GARDEN COURT CHAMBERS
CIVIL TEAM

Response to Consultation Paper CP25/2012:
Judicial Review: proposals for reform

Introduction

1. This is a response to the Consultation Paper on behalf of the Civil Team at Garden Court Chambers. The Civil Team has had the benefit of the sight of submissions made by our colleagues in our Housing Team and our Immigration Team and the Civil Team endorses the responses made by both teams.

2. The Civil Team at Garden Court Chambers is made up of a number of sub-teams each of which specialises in protecting and promoting civil liberties and Human Rights. Each sub-team contains leading practitioners who have appeared in numerous high profile cases successfully challenging the legality of state action via Judicial Review.

3. The thrust of the Government's view is that there is a "pressing need" (para 7) to address the issues summarised in paragraphs 2 – 6 of the Introduction to the Consultation Paper. We would dispute the Government's view that there is a "pressing need" for the reforms as proposed in this Consultation Paper. Our key reasons for disputing the Government's view is that (1) there is no actual evidence presented to justify the substance reforms proposed by the Government apart from anecdotes which do not refer to hard evidence; (2) the Summary and Analysis section of the Impact Assessment states in respect of the main proposals for reform that it has not been possible to monetarise any of the aggregate benefits of any of the proposed reforms; (3) there is no evidence of concerns raised by the judiciary which could found the reforms proposed; (4) the consultation focuses solely on proposals for reform in the High Court and completely fails to identify that, importantly, a large amount of cases in Judicial Review claims have been transferred to specialist tribunals under the Tribunals, Courts and Enforcement Act 2007. This is evident from the Impact Assessment as the role of specialist tribunals are not considered in under heading 1.6 and paragraph 1.29 which must be considered a major flaw in any analysis; and (5) it is our clear view from reading the "Evidence Base" section of the Impact Assessment that the evidential basis as it stands to support the Government's view on reform is highly speculative

4. It noteworthy that these reforms are proposed only for England and Wales and there are no proposals to extend these reforms to Scotland or Northern Ireland or to invite the devolved Governments in those countries to consider similar reforms. Further it does not take into account any devolution issues in respect of Wales and the constitutional issues this raises with the High Court based in Cardiff. Thus it must be doubtful if the reforms proposed are clearly aimed at the purported "economic" policy objectives identified as justifying them.

Response to policy view

5. The proposed policy objective identified for justifying the reforms is the Government's plan to tackle "red tape", promote growth and stimulate economic recovery. Oddly the reform of Judicial Review is highlighted as a "key element" to this plan. Our first response would be that it is really unclear why reform of Judicial Review would justify being characterised as a "key element" to this plan given the specific role of the High Court in reviewing the "legality" of state action. In contrast the true "key elements" would appear to us to be consideration of reforms of legislation, regulatory structures, improved regulators and investment, improvement in decision making processes, transparency and sound political processes and proper ministerial oversight and responsibility which would mean the Courts would have no reason to have to intervene. It is clear that the involvement of the High Court in the challenge by Virgin Trains to the bidding process for the West Coast Franchise was key to its successful resolution. Initially, the Transport Secretary, Justine Greening, stated that the process was not flawed. However, following the issue of the claim a new Transport Secretary, Patrick McLoughlin, was force to scrap the offer of the franchise to the First Group after faults were found with the bidding process. It was estimated the flawed franchise process costing taxpayers at least £40 million even prior to a court hearing and the cost to the public could rise with First Group, whose shares dipped when the bidding was cancelled, seeking damages. In this very public example it is clear that the economic and regulatory problem was not caused by Judicial Review but rather the failure of Government and its administration. This is not the only failure by Government or public bodies which have been exposed by Judicial Review in respect of planning or procurement processes (for example, the challenge by the Law Society against the Legal Services Commission process of awarding family law contracts).

6. It is our view that it cannot be a rational policy to try and remove, restrict or limit a last resort independent judicial safeguard as a "key element" of reform in promoting these purported economic policy objectives without effective reform of the regulatory structure and decision making processes involved.

Response to points raised in the "background" section of the Paper.

7. The Government and Public Bodies in discharging their public functions can only act within the law. Public law, which is the subject matter of Judicial Review, is the set of legal rules which ensure that bodies carrying out public functions:
   i. Discharge their legal duties;
   ii. Do not abuse or exceed their powers; and
   iii. Avoid breaching the European Convention on Human Rights (except where legislation leaves the decision-maker no other option) and/or a European Union right.

8. Lord Justice Sedley in *R v Somerset CC ex parte Dixon* [COD] 1997 323, QBD stated:

> "Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power"

9. The ultimate means by which public law disputes are resolved is by bringing the matter before the High Court using a claim for Judicial Review which Lord Templeman has described as:

> "a remedy invented by the judges to restrain the excess or abuse of power".

10. Only then, will a public law wrong have occurred. It does not matter if the judge, faced with the same decision, would have decided the merits of the case differently, although there are important qualifications to this general principle namely the discretionary nature of the relief available. It is important to always remember that in Judicial Review the court is exercising a form of supervision of the decision-maker namely examining the process by which the decision was made and not conducting an appeal on the merits of the case.

11. The High Court in Judicial Review proceedings acts as a Constitutional Court and any reforms which restrict the access to the Court or modifies its procedures or practice such that access to the Court is further restricted changes the balance of power between the Executive and the Courts favouring the Executive. It is our view that such reforms have to be approached with great care and that this care has not been taken with these proposals set out in the Consultation Paper and the case for justification has not been made. Contrary to the assertion in paragraph 14 of the Consultation Paper a line of case law clearly identifies that Judicial Review <u>is</u> a remedy of last resort and that Claimant <u>must</u> exhaust all <u>effective</u> alternate remedies before making a claim for Judicial Review which emphasises the importance of the High Court as a Constitutional Court. The High Court strictly enforces this requirement and there is nothing in the Consultation Paper to suggest otherwise. It is our view that it is misleading to state "Judicial Review is <u>often described</u> as a remedy of last resort…". It is clear from procedure and practice it is a requirement that the claim for Judicial Review be a last resort.

12. The background section also fails to identify that under the Tribunals, Court and Enforcement Act 2007 creates a Judicial Review jurisdiction equivalent to the High Court in the Upper Tribunal for specialist tribunals. This was a response to providing a proportionate, cost effective and effective remedy is disputes involving particular expertise in the judiciary.

Response to the case for change

13. The Government notes the growth in Judicial Review claims from 1974 to 2011. It is clear given that there has been considerable changes in legislation, regulation, immigration and the ethnic make up of UK society in addition to social, economic, technological, and political change including the impact of the UK jointing the European Union between 1974 and 2011 that a crude comparison over time would not of itself justify the reforms. The case for reform at paragraph 29 states that the vast increase in judicial review applications is accounted for by applications made in Immigration and Asylum cases. On this issue we defer to the response made by our colleagues in the Immigration Team at Garden Court Chambers. However, this data would not seem to support any contention that there has been a major "growth industry" in applications for Judicial Review applications challenging procurement or planning decisions which are in any way disproportionate to growth between 1974 and 2011. Furthermore, on our reading of the Impact Assessment there does not appear to be any sound evidence to justify the assertion made in paragraph 2 of the Consultation Paper that Judicial Review is subject to extensive abuse by some Claimants. The Consultation Paper fails to identify that when Claimants are unsuccessful in their claims they may be subject to adverse costs orders sought by Defendants which would always be a consideration in bringing any claim.

14. Under the subheading concerning permission in paragraph 32 the Consultation Paper refers to a concept of a "pyrrhic victory" with the matter being referred back to the decision maker for further consideration in light of the Court's judgment. In our view this demonstrates a clear misunderstanding of the jurisdiction of the High Court in Judicial Review proceedings and the remedies available to the Court. The jurisdiction of the High Court is in essence to review the legality of decision making and not to make a substituted decision on the facts, save for cases where there is only one alternative outcome. In virtually all successful Judicial Review claims when a decision is quashed the Court will remit it back to the decision maker as the Court. However, in cases where the challenge represents no more than a "pyrrhic victory" the High Court has the discreition to withhold the remedy sought. It is truly concerning to find such a fundamental misunderstanding of (1) of the jurisdiction and (2) the remedies available to the High Court in a Consultation Paper drafted by the Ministry of Justice. It is our view that the present powers of the High Court are adequate and effective to deal with such concerns.

15. The concerns set out in paragraph 33 suggest that inadequate resources are afforded to the Court in dealing with applications rather than that there is a

problem with the timing of applications itself or abuse of the system. The timeframe as set out in the Civil Procedure Rules were drafted in anticipation that the case would be completed within 6 months of issue given the requirement that a claim be brought within 3 months of the decision.

16. The statements in paragraphs 34 – 36 suggest that Judicial Review and the purported fear of Judicial Review impacts adversely on decision making and inhibits major planning, construction or procurement decisions. The suggestion here is that the very prospect of a Judicial Review challenge and delay is damaging to economic growth. There is no actual evidence presented by the Government to support this proposition and in our view even the limited evidence presented in the Impact Assessment does not appear clearly supportive of this view and is highly speculative. Rather, it may be the case that Judicial Review is economically valuable, may save time and money and may boost investor confidence. Given, for example, the case with Virgin Trains and the West Coast Franchise it is our view that the existence of Judicial Review as a remedy is supportive of investor confidence as it is clear that in its absence then investors and shareholders would have to rely solely on the reliability and legality of Government decisions and Ministerial Statements which upon consideration by the Courts have proven to be flawed and unreliable. It is our view that the existence of an effective and independent remedy provided by Judicial Review in the High Court can, if properly funded and administered, promote the economy, economic investment and development as it provides confidence to investors and companies which is often not provided by Government Departments. It is our view that the Consultation Paper is flawed in this analysis and that the Government's case for change is not supported by evidence; and that there is no evidence to support a "pressing need" to take action as set out in paragraph 37 of the Consultation Paper.

Responses to consultation questions

Time limits

17. We refer to paragraphs 13 – 15 of the response of our colleagues in the Housing Team in support of our responses below.

Question 1

18. We do not believe it is appropriate to shorten time limits in procurement or planning cases to bring them in line with the time limits of appeal. First, it is our view that these concerns are already provided for by the requirement to act promptly in bringing a claim. Secondly, the issue of promptness is a matter which a Defendant can raise in its grounds of resistance and the Court can dismiss the claim if justified on consideration of permission. Third, the time limits of 30 days (procurement) or 6 weeks (planning) is based on a concept of when the Claimant " knew or ought to have known the grounds of the claim". It is our view that procurement and planning issues are often complex and require a great deal of investigation and advice which the time limits may not

provide for. Finally, it is clear that in any event the 3 month upper time limit for bring a Judicial Review claim is not absolute and the Court may give permission to extend time for bringing a claim if there is a good reason beyond that time limit in any event.

Question 2

19. It is our view that a 30 day time limit for challenging procurement decisions is insufficient time. The present pre-action protocol which has a minimum time frame of approximately 28 days from the date of service of the letter before action. Clearly 30 days would not realistically accommodate the use of the pre-action protocol which may lead to premature applications being made and extra cost and delay if a 30 day time limit is imposed for procurement cases. Planning cases are often complex and there may be a need for substantial reconsideration by the Claimant and planning authority during the pre-action period. It is our view that the pre-action protocol operates well in line with the present time limit for bringing the claim and the duty to act promptly. We are unconvinced a shortening of the time limit to 6 weeks or any modification of the pre-action period would assist in (1) resolving cases without going to Court or (2) making any meaningful difference in these complex disputes and (3) risk premature applications to the Court in order that the Claimant protect the position in respect of the proposed time limits.

Question 3

20. We can see no need for such a reform as the Claimant is required to bring the claim promptly in any event. We do not consider this proposal for reform a proportionate response as it may (1) lead to further delay if a late application is made, (2) result in satellite litigation in respect of the exercise of this power by the Court and (3) is likely to be insufficient to provide for access to justice given the present requirements of the pre-action protocol and the complexities of the evidence and litigation in these cases. It is our view that the present arrangements are well established and well understood and lead to effective and sufficient access to justice.

Question 4

21. We see no case for the extension of these proposals to any other case and the Consultation Paper and Impact Assessment does not provide any evidence or make out a case for the extension of such reforms. If there were such cases we would have expected the Ministry of Justice to have identified them and evaluated the impact of such reforms on other cases and not to use a consultation process for gleaning suggestions. In any case it is our view that the reforms are not justified in procurement or planning cases and consequently there is no basis for an extension to other cases.

Continuing breach

Questions 5 and 6.

22. We adopt the submissions set out in paragraphs 17 – 22 of the submissions set out the response of our colleagues in the Housing Team.

23. Further it is clear that some cases subject to challenge by Judicial Review, such as unlawful detention claims where mere delay cannot provide any cure to the illegality and may require a prerogative remedy provided by Judicial Review, are 'pure' continuing breach claims where the illegality persists and cannot be time limited by any meaningful reform of the Civil Procedure Rules. The Consultation Paper and Impact Assessment does not appear to have considered this issue.

24. Therefore we oppose amendment to the Civil Procedure Rules.

Permission and Oral Renewal

25. For the reasons set out in the submissions of our colleagues in the Housing team we adopt their responses to questions 7 – 8 of the Consultation Paper.

Totally without merits

Question 10

26. At present we cannot support the proposal set out in question 10. We are in agreement with our colleagues in the Housing Team that we have seen no clear empirical evidence to conclude that introducing such a test is justified and that oral renewed applications are having any adverse economic or other adverse impact. It is clear on a proper assessment of merits that applications which are totally without merit cannot be made in cases funded under Legal Aid. We are aware that the Public Law Project is presently conducing research on this issue and we draw your attention to the publication by V. Bondy and M. Sunkin, *'Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse.'* UK Const. L. Blog (10th January 2013) (available at http://ukconstitutionallaw.org). We understand the authors of this document are in the process of completing their research on these issues. We support our colleagues in the response of the Immigration Team as to their concerns relating to the introduction of this reform.

27. Furthermore, there is no reference to consideration of the fact that if a Claimant does bring an unmeritorious renewal which is abusive then the Court may make an adverse costs award.

28. We appreciate that there may be some cases where permission is denied on the basis of lack of jurisdiction or failure to exercise an alternative remedy which

may be considered abusive of process if subject to an oral renewal. However, we are of the view that (1) this would already be provided for in the summary of reasons provided by the judge on the decisions on the papers and (2) the Claimant would be likely to avoid renewing the application for permission give the obvious risk of an adverse costs order.

29. Our view is that if a provision exists debarring the Claimant from seeking an oral renewal then these will be subject to appeal to the Court of Appeal in any event so this provision is only likely to result in an increase in the number of applications for permission to appeal to the Court of Appeal. This risk that additional satellite litigation may result does not seem to have been considered by those who drafted the Consultation Paper. We direct you to the considerations advanced by our colleagues in the Immigration Team on the present certification schemes.

Question 11

30. Such a proposal should not apply in cases where Human Rights are at issue and claims which concern liberty of the subject. We also endorse the concerns expressed by our colleagues in Immigration Team.

Question 12

31. If an claim for judicial review has been refused on the paper application and identified as being totally without merit we consider the following examples as being circumstances when an oral renewal application should be permitted. First, where there has been a clear change of circumstances whereby the could be an amendment of the grounds of Judicial Review. Secondly, where there is late disclosure of relevant evidence by the Defendant which affects the merits, Third, where there has been a breach of a duty of candour by the Defendant. Given that all of these issues can arise in a claim for Judicial Review one can see that it is not a simple or static process envisaged by the Consultation Paper.

Question 13

32. We do not consider these proposals should be implemented.

Fees

Question 14

33. We are sympathetic to the possibility of the introduction to an additional fee in cases for an application for an oral renewal but only in cases where a judge has specified the case is totally without merit for specified reasons. We are not of the view that there should be a fee for all oral renewal applications envisaged by this proposal. We support the submission of our colleagues from the Housing Team on this issue and endorse the view that no decision should be taken until the consultation on *Fees in the High Court and Court of Appeal*,

CP 15/2011, Ministry of Justice, is complete as otherwise there would be a risk of incoherent and inconsistent decision making by the Department.

34. In any event it is our view the Court should retain a discretion to waive any fee in consideration of the Claimant's means to pay.

Question 15

35. We are in agreement with our colleagues in the Immigration Team that it is not fair to charge the same fee as is currently charged for a full substantive Judicial Review hearing as most oral renewal hearings are listed for, and last, no more than 30 minutes. It may be that an alternative fee structure may be required if the Court consider an application for a "rolled up hearing" is appropriate.

36. It has to be remembered that the fee is for access to the Court and the Defendant may recover its own costs by order of the Court if the application is unsuccessful. Nevertheless, if permission is granted at the oral renewal hearing of the claim it is our view any fee should be refunded by means of a reduction of the fee then due for the claim to be listed for a substantive hearing (in a similar manner proposed by our colleagues in the Immigration Team) as the Claimant will have been put to the additional expense of making a renewed application for permission and will have show that the judge who refused the application on the papers was wrong.

37. Unlike our colleagues in the Immigration Team we make no submission as to the level of the fees pending the consultation *Fees in the High Court and Court of Appeal, CP 15/2011*, Ministry of Justice .

Question 16

38. We adopt the concerns expressed by our colleagues in the Immigration Team and Housing Team.

39. However, we also express a broader concern of reliance on the responses to this Consultation on this issue. This in our view should be subject to an evidence based assessment with a broader consultation. Our concern is that there must be a flaw in the present Impact Assessment both in terms of the Equality Impact Assessment and any Regulatory Impact Assessment if the Consultation process is seeking to rely on anecdotal evidence gleaned from responses on this issue. Without consideration of proper research and evidence gathering there is a real risk that policy changes could have radical unforeseen and detrimental consequences for the relationship between the individual and the state and the constitutional position of the Court by limiting its review of the acts of the Executive and other public bodies.

Conclusion

40. For the reasons set out above the Civil Team at Garden Court Chambers are strongly opposed to these proposals.

Civil Team
Garden Court Chambers
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