



Chris Grayling MP
Lord Chancellor and Secretary of State for Justice
102 Petty France
London SW1H 9AJ

28 January 2013

Dear Secretary of State,

JUDICIAL REVIEW (JR)

Thank you for the opportunity to comment on the proposals regarding judicial review. The Civil Justice Council (the Council) welcomes the opportunity to respond; in particular it supports proposals that increase efficient and effective access to JR at proportionate cost.

This response concentrates on JR cases that have no merit, although it notes that the proposed reforms would affect the full range of JR applications. Care will need to be taken in considering the proposed reforms to ensure that they did not have a negative impact on effective access to justice in this area, which is of fundamental importance to securing the rule of law.

The Council is particularly concerned that reforms do not have an adverse impact on the ability of self-representing litigants (SRLs) to seek effective access to justice through JR. Reforms could potentially have a disproportionate and adverse effect on SRLs due to the particular issues which they face in obtaining access to the courts. SRLs, specifically, face additional barriers to justice as:

- They are generally unfamiliar with court procedure, how to go about obtaining necessary relevant evidence, how to structure their applications and how to comply with the relevant Pre-Action Protocols;
- A disproportionate number of SRLs do not speak English as a first language, have a protected characteristic under the Equality Act or are vulnerable in some other way (such as for reasons of mental health). Any negative impact on effective access to justice can therefore be exacerbated in the case of such litigants.

Any reduction in procedural time limits may, in the light of the above, have a disproportionate effect on SRLs and their ability to successfully bring JR applications. Moreover, the introduction of application fees for JR may, where an SRL is not fee-exempt (and the Council assumes that fee-exemption would apply to those litigants who wish to bring JR applications as it does in other categories of case), pose an

additional adverse practical restriction on fair and effective access to justice. Care will therefore be needed in both formulating any court fees and fee exemptions.

The need for care is not only imperative where fee-formulation is concerned. Care will also be needed in formulating any new rules of court, Practice Directions or revisions to the JR Pre-Action Protocol which are consequent on the present consultation. The Council is concerned that the Civil Procedure Rule Committee (CPRC) should be afforded adequate time to consider any proposed revisions to the rules of court, etc and to draft them appropriately.

Time Limits

Question 1. The Council does not support this proposal for the reason given in respect of Question 2.

Question 2. The introduction of a 30 day limit would make it difficult for parties to comply with the time limits for compliance with the JR Pre-Action Protocol (PAP). There is a risk therefore that parties may simply ignore the PAP, undermining its efficacy and the positive benefits compliance with its requirements brings, i.e. increasing settlement. There is also a risk that parties will simply commence proceedings, which would otherwise not have been issued, increasing unnecessary cost and delay. The Council would endorse the retention of the existing arrangements as described in the PAP.

Question 3. If there is a reduction in procedural time limits, there is a real risk that there will be increase in satellite litigation, i.e. in applications for extension of time. This will have an adverse impact on scarce court resources, whilst increasing otherwise unnecessary costs on applicants. Again, the Council notes that this will have a disproportionate effect on SRLs, who are more likely to require extensions of time to comply with time limits in order to properly prepare their claims.

Question 4. The Council does not have any examples of types of judicial review where a shorter time limit might be appropriate.

Time limits in cases where there are continuing grounds

Questions 5 and 6. The Council does not believe that such challenges – that is, to continuing breach of multiple decisions more than three months after the first instance of the grounds for the claim, on the basis that there was a continuing failure - occur with any frequency. However, when such cases do arise, an earlier deadline would encourage the early issue of a claim and reduce the opportunities and likelihood of a settlement being reached in another way.

The risks in implementing the proposal include increasing uncertainty, with parties rushing to issue ‘protective’ judicial review applications at an early stage and without complying with the PAP. SRLs issuing such applications would be likely to do so without the benefit of any advice. All such cases would take longer to hear and would be more likely to be appealed.

Applying for Permission

Option 1 - Questions 7 to 9

The Council does not support the restriction of the right to an oral renewal where there has been a prior judicial hearing of substantially the same matter, as described in Option 1. In addition, there are a number of benefits to an SRL in an oral hearing, including the explanations of the judge, which can often help to elicit necessary information and evidence, as well as the possibility of the help and support of a McKenzie friend. An oral hearing can also enable a judge to assess the full range of material in making a decision on the merit of the application.

Option 2 - Questions 10 to 13. There is a case for reducing the opportunities for applicants to argue a case that has been certified by a judge as being totally without merit. Removing the right to an oral renewal where this assessment has been made might achieve this.

There was a difference of opinion among Council members on question 12. The judicial members did not tend to think there were any circumstances in which it might be appropriate to allow claimants an oral hearing of a case that had been found to be totally without merit. Other members of the Council believed that an oral renewal might be allowed in some cases.

Fees

Questions 14 and 15. As noted earlier, the Council was concerned that introducing a fee would have adverse implications for access to justice. As, however, the introduction of a fee would presumably be coupled with the introduction of means-tested fee exemption, it may not prove an effective deterrent to unmeritorious or vexatious applications.

We hope that these comments will prove to be of use.

Yours sincerely,

Peter Farr

Secretary to the Civil Justice Council