# THE MINISTRY OF JUSTICE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

# SUBMISSION OF THE COURT OF JUDICATURE OF NORTHERN IRELAND

**16 October 2020**

**PREFACE**

**This is the response of the Court of Judicature of Northern Ireland (which comprises the senior courts in this jurisdiction) to the IRAL "Call For Evidence". It focusses on issues of practice and procedure only.**

## JUDICIAL REVIEW PROCEDURE IN NORTHERN IRELAND

### *Some History*

1. The jurisdiction of Northern Ireland operates a relatively simple procedure in judicial review cases. Its legal sources can be found in the following:

   (a) The Judicature (NI) Act 1978 (the "*1978 Act*"), Part II, sections 18 – 25.

   (b) The Rules of the Court of Judicature of Northern Ireland, Order 53.

   (c) The Judicial Review Practice Direction of the High Court.[1]

2. The 1978 Act represented a major reform of the operation of the senior courts in Northern Ireland. It was the product of the Report of the Committee on the Supreme Court of Judicature of Northern Ireland,

[1] ***N.B.*** These and certain other key documents referred to in this submission are hyperlinked for ease of reference in various footnotes.

published in March 1970[2], which was established to advise on a new Judicature Act for this jurisdiction. Part IV of the Report considered the jurisdiction of the High Court and its exercise. At paragraphs 103 – 116 the Report considered two particular aspects of the jurisdiction of the High Court "*… which have always formed important weaponries in the legal armoury of the subject*". These were, respectively, (a) the prerogative writs and orders and (b) the jurisdiction of the High Court to grant declaratory judgments and orders.

3. The Report noted that the prerogative writs in this jurisdiction, as in England & Wales, were of some longevity, having formed a valuable part of the protective and supervisory jurisdiction of the High Court and the ancient jurisdiction of the Court of Queen's Bench. The latter was, at this stage, exercised on the Crown side of the Queen's Bench Division. The main issue highlighted in these paragraphs was the absence from the existing Judicature Acts of any power to make a declaratory judgment. It recommended that this lacuna be rectified. This part of the Report also noted the desirability of discovery of documents becoming available in Crown side proceedings. The narrow scope of the Report is quite striking. It is encapsulated in a single sentence, at paragraph 116:

> "*It will be gathered that the reforms which we contemplate as likely to be most beneficial in relation to the prerogative jurisdiction consists of procedural changes which could be effected by rules of court such as the introduction of discovery and the ability to seek an order on the Crown side concurrently with other remedies.*"

4. In a separate section, at paragraph 176 – 207, the Report considered the exercise of the jurisdiction of the High Court. Its starting point was that under the Judicature (Ireland) Act 1877 this jurisdiction was exercisable by a Divisional court consisting of two or more judges or by a judge sitting in court or in chambers. The report made certain proposals the effect whereof was to devise a general rule whereby the jurisdiction of the High Court would normally be exercised by a single

[2] Cmnd 4292. The Supreme Court of Judicature of Northern Ireland was renamed the Court of Judicature of Northern Ireland upon the creation of the United Kingdom Supreme Court ("UKSC") in 2010. The 1970 report is commonly known as the "MacDermott Report".

judge. This is reflected in the Conclusions at Part XII, paragraph 340 ff. The 1978 Act followed.[3]

5. The second instrument regulating the procedure of the High Court in judicial review in Northern Ireland is Order 53 of the Rules of the Court of Judicature (NI) 1980 (as amended)[4]. This was first introduced in 1980 in tandem with the 1978 Act. It is a measure of subordinate legislation detailing the procedural out workings of the parent statute and replacing previous procedural rules. It was made by the Supreme Court Rules Committee exercising its powers under Part V of the statute.

6. Order 53 was not, however, a free-standing procedural code. Rather it co-existed with certain other discrete chapters of the Court of Judicature Rules, in particular Order 1 (the overriding objective), Order 3 (extending time), Order 24 (discovery of documents), Order 38 (evidence), Order 41 (affidavits) and Order 59 (appeals to the Court of Appeal).

***From 2005: The Advent of Practice Directions***

7. Until 2005 the two instruments considered above, namely Part II of the 1978 Act and Order 53 of the Rules stood alone. In 2005 A Practice Direction of general application to all senior courts was first introduced[5]. In judicial review cases a tailor-made Practice Note was first devised in 2006, coming into operation on 16 January that year. It was subsequently revised on 30 September 2008 and 10 October 2013. A comprehensive overhaul was undertaken recently, resulting in Judicial Review Practice Direction No 03/2018, which came into operation on 05 November 2018[6]

8. This procedural armoury was augmented in 2011 by a Practice Direction of general application[7]. Its provisions applied to the Court of Appeal (civil and criminal divisions) and the three divisions of the

---

[3] Judicature (NI) Act 1978; see, in particular, Part II (ss. 16 – 25).
[4] Rules of the Court of Judicature (NI) 1980 (as amended) – "*the Rules*"; there is a link within the Table of Contents taking the reader direct to Order 53.
[5] PD No. 1 of 2005 - which was quickly superseded by PD No. 4 of 2005 (effecting only minor changes)
[6] Practice Direction 03/2018
[7] PD No. 6 of 2011, replacing and modernising its predecessor, PD No. 4 of 2005: see FN 5

High Court – Chancery, Queen's Bench and Family. From the perspective of judicial review proceedings in the High Court it regulated (only) skeleton arguments and bundles of authorities. It was subsequently amended by PD4/2012 and a further version, PD1 /2016[8] came into operation on 07 January 2016 and remains in force. The latter must now be considered in tandem with the most recent procedural activity in this field, namely the Remote Hearings Interim Practice Direction 01/2020[9]. This applies to *inter alia* judicial review cases in the High Court and on appeal to the Court of Appeal.

9. Practice Direction 03/2018[10] has the following Preface:

> "The central themes of this revised Practice Direction are partnership, cooperation, efficiency and expedition. Judicial review is a distinctive species of litigation. It lacks many of the trappings of private law litigation. This is reflected, firstly, in the notion of partnership with the Court. Every party and all representatives should be conscious of this partnership and its implications at every stage. It is illustrated particularly in the supremely important duties of candour and co-operation. The related themes of efficiency and expedition require no elaboration. At heart they are designed to ensure that the principles enshrined in the over-riding objective are at the forefront of every case, from initiation to completion. The parties and the Court share the common aim of processing every case in a manner which makes the best possible use of the Court's limited resources and brings about an outcome within reasonable timescales, consistent with every party's inalienable right to a fair hearing."

The introductory paragraphs make clear that this instrument complements, but does not modify or amend, the two instruments noted above. It further reminds judicial review practitioners that

[8] Practice Direction 01/2016
[9] Interim Practice Direction 01/2020
[10] "the PD"

familiarity with a series of Orders of the Rules is essential. It regulates the following topics in particular:

(a) Pre-action protocol steps and requirements.

(b) Initiating proceedings, the Order 53 pleading, service and the leave stage generally.

(c) Affidavits and exhibits.

(d) Urgent cases.

(e) The procedure post-leave.

(f) Bundles of documents.

(g) Skeleton arguments.

10. Within the PD there is a discrete code relating exclusively to planning and environmental judicial reviews. Some of the other procedural matters addressed are schedules of agreed material facts, chronologies, a glossary of terms/acronyms and a list of *dramatis personae*. Third party interventions are possible, requiring the permission of the court and are normally by written submission only. Protective costs orders, usually confined to planning/environmental cases, are also available in the court's discretion.

***Practice and procedure: some specific issues***

11. There is a single pleading in every case, namely the Order 53 pleading[11]. This must be based upon the model Order 53 Statement, which forms part of the PD. It must be accompanied by comprehensive and candid affidavits, exhibiting all relevant documents. Unlike in England and Wales, no formal Respondent's pleading is required. Rather this specific issue is governed by a combination of the Respondent's duty to reply to the pre-action protocol letter and, where directed by the court to do so, to formulate a written response to the Order 53 Statement, usually at the leave stage. Post-leave the

[11] This can be amended, with the permission of the court, at any stage and in most cases is.

Respondent must file affidavit evidence governed by a duty of candour owed to the court. Rejoining affidavit evidence from the claimant is possible. At the substantive stage skeleton arguments are invariably deployed. Disputes about disclosure of documents are resolved by the court where required. Interrogatories are not a feature of judicial practice. The cross-examination of deponents is rare.

12. As will be apparent from the foregoing judicial review cases in this jurisdiction have two distinct stages. At the first stage it is incumbent upon the claimant to secure the leave (or permission) of the court to proceed. This judicial determination can be made on the papers if favourable to the claimant. The judge also has the option of convening an order *inter-partes* hearing. A refusal of leave to apply for judicial review must be preceded by such a hearing. In practice, leave to apply for judicial review is granted on the papers in approximately 30% of all cases in which the Applicant (claimant) overcomes this stage. The total percentage of successful leave applications, to include both paper determinations and *inter-partes* oral hearing determinations, is estimated to be 60%. Oral leave hearings are frequently governed by time limits and focussed on specific judicially directed issues only, with short skeleton arguments where required by the judge, but not otherwise.

13. In granting leave it is open to the judge to specifically highlight apparent weaknesses in either party's case and to exhort consensual resolution. In recent years consensual resolution has become a progressive feature of judicial review proceedings in this jurisdiction. Most frequently, though not invariably, it entails the Respondent rescinding the impugned decision, undertaking to make a fresh decision and paying the claimant's costs. The alternative remedies principle is applied with some rigour at the leave stage. So too the academic cases principle.

14. Urgent cases are fast tracked and can be heard within hours or days, as required. Routine cases are typically allocated a substantive hearing date within four to six months of the grant of leave. In some cases, particularly those belonging to the urgent cohort, an ex tempore judgment will be given at once. Otherwise judgment is reserved.

15. At this juncture it is appropriate to insert some statistics. These belong to the period June 2018 - June 2020 and relate exclusively to judicial review cases in the High Court.

**Judicial Review Applications Received**

| | | 2018 | 2019 | January to June 2020 (Provisional Figures) |
|---|---|---|---|---|
| **Applications for leave to apply for** | | 297 | 277 | 142 |
| **Applications for Judicial Review** | | 72 | 68 | 37 |
| **Ancillary applications** | | 1 | 7 | - |

**Judicial Review Applications Disposed [*i.e.* completed]**

16.

| | | Granted | W'drawn/ Refused/ Dismissed | Other | Total |
|---|---|---|---|---|---|
| **2018** | **Applications for leave to apply for** | 57 | 75 | 112 | 244 |
| | **Applications for Judicial Review** | 8 | 25 | 58 | 91 |
| | **Ancillary applications** | - | - | 1 | 1 |
| | | | | | |
| **2019** | **Applications for leave to apply for** | 73 | 64 | 68 | 205 |
| | **Applications for Judicial Review** | 18 | 18 | 31 | 67 |
| | **Ancillary applications** | - | - | 3 | 3 |
| | | | | | |
| **Jan to June 2020 (Provisional Figures)** | **Applications for leave to apply for** | 23 | 27 | 13 | 63 |
| | **Applications for Judicial Review** | 1 | 6 | 7 | 14 |
| | **Ancillary applications** | - | - | - | - |
| | | | | | |

17. Turning to the topic of judicial manpower and resources, in Northern Ireland a single judge of the High Court is assigned by the Lord Chief

Justice to the judicial review list. Additional judicial assistance may be provided as and when required. All judges of the Court of Judicature are competent to sit in all Divisions of the High Court.

18. The successive Practice Directions noted above were the product of proactive consultation between the judiciary and the professions. There is a Judicial Review Liaison Group with a representative membership of approximately 20. Members of this group debated and made representations relating to the new PD. Following the introduction of the latter, periodic review has been possible at the instigation of both the judiciary and the professions. This has given rise to no issues of substance.

***The Northern Ireland Civil Justice Review Report (2018)***

19. A comprehensive review of civil (and family) justice in Northern Ireland was undertaken at the behest of the Lord Chief Justice of Northern Ireland between 2015 and 2017. This culminated in the publication of the Review Group's Report in September 2017[12]. The report addressed a broad array of issues: paperless courts, online dispute resolution, costs, modernising court procedures, disclosure, expert evidence, unrepresented litigants, McKenzie Friends, litigants with a disability and alternative dispute resolution/mediation. Virtually all of these issues arise, to a greater or lesser extent, in judicial review cases.

20. The Review Report contains a dedicated chapter on judicial review[13]. It is necessary to consider this discrete chapter with alertness to the new PD. In particular the Report's concerns relating to the excessive investment of court time at the leave stage have been substantially addressed by the new PD, which was preceded by a progressive change of culture in the court driven by the presiding judge. Furthermore, all of the views and suggestions in paragraphs 20.21 – 20.31 of the Review Report are/were fully accommodated in the new PD and the practice of the court prevailing since 2017. The same observation applies to other issues raised in this chapter of the report at paragraphs 20.33, 20.34 and 20.40. The "promptness" issue raised in

[12] Review of Civil and Family Justice in Northern Ireland: Review Group's Report on Civil Justice September 2017 – the "*Review Report"*
[13] *Ibid*. at pp. 289-297

paragraph 20.32 has been addressed by an amendment of Order 53, Rule 4[14]. As regards paragraphs 20.35 – 20.39 of the Review Report, proactive and flexible judicial case management generally proves effective and the further mechanisms mooted in those paragraphs are not considered necessary at this time.

21. Chapter 20 of the Review Report ends with a series of recommendations, 12 in total[15]. Happily all of the issues raised in these recommendations have either been the subject of an effective and workable subsequent adjustment (particularly via the new PD) or are not presenting any significant difficulties in the day to day operation of the court.

***Mediation and Consensual Resolution***

22. The Review Report devotes considerable attention to the topic of mediation/alternative dispute resolution in paragraphs 20.41 – 20.48. It is considered that the relevant provisions of the new PD, in tandem with the PAP requirements, work satisfactorily in practice. In addition there is the important factor of judicial influence. In any case where the judge considers that the parties should explore consensual resolution, whether through a mediation/ADR mechanism or otherwise, this is expressly exhorted. This applies particularly, though not exclusively at the leave stage. The court in such cases will normally impose a moratorium on further cost incurring steps pending its further order and directions. The parties are required to operate within a court imposed timetable and to report at the appropriate time. Generally this works well in practice. In particular the three most recently designated presiding judges of the court have no experience of a case where consensual resolution has not been effected following judicial exhortation of this course.

23. More generally, in the not too distant past it is correct that judicial review cases rarely settled. The reasons for this are not entirely clear. However it is beyond dispute that this is no longer the case. There has been a welcome change of culture, the drivers whereof include proactive judicial exhortation; saving legal costs; reducing the risk of

[14] Which took effect on 8th January 2018, *per* S.R. 2017 No. 213
[15] Review Group's Report on Civil Justice: see pp. 296 & 297

adverse publicity; increased transparency on the part of public authorities; and the growing influence of judicial review in the matter of educating and guiding public authorities and correcting their errors, while simultaneously recognising that save in the very small category of cases in which an order of mandamus is made[16] the function and duty of final decision making rests with the authority concerned. The final observation is that in those judicial review cases which prove susceptible to consensual resolution, the judicial experience is that this is normally achievable by the parties and their legal representatives without resort to an ADR/mediation process.

24. Chapter 20 of the Review Report ends with a series of recommendations, 12 in total[17]. Happily all of the issues raised in these recommendations have either been the subject of an effective and workable subsequent adjustment (particularly via the new PD) or are not presenting any significant difficulties in the day to day operation of the court.

***THE IRAL QUESTIONS***

25. 1. Are there any comments you would like to make, in response to the questions asked in the [above] questionnaire for government departments and other public bodies?

**None other than as above**.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

**No procedural improvements are considered necessary. Please see above.**

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

**A codifying statute would probably involve an enormous and costly exercise and would be unlikely to enhance accessibility or**

[16] Impressionistically a tiny minority, well under 5%.

**certainty. No possible practical benefits or cost saving are identifiable. There have been no calls for such a statute in this jurisdiction.**

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?
**The extant law on this subject is considered satisfactory and workable in practice. The remedy most frequently granted to a successful review claimant in this jurisdiction is a quashing order, which leaves the final decision making to the public authority concerned, thereby respecting and preserving the separation of powers**.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?
**All are considered entirely clear. Please see above and the hyperlinked attachments**

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?
**Yes. Please see above and the hyperlinked attachments.**

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?
**No. The costs rules and principles are considered to operate fairly and satisfactorily in this jurisdiction.**

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?
**Please see above and the hyperlinked attachments. None of these issues raises any serious concerns in this jurisdiction. In**

**particular, the principles of standing are a mixture of extant statutory prescription and judicial principle and are considered to operate satisfactorily in practice**. Standing is rarely an issue in this jurisdiction. The leave stage operates to weed out unmeritorious cases.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?
**The purely discretionary grant of any of the available judicial remedies in judicial review works satisfactorily in this jurisdiction. There is sufficient flexibility and no case for reform is apparent.**

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?
**A response to this question is considered inappropriate**.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?
**Please see above, especially paragraphs 11, 23 and 24. No case for reform is apparent.**

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?
**Please see reply to Q11 above. There is no apparent case for reform here.**

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?
**Please see reply to Q8 above. No case for reform is apparent.**

*Omnibus Conclusion*

26. The practice and procedure in judicial review in the jurisdiction of Northern Ireland are in good health. No persuasive case for change is apparent.

**The Right Honourable Lord Justice McCloskey**