BIRMINGHAM LAW SOCIETY

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Response to Ministry of Justice Consultation on Judicial Review Reform

April 2021

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DISPUTE RESOLUTION COMMITTEE

RESPONSE TO MINISTRY OF JUSTICE CONSULTATION ON JUDICIAL REVIEW REFORM

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The Birmingham Law Society is the largest provincial local law society with a membership of some 5,000, representing solicitors, barristers and paralegals working in the West Midlands area. This response has been prepared by the Society's Dispute Resolution Committee in relation to the questions posed by Ministry of Justice in its consultation on Judicial Review Reform published in March 2021.

FOREWORD

Judicial review lies at the heart of the England & Wales legal system. It is of fundamental constitutional importance and is an integral part of the rule of law within our jurisdiction. Judicial review provides access to justice by ensuring accountability of public bodies. Accordingly, we consider that any radical reform of judicial review must be necessary, warranted and supported by clear evidence.

RESPONSES TO CONSULTATION QUESTIONS

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

No. We disagree with the concept of suspended quashing orders. Successful claimants for judicial review should not be denied redress by way of delay, particularly bearing in mind that there may be a lengthy period before a claim is determined in any event.

Given that paragraph 9 of the Pre-Action Protocol for Judicial Review encourages alternative dispute resolution, we consider that respondents to judicial review claims have sufficient opportunity to resolve and remedy matters and this opportunity continues throughout proceedings under Rule 1.4(e) Civil Procedure Rules 1998 ('CPR'). Accordingly, we consider that, ultimately, suspended quashing orders are both unwarranted and unnecessary and would only serve to delay matters. As stated by Sir Geoffrey Vos in *Bank St Petersburg PJSC & Anor* v *Arkhangelsky & Anor* [2020] EWCA Civ 408:

> "*Justice delayed is justice denied*".

This is a historic legal maxim which acknowledges that delays to justice have the effect of denying justice, and which we consider forms part of the wider rule of law. This is reinforced by Clause XXIX of Magna Carta 1297 (which remains in force to this day) which provides that:

> "*we will not deny **or defer to** any man either Justice or Right*" (emphasis added).

Accordingly, we consider that suspended quashing orders would infringe both the rule of law and Clause XXIX of Magna Carta 1297. We respectfully request that the Government and/or Ministry of Justice acknowledge that this is the case and respect such.

Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

As regards the proposals in respect of suspended quashing orders, we oppose this entirely; please see our response to Question 1 above.

As regards the proposals in respect of *Cart* judicial reviews, whilst the arguments of the Public law Project in respect of statistical inaccuracies (see here: https://publiclawproject.org.uk/content/uploads/2021/04/120421-Letter-from-PLP-to-OSR-.pdf) are noteworthy, looking beyond this, we consider that Section 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007 demonstrates clearly that the will of Parliament was that refusal of permission to appeal by the Upper Tribunal should not be capable of further challenge. Accordingly, we consider that the Supreme Court's decision in *Cart* v *The Upper Tribunal* (Rev 1) [2011] UKSC 28 was indeed wrong and consider that this alternate route of judicial review should no longer be allowed to continue.

To achieve this aim, we propose that a new section "10A" be inserted into the Tribunals, Courts and Enforcement Act 2007 which reads as follows:

> "*(10A) An "excluded decision" under section 13(8)(c) is not subject to the supervisory jurisdiction of the High Court*".

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

Yes. We consider that this is a sensible approach which would demonstrate respect for the devolved administrations, devolved jurisdictions and Union of the United Kingdom.

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

No. There is no justification for the preclusion of justice to any judicial review claimants who have been wronged. As per the principle of *restitutio ad integrum*, those who have been wronged are entitled to be restored to the position that they would have been in had the wrongdoing not occurred. We consider that this principle forms an integral part of the rule of law, and we respectfully request that the Government and/or Ministry of Justice acknowledge that this is the case and respect such.

Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

No. We oppose the proposals of prospective-only remedies entirely; please see our response to Question 4 above.

Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

No. We oppose suspended quashing orders entirely; please see our response to Question 1 above.

Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

No. We consider that such legislation is neither necessary nor warranted, and is likely to introduce complexity and confusion rather than simplifying matters.

Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

We consider that there is no case for modifying the approach of the courts to ouster clauses. The courts should decide whether in all the circumstances, effect should be given to a specific ouster clause, as is currently the case. If Parliament wishes to reaffirm, or clarify its will, it can subsequently do so (as demonstrated by the Government's proposals in respect of *Cart* judicial reviews). Where Parliament clarifies its will, this will undoubtedly weigh in favour of the preservation of the ouster clause, and it is hard to envisage a court challenging such a clause in such circumstances.

Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

Yes. We consider that a promptitude test is unnecessary where a longstop period has been prescribed by the CPR. Judicial review is a key means of ensuring accountability of public bodies and it must not be forgotten that ultimately it provides citizens with access to justice which, of course, also has implications as regards equality of arms. There are undoubtedly those out there who may struggle initially to find representation, assistance or funding. We therefore respectfully request that a new time limit of 6 months be applicable to all judicial review claims. It is acknowledged that this additional period may be inconvenient or irritating to respondents, however we do not consider that it would have any meaningful or significant impact on respondents. Additionally, as set out in our response to Question 10 below, this is countered by the benefit of increased opportunity for alternative dispute resolution which would come from an extended time limit, which no doubt would be beneficial to both claimants and respondents. As per our response to Question 16 below, we support an extension to the time limit of CPR 54.14 which we consider ensures fairness to respondents, particularly if the proposed 6-month time limit to bring a claim is adopted.

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

Yes. We consider that an extension to the time limit would better facilitate alternative dispute resolution, which can be difficult within the current 3-month period. Accordingly, we consider that an extension to the time limit would be beneficial to both claimants and respondents. Please also see our response to Question 9 above.

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

Yes. We consider that this proposal is beneficial to claimants and respondents alike, particularly as it will allow parties additional opportunity to explore alternative dispute resolution if they so wish.

Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

No. We consider that a 'track' system for judicial review claims is neither necessary nor warranted.

Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

Yes. This is a sensible proposal and no doubt would assist with improving access to justice.

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

We agree that a formal provision for a Reply would be welcome, however we consider a period of 7 days from the date of service of the Acknowledgment of Service to be too short. We consider a period of 14 or 21 days to be more appropriate/reasonable.

Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

Yes.

Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

Yes. We consider that this is warranted in particular if our proposal of a 6-month time limit to bring a judicial review claim (see our response to Question 9 above) is adopted.

Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

No.

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

No.

Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons

No view is expressed in this regard.

ADDITIONAL SUBMISSIONS

In his 2010 Review of Civil Litigation Costs, Sir Rupert Jackson recommended the introduction of qualified one-way costs shifting ('QOCs') for all judicial reviews. We consider that whilst the Government is considering wider judicial reform, this is the perfect opportunity for this proposal to

be adopted. There is clear merit in the proposal and the introduction of QOCs in all judicial reviews would significantly enhance access to justice. Typically, judicial reviews are brought by citizens of the state, against the state itself. Whilst those who bring judicial reviews are likely to be of limited means and uncertain of the potential exposure to costs that they may face, their opponent is unlikely to be phased by any potential costs risk. Prima facie, there is an inequality of arms in judicial review cases. Using complaints to the Financial Ombudsman Service ('FOS') as an example, complainants to the FOS are typically private individuals, many of whom have lost the entirety of their pensions and/or life savings. Such complainants may choose to use the FOS (as opposed to the courts) owing to the fact that the FOS is free to use, is informal in nature and avoids any potential costs risk. The FOS has wide decision-making powers and rather than being obliged to make a decision that is sound in law, the FOS is only required to make decisions that are considered 'fair and reasonable' in all the circumstances of the case. This has led to increased scrutiny of the FOS in recent years, with allegations of inconsistency, which led to investigation by Channel 4's 'Dispatches', a review of the FOS and intervention by Parliamentarians. The consensus is that there have been serious flaws within the FOS' processes. However, whilst respondent firms of FOS complaints may be able to afford to challenge the FOS through judicial review proceedings, or defend a judicial review, by virtue of their own asset position, or through the benefit of an insurance policy, complainants are not so fortunate, and may well have already lost all of their assets. To such potential applicants for judicial review, how may they get their access to justice? We consider that this is only possible through the introduction of QOCs. The above is just one illustration of many others that could be provided of the potential risks to access to justice.