

Ministry of Justice: Judicial Review – proposals for reform

Response by Thompsons Solicitors

January 2013

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

At his speech to the CBI on 19 November 2012, the Prime Minister said that “...government can still be too slow at getting stuff done” and that one means of tackling this was... “cutting back on judicial reviews”. He commented on the numbers of judicial reviews “Of course some are well-founded as we saw with the West Coast mainline decision. But let’s face it: so many are completely pointless”. In his words: “So here’s what we’re going to do. Reduce the time limit when people can bring cases. Charge more for reviews so people think twice about time-wasting. And instead of giving hopeless cases up to four bites of the cherry to appeal a decision, we will halve that to two.”

This consultation is the manifestation of those intentions. We are told, this time by the Lord Chancellor and the Ministry for Justice, that the intention is to “...make sure that weak or hopeless cases are filtered out at an early stage...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 unnecessary burdens to economic recovery on the other.” The proposals are supposed to “...help put in place the right conditions to promote growth and stimulate economic recovery”.

We are not experts in planning matters and we are not therefore able to comment on those aspects of the proposals which relate specifically to planning.

That said, in our view, the consultation document and its proposals represent a significant illustration of exactly why judicial review, as a means of scrutiny of the executive (and other public decision makers), is so essential, particularly at a time when there is such a crisis in public confidence in those decision-makers.

In overall terms, our views are that the proposals contained in the consultation document:

- will not, in any event, significantly reduce the number of judicial review claims brought and may in fact lead to an increase;
- are not based on any reliable or sufficient evidence base;
- fail to consider properly the well-established mechanisms for preventing abuse of the judicial review process; and
- in the case of procurement, seem to be for the undisclosed purpose of limiting the ability of Claimants who are not “economic operators” to pursue judicial review claims.

The increase in the number of judicial review claims

The consultation document refers to there having been 160 applications in 1974, 4,500 in 1998 and over 11,000 by 2011. It acknowledges the “...*main area of growth in Judicial Review has been immigration and asylum matters*”.

Varda Bondy and Maurice Sunkin's recent analysis of these figures¹ seems to us to be unarguably correct. They say that:

- Comparisons as far back as 1974 are meaningless because before *O'Reilly v Mackman* [1983] 2 AC, Claimants did not need to rely on judicial review in public law matters;
- As the government acknowledges, over three quarters of all applications are in immigration and asylum matters, which are not specifically targeted in this consultation. In any event, changes are already being introduced such that most immigration and asylum applications will be dealt with by the first-tier Tribunal; and
- Once immigration and asylum applications are excluded, there has been little change in the number of judicial review applications made each year - which remains relatively constant at about 2000 applications per year. That figure may seem surprisingly low given, for example, the existence of the Human Rights Act.

In this light, it is difficult to see how the proposals will achieve a significant reduction in the number of applications made. In fact, for reasons we will develop, shortening the limit in some cases may well increase the number of applications.

The Evidence Base

Throughout the consultation document, a series of factual assertions are made to support the conclusion that the number of judicial reviews needs to be reduced and the process changed. These include:

- there is substantial abuse in the judicial review process;
- the proposals will help stimulate growth and economic recovery;
- judicial review leads to substantial cost to public finances;
- the threat of judicial review has an “*unduly negative effect*” on decision-makers;
- delay occasioned by judicial review can affect infrastructure and other projects crucial to economic growth;
- that there is “*a concern that challenges to procurement decisions... seem to be on the increase*”;
- there are too many opportunities to argue the case for permission in “*weak*” cases; and
- unfounded case are taking up too much time.

Again, we fully endorse the analysis of Varda Bondy and Maurice Sunkin. They say that:

- The statistics given in the consultation document ignore the difference between the 11,200 applications made in 2011 and the 7,600 applications for permission considered by the Courts in 2011.
- That difference is actually consistent with findings showing that 34% of judicial review claims are withdrawn after being issued but before being considered by a Judge, the

¹ Varda Bondy and Maurice Sunkin: Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of

reason for withdrawal usually being settlement in favour of the Claimant².

- Factoring in these findings gives a success rate of better than one in four, rather than one in six.
- There is no other quoted evidence of abuse beyond the Official Statistics.
- There is no empirical evidence that judicial review applications are seriously a hindrance to economic growth or a drain on public finances. In fact, the number of “economically relevant” claims is in any event likely to be low.

The evidence base is further undermined by statements made in the Impact Assessment, which include:

- It is not possible to “monetise” the aggregate benefits and costs accurately for a reduction in the time limit for procurement and planning cases and limiting the opportunity for reconsideration of the permission application.
- It is assumed that shortening the time limit in procurement and planning cases will have no impact on the volume of claims brought.
- A risk is identified that shortening the time limits in these cases will actually increase case volumes because pre-action engagement might be curtailed.

Further, the “Evidence Base” document accompanying the consultation document says that “...it is expected that at most there were only a few hundred procurement applications in 2011”. No evidence at all is presented to support the contention that procurement judicial reviews are on the increase.

Against this analysis, the economic rationale for intervention is expressed to be:

“In this case, intervention would be justified primarily on economic efficiency grounds. There would be productive efficiency gains if fewer judicial system costs and other resources were used to achieve an equivalent outcome in terms of final JR decisions”.

In terms of the effect of judicial review on decision-makers, isn't it a good thing that they have impressed upon them the importance of legality, rationality and procedural propriety, and that they should be scrutinised by the courts in these areas?

Existing mechanisms for preventing abuse

The most obvious mechanism for preventing abuse is that not only must claims be brought within three months, they must also be brought “promptly”. The cumulative effect of the two aspects makes for an already strict time limit.

Section 31(6) of the Supreme Court Act 1983 further provides that, where the court considers that there has been delay, it may refuse to grant permission, or may refuse relief.

The claim has to be one of substance. And if the Defendant can show that the impugned part of the process made no difference, then judicial review will not be appropriate. It is not a question of “dotting every ‘i’ and crossing every ‘t’” as the Prime Minister would have it.

There are further mechanisms in the discretionary nature of relief, and in costs.

The consultation document seems to take the view that where a matter is remitted by the court for further consideration by the decision-maker, then that is necessarily a “pyrrhic”, and therefore pointless, victory. That is a gross over-simplification. It may well be that remission for further consideration of a flawed decision will lead to a different outcome.

”

Procurement and Claimants who are not “economic operators”

The reason procurement has been selected as one of the types of case in which shorter time limits would be appropriate seems to be that, in procurement cases, there is a time limit for appeal under the Public Contracts Regulations 2006 (the “Regulations”) of 30 days and that where a shorter time limit for appeals applies there is generally an underpinning policy that appeals should be brought swiftly.

The duties owed under the Regulations are owed only to “economic operators”, which are the only persons able to enforce obligations under the Regulations (see Regulation 47).

Yet, as acknowledged in the consultation paper, the category of persons which may bring judicial review proceedings to challenge a procurement process is not confined to “economic operators” and can include non-economic operators with sufficient interest³. This may be seen as a relatively recent, but significant, development.

In fact, it has been confirmed that a trade union, not being an economic operator, may in principle be able to bring a claim for judicial review in the circumstance of a public procurement:

“11. There seems to be no previous example of a trade union seeking a public law remedy in the context of these Regulations or their predecessors, but that is no reason to suppose that it is not legally possible. One can envisage circumstances in which a breach of the regulations could so affect the members of a union that the law should afford a remedy in public law”.⁴

The proposal is that *“any judicial review proceedings which are based on decisions or actions within the ambit of the Public Contracts Regulations 2006 should also be subject to a 30 day time limit (regardless of whether the claimant is an economic operator or the public contract is excluded from the Regulations).”*

The proposal directs the determination of the time limit to whether the “decision” or “action” is “within the ambit” of the Regulations. This seems to envisage that any complaint that a non-economic operator, such as a trade union, may seek to make in relation to any aspect of the procurement process covered by the Regulations would be subject to the shortened time limit of 30 days.

Non-economic operators are necessarily at one stage removed from the procurement process, which is conducted directly between the contracting authority and the interested economic operators. The circumstances, and degree of knowledge, of the non-economic operators will be very different from those of the economic operators which would be able to make use of the enforcement provisions of the Regulations.

It is simply untenable, given the complexities of procurement and the Regulations, and the state of knowledge of a non-economic operator Claimant to suggest that a time limit of 30 days is appropriate. It will be virtually impossible for non-economic operators to bring such claims, and the proposal can only be viewed as a deterrent from their doing so (particularly in circumstances where, on the government’s own evidence, there are probably only a few hundred cases brought per year).

We turn now to address the specific questions posed in the consultation.

Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and

³ See Chandler v Secretary of State for Children, Schools and Families [2010] LGR 1

⁴ Judgment of Eady J in R (on the application of UNISON) v NHS Wilshire Primary Care Trust and others and (1) MHS State for Health Case CO/12402/2011 at paragraph 11

planning cases to bring them in line with the time limit for an appeal against the same decision?

As we say, we can't comment on the position in relation to planning appeals.

But in relation to procurement cases, our answer is an emphatic "no".

We have explained why the proposal would significantly disadvantage non-economic operator Claimants because of the complexities of procurement and the Regulations, and why, in their case, comparison with the enforcement time limits under the Regulations, is not appropriate.

To that we would add the following.

In procurement cases, there can often be a fundamental difficulty in identifying exactly when the time limit starts to run. This difficulty is particularly acute in "no procurement" cases - ie those cases where the contracting authority resolves to proceed without a procurement process covered by the Regulations at all.

On the one hand, time could be said to run from the time any requirement under the Regulations - such as the requirement to give the relevant notification to the Official Journal - is first not complied with⁵. On the other, there is authority that, in a "no procurement" case, time does not start to run until the final award of the contract⁶. But which is to apply, and, if the latter, how "final" does the award have to be? According to Eady J in the Unison case, the test is whether there is a "*positive decision to go with a particular contracting authority... (unless, of course, it is genuinely conditional)*".

On any analysis, and especially in "no procurement cases", the identification of the date when time starts to run is already a subject of controversy. To expect a non-economic operator to commence proceedings within 30 days of that point in time is unrealistic. The position is made yet more untenable by the qualification to the date of actual knowledge by "*...or ought to have known of the grounds of claim*". This suggests, for example, that a lay representative of a non-economic operator should appreciate that time starts to run once there is an apparent breach of the Regulations. That is simply unrealistic.

In addition, there are the hurdles facing such Claimants in judicial review in general, which have recently been summarised as follows:

*"A public law action of this kind must be, and clearly is, one of the most difficult pieces of litigation that a citizen can be involved in. That is not to say that other litigation of a private nature is not complex or stressful, but this is litigation of a wholly different order to the kind of litigation that the claimants would ordinarily be expected to be involved in, if they are involved in litigation at all. It involves very complex considerations of law and fact, as I have already indicated and it involves the necessity of finding a means of funding and if necessary avoiding so far as possible the risks of having to pay costs in an adverse costs order during or at the end of the litigation. It is a step of enormous magnitude in terms of the stress involved and in terms of the need, as I see it, the social and practical need, to ensure that there is community support by those with a like interest."*⁷

Those comments were made in the course of a judicial review of library closures. In principle, they equally well to a judicial review in relation to procurement.

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?

⁵ Keymed v Forest Healthcare NHS Trust [1998] Env LR 71 at para 94

⁶ Risk Management Partners Ltd v Brent LBC [2010] LGR 99

ity Council [2012] EWHC 516, at paragraph 32.

Again, we can only comment in relation to procurement cases - although we anticipate that there will be overlap with planning cases.

Again, the answer is an emphatic “no”.

The Claimant first has to consider whether judicial review is appropriate and whether Alternative Dispute Resolution may be appropriate.

The Claimant is required to include in the pre-action claim letter *“the date and details of the decision, act or omission being challenged and a clear summary of the facts....details of any relevant formation that the Claimant is seeking...details of any interested parties”*. Claimants are *“strongly advised to seek appropriate legal advice...before sending the letter before claim to other interested parties or making a claim”*.

Claims should not normally then be issued before the date for reply in the letter before claim has passed *“unless the circumstances of the case require more immediate action to be taken”*. Defendants should normally then respond within 14 days.

Once the Defendant, and any interested party, has replied the Claimant then has to consider such further information as has been provided and decide whether to commence proceedings (assuming that funding, representation and coordination with like-minded Claimants has been arranged).

The Claimant then has to prepare a claim form which must include:

- “(1) a detailed statement of the claimant’s grounds for bringing the claim for judicial review;*
- (2) a statement of the facts relied on;*
- (3) any application to extend the time limit for filing the claim form;*
- (4) any application for directions”.*

The claim form must be accompanied by a bundle of documents comprising:

- “(1) any written evidence in support of the claim or application to extend time;*
- (2) a copy of any order that the claimant seeks to have quashed;*
- (3) where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision;*
- (4) copies of any documents on which the claimant proposes to rely;*
- (5) copies of any relevant statutory material; and*
- (6) a list of essential documents for advance reading by the court (with page references to the passages relied on).”*

To expect a Claimant to undertake these pre-action steps and then prepare a claim form and accompanying bundle complying with the Practice Direction within 30 days is utterly unrealistic.

If these arrangements were to be adapted to fit with shorter time limits in procurement cases, we think that the pre-action protocol procedure would have to be substantially disapplied. Certainly, the recommended time for reply of 14 days from receipt of the pre-action protocol letter would have to be shortened. This in turn would mean that the chances of the parties engaging constructively with the issues in the pre-action stage would be reduced. This could well lead to an increase in the number of claims.

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 can not speak in relation to planning cases.

Our answer in relation to procurement cases is again an emphatic “no”.

We are strongly of the view that a 30 day time limit in procurement cases would be too short and would operate as a denial of access to justice. We certainly do not think that it is appropriate to seek to argue that access to justice would be preserved by means of a limited exception to the general rule. This is particularly so in circumstances where the identification of the start of the limitation period can so often be difficult to determine.

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

Not that we are aware of.

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 of the latest incidence of the grounds.

As we read the consultation document, this proposal is intended to apply to all judicial review claims - and not just procurement and planning cases.

There is no evidence base for this proposal in the consultation document at all. All that we have is a statement that “...*anecdotal evidence suggests that, in some cases, the claimant has been able to argue successfully that the time limit should start at a later point...*”.

The consultation document assumes that the law currently provides that any challenge to a continuing breach or cases involving multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds. It is said that 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 challenge first arose*”.

As such, the proposal is presented as seeking merely to “*clarify*” the existing legal position. But these are not accurate statements of the law.

There are ample reported examples of circumstances where Claimants have been permitted to treat the time limit as only starting to run from the last in a series of decisions - such as a continuing breach of planning control⁸, continuing duty to provide housing⁹ and a continuing duty to issue certificates¹⁰. There are further examples of where a continuing policy has been treated as a reason for extending time¹¹.

So, the proposal would not amount to clarification of the existing law. It would represent a significant change. We note that the consultation question does not ask respondents whether they agree with the principle of the proposal.

We do not agree with the principle of the proposal. There is no evidence as to the numbers of such cases. There is therefore no evidence base to suggest that the proposal would have the effects intended by government.

Further, in addition to the examples given above, there are fundamental legal principles which would be infringed.

The first is that, if a policy continues to be unlawful, then “*prima facie it should be discontinued*”¹².

⁸ R (oao Hammerton) v London Underground Limited [2002] EWHC (Admin)

⁹ R v Eastleigh Borough Council ex parte Betts [1983] 2 AC 613

¹⁰ London and Clydesdale Estates Limited v Aberdeen District Council [1980] 1 WLR 182

¹¹ See for example R v Warwickshire County Council ex parte Collymore [1995] ELR 217

ex parte Hilditch 14th June 1990

If the proposal were to be implemented, then once the period of the time limit had elapsed after the policy was introduced, there would be no further opportunity to challenge it by judicial review.

The second is where questions of compliance with EU law, or the European Convention on Human Rights, are engaged. In this context, Burton J said that:

“There is no doubt about the principle, particularly in European [Union] law but obviously extendable to Human Rights legislation, in many authorities that where there is a continuing obligation, a continuing state of affairs, which continue not to be put right by the Defendant, time does not run against a Claimant at least until that state of affairs has come to an end”.

¹³

In any event, there are recognised procedures for redressing the balance where there has been undue delay. Section 31(6) of the Supreme Court Act 1981 may be applied - either in relation to the grant of permission, or relief. For example, permission may be granted on condition that relief does not cover any earlier period¹⁴.

We are firmly of the view that changes to CPR Part 54.5, certainly of the type envisaged by the government, are not justified and would almost certainly place the government in breach of its obligations under EU law and the European Convention on Human Rights.

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?

We believe that the proposal would encourage claims to be brought earlier. That would be an obvious consequence to ensure that claims can proceed.

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 note that there is no question as to whether a respondent agrees with the proposal. We also note that the only evidence to justify the proposal appears to be anecdotal.

We think that oral presentation is a core component of the English legal system. It must be remembered that, where Claimants are unrepresented, the true facts will often only emerge after oral consideration. We are opposed to the limitation of the right as proposed.

We understand that, in preserving the right to an oral hearing for new legal issues which have not been determined by the prior judicial hearing, Claimants alleging bias would still be able to seek an oral hearing.

In any event, if the proposal is to be implemented, it does seem to us that the right to request an oral hearing should be preserved not only where the issue to be determined is sufficiently different, but also where there may have been a significant change in the facts since the last determination at the prior judicial hearing.

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?

If this proposal is to be implemented, then “yes”.

¹³ R (C) v Secretary of State for Justice [2010] EWHC 3407

2000] 3 CCLR 132

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 Acknowledgment of Service? Can you see any difficulties with this approach?

Yes, the Defendant should make the case in the Acknowledgment of Service.

Question 10: Do you agree that where an application for permission to bring judicial review proceedings has been assessed as totally without merit, there should be no right to seek an oral review?

No.

The importance of oral advocacy to the determination of issues in the legal process should not be underestimated. If this draconian step is to be considered, then it should only be considered after full examination of the effects of recent changes to judicial review in immigration and asylum cases, and on the basis of sufficient evidence.

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?

We do not think that the proposal is appropriate at all.

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?

See answers to Questions 10 and 11.

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 weak or frivolous cases early?

We do not favour the implementation of either option. We also consider that the government has not brought forward anywhere near sufficient evidence as to the numbers of weak or frivolous claims to justify such measures.

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

No.

Introducing a fee would limit access to justice - especially for litigants in person with no legal aid.

In environmental judicial reviews, the Aarhus Committee has already found that judicial review in England and Wales is too expensive.

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 apply?

We believe that a fee is inappropriate.

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?

We are not able to provide specific details.

**Further information:
Thompsons Solicitors
Congress House
Great Russell Street
London
WC1B 3LW
jenniewalsh@thompsons.law.co.uk**