THE BAR of NORTHERN IRELAND

Proposal to change the time limits for bringing a Judicial Review

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Bar Council welcomes the opportunity to contribute to the Department of Justice's consultation on the proposal to change the time limits for bringing a judicial review. The Bar's response is structured according to our comments on each of the substantive proposals outlined in the consultation document.

Consultation Proposals

3. The Bar Council highlights the important role that judicial review plays in the justice system in Northern Ireland. It can be defined as the procedure through which the High Court supervises the public law actions and inactions of public authorities and other bodies that are exercising statutory powers, performing public duties and/or taking decisions on matters of public interest.[1] Consequently, judicial review represents the primary means through which the courts can supervise the exercise of public powers and the performance of public duties, thereby ensuring good quality public administration and finality in decision making.

4. The Bar notes that under the Rules of the Court of Judicature (Northern Ireland) 1980 proceedings for judicial review currently must be brought 'promptly' and in any event within three months from the date of the decision which is to be reviewed. Decisions as to what amounts to 'promptly' are currently a matter of judicial discretion. However, a 2010 decision[2] from the Court of Justice of the European Union held that the requirement to bring an application for review 'promptly' is insufficiently certain and incompatible with the principles of certainty and effectiveness in European law. This reasoning has subsequently been applied by the courts in Northern Ireland with the effect that the promptitude requirement is now disapplied in judicial review challenges on European Union grounds.

[1] *Re Wylie's Application* [2005] NI 359, 362, para 7

[2] *Uniplex (United Kingdom) Ltd v NHS Business Services Authority* (C-406/08) (2010) PTSR 1377

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5. Consequently, the time limits required in judicial reviews that raise domestic grounds of challenge currently differ from those that raise EU grounds. The Bar Council shares the Department's concerns that this 'two-track system' is difficult to interpret consistently, creates unnecessary uncertainty for potential applicants and respondents and could impede access to justice.

6. The Bar Council welcomes the Department's move to provide a clear and transparent time frame for the bringing of judicial review proceedings in Northern Ireland. The Department's proposal outlines that there should be no requirement to bring judicial review proceedings promptly in any case and that all proceedings should instead be required to be brought within three months of the date of the reviewed decision. We consider that the Department's proposed change will provide the judicial review process with a greater degree of certainty and ensure continued compliance with obligations arising from EU law.

7. The Bar Council highlights that work has also already been undertaken in other jurisdictions to clarify the time limits for judicial review. The Republic of Ireland removed the general requirement for applications for judicial review in that jurisdiction to be brought promptly in 2011, following the judgment of the Court of Justice of the European Union in *European Commission v Ireland* (C-456/08). Meanwhile once Section 89 of the Courts Reform (Scotland) Act 2014 is commenced it will provide that an application for judicial review in Scotland must be made before the end of the period of three months beginning with the date on which the grounds arose or such longer period as the Court considers equitable having regard to all the circumstances.

8. However, the Bar notes that the issue of whether or not time limits for judicial review generally should be clarified was not taken forward as part of the wider reforms of judicial review in England and Wales under the Criminal Justice and Courts Act 2015. Consequently, the dual system developed by the courts in Northern Ireland also applies in this jurisdiction. Despite this, we concur with the Department's assessment that if the present position continues to prevail then the judicial review procedure here will not offer applicants the degree of certainty afforded to counterparts in Scotland and the RoI.

9. The Bar Council acknowledges the merit in a having a simple, straightforward and consistent time limit which applies to all leave applications. However, we would highlight that cases can arise where an application may genuinely take longer to submit. The Court currently has discretion to extend the three month time limit in appropriate circumstances. We welcome the Department's intention under the current proposals to retain the flexibility afforded by this discretion as the power to extend the time limit in appropriate cases must be retained. We also welcome

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the Department's decision not to constrain the Courts by prescribing specific scenarios where applicants could potentially exceed the three month time limit.

10. The Bar Council highlights that delays caused by litigation or the threat of impending action can be of particular concern for specific categories of cases such as those involving planning and procurement decisions. We note the Department's consideration of a reduction in the time limit for bringing judicial review proceedings in these specific categories of case so that they are aligned with the time limits available for the relevant statutory appeals. However, the Department's assessment recommends that reducing the time limits for particular types of cases is not necessary at present as such a change could impede access to justice and potentially restrict the time available to seek a negotiated settlement or explore alternative solutions.

11. The Bar points out that the Department's proposal to remove the promptitude requirement could have undesirable consequences in certain categories of case, particularly planning decisions. For example, the three month timescale could have an adverse impact on a property developer who has obtained planning permission and may then be constrained from going ahead with work until this period of time has lapsed due to the potential for an application for judicial review to be made. Consequently, the potential delays resulting from the removal of the promptitude requirement could have significant financial implications for commercial property developers and other third parties.

12. The Bar considers that it may be necessary to have a revised timescale only to be allowed in respect of planning decisions where permission has been granted due to the higher level of third party interests. We would highlight the Department's observation that avenues are already available in cases of planning permission being refused with the potential for an applicant to appeal through the Planning Appeals Commission which must be brought within 30 days. Consequently, we take the view that the time limit applicable for a statutory appeal in respect of a planning decision already provides sufficient certainty for applicants at this stage of the process.

13. We suggest that the Department should consider the consequences of undesirable consequences resulting from delays in certain cases, where under an application may have been made with the 3 month time limit but due to the circumstances, should have been made earlier. In England and Wales Section 31(6) of the Senior Courts Act 1981 expressly provides statutory recognition of the court's entitlement to refuse relief on the ground that the challenge might have been brought in a more timely fashion. Section 31(6) states:

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(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
(a) leave for the making of the application; or
(b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

14. The Bar notes that judicial discretion already provides for this option in cases in Northern Ireland. However, we contend that the Department should give consideration to the introduction of a similar statutory provision in respect of judicial review cases here, thereby catering for cases involving planning or procurement decisions which require timeliness.

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