Northumbria University's Public Law Research Group's response to the Judicial Review consultation

January 2013

Contents

Foreword

Background

This document is a response to the consultation paper produced by the Ministry of Justice. The Public Law Research Group is based at Northumbria University School of Law and its members include external practitioners from private practice and academics from other institutions, as well as academics from the Faculty of Business and Law at Northumbria University. The Public Law Research Group discussed the issues raised by the consultation and organised a response, co-ordinated by Richard Glancey, Senior Lecturer in Public Law at Northumbria University.

Aims

The aim of this document is to provide responses to the questions raised by the consultation paper. The reforms suggested by the Government are in three key areas of the Judicial Review process:

- the time limits within which Judicial Review proceedings must be brought;
- the procedure for applying for permission to bring Judicial Review proceedings; and
- the fees charged in Judicial Review proceedings.

The Government are encouraged to listen to and seriously consider the responses made by not just this paper, but by all the responses, as a great deal of concern has been raised with the proposals.

As will be seen throughout this document, perhaps the key concern for us, which has been shared by many others around the country, is the significant lack of evidence put forward by the Government upon which to base the reforms. Where such far-reaching reforms are being suggested, it is a basic and fundamental requirement to base such reforms upon reliable and trustworthy evidence. No such evidence has been put forward. Indeed, the consultation specifically refers to 'anecdotal' evidence upon more than one occasion, and it suggested that such evidence falls some way short of a sufficient evidence upon which reforms should be based. We can only therefore recommend that the proposals should not be implemented until such time as a proper evidence gathering exercise has taken place. Without such evidence there is no mandate for, and therefore no legitimacy to, the proposals.

One further concern that we would like to highlight is the lack of consultation time given. The usual consultation time was halved and respondents given only 6 weeks to consider such important and far reaching changes. In addition, this 6 week period took place over the Christmas and New Year holiday period, which further lessens the adequacy of the consultation process. Furthermore, in paragraph 37 of the consultation document, it states that views are sought on how the proposals can best be implemented. This suggests that a decision to make these reforms has already taken place and this consultation is merely going through the motions rather than being a genuine and adequate consultation process.

Answers to the specific questions raised by the consultation are set out below.

Chapter 1: Time limits for bringing a claim

This chapter deals with questions 1-6 of the consultation paper:

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?

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?

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?

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

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.

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?

1. Those who practice Judicial Review cases state that only a very low proportion of cases get issued; the vast majority settle prior to any action. The current timescales are already extremely tight, being promptly, and no later than 3 months. Under these rules claims have been struck out which were brought within the 3 month limit but not promptly enough. Reducing the timescale will have the effect of reducing even further the ability for claims to settle and result in more cases being issued. Further to this, it will result in more cases being issued protectively. It will be in both clients' and practitioners' interests to issue solely to ensure the deadline is not missed. Practitioners may feel obligated to issue a claim, which would otherwise not be issued, in order to protect against a complaint for acting in the client's best interests and missing the last opportunity to seek redress. Judicial Review is an avenue of last resort, so to change the rules about access to that last resort would seem contrary to the principles of good administration of public decision making and appears to undermine the principle of the Rule of Law, particularly with regard to access to justice.

2. If more protective proceedings are issued there would inevitably be more requests for proceedings to be stayed until further work on the case can be carried out. This would lead to more delays rather than less, and for those cases where a stay was refused, they could be carried out with less time for preparation than they would otherwise be.

3. There are also serious concerns about whether this would breach Article 6 of the European Convention on Human Rights, particularly when taking such a drastic step of reducing the ability to obtain a hearing.

4. It has not been sufficiently demonstrated why reducing the time limit to match appeals is necessary or desirable. Given that Judicial Review is the last opportunity for redress, the correct balance needs to be achieved between allowing sufficient time for a claim to be made whilst allowing the operation of Government not to be hampered. The current timescales already stretch this balance very tightly so to further reduce them would tip the balance and result in serious concerns about access to justice and upholding the Rule of Law.

5. Having different time limits for different matters, dependent upon the substance of the claim introduces new levels of complexity that is unnecessary.

6. In relation to procurement cases, EU law must be considered. Having a time limit of only 30 days where an EU law matter is in issue is not workable or realistic as additional time may be necessary to liaise with EU partners, examine EU documentation and registers. The consultation document does not clearly demonstrate that these concerns have been considered.

7. The suggestion the rules should change in relation to continuous breaches and/or multiple decisions is of concern. It is worrying that where there is a continuous breach, the 3 month time limit should start from the first instance of the breach. Longstanding issues of continuous breaches will fall foul of these rules and will be out of time, which could lead to grossly unfair decisions. It would appear to suggest that where a public decision maker has consistently acted in an unlawful way, that this cannot be subject to scrutiny by the courts. The current state of affairs has developed over time with fairness and good administration in mind. These proposals want to reverse these developments and bypass these principles, which are at the heart of Judicial Review.

8. For example, a decision by a public authority to remove a service from a particular area will have a specific time when the decision is made from which the 3 month time limit will start. However, those people affected in the area continue to suffer the effects of that decision in the absence of a service provision by the local authority. If that decision to remove the service was unlawful, then this is a continuing unlawful breach which affects people, but under these proposals they would not be able to bring a claim after the initial 3 months. Many people will not be aware of this breach until it affects them, so to give effect to these proposals is manifestly unfair and removes the right to access to justice is contrary to the Rule of Law and good administration.

9. To counter the above, the practical effect would be that judges would use their residual discretion to allow claims out of time in more and more circumstances. This would result in the proposed approach being negated and meaningless, and would add new uncertainties and complexities into the process. Having to rely upon the discretion of the court for fairness to be achieved, rather than the rules ensuring fairness, is a problematic situation. It will result in uncertainty, lack of clarity and confusion.

10. In addition, where there are multiple decisions, later decisions may be taken on different or new evidence, which means later decisions are substantively different from earlier decisions. If the earlier decision is the point from which the time limit runs then this would amount to a failure to take into account new evidence which is a clear public law failure and of great concern. The reality of the multiple decision-making process and their impacts and effects highlight a lack of understanding of how the process works in reality.

11. In addition to the above, the proposal to alter the rules about continuing or multiple breaches has further problems. It undermines the spirit of the Civil Procedure Rules by forcing people to bring Judicial Review applications earlier, rather than trying to engage in dialogue with the body concerned and trying to reach a settlement. The possibility for such negotiations will be significantly curtailed with the result of more applications being brought and brought more quickly. This will only exacerbate the problem and create a bottleneck of applications.

12. The proposed solution, which can be seen with these entire proposals in general, is to be trying to treat the symptoms rather than the cause. The best way to reduce Judicial Review applications is for public bodies to act lawfully. If that was the case then there would be no reason for people to bring Judicial Review applications. Reducing the opportunity for people to bring applications will not reduce the need for acts of public bodies to be scrutinised. The only foreseeable result therefore is to create further bottlenecks and exacerbate the problem (if there is a problem) further. A far more worthwhile, meaningful, and in the long term, efficient, enterprise would be to work more closely with public bodies to help identify and address common problems to reduce the need for Judicial Review applications to be brought in the first place.

13. It also needs to be borne in mind that there is an abundance of precedent where courts have found it inappropriate to grant a remedy due to undue delay, even if they find in favour of the applicant. The current rule in s31(6) Senior Courts Act 1981 states that remedies can be refused if they are not conducive to good administration, and the courts have no problems enforcing this rule. There are therefore clear and workable rules already in place to prevent undue delay from hampering the administration of government.

Chapter 2: Applying for permission

This chapter deals with questions 7 to 13 of the consultation paper:

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?

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?

The proposal to introduce a new test of whether a matter has already been considered at a prior judicial hearing raised many issues and concerns. It adds a new layer of complexity in an already complex process.

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?

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?

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?

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?

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?

14. The prior judicial hearings were not performing the same or analogous role as the court carries out in Judicial Review cases. Judicial Review cases are a special type of case with their own rules and processes governed by judges familiar with and specialising in such rules and processes. To state that a matter has already been heard previously in another 'court' therefore it does not need to be considered in a Judicial Review case is a decision which lacks any understanding and appreciation of Judicial Review, has no merits whatsoever, and circumvents the Rule of Law by denying people access to appropriate justice: access to inappropriate justice is not access to justice. This would be particularly acute in immigration cases, which would be most affected by these proposals. When dealing with the status of someone's life and where they and their family live, adherence to the Rule of Law is

paramount, and these proposals, as outlined above, do not meet the threshold required by the Rule of Law.

15. The proposals in relation to oral renewals again give rise to cause for concern. There is currently a filtering process in place when the initial application is considered, where the courts look at the sufficient interest test. Only those with sufficient interest will be able to proceed with their application. Part and parcel of this test is looking at the merits of the claim, as detailed in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Ltd* [1982] AC 617. To remove the right of appeal to the same court, but to keep an appeal route to the Court of Appeal, will result in one outcome – more appeals to the Court of Appeal. This will increase the stress on the resources of the Court of Appeal.

16. There may be circumstances when access to oral renewal or oral appeal, as opposed to on the papers, would be required in order to fulfil the duties under Article 6 of the European Convention on Human Rights. It is certainly feasible that the specific facts of a particular case would require such and this needs to be considered more fully.

Chapter 3: Fees

This chapter deals with questions 14 and 15 of the consultation paper:

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

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?

17. There are no significant concerns envisage with this approach. However, there is an aspect that clashes with the rationale for saving costs. Those who bring claims are either wealthy individuals (given the costs implications of Judicial Review), for whom this would not be an issue, or publicly funded, in which case the public bill will increase as a result of this proposal, thereby negating the costs saving.

Chapter 4: Summary

18. The overriding impression when considering these proposals is the lack of evidence to justify such steps being taken. In the absence of such evidence these proposals should not be implemented. If a mandate is to be sought to implement changes then a full and proper evidence gathering exercise needs to take place.

19. There are further concerns with the proposals in general. For example, the assertion made in paragraph 3 of the consultation that Judicial Review stifles innovation is a startling statement which lacks credibility and is not evidence based. To assert that the threat of proceedings against unlawful actions of a public body inhibits innovation, by logic, asserts that unlawful actions aid innovation and thereby should not be subject to challenge.

20. In paragraph 35 the consultation states that the threat of Judicial Review has a chilling effect on public bodies. Again, there is no evidence for such a dramatic statement. It is quite remarkable to state that the threat of action for unlawful activities inhibits public bodies from doing their job. It is a basic requirement of the Rule of Law that law applies to all people – nobody should be above the law.

21. The 'pressing need' to reform Judicial Review has not been demonstrated due to the lack of evidence. Only when there is evidence which proves a certain course of action needs to be taken can it be said there is a pressing need to take such action.

22. The proposal will result in disparity in public law protection between different parts of the UK. Therefore people in England and Wales will have less protection against unfairness and poor administration in public decision-making than in other parts of the UK.

23. If figure 1 on page 10 of the consultation document is considered, it is apparent that the increase in the number of Judicial Review applications is due to the increase in immigration cases. The number of criminal and other applications has essentially remained static over the course of the last 7 years according to figure 1. It has not been demonstrated in the consultation document how the proposed measures deal with this. The rationale behind the changes is stated as being a pressing need to tackle the large increase in Judicial Review cases, yet the area responsible for this increase is not the subject of the proposals. The proposals therefore are not targeted and do not address the given rationale for change. In addition, it is understandable that immigration cases have increased since the advent of the Human Rights Act 1998 and the duties placed upon public authorities by section 6 of that Act. Judicial Review is a measure of last resort, and in immigration cases, offer the final opportunity for the actions of the State to be scrutinised. It would be gravely worrying if such an avenue was restricted further. These aims are ever more important in a shrinking world and should be maintained, and improved, rather than curtailed.

24. Whilst the consultation document pays lip service to EU law in the introduction (paragraph 5), no meaningful reference has been made to EU law at all. In particular with procurement

matters, EU law impacts this area and the compatibility of these measures with EU law has not been considered adequately.

25. One of the main proposals, to reduce time limits, only applies to procurement and planning. Why these two areas have been targeted, bearing in mind the given rationale behind the changes, does not seem to marry together convincingly. With this in mind, the public could be led to believe that targeting these two areas shows political motivation to reduce the opportunity of decisions of public bodies to be scrutinised. This, again, shows little respect and regard for the Rule of Law and is contrary to the principles of fairness and good administration.

26. In light of the above, we can only recommend the proposals be reconsidered until such time as proper and full evidence is gathered and an adequate consultation process can take place where the evidence can be considered in depth. Without this, these proposals raise the prospect of creating extra layers of complexity and having the opposite effect than intended by creating more applications for Judicial Review which will create further burdens upon the system. In the current economic climate where public bodies are facing severe cuts and have to make difficult decisions on how to allocate ever shrinking resources it is more important than ever to ensure through the process of judicial review that there is a way parties with sufficient interest can hold public bodies accountable and ensure that they are acting lawfully and fairly in making decisions. Great care needs to be taken before these processes are changed. We should be looking to make reforms which strengthen the judicial review process not risk undermining it.

Appendix: Contributors

Co-ordinator

Richard Glancey	Northumbria University School of Law

Contributors

Colin Murray	Newcastle University Law School
Alex Peebles	Irwin Mitchell Solicitors
Adam Slawson	Ben Hoare Bell Solicitors
Ronagh Craddock	Ben Hoare Bell Solicitors
Victoria Gleason	Ward Hadaway Solicitors
Nigel Petts	Newcastle Business School
Sue Abbott	Newcastle Business School
Andrew Hutchinson	Northumbria University School of Law
Lucinda Hudson	Northumbria University School of Law
William Walton	Northumbria University School of Law
Ashley Savage	Northumbria University School of Law
Rachel Dunn	Northumbria University School of Law
Victoria Dunford	Northumbria University School of Law
Claire McCann	Northumbria University School of Law
Tim Wilson	Northumbria University School of Law