



The Law Society

## **Judicial review: proposals for reform**

Response to Ministry of Justice consultation paper

January 2013



# Judicial Review: Proposals for Reform

## Response by the Law Society of England and Wales

### General remarks

1. The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.
2. The ability to challenge the lawfulness of the decisions and actions of public bodies is fundamental to the rule of law in the UK, as well as being a hallmark of a civilised democratic society committed to the protection of individual rights.
3. The Society is concerned that the length of time allowed for responses to the this consultation (just six weeks), coupled with the fact that it has spanned the Christmas and New Year period, means that many will have found it difficult, if not impossible, to formulate a full response to these substantial proposals in this important area of law. The Society therefore agrees with the comments of the House of Lords Secondary Legislation Committee in their 22<sup>nd</sup> Report of 2012-13, in which they wrote:

*'We note that on 13 December 2012 the Ministry of Justice launched a consultation on "Judicial Review: Proposals for Reform", setting a deadline for comment of 24 January 2013, a six-week consultation spanning Christmas and New Year. We would comment that the tightness of this timescale cannot be convenient for anyone but the Government'.<sup>1</sup>*

4. The consultation is an attempt by the Ministry of Justice to put flesh on the bones of the joint statement of the Prime Minister and Deputy Prime Minister on 6 September 2012 attacking delays in the planning system as a drag on economic growth.<sup>2</sup> The right to bring a judicial review to the courts is too important to be impaired by hasty reforms. In asylum and immigration cases (which account for over three quarters of applications for permission to apply for judicial review in 2011<sup>3</sup>) and medical treatment cases, for example, they may literally involve issues of life and death.
5. Aside from the increase in the number of judicial review cases being brought before the courts, the consultation paper offers no analysis of the reasons for that trend. It does not address the question of whether the underlying problem is in fact the result of faults in the initial decisions which are being challenged. Nor is there any analysis of the reasons for delay in the hearing of judicial review cases, for example, a shortage of judicial resources.

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<sup>1</sup>House of Lords Secondary Legislation Committee, (2012) 22<sup>nd</sup> Report: *The Government's new approach to consultation – "Work in Progress"*, London: The Stationary Office.

<sup>2</sup>David Cameron and Nick Clegg (2012), *Plans to Boost UK Housebuilding, Jobs and the Economy*, London: Number 10.

<sup>3</sup>[Ministry of Justice \(2012\), \*Judicial and Court Statistics 2011\*, London: Ministry of Justice.](#)

6. The claim that judicial review challenges to planning decisions are a drag on economic growth is no more than anecdotal assertion. No hard evidence to substantiate that charge is presented in the consultation paper.
7. Instead, statistics show that while the number of planning judicial reviews has risen in total from 112 in 1998 to 191 in 2011, the number of applications granted permission to proceed to a full hearing has risen over that time from 51 to only 61, and the number of substantive hearings allowed has actually fallen from 10 to 6<sup>4</sup>.
8. These figures might, if taken in isolation, suggest an increase over the last decade in the number of unmeritorious claims lodged at court with a proportionately more robust approach by the courts towards weeding these out. However, if the number of judicial review applications has increased, then this must be set in its appropriate context, namely a decade of continuing legislative (and policy) reforms to the system. In addition, the figures are misleading if they are interpreted to mean a disproportionately large increase in unmeritorious claims because the figures do not account for the substantial number of meritorious review applications which are settled (in the applicant's favour) before the permission or hearing stage is reached.

The Law Society is not opposed to the reform of the judicial review process where improvements can be made to the efficiency of the process, for example:

- Claims could be brought more quickly (CPR 54 does after all say “promptly”) but that will only work if all of the parties act promptly in taking pre-action steps;
- Prompt compliance with the pre-action protocol is desirable;
- The pre-action protocol could be better enforced;
- Better quality decision documents and responses from public authorities are essential;
- Judicial resources are necessary to enable cases to be dealt with quicker.

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4

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121212/text/121212w0003.htm#12121272003254>

## **Time Limits**

**Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?**

9. The Society does not agree that it would be appropriate to shorten the time limit for procurement and planning cases. While there are particular issues with shorter time limits for procurement and planning cases, there are many concerns common to both areas. Those include the differences in the work required to bring a claim, and hence the logical disconnect in simply aligning the time limits for judicial reviews with those for appeals under the Public Contract Regulations 2006 and the Town & Country Planning Act 1990. The quality of claims filed will be adversely affected and that in turn will impact on the time and cost involved in dealing with them.

## ***Procurement***

10. The nature of and the requirements for bringing judicial review are quite different from those pertaining to a procurement challenge under the Public Contracts Regulations 2006. It is not therefore logical to align time limits for the two different types of challenge.
11. The Society is concerned that the Ministry of Justice seems to have potentially overlooked the fact that tendering for contracts let by the Legal Services Commission for the provision of legal aid services are covered by the Public Contracts Regulations 2006. Applicants responding to invitations to tender have no right of appeal. Any firm failing to secure a tender therefore has no alternative but judicial review to challenge the soundness of the decision making of the Legal Services Commission. To reduce, from three months to 30 days, the maximum time available for a legal aid firm to establish the grounds for, prepare and submit an application for a judicial review of the Legal Services Commission is impractical and unwarranted. Given the specialist and limited availability of legal advisors in this area, it is likely that any firm affected in this way would not be able to source and obtain objective advice on the issues. This is likely to lead to premature and possibly inappropriate applications for judicial review being made.
12. The Impact Assessment accompanying the consultation paper repeatedly concedes that 'it has not been possible to monetise the aggregate costs accurately...'. Page 11 of the Impact Assessment states 'that at most there were only a few hundred procurement applications in 2011'. The Society questions why it is therefore necessary to foreshorten the period in which a judicial review challenge to a procurement decision can be brought. Page 12 states that 'no overall cost to legal service providers have been identified, for example in terms of reduced levels of business'. The Society challenges that statement. A firm of solicitors which loses its contract to provide legal aid services may be unable to continue in business. The firm cannot appeal against a decision of the Legal Services Commission; its only recourse is judicial review, and it is proposed to make that option more restricted. In practice reduced time limits for procurement judicial review applications may lead to an increase in cases as desperate firms turn more quickly and in increased numbers to the only remedy available to them. A full Impact Assessment would quantify the increased demand on the time of the judiciary in dealing with an increase in procurement cases likely to arise from the

reduction in the time available to submit an application for a judicial review of a public procurement decision.

## ***Planning***

13. The Government is mistaken in drawing a parallel between an application for judicial review and a statutory appeal under sections 287 or 288 of the Town & Country Planning Act 1990, in order to justify a reduction in the time limit for the former from 3 months to 6 weeks. The information and documentation needed for an applicant to file and serve lodge a section 287 or 288 appeal is often much less than that needed for a judicial review. The party appealing under section 288 will almost always have been involved in preparing and submitting the planning application, or objecting to it, or to the inspector on appeal and is likely to have all of the relevant papers to hand. Following a planning appeal, the issues will almost certainly be narrowed, so that a statutory review will usually be sought on much narrower grounds than a judicial review of a decision of a local planning authority. The applicant under section 288 will or should have been sent a copy of the decision notice via e mail from the Planning Inspectorate. Contrast this with many planning decisions (including decisions on major developments) which are finalised, often by planning officers, who simply notify the developer that the decision has been made. This simplified approach to section 288 appeals is evident by the use of Civil Procedure Rules (CPR) Part 8 as the process for issuing a claim. Further, there is no permission stage under Part 8 of the Civil Procedure Rules before the appeal is heard by the High Court.
14. More time is needed to prepare the case in support of a judicial review application. A party seeking judicial review may not have had any earlier notice of the development proposals that have resulted in a decision that materially affects his or her interests. Awareness of such a decision may come through publicity only after the decision has been taken, and such a person will have to establish what happened and why he or she was not notified by the local planning authority or the developer. The party bringing a judicial review will have to piece together the basis for the legal challenge starting with the officers' report to the planning committee (often requiring requests for information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000 which need not be answered for 20 working days) and it may be necessary to obtain and consider technical expert evidence. Such persons are frequently ordinary residents rather than a competing developer or professionally represented landowner. Such an aggrieved person has then to recognise the need for professional advice, the likely costs and the implications of taking action to protect his or her interests. All of this takes time and 6 weeks is not enough. Nor is it sufficient to suggest that any difficulties with a shorter time limit can be mitigated by giving the courts powers to allow matters to be brought out of time. That is likely to be a rarity and as a result is likely to generate an increase in satellite litigation.
15. There will be several unintended consequences if time limits for planning judicial reviews are shortened. There will be fewer opportunities to reach a settlement before a case reaches the court. The local authority in particular may not be able to and often will not wish to review its decision when a challenge will be submitted within 6 weeks – 3 months does allow time for reconsideration. In

future nothing could be done to resolve a dispute until the proceedings have commenced. Earlier filing of applications for judicial review is likely to result in more poorly formulated claims.

**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?**

16. Time limits of 30 days in procurement judicial reviews and 6 weeks in planning judicial reviews will not provide sufficient time for the current pre-action procedures, particularly so in cases involving the Environmental Information Regulations 2004. It can also take considerable time (anything up to a month) to apply for and be granted public funding. It should be borne in mind that the statutory 6 week appeals do not require pre-action process. As noted above, they also proceed under the simpler CPR Part 8. A consequence of shortening time limits is likely to be a reduction in opportunities to settle the claim by consent.

**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?**

17. No. In the view of the Society powers for the courts to allow an extension of time to bring a claim would not outweigh the difficulties created for those applying for judicial review by shorter deadlines. It would, for example, place the burden on the claimant to seek extra time. Because extensions would be discretionary they would be rare rather than granted regularly. The claimant would not be sure that an extension would be granted. This may also lead to an increase in satellite litigation and a key issue of difficulty – issues of fact are likely to arise with which the Administrative Court is not well assized to deal.
18. Following the case on *Uniplex*<sup>5</sup> certainty of time limit is required at least in all claims which derive from European legislation, including all public procurement and those planning challenges based on Directives, for example failure to carry out an Environmental Impact Assessment. It follows that any time limit which becomes uncertain because it can be extended by the court's discretion may be struck down by the European Court of Justice.

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

19. The Society is strongly of the view that shorter time limits are not appropriate in planning, procurement or any other types of case. They would, for instance, cause significant problems in other areas such as community care cases. There is a real problem in securing funding certificates promptly from the Legal Services Commission. There is a particular concern in judicial review cases involving disabled clients who often need more time to gather documents and other information. Shorter time limits may have the adverse consequence of leading to more self-represented litigants appearing in the Administrative Court with the

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<sup>5</sup> [http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2010/C40608.html&query=title+\(+uniplex+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2010/C40608.html&query=title+(+uniplex+)&method=boolean)

consequent increase in already scarce judicial resources that has to be applied dealing with litigants without the benefit of legal advice and assistance.

20. Although most immigration cases are filed well before the three month deadline as most are urgent in their nature, nonetheless shorter time limits would be completely unworkable in immigration cases. The principal factor causing delay in immigration and asylum judicial review cases is the delay in the Home Office and the UK Border Agency responding. The quality of Home Office decision making is frequently poor and there is often no right of appeal other than by way of judicial review. Many cases have a foreign dimension which inevitably leads to delay while information is being sought. It is common for applications to be lodged which are not looked at until a claim is issued, the Treasury Solicitor becomes involved in the case and agrees to pay costs. Rather than reducing time limits, more resources are required elsewhere. For example, earlier involvement in cases by The Treasury Solicitor in responding to cases would avoid some litigation. The issue of the number of immigration and asylum cases in the Administrative Court in any event will be eased by Clause 20 of the Crime and Courts Bill currently before Parliament which will allow the Lord Chief Justice to transfer those cases to the Immigration and Asylum Chamber of the Upper Tribunal.

### **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.**

21. The Society does not agree that any challenge to a continuing breach of multiple decisions should be dated from the first instance of the grounds. There is often difficulty in establishing when, for example, an instance of ill treatment in detention or the omission of proper care commenced. Cases involving discrimination are a continuous process over time and do not involve singular first or last instances. The following examples highlight just some of problems with this approach:

21.1. Consider a case of wrongful imprisonment: at what point does imprisonment become unlawful? It may be many months after the detention of an individual began. At which point should the clock start?

21.2. A prison failing to assess and address the disability needs of a prisoner under this proposal would only be challengeable for the first three months as the act of omission occurred on the first day of imprisonment. The prison is under a continuing obligation and must continue to be liable to challenge until the neglect is rectified.

21.3. With reduced welfare budgets the decision to reduce community care arrangements may be taken many months before it impacts upon an individual with the risk that the individual might be out of time to bring a judicial review.

21.4. On occasion the conduct complained of only becomes serious enough to challenge when it has been persistent or repeated.

**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?**

22. In the view of the Law Society there is a risk that claims might be brought earlier, and that they will consequently be poorly drafted and based on inadequate information thus causing delays in the courts when it might have been possible to resolve the issue outside the arena of the court. This may also result in additional costs to defendant public authorities were cases to be issued and subsequently settled as costs then become more recoverable from the defendant.

### **Applying for Permission**

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

**Question 7: Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a “prior judicial hearing”? Are there any other factors that the definition of “prior judicial hearing” should take into account?**

23. In the view of the Law Society this proposal to restrict the right to an oral hearing is a fundamental change. It will reduce substantive legal rights and would be contrary to Article 6 of the European Convention on Human Rights in denying access to a hearing.
24. The proposals to limit the provision of an oral hearing in certain circumstances stem from the belief that oral hearings are a cause of delay and expense. No evidence has been presented to indicate that there is in fact such a problem.

**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?**

25. Rejecting the proposed curtailment of the right to an oral hearing, the Law Society opposes determination of whether the issue raised in a judicial review is substantially the same as a prior judicial hearing by a judge considering the application for permission. The proposal fails to understand the nature of oral hearings for permission which are always substantially the same grounds as the previous application. If introduced, this would lead to more litigation over whether an issue is or is not substantially the same.

**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?**

26. No. This will lead to satellite litigation and divert from the real issue as to whether the public body has acted unlawfully. It is likely to lead to an increase in applications for permission to appeal to the Court of Appeal.

**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?**

27. The Society is opposed to the removal of the right to an oral hearing where an application for permission to bring judicial review has been ruled as ‘totally without merit’. The consultation paper presents no evidence that there is a problem with the oral renewal procedure. This would be a disproportionate limitation of access to justice where public authorities are being held to account. There are a disturbing number of cases which fail at paper application stage as being without merit which succeed at oral renewal, for example:

27.1. In *Leyton v Wigan County Council* (Co 7428) a litigant in person was refused permission on the papers, granted permission at an oral renewal hearing and then went on to win his case.

27.2. The case of *Masuku v Secretary of State for the Home Department* (an unlawful detention claim) was certified as totally without merit on the papers. Solicitors for Mr Masuku decided to renew the application orally. Two days before the oral permission hearing, the Secretary of State conceded permission and released the client from detention.

27.3. *Moussaoui v Secretary of State for the Home Department* (a challenge to refusal to grant leave under the Legacy Programme) was certified as totally without merit at the paper stage. At the renewal hearing, the Secretary of State agreed to reconsider the decision not to grant leave. Although permission was not formally conceded or granted, Mr Maoussaoui got the relief that he was seeking in the reconsideration of the decision.

27.4. In *R ((i) Friends of the Earth (ii) Solar Century (iii) Homesun) v Secretary of State for Energy and Climate Change* – CO/11091/2011 the Administrative Court refused permission on the papers on the basis that the case had no arguable merit but permission was granted after an oral renewal hearing.

28. These cases indicate the vital need to retain the oral renewal stage. Often the judge who reviews the papers has no experience of the particular area of law and policy and practice being challenged. Where a judge certifies an application to be totally without merit, arguable cases are being unheard which does not conform with good administration and the rule of law. It is an important safeguard to ensure the individual can access justice. Hence the need to retain recourse to an oral renewal. Removal would only result in an increase in the number of applications to the Court of Appeal. The loss of oral renewal hearings could lead to an increase in rolled up hearings, creating problems for the courts in dealing with them and for the Legal Services Commission in funding them.

29. The Society would also draw attention to legal aid issues associated with oral renewals. The initial work in submitting the form to renew the application for an oral hearing is not usually funded due to the short deadline for submitting the renewal application. It is assumed that if a fee is payable, then it would be payable at this stage. The Law Society would recommend that funding certificates should be changed to recover the new renewal fee.

30. It is also worth pointing out that the Legal Services Commission monitors the success rates of public law challenges which are funded by legal aid. That monitoring will pick up if a firm is being granted legal aid for oral hearings which fail more often than not. If a firm has a disproportionate rate of failure, the Commission will investigate to assess the reasons. The Commission has a range of sanctions available if there is evidence of incompetence or of taking cases which have little chance of success, ranging up to taking a contract away from the firm.

31. Furthermore there is no right to respond to the Acknowledgement of Service which often attaches a new decision letter, thereby rendering the application “without merit”. It is essential that the claimant has a reasonable period of time to respond to any new decision or points made in the Acknowledgement of Service.

**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?**

32. A totally without merit criterion could be applied in all judicial review cases but would give rise to similar issues and problems as highlighted above.

**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?**

**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?**

33. The Law Society, as highlighted above, is reluctant to agree to restricting the right to an oral renewal and opposes both suggested options. Weak or frivolous cases submitted by a self represented litigant will still take up court time in the interests of justice. Weak or frivolous cases submitted by lawyers, particularly if legally aided, can raise professional standards issues, if persistent or blatant, which would be one way of dealing with them.

## **Fees**

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

34. The Society would not object in principle to the introduction of a fee for an oral renewal provided that it is not prohibitively expensive and that the continuation fee for proceeding to a full judicial review is then waived. However, in order to do so, there must be a mechanism in place to ensure that applicants in receipt of legal aid are not adversely affected by a need to secure a change in their funding certificate in order to apply and pay the fee. This potential problem could be overcome simply by a change in the legal aid rules that permits the funding

certificate costs limits to include the cost of a renewed hearing to be included in any initial certificate limit.

**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?**

35. The Law Society has consistently objected to the Government's policy of seeking to recover the operating costs of the courts and judiciary through court fees. The Society is therefore concerned about the possible impact of setting the fee for an oral review is at £215, and, as seems likely, raising it to £235. Many individuals seeking judicial reviews would find fees of that order prohibitive, denying access to justice.

### **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?**

36. Clearly changes to the procedures for bringing judicial reviews will have a disproportionate effect on members of ethnic minority groups. Immigration and asylum applications form a substantial proportion of judicial reviews and most of those will have been brought by individuals from a minority background.

37. The disabled and those with mental health issues are likely to need more time to gather the information necessary to come forward with a judicial review challenge and would undoubtedly be disadvantaged by shorter time limits. Their carers who may be bringing cases on their behalf could also be adversely affected (such as parents of children with disabilities) although in education cases, expedited hearings are often sought.

38. The consultation has not been sufficiently thorough to safeguard vulnerable groups and a full equality assessment based on actual figures/research needs to be undertaken.