

Rt Hon Jack Straw MP
Lord Chancellor and Secretary of State for Justice
Selbourne House,
54 Victoria Street,
London,
SW1E 6QW

Direct Dial: 0207 650 1243

Email: rstein@leighday.co.uk

Your Ref:

Our Ref: RS SB Admin D

Date: 19th December 2007

By post & FAX no 020 7210 0647

Dear Sir,

Delays in the Administrative Court

We act for the Public Law Project. PLP is a national legal charity founded in 1990, whose central aim is to improve access to public law remedies for those whose access to justice is restricted by poverty, or some other form of disadvantage. Within this remit, PLP has three main objectives: (1) increasing the accountability of public decision-makers; (2) enhancing the quality of public decision-making; and (3) improving access to justice. PLP's work combines legal advice, casework, training, policy and research activities across the range of public law remedies.

Our client considers that the present delays which are occurring in the listing and hearing of cases in the Administrative Court are unlawful and require prompt action to be remedied.

Please treat this letter as a letter of claim pursuant to the Judicial Review Pre-Action Protocol.

Current position

There are very considerable delays in the consideration of claims in the Administrative Court. The problem has been continuing for at least 18 months and appears to be growing more severe over time. The scale of the delays is evident from the response to a Freedom of Information Act request made to HM Courts Service dated 13 November 2007.

The current average period for an application for judicial review to be considered on the papers is 15.7 weeks (8.9 weeks in 2005). It takes a further 19.1 weeks (11.8 weeks in 2005) for a renewal hearing. These figures include expedited hearings, so the averages give a somewhat over-optimistic picture.

Our client's current information is that it is taking in the region of 18 months for a non-expedited 1 day straightforward claim for judicial review to get from initial claim to a substantive hearing, assuming an oral permission hearing.

A number of further worrying points emerge from the recent "Justice Outside London" report and its annexes. The report reveals that the number of applications being made to the Administrative Court is continuing to rise. Over the last 5 years, the number of new cases received has increased from 6,257 per annum in 2002 to 11,032 in 2006. It appears that this increase in workload largely results from the statutory review procedure in the Nationality, Immigration and Asylum Act 2002 along with control order and proceeds of crime claims.

Despite this large and growing increase in workload, the judicial resources allocated to the Administrative Court have remained static, and may have declined. In 2005, the total number of judicial sitting days in the Administrative Court was 1,637 days. In 2006, there were only 1,571 sitting days, despite the Court's increasing workload.

The report of Stephen Fash, annexed to "Justice Outside London", comments that "the pressure of work generally on the High Court bench, and QB in particular, means that there are too few judges available to meet the needs of the Administrative Court. To maintain current work levels the Court needs to sit the equivalent of 55 days per week..., which equates to 12 High Court Judges per week. This level of allocation is rarely, if ever, achieved let alone the additional 3 judges per week that would be needed for at least a year to address the current backlog."

Justice Outside London comments that:

... 14 judges would be needed to eliminate the backlogs, and that 10 or more judges consistently would be needed to tread water. Realistically, there is no possibility whatever of deploying 14 judges to the Administrative Court and little prospect of deploying 10 or more other than occasionally. This was achieved subject to some daily absences for other matters for about three weeks in March 2007, but this was exceptional (paragraph 132).

Despite the increase in the Administrative Court's workload, its judicial and administrative resources have not kept pace. Delays are worsening and ever more cases are being expedited. As a result "ordinary" claims for judicial review are now subject to extremely long delays.

The problem

Judicial review claims by their very nature must be dealt with swiftly. A Claimant must issue the claim "promptly and in any event within 3 months" and will be refused permission if he or she fails to do so. Applications for immigration statutory review are subject to even stricter time limits (2-5 days depending on whether the case is in the 'fast track'). Such strict time limits are imposed because of the urgency of the issues and because good administration suffers if Administrative Court litigation is delayed.

If long delays occur in the determination of cases, this disadvantages Claimants because a long delay means that proceedings may become academic, or a remedy may be refused on the grounds of detriment to good administration. There are a large number of cases which may not merit expedition but where the Claimant suffers considerable prejudice by reason of the delays. Even in those cases which are expedited, Claimants are spending longer periods in detention, without education, or without financial support because even expedited cases are taking much longer to be listed.

For Defendants, the current delays are equally unacceptable. Mr Fash notes:

The backlog and consequent delays in resolving cases have led to criticism from a number of quarters including the Home Office and Assets Recovery Agency, whose cases often require expedition. The Prime Minister's Delivery Unit has, of late, also taken a keen interest in the Court's performance and in particular the impact that the lack of judicial resources is having on the removal of failed asylum seekers.

In *R (Casey) v Restormel Borough Council* [2007] EWHC 2557 Munby J noted:

It is no secret that the Administrative Court is having great difficulty coping with its present workload. That is not, I believe, any fault of the judges and it is certainly, I wish to emphasise, no fault of the dedicated and tireless staff in the Administrative Court Office. The

volume of paper applications that has to be dealt with necessitates a diversion of judges to deal with Table applications who might otherwise be sitting in court. So there are delays in listing cases for hearing in court. All this has led to public concern. A commentator in the *Times* (Cragg, Legislative Update, 16 October 2007) comments acridly that "all judicial review cases are meant to be considered quickly," observing that there is an outside time limit of three months to file a claim for judicial review and continuing: "It is said to be potentially "detrimental to good administration" if public bodies have to wait for months or years to find out if they have been acting unlawfully, but that is what is now happening."

Expedition is no answer to the general problem of delay. Granting expedition in one case simply has the effect of pushing other cases further towards the back of the queue.

Foreseeable

The current problems with the Administrative Court were entirely foreseeable. They appear to result largely from the Government's legislative programme, without any commensurate increase in resources. With prior planning they could easily have been avoided. The current problems were the inevitable result of greatly increasing the Court's caseload without increasing the judicial and administrative resources available to the Court.

Steps taken to date

It appears that very recently some limited steps have been taken to improve the position. A recruitment exercise for deputy judges has commenced. However, each deputy judge will only sit part-time, often for only 28 days. A large number of deputy judges will be needed to replace even a single full-time judge.

The Justice Outside London report (which is currently subject to consultation) proposes the establishment of regional Administrative Courts, each with a circuit judge nominated to sit as a deputy high court judge to deal with Administrative Court work. However, the report does not make clear whether these circuit judges would be additional to or in substitution of the current allocation of High Court judges to the Administrative Court. Nor is it clear when, if at all, such reforms would be implemented.

Neither of the above steps deals with the current difficulties. Even if fully implemented, they will take a substantial period of time to be effective.

Delays unlawful

We consider that the current delays in the Administrative Court are unlawful. They are in breach of the common law right to access to justice, Article 6 of the ECHR and the duty to ensure that there is an efficient and effective court system, pursuant to section 1 of the Courts Act 2003.

Under the Concordat, it is the Secretary of State/Lord Chancellor's duty to ensure that there is an efficient and effective judicial system, and for deciding the number of judges required in the Administrative Court (para. 29). This duty is reflected in the Lord Chancellor's oath of office under section 17 of the Constitutional Reform Act 2005 ("I... do swear that in the office of Lord High Chancellor... I will... discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God").

It is well established that there is a right under the common law to the determination of a claim within a reasonable time. See *Porter v Magill* [2002] AC 495 at [106] per Lord Hope of Craighead. That right has always been part of English law and is reflected in Article 6(1) of the Convention. For example, delays in resolving public law claims in the Swiss Courts due to an increase in workload were held to be a breach of Article 6(1) in *Zimmerman v Switzerland* (1983) 8737/79. Although the Swiss authorities had a "genuine willingness to tackle the problem, they did not give sufficient weight to the structural aspect..." [31]. The court will consider the reasons for the delay and whether they were foreseeable. So where the problem is not simply a temporary and unexpected excess of work that will be cleared in due course, the Court will find a breach of article 6 (see eg. *Buchholz v Germany* (1981) 7759/77).

The same considerations apply here. In respect of the current delays in the Administrative Court, Munby J commented (in *Casey* at [28-33]):

The delay, I said, was simply indefensible. I referred to Magna Carta, expressing the view that the potential delay here amounted to a denial of justice in the sense in which that phrase is used in Magna Carta. My reference was, of course, to Chapter 40 of Magna Carta, which it is to be remembered remains in force as part of Chapter 29 of the Statute of 1297, and which declares that:

"Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam (To no one will we sell, to no one will we deny or delay, right or justice)."

The opportunity for subsequent reflection gives me no reason to moderate my views.

...

Hard pressed local and other public authorities should not be prejudiced, income tax, corporation tax and council tax payers and rate-payers should not be financially disadvantaged, other more deserving claimants seeking recourse to over-stretched public resources should not be prejudiced, because of delays in the Royal Courts of Justice. It is fashionable nowadays in some circles to decry as no longer relevant anything more than twenty or thirty years old. But there are some principles that ring down the centuries. Magna Carta may be only eight years short of its eight hundredth anniversary, but its message in this respect is timeless. And that message needs to be heeded, not least, it might be thought, in the Administrative Court.

The present scale of the delays in the Administrative Court neither complies with the common law right to a prompt hearing, nor with Article 6(1). For the same reasons, the delays are in breach of the Lord Chancellor's statutory duty under section 1 of the 2003 Act.

We therefore invite you to:

- 1) Consent to declarations to that effect.
- 2) Set out what urgent and effective steps you intend to take that will lead to the elimination of the current delays, by making immediate and appropriate improvements in the judicial resources available to the Administrative Court.

Disclosure

In the event that the above steps are not taken, our client intends to bring a claim for judicial review. In order to do so, it requires additional documents and information. Please provide the following:

- 1) Documents recording all representations made by local or central government bodies about the current delays in the Administrative Court.

- 2) The report prepared by May LJ for the Lord Chancellor and Lord Chief Justice in 2005.
- 3) Any contemporaneous documents considering or projecting the effect of the (a) immigration statutory review powers; (b) control orders; and (c) proceeds of crime legislation on the workload of the Administrative Court.
- 4) Detailed statistical information showing the current delays in the resolution of non-expedited claims for judicial review.
- 5) Any documents containing projections or estimates of the likely effect of (a) the current recruitment campaign for deputy high court judges; and (b) the establishment of regional Administrative Courts on the current delays and backlog.

Please also treat this request as a request made under the Freedom of Information Act 2000,

Protective Costs Order

The proposed proceedings are of great public interest and importance. They will be brought by the Public Law Project, which has no private interest in their outcome. The PLP, a charity, has no resources that it can properly allocate to this important claim. The case is therefore one in which a protective costs order would be appropriate.

In order to avoid the necessity for a PCO application, please confirm that the Ministry of Justice will not seek its costs against the PLP.

Response

We view this matter as urgent. Taking account of the Christmas break, we request a response **by close of business on Friday 11 January 2008**.

Yours faithfully,

Leigh Day & Co

cc Treasury Solicitor