23 December 2012

Mr James Martin
Ministry of Justice
102 Petty France
London
SW1H 9AJ

Dear Sir

JUDICIAL REVIEW: PROPOSALS FOR REFORM CONSULTATION

I am writing regarding the Judicial Review proposals for reform consultation.

I am opposed to the proposed reforms for the following reasons:

TIME LIMITS IN ENVIRONMENTAL AND PLANNING CASES

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?

1. No. The present time limit of three months is perfectly adequate, and gives sufficient time within which to prepare the Claim Form and supporting written evidence bundles for the Administrative Court.

2. Sometimes, the Claim Form and supporting Skeleton Argument if lodged can take some time, especially as in a planning matter; complex issues of law may arise regarding policies and their application in a particular case, and relevant statutory provisions.

3. It has to be remembered that a full bundle of supporting "written evidence" also has to be filed, to enable the judge to be in a position to consider all of the issues involved before forming a view as to whether a sufficient *prima facie* case has been made out for the granting of permission.

Question 2: Does this provide sufficient time for the parties to fulfill the requirements of the Pre-Action?

4. No. The pre-action protocol letter first of all has to be drafted, and this again may involve complex issues of law regarding policies and their application in a particular case, and relevant statutory provisions.

5. These all have to be set out in order to give the respondent public authority sufficient information to consider their position and whether they will be justified in opposing an application or whether they should settle the matter.

6. It is customary to give the respondent public authority at least 14 days in which to respond. One the response has been received, the prospective claimant or his or her legal advisers have to fully consider the response before deciding whether to proceed with the claim or not.

7. If the time limit were to be reduced to six weeks, the time in sending the pre-action protocol letter and considering the response would take up at least half of that time, leaving only three weeks within which to lodge the claim.

8. This would lead to hurriedly prepared claims being lodged with the court without sufficient attention to detail.

9. This cannot be in the overall interests of promoting sufficient access to justice, bearing in mind the rights given under articles 9(2) and (3) of the Aarhus Convention.

Protocol? If not, how should these arrangements be adapted to cater for these types of case?

10. It is difficult to see how there could be appropriate adaptation in such circumstances. One way might be to give the respondent seven days within which to respond, but this would again mean that the response would be hurried.

11. The respondent would be denied the opportunity of having sufficient time to prepare a fully drafted response that dealt with all of the issues raised by the prospective claimant.

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?

12. No. For the reasons already stated, any reduction to a six week time limit would be counter productive by depriving the prospective claimant of being able to thoroughly prepare and draft the necessary papers to lodge with the Administrative Court.

13. Again, relating to environmental cases for the purposes of article 9(2) and (3) of the Aarhus Convention, it is contended that a reduction to six weeks would infringe the rights of,

> "access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6".
>
> "access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

14. It is further contended that any reduction in the time limit in such cases would also infringe article 9(4) of the Aarhus Convention in that it would reduce the right to,

> "adequate and effective remedies, including injunctive relief as appropriate"

and also the right to remedies that are both "fair" and "equitable".

15. In the event that the proposals for restricting any right to renew an application to an oral hearing are implemented, clearly sufficient time within which to adequately prepare a claim is of the utmost importance.

16. In those circumstances, it would be even more important for prospective claimants to present their case as fully and thoroughly as possible, so that the judge considering the matter on the papers had all of the sufficient information to hand to enable him or her to make a fully informed and reasoned decision on the papers, especially if it was going to be a final one.

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

17. So far only environmental planning cases have been mooted for change. I cannot see what other possible cases would qualify for any reduction in the time limit for applying for permission to apply for Judicial Review.

18. It also has to be remembered that originally under the old Order 53 RSC, the time limit was six months that proved to be perfectly adequate, and no reasonable explanation has ever been given for reducing it to three months.

Time limits in 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.

19. I agree that the wording of CPR Part 54.5 should be amended, but not in the matter indicated above.

20. If there are to be time limits, then they should be clear and unambiguous. The current provision relating to promptly clearly doesn't fulfill this requirement.

21. Either the time limit is three months or it isn't, and there should be no in between provision that isn't applied in a coherent and regular manner.

22. As things stand at the moment, some judges apply the promptly provision and refuse permission even if there is an arguable case that has been brought within the relevant time limit.

23. In other cases, judges have not applied this criteria, and have nevertheless granted permission, as occurred in R. (West Kensington Estate Tenants and Residents Association and anor. v. London Borough of Hammersmith and Fulham CO/6338/2012, copy order enclosed.

24. In that case, His Honour Judge Sycamore (sitting as a Judge of the High Court) stated that,

> "The Defendants and Interested Parties argue that the claim was not filed promptly and that permission should be refused. I am not persuaded that the claimants should be denied permission on this basis. The claim was issued within three months (albeit at the end of that period) and the explanation advanced by the claimants together with the lack of any evidence that it would be unfair or unreasonable to proceed persuades me that permission should be granted."

25. The imposition of the requirement for "promptly" in CPR Part 54.5(1)(a) was also seriously criticized by the Aarhus Convention Compliance Committee in ACCC/C/2008/33 where it was held that the provision lead to uncertainty and was unfair for the purposes of article 9(4) of the Aarhus Convention.

26. In addition, it could also be argued that CPR Part 54.5 may be *ultra vires* of the rule making powers in the Civil Procedure Act 1997 in that it purports to inhibit access to the court without statutory powers.

27. The statutory provision presently governing the grant of permission to apply for Judicial Review is section 31 of the Senior Courts Act 1981, and although it refers to criteria for extending time limits, there is no mention of "promptly" at all.

28. It may be therefore that this provision might be susceptible to a court challenge either collaterally or on a separate Judicial Review.

29. Regarding an amendment to make each separate decision the subject of a separate time limit so that there would have to be Judicial Review applications in respect of each one, even though related as a series is unworkable and detrimental to achieving justice.

30. At present, a prospective claimant is required to exhaust all available alternative remedies, including those for internal review and complaints schemes etc.

31. Obviously this is sensible as Judicial Review should be a remedy of last resort, and the time limit should run from the date of the final decision where there have been a series of related decisions concerning the same underlying complaint.

32. This is clear from R. v. Chief Constable of Merseyside *ex parte* Calvely [1986] 1 Q.B. 424 as to utilizing alternative remedies, and also R v. Secretary of State for Education and Science *ex parte* Threapleton [1988] (official transcript), that where there are a series of decisions, culminating in a final one, that the time limit should run from that.

33. To require a prospective claimant to seek permission for Judicial Review of each separate decision when it comes into being with a separate time limit being applicable to each is impracticable.

34. Such a change would lead to unnecessary separate holding claim forms being filed whilst the prospective claimant still pursued other internal remedies to settle matters.

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?

35. The proposal is totally unworkable. At present, if there are a series of decisions culminating in a final decision, the time limit runs from the final one.

36. This is completely sensible, and enables the prospective claimant to utilize all available internal remedies etc.

37. Judicial Review at present is a last resort and the prospective claimant should exhaust all other available and effective remedies first.

38. Very often, this will lead to a series of separate decisions, especially in an Ombudsman or a complaint procedure is being exhausted.

39. In addition, very often the matters at issue can be settled well before Judicial Review is reached, say on an internal complaint.

40. Therefore, if a prospective claimant was required to seek permission to apply for Judicial Review in respect of the first available decision without having it reviewed or pursuing alternative remedies first, this would make the delays with Judicial Review even worse than they are now.

41. This would result in prospective claimants lodging Judicial Review claims over each separate decision to ensure that the time limit was observed in each case, merely to preserve their position whilst probably seeking alternative remedies and succeeding, thus having made the Judicial Review application superfluous.

42. In addition, it must be obvious that requiring the prospective claimant to seek Judicial Review of the first available decision would mean that cases would again be less likely to settle before the court process was begun and this cannot be desirable.

43. The concept of Judicial Review, as an avenue of very much last resort is sensible and must therefore be fully retained in its present form.

44. This proposal therefore cannot be common sense and will promote more unnecessary Judicial Review applications clogging up the court system and not less. This proposal therefore should be completely abandoned.

APPLYING FOR PERMISSION FOR JUDICIAL REVIEW

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?

1. The definition of a court is not in doubt. However, the proposal to prohibit renewals of an application for permission for Judicial Review regarding cases where there has been a "prior judicial hearing" is objected to.

2. In most cases this would involve either inferior tribunals acting in a quasi-judicial function with all of the characteristics of a court, or county courts or magistrates' courts or the crown court on appeal.

3. All of these are inferior tribunals who make findings of fact and determine issues of law in the light of them at first instance.

4. No valid reasons have been advanced as to why this should justify the removal of the right to apply for an oral hearing where permission has been refused on the papers.

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?

5. The question is a false and totally misleading one. Whether or not the issues are the same, in all Judicial Review applications, it is sought to review a previous decision whether given in writing or arrived at as a result of judicial proceedings or not.

6. The essence of Judicial Review is concerned mostly with jurisdiction issues, errors of law on the face of the record or procedural shortcomings of one nature or another.

7. It is clear that this can occur in respect of decisions arrived at after a judicial hearing whether of law alone or mixed fact and law, or decisions by themselves that haven't been subject to any prior judicial scrutiny.

8. It must also be clear that errors of law may arise in respect of decisions arrived at after a judicial hearing in just the same way as those that have been arrived at without.

9. The requirement that there should have been a prior judicial hearing is a total red herring and if there is to be any restriction at all, which isn't conceded, it should be restricted to cases that are held to be "without merit".

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?

10. This is ridiculous because it must be obvious that nearly all defendants would sought to claim that there should be no right to an oral hearing in the interests of their client.

11. The defendant isn't independent and impartial and to give them the right to make such representations would lead to this being utilized in almost every case, irrespective of the underlying merits.

12. It must be obvious that the defendant or interested party has a vested interest in seeing off any prospective legal challenge as soon as possible, and as such, the defendant's legal advisers would almost invariably seek to argue that even a meritorious case had no merit and should be summarily dismissed on the papers.

13. For the reasons stated in the next section, such a reform would in my view require substantive legislation and it would be unlawful to seek to implement it via changes to the rules as is presently proposed.

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?

14. No. The proposed restriction to the right to renew applications for permission to apply for Judicial Review cannot be implemented by subordinate rules of court.

15. There is no provision for such restriction of the right of access to a court in any of the provisions of the Civil Procedure Act 1997, nor any other rule making powers in sections 84(5)(b) and (5A)(b), section 85(1)(a)(b) or section 87(1) and (2) of the Senior Courts Act 1981, or the Access to Justice Act 1999 authorising the Civil Procedure Rules Committee to make any rules that bar the constitutional right of access to the court.

Principles of removal of access to court by statute

16. The constitutional right of access to a court may only be removed by statute in clear and unambiguous terms.

17. See Maxwell on Interpretation of Statutes, p. 116; Cross on Statutory Interpretation, p. 166 and Bennion, Statutory Interpretation, p. 718.

18. See *Re* Boaler [1915] 1 K.B. 21, *per* Scrutton L.J. at p. 36, 39 and 41; R. & W. Paul Ltd. v. Wheat Commission [1937] 1 A.C. 139, *per* Lord Macmillan at p. 153; Lee v. The Showmen's Guild of Gt. Britain [1952] 2 Q.B. 329, *per* Romer L.J. at p. 354; Pyx Granite Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260, *per* Viscount Simonds at p. 286; Commissioners of Customs and Excise v. Cure and Deeley Ltd. [1962] 1 Q.B. 340, *per* Sachs J. at p. 357-358; Raymond v. Honey [1982] 1 A.C. 756, *per* Lord Bridge at p. 14G; R v. Secretary of State for Home Department *ex p.* Ruddock [1987] 1 W.L.R. 1482, *per* Taylor J. at p. 1492F-G; R v. Lord Chancellor *ex p.* Witham [1998] 1 Q.B. 575, *per* Laws L.J. at p. 579H to p. 580A, 581E-H to p. 583A-C, 584A-F to p. 585G-H, 586A and 586G-H, and *per* Rose J. at p. 586H to p. 587A-B, and R v. Secretary of State for the Home Department *ex p.* Pierson [1998] 1 A.C. 539, *per* Lord Browne-Wilkinson at p. 573G-H to 574A.

19. R v. Lord Chancellor *ex p*. Witham [1998] 1 Q.B. 575, was approved in R v. Secretary of State for the Home Department *ex p*. Pierson [1998] 1 A.C. 539, *per* Lord Browne-Wilkinson at p. 575A-D.

20. Therefore, any proposed restrictions on the right to renew applications for permission to apply for Judicial Review to an oral hearing hasn't been authorised by clear and unambiguous words by statute, and cannot therefore constitutionally cut down a prospective claimant's constitutional right of access to the court implied in section 31 of the Senior Courts Act 1981 and would be unlawful and *ultra vires*.

"Natural Justice" under common law and the right to be heard

21. There is nothing in either the Senior Courts Act 1981 or the Access to Justice Act 1999 that specifically and unambiguously removes a prospective claimant's right to be heard in support of any application for permission to apply for Judicial Review.

22. Contended that the proposed amendments to CPR Part. 54.5, in denying a right to be heard, would constitute a denial of "Natural Justice" at common law by the claimant being denied the right to the "*audi alteram partem*" principle.

23. See University of Ceylon v. Ferodo [1960] 1 W.L.R. 223, *per* Lord Jenkins at p. 231-232; Kanda v. Government of Malaya [1962] 1 A.C. 322, *per* Lord Denning at p. 338.

24. See also Wiseman v. Borneman [1971] 1 A.C. 297, *per* Lord Reid at p. 308C, *per* Lord Guest at p. 310G-H, where it was held that right to "Natural Justice" and right of audience before court could only be removed by statute.

25. See also Ridge v. Baldwin [1964] 1 A.C. 40, *per* Lord Reid at p. 68-80, *per* Lord Morris at p. 113-114, *per* Lord Morris at p. 121-124, *per* Lord Hodgson at p. 132-133,

26. Ridge v. Baldwin [1964] 1 A.C. 40, was subsequently reviewed and fully approved in Chief Constable of North Wales Police v. Evans [1982] 1 W.L.R. 1155, *per* Lord Brightman p. 1174B-H to p. 1175A-C.

27. Also, before any adverse order can be made against a party, that party should have the right to be heard, and it is contended that this principle is applicable to a refusal of permission to apply for Judicial Review that is final in effect.

28. See R v. Central Criminal Court *ex p*. Boulding [1984] 1 Q.B. 813, see head note at p. 813-814, and *per* Watkins L.J. at p. 820H to p. 821A; and Raja v. van Hoogstraten [2004] 4 All E.R. 793, *per* Chadwick L.J. at p. 831C-F, no. para. 94, 835J to p. 836A-B, no. para. 106, where it was held to have been a breach of "Natural justice" to make a committal order without the defendant being heard, and not proper to make it in his absence on the basis that had he been present, he would have had nothing useful to say.

29. See also Polanski v. Condé Nast Publications Ltd. [2005] 1 W.L.R. 637, *per* Lord Nicholls at p. 642C-F, no. paras. 18-19, p. 644E-F, no. para. 31, *per* Lord Hope at p. 650B-C, no. para. 61, where a fugitive claimant was entitled to give evidence via video link to support his claim to justice.

Right of access to court under article 6(1) ECHR

30. It is contended that the proposed changes to CPR Part 54(5), read in conjunction with section 84 of the Senior Courts Act 1981; and the Civil Procedure Act 1997, in specifically precluding an automatic right to be heard in support of an application for permission to apply for Judicial Review would contravene schedule 1 article 6(1) Human Rights Act 1998 in applications that engaged either the application of "convention rights" or a "determination of civil rights and obligations".

31. The Strasbourg jurisprudence under the ECHR shows that there should be no impediment to access to a court in a manner that impairs the very essence of such right of access.

32. See Golder v. UK [1979] 1 EHRR 524, at p. 535, para. 34; Philis v. Greece [1991] 13 EHRR 741; Tinnelly & Sons Ltd. v. UK [1998] 27 EHRR 249; Fayed v. UK [1994] 18 EHRR 393 and Powell v. UK 12 EHRR 335.

33. Although the right of access to a tribunal is not absolute, this principle must be proportionate and "necessary in a democratic society" to satisfy the procedural guarantees of article 6(1) ECHR and the right of "freedom of expression" under article 10(1) ECHR and the measures must be "prescribed by law".

34. See Ashingdane v. UK [1985] 7 EHRR 528, at p. 547, para. 57; Lithgow v. UK [1986] 8 EHRR 329, at p. 394, para. 194; Tolstoy v. UK [1995] 20 EHRR 442, at p. 475, para. 59; Stubbings v. UK [1997] 23 EHRR 213, at p. 227, para. 52; Société Levage Prestations v. France [1997] 24 EHRR 351, at p. 365, para. 40.

35. The right to an oral hearing is inherent in article 6(1) ECHR, see also Lobo Machado v. Portugal [1997] 23 EHRR 79, at p. 98, para. 31,

36. It is also essential and inherent principle implied by article 6(1) ECHR that all parties must be given equal opportunity of presenting their own case and adducing evidence, see Dombo v. Netherlands [1994] 18 EHRR 213, at p. 229-230, para. 33,

37. The principle regarding the right to be fully heard, is also consistent with the principle of "equality of arms", see De Haes and Gijsels v Belgium [1998] 25 EHRR 245, at p. 56-57, para. 53.and Osman v. UK [2000] 29 EHRR 245, at p. 315-317, paras. 147-154.

Right to be heard under article 6(1) ECHR

38. It is contended that a prospective claimant seeking permission to apply for Judicial Review must be given the opportunity of being heard, before any adverse order such as a final refusal of permission is made against him.

39. See Hooper v. UK [2005] 41 EHRR 1 at p. 8-9, paras. 29-31, relating to requirement for being heard before a binding over order is made.

40. Therefore if it is necessary for a Defendant to be heard before making of a binding over order, it must equally be required that a prospective claimant seeking permission for Judicial Review should be heard before any final order is made refusing such permission.

41. This is especially so in a "criminal cause or matter", as no further appeal lies from the refusal of permission to appeal to the Court of Appeal under section 18(1) of the Senior Courts Act 1981.

Requirement for oral hearings under article 6(1) ECHR

42. The Strasbourg jurisprudence under article 6(1) ECHR, has upheld the right to oral hearings unless there may exist "exceptional circumstances", and this would appear to be inapplicable to applications for permission to apply for Judicial Review in general.

43. What may be "exceptional" depends on each case, and it is contended that for this to apply for applications for permission for Judicial Review, this would require legislation expressly stating this to be case with some convincing criteria being applicable.

44. Therefore, it is contended that the Strasbourg jurisprudence under article 6(1) ECHR gives a legal presumption in favour of oral hearings.

45. The proposed amendments to CPR Part 54.5 are clearly at odds with this and applications for permission to apply for Judicial Review wouldn't qualify for "exceptional circumstances" under the ECHR jurisprudence in any event, and there is no authority for such a proposition.

46. See Ekbatani v. Sweden [1988] 13 EHRR 154, at p. 508-511, paras 23-33 and in particular at p. 511, paras. 31-33; Fredin v. Sweden (No. 2) App. 20/1993/494, 25/01/94, at paras. 21-22; Stallinger v. Austria [1998] 26 EHRR 81, at p. 97, paras. 50-51; Salomonsson v. Sweden App. 38978/97, 12/11/02, at paras. 34-40; Lundevall v. Sweden App. 38629/97, 12/11/02, at paras. 34-40 and Miller v. Sweden [2006] 42 EHRR 51 at p. 1164, para. 29.

Requirement for hearings to be heard in open court in public under article 6(1) ECHR

47. Any hearing that involves the application of article 6(1) ECHR, regarding consideration of "civil rights and obligations", must be heard in open court in public.

48. Issue of holding hearings which determine "civil rights" of parties in public under article 6(1) ECHR was considered by the ECHR in Scarth v. UK [1999] App. no. 33745/96, 22/07/99.

49. It was held that in the particular circumstances of that case, that the holding of arbitration hearings in the County Court under the then Order 19 CCR 1981 in chambers breached article 6(1) ECHR. See Scarth v. UK [1999] App. no. 33745/96, 22/07/99, and in particular paras. 18-29,

50. This approved the decision of then European Commission of Human Rights in Scarth v. UK Application No 33745/96, Report dated 21/10/98, see paras. 29-40.

Requirement for hearings to be heard in open court in public under domestic law

51. The Common law rule is that all proceedings should be held in public unless special circumstances apply.

52. See Scott v. Scott [1913] A.C. 417, *per* Viscount Haldene at p. 435, 437-438, *per* Lord Halsbury at p. 440 and 445.

53. See also R. (Hammond) v. Secretary of State for the Home Department [2006] 1 A.C. 603, where it was held that where article 6(1) ECHR rights concerned, oral hearings should be held, and that schedule 2 para 11(1) of the Criminal Justice Act 2003 was incompatible with the Human Rights Act 1998, by denying completely the right to the possibility of any oral hearing at first instance.

54. See R. (Hammond) v. Secretary of State for the Home Department [2006] 1 A.C. 603, *per* Lord Bingham at p. 611-614, no. paras. 10-15 for a review of some ECHR authorities relating to oral hearings, and see in particular no. para. 13 relating to non-criminal cases and article 6(1).

55. For consideration of oral hearings regarding article 6(1) rights, see R. (Hammond) v. Secretary of State for the Home Department [2006] 1 A.C. 603, *per* Lord Bingham at p. 615A-G, no. para. 16.

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?

56. Yes. Environmental and planning applications that engage the Aarhus Convention should be exempt, as such a restriction would infringe article 9(2), (3) and (4) of the Aarhus Convention requirements for access to justice in environmental cases.

57. Article 9(2), (3), (4) and (5) of the Aarhus Convention, provides,

"**Article 9**
ACCESS TO JUSTICE

"2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair,

equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

58. In addition, applications that engage individual "convention rights" under the Human Rights Act 1998 should be exempt as such a restriction would infringe article 6(1) ECHR as incorporated under schedule 1 of the Human Rights Act 1998 requirements for access to an independent and impartial tribunal for the determination of "civil rights and obligations".

59. Many applications for Judicial Review do engage underlying "convention rights" such as stop and search cases involving the police or issues relating to prisoners' rights etc.

60. In addition, such a restriction would also infringe the right to "an effective remedy" under article 13 ECHR, which although not incorporated directly in the Human Rights Act 1998, is implied in the right to obtain the appropriate relief in claims brought under this Act, in section 8(1() of the Human Rights Act 1998.

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?

61. It is considered that it would be appropriate in all cases, in view of the previous submissions made above and that there should be no exceptions to this.

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?

62. Neither is appropriate at all. The filtering out of weak or frivolous cases is done both by the first paper judge and if renewed to an oral hearing, the judges in open court who can impose strict time limits where he considers that the points raised have no merit or validity.

63. It is considered that this is perfectly proportionate and that the changes proposed are disproportionate and attempts to stifle what may prove to be meritorious cases after closer examination.

64. A finding by a single judge at the paper stage that a case has "no merit" is after all only his view, that judges do differ in their views of cases, as shown in the Court of Appeal and Supreme Court where differing dissenting views are shown in judgments of the court.

65. It is wrong in principle that a view taken by one judge on the papers that a case has "no merit" without the benefit of hearing argument by the claimant should deprive the claimant of the opportunity of having the matter reconsidered at an oral hearing.

66. Whilst accepting that there may well have been cases where cases have been found by the paper judge to have "no merit" and this has been upheld both at the oral stage and even in the Court of Appeal, there have been other cases where this hasn't been the case.

67. Sometimes judges misunderstand the facts of the case, or even miss apply the law, or even there is a judgment from a higher court in the interim period between the paper refusal and the renewed oral hearing that completely changes the interpretation given to the law applicable to a particular issue under consideration in a case.

68. It may be that these cases are in the minority, but in the overall interests of preventing miscarriages of justice, it is essential that there should be an opportunity in all cases of renewal to an oral hearing as a safety valve.

69. The fact that there may be other cases that do turn out to be "without merit" is a cross that the courts should have to bear, in order to avoid any possibility of miscarriage of justice in a case taking place.

70. It should also be remembered that in a criminal case, renewal to an oral hearing is the last stage as unlike in civil cases, an application cannot be appealed against or renewed to the Court of Appeal (Civil Division) under section 18(1) of the Senior Courts Act 1981.

71. Therefore, the automatic opportunity to renew to an oral hearing in a "criminal cause or matter" should be retained, even if not in civil matters, especially in cases where the liberty of the subject may be at stake.

72. In addition, sometimes in criminal matters, an application for permission for Judicial Review is combined with an application for a Writ of Habeas Corpus, in respect of which a prospective claimant is be able to apply for an oral hearing for permission as of right.

FEES

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

1. No. An increase in such a fee would be in breach of article 6(1) ECHR as incorporated under schedule 1 Human Rights Act 1998 by prohibiting access to justice. See in particular, R. v. Lord Chancellor *ex parte* Witham [1998] Q.B. 575.

2. In addition, in environmental cases to which article 9(2) and (3) of the Aarhus Convention may be applicable, it may risk infringing the provision that costs shouldn't be "prohibitively expensive" under article 9(4) of the Aarhus Convention.

3. As the Ministry may be aware, the Aarhus Convention Compliance Committee in ACCC/C/2008/23; ACCC/C/2008/27 and ACCC/C/2008/33 has considered the whole issue of what may constitute "prohibitively expensive" costs in environmental cases.

4. In addition, a preliminary view has been given by the Advocate-General in Edwards v. UK Case C-260/11 as referred by the Supreme Court in R. (Edwards) v. Environment Agency (No. 2) [2011] 1 W.L.R. 79.

5. The Advocate General is clearly of the view that whether costs are "prohibitively expensive" is subject to both an objective and subjective view and that the circumstances of individuals is a relevant criteria to be taken into account.

6. A judgment is to be delivered by the European Court of Justice shortly in relation to the parts of the Aarhus Convention that are part of EU Community Directives.

7. In the event that such a fee was introduced, it is clear in that the current scheme of fee exemption and remission would have to be applicable.

8. In order to comply with its obligations under article 6(1) ECHR as incorporated under schedule 1 Human Rights Act 1998, access to justice would not be able to be denied to those who were unable to pay the required fees.

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?

9. No, for the same reasons as set out above, and in respect of the Court of Appeal I would again make the same objections relating to the Aarhus Convention.

10. There is already a fee for issuing the Judicial Claim Form, and at present there is no fee payable for renewing the application.

11. If on the hypothetical basis that the proposals of restricting the right to renew applications for permission to an oral hearing were implemented, the issue of payment of any fee obviously wouldn't apply in such cases.

12. As I understand it, such a direction would only be given if the judge who had considered the application on the papers concluded that it was "without merit".

13. Presumably, if the judge decided not to make any such direction, he wouldn't make a finding that the application under consideration was "without merit".

14. Therefore, it would seem grossly unfair if such an applicant who although had had his application refused on the papers but who hadn't been prohibited from pursuing it to an oral hearing then had to pay an extortionate fee.

15. It would be implied that the application had merit, and was a fit and proper case to be considered at an oral hearing.

16. The idea that a fee equivalent to the full fee payable for Judicial Review should be paid at that stage lacks credibility in these circumstances.

17. The whole basis for requiring permission for prospective claimants for Judicial Review was so that if on a quick perusal of the case by a High Court Judge there was an arguable case that had "reasonable grounds", such permission should be granted.

18. See I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617, *per* Lord Diplock at p. 644A and R. v. Legal Aid Board *ex parte* Hughes [1992] 24 H.L.R. 698.

19. The thinking behind this was that an ordinary person, who wished to challenge the lawfulness of a public body, was able to bring his case and grounds before the court for a small fee in order to see if he has an arguable case.

20. The whole tenor of these proposals is to reverse this principle and thus deny access to justice. Again, even if a paper judge has refused permission, there are many cases where this has been reversed at an oral hearing.

21. Even if such cases aren't many in number, to implement the proposals would risk serious injustices and denials of access to justice and this is a price that shouldn't be paid simply for the ends of expediency as proposed by the Ministry of Justice.

22. It must also be remembered that the conclusion on the papers reached by one judge is only his personal opinion, and there may be some cases where other judges might have taken a different view.

23. The present right to renew to an oral hearing without the payment of any additional fee gives some checks and balances in the system to what might otherwise by an unaccountable decision taken by a judge on the papers.

24. The whole tenor of the present proposals is that it is assumed that the vast majority of applications for permission to apply for Judicial Review have no merit in the first place.

25. This can only be established once the application has been fully examined and ventilated at an oral hearing. At present, the time given for such hearings rarely exceed 30 minutes, so that in cases where there is an arguable case, permission is granted.

26. As has been acknowledged, the majority of applications for permission to apply for Judicial Review concern Immigration and Asylum applications.

27. It is proposed to change the system with specialist tribunals dealing with such applications, which is to be welcomed, so that the need to change the Judicial Review procedures will be rendered redundant.

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?

1. These proposals may seriously affect access to justice for litigant in persons LIPS and also campaigners for welfare reform and environmental campaigners.

2. Any increase in fees will certainly seriously affect LIPS and also campaign groups who may have small recourses to draw on.

3. In addition, applications may be brought in respect of individuals claiming discrimination and breaches of the Equality Act 2010.

4. These types of cases may arise in respect of individual challenges, or in connection with environmental cases, such as R. (Harris) v. London Borough of Haringey [2010] EWCA Civ 703, where it was held that the local authority had failed to comply with the requirements of the Equalities Act 2010 in connection with a planning application and its effects on minorities entitled to protection from discrimination under the Equalities Act 2010.

5. As such, the proposals are seriously discriminatory and may also infringe article 14 ECHR as incorporated under schedule 1 Human Rights Act 1998.

GENERAL OBSERVATIONS

1. It also has to be noted that recently there have been a number of Judicial Review applications that have challenged government decisions and policies that have proved to be politically embarrassing for the government.

2. In the case of Virgin Trains, this led to the discovery that the whole tendering process had been flawed and conducted illegally, although the matter was settled out of court without the necessity of a full hearing on the merits.

3. In the case of the Ministry of Transport decision to elect to proceed with the proposed High Speed 2 scheme to build a high-speed railway between London and Birmingham and beyond, permission was granted for a Judicial Review to both campaign groups and a *consortium* of local authorities.

4. The hearing of this case has been concluded and a judgment from Mr. Justice Ouseley is anticipated sometime in early 2013.

5. In the case of the Earls Court regeneration scheme, and the adopting of local plans by Hammersmith and Fulham and Kensington Councils, again permission to apply for Judicial Review of the adoption of those plans has been granted and will be heard in due course.

6. All of these challenges have been extremely high profile and have attracted widespread publicity. It is with such a background that these ill-conceived proposals are only now being put out for consultation.

7. The Ministry of Justice is therefore most strongly urged to reconsider and abandon these ill conceived and unlawful proposals.

Yours faithfully

Terence Ewing

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