introduces the proposed reforms as being intended:

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

He also calls the measures "*simple and proportionate*". More disturbingly, however, there is talk of 'striking a balance' between what the Rule of Law requires and the 'needs' of public authorities and businesses, the 'inhibiting' effects accountability through judicial review has on them and the 'pyrrhic' nature of victories when unlawful decisions are struck down requiring public authorities to retake them lawfully. All these assumptions need to be challenged.

Also very troubling is the lack of an evidence base for the proposals (there is much reliance on anecdotal evidence and what it suggests: see for example, paragraphs 64 and 79) and the lack of any meaningful data on the impact the proposals will have in equality terms, if implemented.

Proposed changes to time limits

There are two proposals for change here. First, a reduction in the time frame for certain types of judicial review claim. Currently all claims must be brought promptly but in any event within three months of the decision which is being challenged. The Government wants to change that, with the time limits for challenges to planning and procurement decisions being reduced to six weeks or even a month of when claimants knew or ought to have known that grounds arose.

Issues you should consider raising in a consultation response include:

- The main problem the government identifies – increases in case numbers – is not attributable to planning or procurement cases. The increase in judicial reviews comes from immigration and asylum cases: there has been no tangible increase in other types of judicial review claims (the Government's own graph shows this, see p.10 of the consultation document).

- The reason for short time limits in procurement and planning appeals is that those with the right to appeal are already involved in the process – as parties. Others, who have to challenge using judicial review, are less involved and have less information at the start of the process so they need more time.

- It is accepted by the Government, that the time envisaged may not be enough time for a case to be put together, or a proper exchange of pre action correspondence in line with the judicial review pre action protocol (which might mean the claim becomes unnecessary, or is at least more focussed).

- Shorter time limits may mean that people issue judicial review claims before they try to resolve the issue in other ways: this risks swamping the courts with premature applications.

- Shorter time limits will mean increased costs for claimants and defendants who have to prepare their cases at short notice.

- This also seems to be the thin end of the wedge: the Government asks about other types of judicial review in which shortened time limits might be appropriate.

- Short time limits adversely impact on access to justice – particularly by vulnerable people and groups who may find it difficult to access information or consult lawyers. For example, people with mental health problems or people who are detained may face particular difficulty in complying with shorter time limits.

Secondly, the Government says it is concerned that:

> *"in some cases, the grounds may arise from an ongoing state of affairs or from a number of related decisions. This may be because the claim relates to a ground or grounds which are ongoing, for example, a delay or failure to take a decision or implement a policy properly. This may mean that it is possible to bring a claim for Judicial Review after more than three months by arguing that a continuing failure means that the starting point for the time limit is continually moving...*

In others, it may be because the decision complained of has led to some further activity, for example, correspondence between the claimant and the decision making body seeking clarification on the decision, or the reason for reaching it, or asking for the decision to be reconsidered in the light of further submissions. In these cases it is the later decision which is relied on as the starting point from which the three month period starts to run…

We believe that the current law ought to function so that the time within which proceedings must be brought starts at the point where the grounds giving rise to the claim first arose. Nevertheless, anecdotal evidence suggests that, at least in some cases, the claimant has been able to argue successfully that the time limit should start at a later point, either by challenging the latest point of continuing breach or the latest decision in a series of related decisions, essentially frustrating the application of the three month time limit."

What is proposed to eliminate this problem is a rule change requiring:

"any challenge to a continuing breach or cases involving multiple decisions [to] be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds. The review should ensure that the wording of this rule reflects the current legal position that the time limit to be applied in Judicial Review proceedings starts to run from the point at which the grounds for the claim first arose, taking into account when the claimant first knew or ought to have known of the grounds arising."

How this change will operate is far from clear, but it could have profound effects on the scope to challenge ongoing failures by the state.

Issues you should consider raising in a consultation response include:

- The courts already have the power to prevent judicial review cases from proceeding if they are not brought promptly. There is no evidence that this test is not working from either claimants or defendants.

- At best, this element of the proposals creates massive uncertainty about when claims need to be brought, and is simply not compatible with EU requirements of certainty in environmental cases.

- At worst, it could allow public authorities to rely on their own unlawful delays and failures to immunise themselves against challenge. For example, if a person is unlawfully detained but they don't realise that their detention is unlawful until after three months have passed, the proposed change might mean that the person is too late to bring a challenge. The longer the unlawful detention lasts, the harder it will be for the detainee to challenge it. This would be inconsistent with good administration and its absurdity would lead to increased litigation.

- Many claims will end up being issues protectively – unnecessarily burdening the Courts and exacerbating the very problem the Government appears to be concerned about.

- There are problems about challenging unlawful Government policies or secondary legislation. Would the grounds arise when the policy or legislation came into force but before anyone had been affected by it? What would happen if an unlawful policy did not affect anyone for more than six months - could it still be challenged, or would it, as the Government apparently intends, be rendered immune from the scrutiny of the judicial review court?

- The proposal is contrary to the practice in discrimination and human rights law. In discrimination law a person can bring a challenge up to three months after the date of the last act of discrimination. In human rights law, the European Court of Human Rights considers that a claimant is within the time limit if the human rights breach is on-going.

In any response, you may want to give examples based on your own cases and direct experience of how the proposals on timing will impact on access to justice and, if relevant, breach ECHR rights.

Proposed abolition to the right to an oral permission hearing in many cases

According to the consultation document, a claimant "*may have up to four opportunities to argue the case for permission*".

There are two proposals for reform. The first is to:

> "*remove the right to an oral hearing in cases where there has already been a prior judicial process involving a hearing considering substantially the same issue as raised in the Judicial Review claim".*

The Government proposes that defendants to judicial review claims will raise the argument, when appropriate, that no oral permission hearing is permitted, and that the judge deciding permission on the papers will then make a ruling on that. If that ruling bars an oral permission hearing, there will be an opportunity to seek permission to appeal against the refusal of permission from the Court of Appeal to proceed with the judicial review - but only on the papers. There will be no oral permission hearing there either (unlike now).

The second, linked proposal on oral permission hearings is to remove the (at present) automatic right to an oral renewal hearing in cases where a judge has, on the papers, certified that the claim is "*totally without merit*".

It is clear that the 'judicial process' is intended to encompass a wide range of decisions – those of coroners, magistrates and certain tribunals are all mentioned.

So, for example, if a coroner refuses to adjourn an inquest when this is necessary, or adjourns inappropriately, directs the jury in an objectionable way, or decides that the inquest need not be conducted in compliance with Article 2 of the European Convention on Human Rights. Challenges to coroner's substantive decisions e.g. verdicts may also be affected by the proposed arrangements.

Both proposals are likely to mean many, very significant decisions of judicial bodies being exposed to far less scrutiny than now.

Issues you should consider raising in a consultation response include:

- The right to an oral hearing to present arguments about unlawful action on the part of public bodies - whether magistrates, tribunals, Coroners, the Police, the IPPC or Central government departments - is a vital element of the judicial review process; one that has been preserved despite careful examination of the process when the CPR were established by Lord Woolf and reviewed for judicial review cases by Sir Geoffrey Bowman. And oral hearings are important - they are sometimes the only opportunity to develop and properly test arguments for permission.

- Oral advocacy is central to the English and Welsh adversarial legal system. In the case of *Sengupta v Holmes,* Lord Justice Laws stated at paragraph 38:

> "He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."

- Many people, particularly litigants in person, find it easier to express their arguments orally than in writing. A system where the right to an oral renewal may be removed will disadvantage those litigants.

- As the consultation paper grudgingly acknowledges, each year literally hundreds of judicial review claims are granted permission to proceed at oral hearings, despite permission having been refused on the papers. Some of these cases would simply not have proceeded if the government's reforms had been implemented.

- Satellite litigation is likely to arise in order to determine whether or not an issue has been substantially considered in a prior judicial process.

- The effect of people being denied the right to an oral renewal hearing will lead to more people applying to the Court of Appeal, thereby merely shifting the burden from one court to another.

- The courts already have powers to deal with vexatious and frivolous litigants.

Again, in any response, you may want to give examples based on your own cases and direct experience of how the proposals on timing will impact on access to justice and, if relevant, breach ECHR rights.

Proposed fee for oral renewal hearings

The consultation proposes charging a fee of £215 for an oral renewal hearing. This fee would be refunded if the claimant was granted permission to proceed with the judicial review claim.

Issues you should consider raising in a consultation response include:

- Increasing the cost of bringing judicial review proceedings limits access to justice. Litigants in person who do not have legal aid will be disproportionately affected by this proposal.

- The Aarhus Committee in Europe, which regulates environmental judicial reviews, has already stated that judicial review in England and Wales is too expensive for litigants.

Impact of the proposals on equality

The consultation is accompanied by an equality impact assessment. However, due to the limited data, the Government is unable to assess the impact that these reforms

would have on people with protected characteristics. As a result, the consultation states:

> "*To help us fulfil our duties under the Equality Act 2010, we would welcome information and views to help us gather a better understanding of the potential equalities impacts that these proposed reforms might have."*

Issues you should consider raising in a consultation response include:

- Unless it can assess the potential equality impact of the proposals, the Government should not proceed.

- The proposals are likely to have a disproportionate impact on people with protected characteristics who are more likely to be unrepresented and facing poverty.

Again, in any response, you may want to give examples based on your own cases and direct experience of how the proposals will impact on access to justice for people with protected characteristics.