RESPONSE OF GARDEN COURT HOUSING TEAM TO THE MINISTRY OF JUSTICE CONSULTATION

Judicial review: Proposals for Further Reform

Introduction

1. This is the response of Garden Court Chambers Housing Team to the Ministry of Justice Consultation Paper Judicial Review Proposals for Reform. This response highlights aspects of the proposals that directly affect housing cases. In terms of the proposals wider implications reliance is placed on the response produced by Garden Court's **Civil Team** which are wholly adopted, and this response should be read in conjunction with that response. In addition the Housing Team endorses the responses made by the Immigration and Family Team at Garden Court and the response provided by the Community Law Partnership one of the leading housing firms acting for tenants, travellers and gypsies.

2. The Housing Team at Garden Court Chambers is one of the largest specialist housing teams in the country (over 20 barristers) and has a reputation for excellence in this area. It is one of only two chambers ranked at Band 1 in Chambers and Partners UK 2014. The team covers all aspects of housing law including security of tenure, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit. The team is particularly committed to .representing tenants, other occupiers and homeless applicants.

Summary of Response to the Consultation

3. The extent of judicial review applies in housing cases is more limited than it once was as jurisdiction for homelessness cases was transferred to the County Courts under the Housing Act 1996 by section 204. There do remain situations where judicial review arises; they fall within four main categories:
   (a) Emergency cases where applicants are street homeless often referred from solicitors' offices or citizens advice bureaus where local authorities have refused to accept applications for a variety of reasons sometimes to do with eligibility, previous applications or lack of documentation.
   (b) Situations where authorities have accommodated pending initial assessments but have refused to accommodate pending a statutory review of the case under section 202 Housing Act 1996. There can be challenges as to whether or not they have lawfully exercised that discretion.
   (c) In limited circumstances there can be challenges in relation to the way in which allocations policies are being applied by local authorities. The extent of these challenges are relatively limited following the restrictive approach taken by the House of Lords in the case of *R(Ahmad) v Newham London Borough Council [2009]* HLR 41 HL.
   (d) Challenges where the local authorities have accepted a full duty applies to an applicant under Part VII Housing Act 1996 but have failed to meet that duty. This can be where they have purported to provide accommodation that is wholly unsuitable for the needs of the applicant and their family.

4. The challenges in this sphere largely arise in emergency situations where applicants face street homelessness. The majority of cases involve urgent consideration by an "out of hours" judge or the duty judge. In the most cases when injunctions are granted requiring local authorities to accommodate, the situation moves forward very quickly and one finds that decisions are reviewed and homelessness applications are accepted. Or in cases where unsuitable accommodation has been provided steps are then taken prior to

consideration of permission to offer alternative accommodation. In the field of housing it is rare to have a case that goes to a full judicial review hearing. Most cases settle at an early stage. The ability on the part of solicitors to act with emergency public funding is vital to their being able to take on this type of work. It is certainly not the case that the administrative court is unduly burdened with judicial review housing cases.

5. The administrative court has given appropriate guidance to ensure that ill prepared and unmeritorious cases are not brought. This guidance is followed by practitioners in the field and the system works well in practice. The ability to take on these cases provides an important safeguard and often results in bad practises adopted by public bodies being nipped in the bud.

6. In terms of the delay in cases, and the burden on the administrative court; with the transfer of immigration and asylum cases to the tribunal both delay and the burden on the administrative court will be greatly reduced. With housing cases, as indicated since the vast majority settle after injunction applications or close to or around the consideration of permission the burden on the administrative court is not great. There are only a handful of full judicial review cases each year. From a housing perspective the current way in which cases are brought considered and disposed of by the Administrative Court has evolved over the last 15 years and works well in practice. What is proposed will undermine the safety net that is now in place; that means that vulnerable persons who find themselves on the streets have a last resort. This team has dealt successfully with countless cases where applicants have been unlawfully deprived of their rights under Part V11 and it has been necessary to issue challenges by way of Judicial Review. We consider that these proposals if implemented will mean that the rule of law in this protected area will be abrogated.

Response to Proposals Standing (67-90)

7. The Housing Team adopts the **Civil Team** Response on this issue. In the context of housing the proposed changes may limit the ability of bodies such as Shelter or the Equality Commission to intervene, in

some albeit rare housing judicial review cases where wider policy considerations come into play and there is a huge public interest in groups representing vulnerable bodies having say in what can be far reaching decisions. An example of this was the intervention of Women's Aid in the case of *Moran v Manchester City Council* [2009] 1 WLR 1506, HL. where the courts and eventually the House of Lords were considering whether or not accommodation at a women's aid hostel constituted "accommodation" within the meaning of Part VII Housing Act 1996. This case had important implications in relation to the way in which those fleeing domestic violence were provided with emergency accommodation and the House Lords readily acknowledged the benefit of submissions made by the intervener.

Procedural Defects (91 to 105)

8. In the context of challenges in relation to housing the vast majority of cases do not concern any substantive challenges and it is rare to find a case that involves allegations that can be categorised as "procedural defects" only. The challenges in housing are invariably of practical effect. One is generally looking for the court to grant an injunction which is a discretionary remedy or in the end make an order which again is a discretionary remedy so from the outset, if the court viewed the case as technical only, it would be not be allowed to progress. It is not something that currently Judges feel compelled to leave to the end of the case, they will at every stage have an overview of the case. We consider that the courts strike a proper balance in assessing cases from the earliest stage and the perceived problem is one that does not really exist in practice.

The public sector equality duty in judicial review (106-109)

9. The Housing Team adopts the responses made by the Garden Court **Civil Team** on this topic and it is our position that judicial review is the most appropriate remedy for taking public sector duty challenges. In practice local authorities do now in their decision making processes purport to and provide decisions that reflect an awareness of the need to comply with their duties under the Equality Act 2010.

Rebalancing financial incentives (110-179)

10. There is simply no evidence in the context of housing judicial review cases to support the argument that there are unmeritorious cases being run. The current system already has a number of inbuilt safeguards such as the fact that before issuing any emergency judicial review there is a requirement that the urgent cases form confirms the papers have been served on the local authority. They have an opportunity to have letters placed before the Judge from the start of the case. In practice again in many cases once the grounds for judicial review are served (on short notice) on a local authority, very often the situation is resolved, firstly by the authority agreeing to provide emergency accommodation for a short period, say 24 hours, and then after that has been achieved they re-assess the case and agree to accommodate in the medium term.

11. The proposal to make all work to bring an application for judicial review "at risk" as proposed under paragraph 121 in practical terms will mean that firms of solicitors and barristers will not be in a position to continue to take on this work. Already it can be seen in this sector that many smaller firms are closing and those that remain often have the housing department as the poor relatives within the firm. Those holding the purse strings of the firms that do this work will simply not be prepared for their employed solicitors to take on work that is speculative in terms of payment in this way. It cannot be compared to taking on conditional fee cases where the inter partes rates are assured in most cases.

12. In this field, in the vast majority of cases beneficial results are achieved for the clients, however the majority of cases settle at a very early stage. Local authorities will often agree to accommodate but will do so on the basis that the application is withdrawn with no order as to costs. They can also raise arguments to say that the client has only just produced documentation that allowed them to accept the application. In situations where the challenge is in relation to accommodating pending a review one finds that the Section 203 review decision is dispatched shortly after the challenge is made. The

case has then moved to a different stage in the case, and a different challenge which involves an appeal under section 204 of the Housing Act 1996; therein the jurisdiction in relation to accommodating pending appeal lies with the county court. Hard pressed local authorities are often very concerned about their budgets and will do their utmost to avoid costs orders. In some cases this can be dealt with by written submissions to an administrative court judge to determine who should pay the costs. Even this course can be resisted by authorities who complain that the time spent on such submissions is too great. Often they can point to some change in circumstance that they can deploy to as a justification for changing tack in the case.

13. In terms of the guidance proposed under paragraph 125 this is wholly inadequate as a safeguard to allow solicitors and barristers to undertake this emergency and vital work. On the face of it one would have to take on the case and spend a substantial amount of time after the event, making representations to the Legal Aid Agency on the detail of the case. One could see a situation where after settling a case one would have to write to the authority for them to provide confirmation as to why they changed their decision in a situation where they were unlikely to co-operate because that would then involve them making admissions that would make them liable to the costs on written submissions to a judge. The proposal is unfair and unworkable and will undoubtedly mean that practitioners cannot undertake this important work. There are countless examples of situations where local authorities have fallen into bad practices such as adopting "gate keeping" policies to limit the number of homelessness applications. Unlawfully rejecting cases unless the applicant produces documentary proof as to eligibility or as to their accommodation history. It is only through proper challenges that such conduct has been stopped. Another avenue of challenge that is commonplace is where authorities refuse to continue to accommodate vulnerable applicants pending a section 202 review by only conducting a cursory and restrictive exercise of their discretion an example of this can be seen in the recent case of *R(on the application of) IA v City of Westminster* [2013] EWHC 1273.

14. At paragraph 128 reference is made to payment not being made in a situation where the public body's decision was quashed for reasons unrelated to the claimant's grounds of claim. The suggestion here is that the Legal Aid Agency would undertake separate enquiries with the public body as to how any new decision was reached and whether or not reconsideration was given as a result of the challenge. On this it may well be in local authorities' interest to claim, as they often do, that their reconsideration of the case was nothing to do with the judicial review challenge and was just a happy coincidence. This proposal creates scope for mischief making on the part of public bodies tying those acting for claimants in knots and in the long term ensuring that they do not have to face legitimate and proper challenges in the courts. The position is as set out in the response by the Community Law Partnership one of the leading firms in the sector. The actuality of the situation will mean that firms will no longer be able to take on the cases on behalf of vulnerable and disadvantaged applicants. It will also mean that public bodies will be encouraged to resist any sensible settlement in the knowledge that lawyers from the other side will probably not be able to afford to proceed any further.

15. In relation to costs of oral permission hearings in the housing context if there is an oral hearing it normally involves an injunction application sometimes dealt with at the same time as the application for permission. There is no reason to depart from the established rule in relation to oral permission hearings. This was something that was considered as part of the Jackson Reforms and it was considered that claimants should be protected from being deterred from bringing good claims. There is no justification for changing the current approach.

Wasted costs orders

16. In practice it is rare for the court to consider wasted costs orders, it can sometimes arise where the authority take the view that the claim has been issued against the wrong body i.e. in circumstances where the duty under the Part VII Housing Act 1996 applies to a different local authority. It can also arise in cases where there has been a failure on the part of the applicant's solicitors to disclose documentation that

undermines the basis of the claim. The current approach on wasted costs orders as elaborated on in *Ridehalgh v Horsefield* followed a series of cases at the time where what had developed before the courts was termed satellite *litigation* in relation to wasted costs. Where a party failed and the court determined that they had a weak case it become commonplace for applications to be made for wasted costs involving huge expense. The balance has been struck by the approach in *Ridehalgh v Horsefield* where a two stage process is necessary to ensure fairness. It is a very serious matter for barristers or solicitors to be faced with a wasted costs order and requires them having to contact their insurers with a view to representation at the second stage. The process currently applied is fair and thorough. The proposal to make it easier in effect for wasted costs orders to be made; perhaps on written application is dangerous. This should not be done on a peremptory basis. The proposal also quite simply serves to again act as a deterrent to those who are act at emergency situations and asked to take on difficult cases. One might be asked to take on a case where a family in desperate circumstances are camped in a solicitor's office and then find that at a later time they failed to tell the solicitor about a previous homelessness application to another authority. A review of the cases that pre-date *Ridehalgh v Horsefield* and the huge amount of litigation that arose provides a stark warning in relation to extending the application of "wasted costs orders". A further point is that unscrupulous public bodies may use the threat to snuff out challenges by local solicitors.

Protective costs orders

17. In our view the guidance in *Corner House Research v Secretary of State for Trade and Industry* provides an important protection to ensure that cases where there issues of general public importance can be brought. In our view the balance has been properly struck by the guidance in this case and should not be altered. We disagree that protection should be precluded if the Claimant has a private interest or stake in the case. The courts can be relied on to balance the

considerations on a case by case basis and there is no justification for modification.

Interveners

18. We disagree that third parties intervening in judicial review claims should be responsible for additional costs. Certainly in the housing context there is no evidence that interventions add much to the costs of the case. The courts already give directions as to whether interventions are allowed in the first place, and secondly as to the extent to which the intervener is given time in the case. Such interventions can be extremely helpful where cases are of wider public importance and specialist considerations apply. There is no reason to alter the current status quo.

Leapfrogging (180-202)

19. There are numerous examples of cases where it becomes obvious that there is a need for the case to be decided by the Supreme Court to achieve resolution of conflicting authorities or where new legislation or circumstances dictate that a previous decision of the Supreme Court is unworkable. The proposal for "leapfrogging" is supported in principle in order to save on unnecessary hearings before the Court of Appeal where the real issue is simply whether or not permission should be granted for an appeal to the Supreme Court. We consider that there needs to be a thorough consultation on leapfrogging arrangements before they are introduced.

Impact assessment and equality impacts (203-212)

20. Undoubtedly the proposals will result in vulnerable and disadvantaged members of society being denied access to justice by way of judicial review and in effect being denied their rights under the homelessness legislation. At present it can be seen that small firms that are franchised to do housing work are going out of business. The larger firms that undertake this work are repositioning themselves to do less tenant/applicant work in general. If the proposals go through undoubtedly vulnerable applicants will be unable to find solicitors and

barristers who are able on a day-to-day basis to take on this specialist work. On the one hand the Government has sought to keep in scope cases involving "homelessness", however in practical terms this will mean that the already small pool of practitioners who undertake this work will be dissipated. As identified by the Community Law Partnership particular groups such as gipsies and travellers will be unable to find representation.

Responses to questions posed

21. The Housing Team adopts the Garden Court **Civil Team** responses on all the questions posed.

1st November 2013