

British Irish RIGHTS WATCH

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24 January 2013

Dear Mr Odulaja

Re: Judicial Review: proposals for reform (Consultation Paper CP25/2012) (CM815)
Rights Watch UK has the following mission, expertise and achievements:

Mission

Promoting human rights and holding governments to account, drawing upon the lessons learned from the conflict in Northern Ireland.

Expertise and Achievements

Since 1990 we have provided support and services to anyone whose human rights were violated as a result of conflict. Our interventions have reflected our range of expertise, from the right to a fair trial to the government's positive obligation to protect life. We have a long record of working closely with NGOs and government authorities to share that expertise. And we have received wide recognition, as the first winner of the Parliamentary Assembly of the Council of Europe's Human Rights Prize in 2009 alongside other honours.

Introduction to our submission to the Consultation Paper

We welcome the opportunity to respond to Consultation Paper CP25/2012 on Judicial Review: proposals for reform. We note the short deadline for submissions which is not in accordance with government policy which is stated as "Consultations should normally last for at least 12

weeks with consideration given to longer timescales where feasible and sensible.”¹ It will also become apparent in our responses to the suggested questions in the Consultation Paper that we are concerned regarding the motivation for these proposals to reform what is an essential tool in challenging policy decisions (or the failure to make policy decisions) of the executive and the administration.

We do not consider ourselves constrained by the questions suggested in the Consultation Paper.

Time Limits

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?

We acknowledge that procurement and planning cases are not part of our expertise but we are in a position to make the following general observations.

It is important to recognise that even at present the three month time limit is expressed as an absolute maximum and the court has often stated that proceedings brought well within the three month period have not been “prompt” (see for example *R v Independent Television Commission ex parte TVNI Ltd* Times 30 December 1991).

While we agree that judicial review should be an effective process (paragraph 39) and to the benefit of all parties involved, we are concerned that to shorten time limits in planning and procurement cases may be counter-productive. Procedural changes to judicial review should not be considered and implemented in isolation of other considerations.

Shortening the time limit will reduce the time period for negotiation and have a potential effect on the quality of the application particularly for those parties in a less financially secure position or seeking to secure pro bono legal representation or representation through public funding. This disadvantage may result in increased costs for public authorities who have to respond to premature claims. The government concedes that the number of planning and procurement claims is relatively low and not expected to rise, so shortening the time limit is unlikely to have any significant impact on economic growth (paragraphs 2.11-2.12 of Evidence Base).

We also express concern that this proposal will disproportionately disadvantage environmental and ecological interest groups in particular. These pressure groups are not in the same position as the parties directly in the appeal case. Parties to the case have all the necessary information and resources to hand and do not need to seek permission, but interested parties and possible interveners lack this information and require permission. To shorten time limits will inevitably restrict the important work of these pressure groups and may be contrary to Article 9(4) of the Aarhus Convention which obliges the UK to provide adequate and effective remedies which are fair, equitable, timely, and not prohibitively expensive. In addition the proposal is contrary to the spirit of the equality of arms principle.

¹ See <http://www.bis.gov.uk/files/file47158.pdf>

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?

We submit that the government has underestimated the importance of the Pre-Action stage of proceedings. Often the issuance of a Letter Before Claim and the threat of litigation leads to settlement and dispenses with the need for adjudication in the Administrative Court. Research conducted on behalf of the Public law project has been estimated that over 60% of potential judicial review applications are resolved by mediation before the commencement of proceedings.² By shortening the period in which this is possible, the number of permission applications is likely to rise.

It is possible to illustrate the positive contribution judicial review applications make to local government and public administration decisions. Contrary to the unsubstantiated claim that judicial review has 'an unduly negative effect on decision-makers' leading to 'overly cautious' decisions (paragraph 35), judicial review ensures that decisions are legal, rational and procedurally fair. Research illustrates that 'judicial review litigation may act as a driver to improvements in the quality of local government services' as both the law and public administration share the mutual aim of maintaining the highest standards.³ The Government has itself acknowledged this.⁴

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?

We have concerns about the extent to which the government has assessed the impact that shortened filing times may have on vulnerable individuals less able to engage with the judicial process due a range of factors including economic power, and whether the discretion to extend would be sufficient to counter this disproportionate disadvantage. We also point out that

² See Varda Bony and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (London: Public Law Project, 2009) at page 30 paragraph 2.6. Available at

<http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>

This research demonstrates that most claims are settled, and most settlements satisfy the claims made in the challenge. As noted 62% of potential cases are either settled or abandoned as soon as a letter before claim is sent. 34% of claims which are issued are withdrawn before the permission stage, the vast majority in favour of the claimant; where permission is granted 56% are withdrawn before further action. See also Varda Bondy, Linda Mulcahy with Margaret Doyle and Val Reid, *Mediation and Judicial Review: An empirical research study* (London: Public Law Project, 2009) available at

<http://www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf>

See also Advice Now Service analysis of this research at

http://www.asauk.org.uk/go/SubPage_96.html.

³ See for example Lucinda Platt, Maurice Sunkin, Kerman Calvo *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (University of Essex, Colchester: University of Essex, Institute for Social and Economic Research, No 2009-05, 2009), 22

⁴ See Treasury Solicitor's Department, *The Judge Over Your Shoulder* (London 2006) at page 3

reliance on judicial discretion is discordant with the desire to achieve certainty for claimants (paragraph 44).

For example, where a person is detained he or she may find it difficult to access legal advice. This is particularly so for those in immigration detention or foreign nationals in prison facing imminent removal.⁵ Those pursuing a transient lifestyle such as Gypsies and travellers may similarly be prejudiced, specifically where planning decisions which affect their communities engage Article 8 Convention grounds.

Furthermore, the discretion to extend time would not be sufficient if it failed to comply with European law principles of certainty and effectiveness in claims involving public procurement and environmental impact assessments (see *Uniplex (United Kingdom) Ltd v NHS Business Services Authority* [201] PTSR 1377; *R (Buglife) v Medway Council* [2011] EWHC 746 (Admin)).

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

Given the above arguments, we do not believe that shorter time limits are appropriate in any types of judicial review application. We express concern at the Government's intention to shorten time limits in other types of cases without due regard for the impact on access to justice and the enjoyment of human rights. Unless this impact can be meaningfully assessed on the basis of accurate information the Government should not apply shortened time limits to other types of cases.

Time Limits: Cases where there are continuing 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.

Please see response to Question 6.

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?

⁵ The Justice Gap, *Foreign National Prisoners: Access to Justice*, 22 January 2013, reporting that only 69% of detainees interviewed in an empirical study conducted by Bail for Immigration Detainees (BID) had a legal representatives. Available at: <http://thejusticegap.com/News/foreign-national-prisoners-access-to-justice/>. The BID research is available at Bail for Immigration Detainees, *The Liberty Deficit: Long-term detention and bail decision making*, 20 December 2012 at <http://www.biduk.org/119/news/latest-news.html>

We argue that 'first instance of the grounds' is ambiguous and the proposed rule is contrary to the calculation of time limits in continuing breach cases as practiced in other areas of law.

With regard to planning cases, following the House of Lords decision in *R (on the application of Burkett) v. Hammersmith and Fulham LBC (No.1)* [2002] 3 All ER 97, the time limit for judicial review applications under Civil Procedure Rules (CPR) 54.5(1) runs from the date that planning permission was granted and not from the (earlier) date that the committee resolution was passed. These are two significantly different stages of the decision process between which many changes to the initial decision may occur. Following *Kides v South Cambridgeshire District Council* [2002] EWCA Civ 926 the decision-maker is obliged to take into account any change of circumstances between the passing of the resolution and the issuance of planning permission. Changing the rules under CPR 54.5(1) may encourage earlier applications for judicial review thereby making it impossible for the matters to be resolved without resorting to litigation.

More broadly, this proposal is inconsistent with the practice of discrimination law in relation to continuing acts or a series of acts of discrimination. In these situations, time runs from the last act of discrimination. It is also contrary to human rights law as interpreted by the European Court of Human Rights (ECtHR) which has held that a claimant is within the time limit if the human rights breach is part of a 'continuing situation' (see *Ülke v. Turkey*, Application No. 39437/98, 24 January 2006, 'taken as a whole and regard being had to its gravity and repetitive nature').⁶ In the domestic arena there are documented cases where a foreign national person in prison or a similar form of immigration detention may not have access to legal representation and may not know that his or her detention is legally challengeable until after the specified time period, thus losing a right to challenge if the three month period has passed.⁷ We believe this proposal signifies a dramatic departure in practice from other areas of the law and cannot be justified solely on the basis of 'anecdotal evidence' (paragraph 64).

Applying for Permission

Option 1: Restricting the right to an oral renewal where there has been a prior judicial hearing of substantially the same matter

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?

We emphasise that the right to an oral hearing for a renewal is a vital part of the judicial review process. It is a fundamental principle of UK administrative law that a person affected by a governmental decision ought to be afforded some opportunity to present his case to the decision maker. Further, it is clear that Article 6 of the European Convention on Human Rights (the ECtHR) which protects the right to a fair trial, is also engaged here, ensuring the right to a fair and public hearing within a reasonable time before and by an independent and impartial tribunal.

⁶ See <https://wcd.coe.int/ViewDoc.jsp?id=960297&Site=COE>

⁷ See Bail for Immigration Detainees, *The Liberty Deficit: Long-term detention and bail decision making*, 20 December 2012 at <http://www.biduk.org/119/news/latest-news.html>

The Government concedes that judicial review may be the only available route for a claimant to challenge a decision of the government (paragraph 77). Contrary to the claim that there are four opportunities to argue a case, in practice this rarely happens due to the pressure to mediate, a promise to reconsider and the force of prohibitive costs driven by a pernicious public legal funding regime.

Although the Government has argued that there are a number of judicial review claims which have been of 'substantially the same matter' it is noteworthy that the government has no evidence to support this claim. It only provides anecdotal evidence that some cases 'reargue substantially the same points in a different forum in the hope that a different conclusion will be reached' (paragraph 79). Reliance on this argument assumes that cases were in fact arguing similar points, but this is by no means clear. Invocation of a sound legal principle can be unreasonable where the facts do not support it, but it does not render the principle unsound. An applicant may argue the same points in the expectation of a different conclusion and may be right in doing so if the facts and law justify it.

The definition of 'prior judicial hearing' (paragraph 83) is broad and we express concern at the inclusion of judicial functions of coroners and inquiries established by statute. Each inquiry is a distinct investigation although there may be similar but not identical facts. We submit that it is inappropriate to draw parallels in cases of 'substantially the same matter' in these situations. The consequences of doing so are far-reaching especially if judicial review is the only means by which one can challenge a decision of the executive or the administration.

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?

We do not accept the restriction of oral renewal *per se* and therefore make no submission on this question.

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?

We do not accept the restriction of oral renewal *per se* but if the proposals were to be adopted we submit that placing the burden on the defendant is preferable to placing it on the claimant.

Option 2: restricting the right to an oral renewal where the case is assessed as "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?

We express concern that the phrase 'totally without merit' is not statutorily defined but is subject to judicial discretion. The proposal to restrict the right to an oral hearing in a renewal application for cases 'totally without merit' assumes that judges are consistent in their findings on permissions on the paper and apply standards of merit based on a shared objectivity of interpretation from statute, common law and other accepted standards applying to judicial merit.

Research conducted by Bondy and Sunkin shows marked variation in the rates of grant and refusal of permission as between judges which does not correlate to the nature or type of case.⁸ Given this inconsistency in judicial decisions it would be unfair to deny a claimant the opportunity of an oral hearing before another judge where there is a greater chance of permission being granted. Evidence demonstrates that the success rate of permission claims at an oral hearing is almost twice as much as those on papers alone.⁹

It is important to note that at present even when judges deem an application as 'hopeless' it does not carry the severe consequence of a denied oral renewal hearing.

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?

Given that this issue is beyond the scope of our experience and expertise we make no submission on this question.

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?

Yes; there have been instances when, after being declared 'totally without merit' a claimant has succeeded at final hearing (see *Leyton v Wigan County Council* (Co 7428)). Mindful of this fact, the government should not deny the right to an oral renewal application.

Combining Options 1 and 2

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?

We are concerned that the Government conflates the 'growth' of Judicial Review claims with a rise in claims without reasonable prospect of 'success'. The statistics cited fail to record the number of claims which are settled out of court before judgment is made on permission. The Government has conceded that data is not collected centrally on these matters. Furthermore, refusal of permission does not necessarily mean that a claim has failed, often the challenged decision is withdrawn and permission for judicial review is refused on the grounds that the

⁸ See *The Dynamics of Judicial Review Litigation* page 67 paragraph 4.5

⁹ Ibid at page 56 paragraph 4.3

matter has now become 'academic'. Again, the statistics cited by the Government do not capture this. The Impact Assessment states that in 2011, only 300 out of 2000 oral renewal Judicial Review applications were granted permission (paragraphs 2.40; 2.57 Evidence Base). This demonstrates that the existing filtering mechanisms are effective at filtering out 'hopeless, frivolous or vexatious' claims.

We believe that neither of the proposals will achieve the desired aim of filtering out weak and frivolous claims early. Removing the right to oral renewals would prematurely deny access to the courts for potentially meritorious claims. For example, those 300 applicants whose oral renewals were successful in overturning the decision on the papers in 2011 would under the new proposals be denied access to judicial review (paragraphs 2.40 and 2.57 Evidence Base).

Furthermore, we suggest that the government has overestimated the extent of claims which are 'totally without merit'. Excluding immigration and asylum claims, in 104 civil claims which had judicial observations only twelve were assessed as 'totally without merit'.¹⁰ This also demonstrates that the existing mechanisms for filtering out weak and frivolous cases are effective.

Fees

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

BIRW believe that the proposal to introduce a fee for an oral renewal hearing will have a disproportionate effect on those litigants in person without legal aid or with limited access to financial resources including those in prison and in other forms of detention or custody.

With reference to judicial review in relation to environmental matters, under Article 9(4) of the Aarhus Convention, remedies must not be 'prohibitively expensive'. This has been interpreted to refer to the total cost of making an application, including exposure to the risk of costs if the application fails and to costs of interim injunction relief. A remedy is 'prohibitively expensive' if an ordinary member of the public who is not entitled to legal aid is reasonably prevented from challenging the decision.¹¹ (See *R (Edwards) v Environment Agency (No.2)* [2010] UKSC 57 and *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006).

The issue of fees was considered by the Law Commission in 1993 and they were careful not to 'front-end' costs. They noted in particular that this stage was 'intended to simply be a filtering mechanism' and thus it was not appropriate to introduce a fee.¹² The Government has not

¹⁰ See Varda Bondy and Maurice Sunkin "Judicial Review Reform: Who is Afraid of judicial review? Debunking the myths of growth and abuse", *UK Constitutional Law Group*, 10 January 2013, at <http://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/>

¹¹ See Working Group on Access to Environmental Justice, "Ensuring Access to Environmental Justice in England and Wales", May 2008 at http://www.wwf.org.uk/filelibrary/pdf/justice_report_o8.pdf

¹² See Law Commission Consultation Paper No 126 HMSO, 1993, at paragraph 5.6

demonstrated if or how the situation has changed in such a way that a policy departure is now warranted.

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?

If fees are to be introduced at the proposed level for an application for an oral renewal then there must be the guarantee that if the application is successful then the fee will be waived. We reiterate that fees should not be a barrier to access to justice especially when there is inequality of economic power between the interested parties.

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?

As described above we are particularly concerned about particular vulnerable groups who may be adversely effected by these proposals including those in prison and in other forms of detention or custody; those with mental health problems; those who are itinerant including Gypsies and travellers.¹³

In order to comply with s149 of the Equality Act 2010 the Government must have 'due regard' to the aims of the general equality duty. This necessitates an adequate evidence base for decision making. It is unacceptable for the Government to proceed with the proposals in the absence of accurate information concerning the equality impact.¹⁴ (See *R (on the application of Siwak) v Newham LBC* [2012] EWHC 1520 (Admin)).

The proposed reforms to judicial review as set out in this Consultation Paper are driven by Government concerns regarding cost and bureaucracy. These drivers should not be taken as determining the future of judicial review in England and Wales beyond those proposed and considering the views of NGOs such as ourselves. Judicial review continues to be an important means of holding public bodies to account for the misuse and abuse of power.

Yours sincerely,

BIRW

¹³ See for example Sarah Cemlyn, Margaret Greenfields, Sally Burnett, Zoe Matthews and Chris Whitwell, *Inequalities experienced by Gypsy and Traveller communities: A Review*, Equality and Human Rights Commission, Research report 12, 2009. Available at http://www.equalityhumanrights.com/uploaded_files/research/12inequalities_experienced_by_gypsy_and_traveller_communities_a_review.pdf

¹⁴ See http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_update_nov.pdf

