



Judicial Review: Proposals for Reform (CP25/2012)

JUSTICE Response

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“There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review”

Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122

Introduction

1. JUSTICE is an independent human rights and law reform organisation and is the British section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law. JUSTICE has worked actively on issues of good administration, oversight and accountability since our inception, publishing *The Citizen and the Administration* (1961), *The Citizen and his Council* (1969), and *Administration under the Law* (1971) during the early development of modern administrative law in England and Wales. We briefed on the retention of the constitutional duties of the Lord Chancellor in connection with the rule of law, independence of the judiciary and the public interest in the administration of justice, during the passage of the Constitutional Reform Act 2005.¹ We regularly intervene as a third party, including in cases arising by way of judicial review. Most recently, we argued in *R (Cart) v Upper Tribunal*, for the retention of judicial review for the determinations of the Upper Tribunal and other similar specialist tribunals. In that case, Lord Dyson stressed the fundamental nature of the function of judicial review:

“There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review”²

2. On 13 December 2012, the Ministry of Justice published *Judicial Review: proposals for reform* (CP25/2012) for consultation. Its publication followed statements in late November by the Prime Minister and the Secretary of State for Justice to the effect that judicial review – particularly in connection with planning decisions - was ripe for reform to deal with cases which were “time-wasting”.³
3. We deeply regret that this consultation appears to have been published without adequate time for analysis or review and presents significant proposals to curtail judicial oversight of public authority decision making without clear evidence or justification in support. That the consultation document has been published without a complete assessment of its likely impact on groups protected by the Equality Act 2010 raises significant concerns. Publication of the consultation over the holiday reduces the consultation period to around 6 weeks or 24 working days. This truncated timetable has proved problematic for most stakeholders. However, it could serve to exclude those who require assistance and

¹ For example, see ss 1 and 3.

² Lord Dyson, *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122

³ BBC Online, *PM to crack down on “time-wasting appeals”*, 19 November 2012

support to communicate, including some groups of people with disabilities, entirely. We are concerned that although the consultation paper acknowledges that judicial review “is a critical check on the power of the State”,⁴ that throughout this consultation process judicial review has been painted by the Government as unnecessary and overly bureaucratic red tape to be diminished without cause for concern. The very slim impact assessment produced and the use of “anecdotes” and impressions to support the Government’s case for change, taken together with the speed of the consultation process shows significant disregard for the important constitutional role played by judicial review.⁵

Constitutional significance of judicial review

4. The consultation paper briefly recognises judicial review as the “key mechanism” for individuals to hold the Executive to account. However, it fails to acknowledge the significant public interest in the effective operation of judicial review for the purposes of scrutinizing administrative activity in this country, from the decisions of Ministers and local councilors to the wide panoply of public agencies exercising public functions on which we all rely. Modern judicial review and associated administrative law provides an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again.
5. In a country with no written constitution to control the relationship between the citizen and the State, this function takes on a particular constitutional significance. The judiciary see the function of review as a constitutional duty to be treated with the utmost respect. As Lord Bingham, then Master of the Rolls, explained, “the court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power” and it “must not shrink from its fundamental duty to ‘do right to all manner of people’”.⁶
6. The public good served by judicial review is not addressed in any detail in the consultation paper, but a brief review of recent case-law shows that review cuts across the broad swathe of public decision-making and acts as an important check to ensure that governance is lawful, rational and fair. From local people challenging private sector

⁴ Consultation, para 2. See also para 11.

⁵ Consultation, paras 35, 49, 64 and 78, for examples.

⁶ *R (Smith) v Ministry of Defence* [1996] QB 517, 556.

outsourcing of public services⁷ to major national corporations challenging the outcome of multi-million pound tenders,⁸ it is clear that access to judicial review grants the citizen an essential degree of control over the quality of public decision making.

7. Similarly, little time is spent in either the consultation document or the impact assessment analysing the hurdles already incorporated into the judicial review process to protect public authorities from unwarranted challenge. Not least, the process of review was subject to close scrutiny as a result of the Bowman Review (2000), which led to the creation of a detailed Pre-Action Protocol designed to encourage more focused litigation and early settlement where possible.
8. Clearly, it must be open to the Government – and to Parliament - to review whether the existing arrangements for judicial review are working, including whether the procedure adopted is disproportionate, unduly restrictive or overly burdensome. However, the constitutional importance of judicial review places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place to preserve access to justice, accountability and good administration. We are concerned that this consultation fails to take this obligation seriously.

Evidence-based policy making: the case for change

9. There are a number of features of this consultation exercise which create concern:
 - a. **The truncated timetable** (outlined above) has already been subject to significant criticism by the House of Lords Delegated Legislation Committee.⁹ Increasingly shortened timescales for engagement reduce the likelihood that all persons affected by the proposals will be able to respond.
 - b. **The case for reform is broadly based on assertions and implications, unsupported by evidence.** The consultation talks about Government “concerns”

⁷ See for example, current reports on the challenge brought by local residents of Barnet against the plan to outsource provision of services wholesale (“EasyBarnet” litigation).

⁸ The challenge to the East Coast Mainline franchise was clearly affected by judicial review. The challenge brought by Virgin Trains was able to identify serious failings in central Government processes and in taking the decision in that individual case.

⁹ Second Report of Session 2012-12, HL Paper 100, para 37. (Timetable for review criticised as inconvenient for anyone but Government).

and that there “may” be evidence of abuse of judicial review. Few examples and little evidence is cited to support the Government’s case.

- c. **Where evidence is provided, it is weak and undermined by simple analysis.** For example, as we explain below, figures provided show that, outside immigration and asylum cases, the rate of judicial review has remained static for many years.
- d. **The impact assessments produced do not fulfil their purpose.** The principal justification provided for reform is that judicial review is an economic burden which cannot be justified in the current climate. Yet, the impact assessment prepared provides no concrete examples of cases where judicial review has stood in the way of economically viable and valuable projects. The figures provided are limited as the Government accepts that little data is available on the impact of judicial review. Little or no consideration is given to the positive benefits of the existing procedure (such as encouraging early settlement and pre-action mediation).

10. The case for change identifies a series of arguments for reform, none of which stand up to scrutiny:

- a. **Judicial review has grown exponentially:** The consultation argues that the number of judicial review cases has expanded from 160 in 1974 to over 11,000 in 2011. This is a crude comparison which says little about judicial review or the case for reform. As Bondy and Sunkin (the authors of a 2009 major study on the operation of judicial review) note, before the early 80s, modern judicial review did not exist.¹⁰ Claims could be brought to challenge public authorities but as ordinary civil proceedings. The figures do not compare easily. The figures provided by the Government show that the bulk of these cases are immigration and asylum cases. In fact, the graph provided illustrates that, immigration and asylum aside, the figures for judicial review have remained broadly static. The Crime and Courts Bill currently being considered by Parliament will provide for these cases to be heard not by the Administrative Court, but the Upper Tribunal. That the consultation paper does not grapple with either of these significant factors is disappointing.

¹⁰ The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing, Varda Bondy and Maurice Sunkin, 2009. See also *Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse*, UK Const L Blog, 10 January 2013.

The analysis of the figures provided is relatively bare. There is no examination of the reasons for the growth alleged, including in the development of judicial review, the expansion of the State or in any increase in judicial capacity. Equally, the consultation proceeds on the basis that growth in review is inherently detrimental to good administration. Indeed, the consultation argues that “the threat of judicial review has an unduly negative effect on decision makers”, leading them to be “overly cautious in the way they make decisions”. Little explanation is provided for this skepticism. There is no evidence provided for this belief, nor examples given, either in the consultation or the accompanying impact assessment. It is at odds with the long-standing guidance issued by the Treasury Solicitors, *Judge over your shoulder*, intended for public decision makers, which explains that administrative law is commensurate with good administration.¹¹

- b. **Judicial review takes too long:** The consultation explains that the Government is “concerned that it takes too long to weed out weak or hopeless cases”. The figures given show that it takes on average 11 weeks for a decision on permission on the papers and around 10 months for a review to proceed to completion. However, there is nothing in the consultation which tackles the cause of this delay. The timeframe envisaged in the CPR was for a review to be completed in no more than 6 months. Judicial reviews can be complex both to bring and to defend. In light of the important function served by judicial review, that cases are time consuming cannot alone provide justification to restrict access to the court. Rather, the figures provided by the consultation could equally support the case for additional resources for the Administrative Court, or new and additional costs burdens to be imposed on public authorities who resist permission unduly.

¹¹ The 4th edition, published in 2006 explains: “We have always kept in mind the purpose and target audience of this book. Its purpose is not “How to survive Judicial Review”, but rather to inform and improve the quality of administrative decision-making – though, if we are successful, that should have the incidental effect of making decisions less vulnerable to Judicial Review”. http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf A more recent parallel guide for public authorities published by the Scottish Government, to assist administrators applying public law principles in Scotland explains: “Good decision-making is an essential part of good government. It is fundamental to the Rule of Law ideal that official decisions are fair, efficient, accessible and not arbitrary, and that they comply with the law. *Right First Time* is designed to assist any public decision-maker comply with these high standards.” (*Right First Time* (2010). <http://www.scotland.gov.uk/Publications/2010/02/23134246/1>

That the impact of the removal of the bulk of existing judicial reviews from the Administrative Court to the Upper Tribunal is not considered in the assessment of the impact of any delay is disappointing and shows a lack of joined-up thinking on the part of the Ministry of Justice. If all immigration and asylum cases are – following the passage of the Crime and Courts Bill – to be moved to the Upper Tribunal, it is arguable that resources should be freed at the Administrative Court to allow all other cases to be dealt with more efficiently.

- c. **Judicial Review poses an economic burden:** The consultation argues that the time taken for review comes at “a substantial cost to public finances, not just the effort of defending the legal proceedings but also the additional costs incurred as a result of the delays to the services affected” It goes on to suggest that review can affect “infrastructure and other projects crucial to economic growth, as well as other private and voluntary sector organisations”. No detail is provided to support the Government’s case that review is adversely affecting the economy. Without a detailed explanation of the Government’s concerns, it is difficult to assess whether there is indeed a “pressing need” for change. Notably, Bondy and Sunkin note that, on the figures available, very few claims are likely to have a significant economic impact beyond the cost of litigation. Of the planning claims highlighted by the Prime Minister, in 2011, only 30 planning reviews were pursued to a final hearing. Of those, 6 involved a central Government Department. It is likely that some of this handful of cases could have had a significant economic impact.¹² However, without further analysis, it is difficult to assess the potential impact on growth. It is however simpler to doubt that a handful of cases could justify the wholesale reform of the procedure for judicial review.
- d. **Judicial review is abused by time-wasters:** The Prime Minister identified claims as time-wasting or frivolous. The consultation reasserts this belief, that the “process may in some cases be subject to abuses, used as a delaying tactic”. There is little further explanation for the Government’s concern that judicial review is subject to abuse given. The figures cited in the case for reform explain that most claims for judicial review are refused permission. However, this does not appear to provide support for reform or evidence of abuse, but instead, evidence that the current system where permission is necessary for a case to proceed is

¹² *Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse*, UK Const L Blog, 10 January 2013.

capable of filtering out unmeritorious claims before they proceed to a full hearing. Judicial review is unique, in that no other civil proceedings require this kind of judicial pre-approval to continue. That the permission stage exists is recognition that frivolous review could unjustifiably hinder good administration.

Similarly, that cases are withdrawn at an early stage does not necessarily support the conclusion that those cases were unmeritorious. They could have resulted in early settlement and the threat of litigation could have served the public authority to abandon a flawed decision before its implementation led to further harm.

Bondy and Sunkin have, in their research, more closely examined the progress of claims before a full hearing. The official statistics fail to reflect the number of claims which are withdrawn before permission stage, likely after a settlement. They also note that on oral application for permission, around 62% of cases are granted permission to proceed and that very few cases are refused permission expressly on the grounds that they are without merit.¹³

- e. **When claims are won, the victory doesn't matter:** The consultation explains the Government's assessment that "where a claimant is successful, it may only result in a pyrrhic victory with the matter referred back to the decision-making body for consideration in light of the Court's judgment". This assessment of the purpose and value of a judicial review claim by a Government department is deeply disappointing. The remedies available to the Court are varied, but it is never the purpose of review for the court to become an administrator. Where a decision is judged unlawful it is determined that a decision-maker has failed to act within his or her powers, has misunderstood the law or acted so unreasonably that no other decision maker could rationally have reached the same conclusion. In practice, a victory will necessitate a new decision and greater reticence and awareness by the decision-maker. This is a serious outcome for any aggrieved claimant and important for good governance and the rule of law.

11. The consultation paper sets out three issues for consultation; on shortening the time limits for judicial review, removing the ability to renew an application for permission at an

¹³ *Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse*, UK Const L Blog, 10 January 2013.

oral hearing and introducing fees for permission hearings. We consider each of these issues in turn below.

12. JUSTICE considers that the Government has not made the case for reform of the existing judicial review process. Without a case for reform, the specific changes proposed in the consultation are unsupported. We respond to a few of the detailed questions posed, but maintain that reform is unnecessary and could undermine access to justice, accountability and transparency, and the public interest in good administration.

13. Where we do not address a question in the Government's consultation, this should not be taken as support for reform.

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?

14. JUSTICE does not agree that it would be appropriate to shorten the existing time-limits to reflect statutory time-scales for appeal. Ultimately, the Government has not shown that the current time-scales for review are problematic.
15. The existing time-scale for the bringing of judicial review claims is exceptionally tight when compared to other civil litigation. The comparator with statutory appeals is not a fair or appropriate baseline for comparison. A statutory appeal will often involve a party which has made a substantive application asking for a rehearing or a review of a decision a case which it has made. By way of contrast a judicial review is characterised by its supervisory nature. An application is not a rehearing of a case which the parties may have been immersed in for months, instead, it is more likely to involve a person who becomes aware of the implications of a public decision for his or her circumstances challenging the lawfulness, rationality or fairness of that decision from a position of relatively little knowledge of the decision making process. Advice will be sought, as will information from the decision maker, and through the operation of the Pre-Action Protocol, attempts will be made to better clarify the issues and concerns that arise in the case, diverting ill-concieved matters from the Administrative Court.
16. The consultation proceeds on the basis that truncating the time-table for review will speed up litigation and will perhaps divert some cases from court. This conclusion does not necessarily follow. A tight timetable for remedy may in fact encourage parties to proceed with cases that may have been dropped following advice or mediation.

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?

17. The existing time-scale for the Pre-Action Protocol (PAP) provides for 28 days between the letter before claim and the issuing of proceedings. It is clear that the proposals for consultation, either in connection with procurement or planning, could not accommodate the existing PAP. However, it is equally difficult to envisage how constructive enagement between the parties – including the identification of issues and the

formulation of a detailed complaint and the exchange of correspondence – could be achieved on a shorter timescale. While modern communications might speed up the exchange of communications between the parties, time for advice to be taken and digested and instructions given on both sides makes it unlikely that the benefits of the PAP could be achieved within a shorter timescale designed to accommodate the proposed restriction of time in the consultation.

Question 3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

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

18. JUSTICE does not accept that the case has been made to reduce the current time limits for judicial review. We do not agree that judicial discretion to extend time would ensure access to justice.

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

19. JUSTICE considers that this would be a significant restriction on the time limit for review in cases of ongoing illegality in public administration. It would be inconsistent with practice adopted in other limitation cases, and specifically, in litigation involving individual rights and equality and claims under EU law. Broadly in each of these circumstances, a claim crystallizes when the claimant has or should reasonably have had sufficient knowledge to bring a claim or at the end of the period of allegedly unlawful, continuing conduct.¹⁴

20. As explained above, individuals affected by a decision may not become aware of its impact, reasonably, until some time after a decision has been taken. It would be arbitrary to base the time limit for judicial review in cases of ongoing and continuing illegality on the trigger for the continuing maladministration, regardless of the awareness of those affected by the problem.

21. There is little justification for this proposal in the consultation. Given that it would overturn current practice at a stroke, based on a long line of existing House of Lords authority, this is surprising. The policy reasons for the existing practice are clear.¹⁵ Not only does existing practice ensure that individuals are not arbitrarily excluded from bringing a claim before a decision becomes public knowledge or is implemented, but it deters early challenges to decision-making during complex processes and ensures that when challenges are brought, the implications of an alleged illegality are clear for both the claimant and the defendant.

Applications for Permission

22. We repeat our objection outlined above, that the case for reform has not been made. In this part of the consultation, the Government explains its concern that “procedures for considering whether permission should be granted allows claimants too many opportunities to argue their case, particularly where their case is weak”. The Government provides no evidence that the renewal process “takes up court resources meaning that well-founded cases may not proceed quickly”.

23. The Government uses an analogy with the recent changes to Part 54 in the light of the decision of the Supreme Court in *Cart* that judicial review should lie in cases where the Upper Tribunal refuses permission to appeal. We are concerned that this is not an appropriate analogy to draw with judicial review more widely. That permission is applied in judicial review alone – beyond appeals – is in itself a significant restriction on access to court.

24. The research produced by Bondy and Sunkin provides clear justification for the oral renewal process: to prevent the arbitrary operation of the gateway by paper judges who might take an inconsistent approach to cases. In their work, they established clear variance across individual judges in how stringently the test for permission was applied to the papers. They also illustrated that around 62% of applications for permission on renewal were successful. Regardless of whether this significant proportion of cases went on to succeed, it is clear that they had a case that the public authority in question

¹⁴ In connection with EU claims, see *Uniplex*, ECR 2010 I-00817, para 47.

¹⁵ See *Burkett v Hammersmith & Fulham LBC*, [2002] UKHL 23, 52.

was acting illegally, irrationally or unfairly. Without opportunity for reconsideration, this possible maladministration would go unexamined.

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

Question 8: Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

Question 9: Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as “totally without merit”, there should be no right to ask for an oral renewal?

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

25. We reject the underlying premise that there is a case for oral renewal to be restricted. Against this background, we do not agree with either option proposed or with the detailed propositions in QQs 6-8 and 9-10. We do not think that there are any types of judicial review cases where restriction would be appropriate.

Fees

Q14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

Q15: 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?

26. We reiterate our view that the case for reform has not been made.

27. The decision to introduce a fee for an oral renewal hearing cannot be dismissed without further analysis. However, in light of the important constitutional function of judicial review, the fee should not be set at a level which frustrates access to justice.¹⁶ In recognition that claims may be brought by vulnerable individuals or groups of individuals seeking redress against a public body, if a fee is introduced, the court should be granted the discretion to waive the fee in cases of hardship. It is disappointing that there is no acknowledgement in the consultation that the introduction of a fee could engage the right of access to justice or any analysis included on how the introduction of a fee for renewal might impact on the significant number of cases currently granted permission on renewal.

28. However, renewal hearings are far shorter than a full judicial review hearing and a fee on the same scale might appear disproportionate, and set as a deterrent to the pursuit of renewal rather than to cover the likely costs of any hearing in terms of court time.

¹⁶ *Witham* [1998] QB 575 establishes that court fees may be set in a way which restricts access to justice and undermines the rule of law.