One bite of the cherry, double-quick time (and be ready to pay the congestion charge)

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The judicial review process was reformed on 1st July 2013. So, what happened? Well, prompt just got prompter. Moreover, the court's intolerance for truly hopeless cases is set even further below the Plimsoll line.

The need for 'promptness' is the hallmark of judicial review; to qualify to use the process at all there has to be a defendant exercising public functions, and public administration needs not to be held up by frivolous or unmeritorious challenges. The classic formula is that a claim must be issued "promptly" and in any event, within a backstop of three months of the date when the grounds for the claim first arose.

That has now been disapplied in the case of challenges to decisions made by the Secretary of State or local planning authority under the Planning Acts. In that case, the claim must be filed not later than *six weeks* after the grounds to make the claim first arose. In the case of challenges to decisions governed by the Public Contracts Regulations 2006, in other words public procurement cases, there is now a 30-day time limit. Perhaps understandably, the Government was concerned in the wake of the ECJ's judgment in the *Uniplex (UK) Ltd v NHS Business Services Authority* case in 2010 that effectively a two-tier system had been created with different time limits for cases with and without a European dimension, with doubt cast on the need to act 'promptly' in the former case.

A notion of a six-week time limit in planning challenges is not entirely new. A certain *déjà-vu* has been afforded by the *R v Ceredigion CC ex p McKeown* interlude in the late 1990s in which Laws J concluded that it was almost impossible to conceive of a case where an application for permission to apply for judicial review would be granted where it was made more than six weeks after the impugned decision. He could see "no rhyme nor reason" in allowing the common law remedy of judicial review to be enjoyed upon a timescale in principle more generous to an applicant than Parliament had seen fit to fix in relation to challenges brought by way of a statutory appeal. The primary requirement was that any application should be made promptly. As it turned out not so long afterwards, the House of Lords did see rhyme and reason, and in *R (Burkett) v Hammersmith and Fulham LBC* stated that to draw an inference that the 3-month time limit had, by mere judicial decision, been replaced by a six-week rule was a misconception.

The new shorter time limit could well be something of a windfall for defendants. It is of no real surprise that of the 250 consultation responses, most of which opposed the reforms, the small body of support came principally from businesses and public authorities. Claimant groups will have to move swiftly to meet the new deadline. To an extent, this represents nothing new. There is a six-week absolute cut-off for filing a statutory appeal, no discretion allowed. However, only a 'person aggrieved' by the decision (for example to refuse to grant planning permission) can bring a statutory challenge. This implies a certain pre-involvement in the process. Arguments may already be well-rehearsed and there may be continued ready

access to legal advice. By contrast, would-be applicants for judicial review of the grant of planning permission may only hear about the decision late in the day and then face a rush to secure appropriate legal advice. To that extent, the new time limit may have a dampening effect on claims.

A key motivation behind this part of the reforms is to provide greater certainty for defendants to judicial review claims and to avoid the current delays which the Government fears may frustrate plans for growth. Will the reforms deliver this intended benefit?

The Government accepts that a six-week time limit will squeeze the pre-action protocol out of the picture, and will invite the Master of the Rolls to disapply it in these cases. Certainly the pre-action process can be used as a delaying tactic, in which case it would be preferable to draw out the claim at the earliest point. However the combined impact of a shorter period for challenge and no pre-action requirement is likely to mean more claims rather than fewer, as claimants issue on a protective or precautionary basis to beat the time limit. Further, the court's discretion to extend time remains, blurring the edges of the new bright line and possibly mitigating its practical effect.

For public bodies, then, there is a sense of the reforms giving with one hand and taking away with the other: greater certainty more quickly, but loss of the chance to discourage a claim at the outset or indeed to point to a claimant's failure to use the pre-action procedure when arguing about costs.

The real question is whether much practical difference will be made in view of current delays in listing. It is undeniable that there have often been almost ludicrous delays between a refusal on the papers and an oral renewal hearing. It makes a certain sense therefore that the new time limit in these cases has been brought in at the same time as a ban on renewing an application to an oral hearing where it has been declared by a judge on the papers to be *totally without merit*. The hope is that this will pare down the Administrative Court's workload.

Lest there be an elephant in the room, let's be clear: it is the immigration workload that is the seen as the bane of the court, constituting upwards of 70% of the caseload. At times it seems that most everyone in the process is slightly sick of it on some level and it is surely this sector that is the real target of this part of the reforms, described by the Government as a "package of measures to stem the growth in applications for judicial review".

The Government's rationale has been lambasted by practitioners and has caused considerable disquiet. It seemed that the data had been skewed and did not actually support the case for reform. True it may be that only 1 case in 6 gets permission, but that is not a reliable indicator of the merits of a case. Withdrawal pre-permission is just as likely (if not more so) to mean that a case appeared so *strong* that the defendant preferred to re-take the decision rather than defend and run the risk of judicial criticism and greater costs exposure. A large percentage of the Attorney-General's Panel Counsel members wrote collectively to the Attorney-General emphasising their experience of the surprising turns that can occur in

oral hearings, including in those cases where the judge on the papers had ticked the 'totally without merit' box.

At the same time, it must be acknowledged that the unfettered *right* to an oral hearing has also encouraged last minute changes to a case, and certainly last minute presentation of arguments, possibly in the hope of bouncing the court into granting permission.

It is not especially easy to predict when a judge will and won't accede to an assertion in the Acknowledgment of Service that the case should be declared totally without merit. Thus far it has really tended to act as a stepping stone to a further declaration that any oral renewal *not be a bar to removal* (hence the particular usage in immigration cases).

The real impact of the reforms is the removal of the right to an oral hearing. Clearly when paper decisions were introduced the right to an oral hearing was preserved. There was always the prospect of a second bite of the cherry. That was arguably necessary in the interests of justice: the claimant is subject to the duty of full and frank disclosure of its whole case, but there is no obligation upon the defendant to go beyond a brief outline of its position. The claimant has no formal opportunity to rebut the defendant's response and so does not get the last word. The judge cannot easily raise queries directly with the parties. *Audi alteram partem* does not really operate to its full extent on paper alone.

The permission stage is only supposed to be a filter to weed out unarguable cases before they take hold and strangle the overall efficiency of the process. Ironically, it may have been the previous reforms that have contributed to delay in the system. The permission decision became effectively a two-stage process rather than a one-stop filter. The desire to clear out the weaker cases and speed the way for the meritorious ones is a laudable one, but this change surely increases the chance for any mistakes, or misunderstandings on the part of the judge, to go uncorrected. One has to be concerned about unrepresented litigants who lack the drafting skills to be persuasive on paper. Counsel is often only engaged at the oral stage, yet a deceptively unmeritorious case may be stopped before ever setting sail.

Even greater responsibility now lies with the judges. It will be interesting to see how often the 'totally without merit' box gets ticked. Judges may well err on the side of caution and let the parties decide whether the case should be further pursued. We may see a move to even fuller paper submissions, with parties anxious not to miss a chance to get through the filter, alternatively to ensure that a case does not.

Finally, the fee change. This operates as a sort of Administrative Court congestion charge. It will cost more to renew to an oral hearing, but the Claimant does not pay again if permission is granted and the matter needs to proceed to a substantive hearing. So a weak case still pays, but a meritorious one does not pay twice.

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