EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT No. 2) RULES 2015

2015 No. 670 (L. 9)

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Civil Procedure Rules ("CPR") which are rules of court and govern practice and procedure in the High Court, the Civil Division of the Court of Appeal and the County Court.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make civil procedure rules. The first CPR were made in 1998. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and county courts, replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC). The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The changes were made, and continue to be made, in response to the report 'Access to Justice' (1996) by Lord Woolf.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 In September 2013, the Government launched a public consultation seeking views on a series of proposals for further reform of judicial review. This followed an earlier consultation in December 2012. Further details on this consultation are provided in section 8 below. On 6 February 2014 the Government published its response, outlining

the reforms it intends to take forward (this is available on the Justice Consultation Hub which can be accessed via this link: https://consult.justice.gov.uk/digital-communications/judicial-review or by writing to Judicial Review Team, Post Point 4.38, 4th Floor, Ministry of Justice, 102 Petty France, SW1H 9AJ to request a copy).

7.2 The measures proposed by the Government which are covered by this instrument relate to judicial reviews brought on grounds highly likely to have made no substantial difference to the outcome and interveners and costs. These are contained in sections 84 and section 87 of the Criminal Justice and Courts Act 2015. Remaining proposals within this consultation which the Government is taking forward, including within the Criminal Justice and Courts Act 2015 will be implemented separately.

Likelihood of substantial difference to the outcome

7.3 The reform builds on the previous common law position that the court may refuse a remedy or permission where the conduct complained of (the grounds for the judicial review) would inevitably have made no difference to the outcome for the applicant. The policy intention behind this reform is to prevent judicial reviews being brought on technicalities that would in practice have been highly likely to make no substantial difference to the end result for the applicant. It aims to limit the delay that such cases can cause and ensure that court resources are directed to those cases in which a difference to the outcome is more likely.

7.4 The key changes are that the court:

a) is required to consider argument on whether it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred at permission when raised by the defendant or of its own volition;

b) is required to refuse relief or permission to apply for judicial review where satisfied that it is highly likely that the outcome for the applicant would not have been substantially different had the conduct complained of not taken place; but nonetheless,

c) may grant permission or a remedy where the argument is made out if it is appropriate to do so for reasons of exceptional public interest and certifies that this is the case.

7.5 The rule changes provide for the defendant to raise the argument that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred within the Acknowledgement of Service of the judicial review claim. At present the initial consideration of granting or refusing permission for judicial review is determined on the papers by a judge usually without an oral hearing. The rule change sets out the procedure for when the court wishes to hear oral argument on whether permission should be refused based on this argument prior to taking a decision on the papers on whether permission should be granted. Finally, the

new rule requires the court to serve on the parties any certificate that permission has been granted for reason of exceptional public interest where it finds that the argument is made out that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred and to give reasons for that decision.

Interveners and costs

7.6 The policy intention is to ensure that those who voluntarily intervene in a judicial review do so with a more appropriate measure of costs liability.

7.7 The reform creates two rebuttable presumptions concerning the costs of those who ask the court for, and are granted, permission to intervene in a judicial review case in the High Court or on appeal to the Court of Appeal. The first presumption is that a party to the judicial review may not be ordered to pay any costs incurred by the intervener unless exceptional circumstances make it appropriate to do so. The second presumption is that on an application by a party the court must order an intervener to pay costs incurred by the party as a result of the intervention if one or more of four conditions are met; the court need not make an order if exceptional circumstances make it inappropriate to do so. Those conditions are that:

a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;

(b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;

(c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; and

(d) the intervener has behaved unreasonably.

7.8 The rule change sets out that a party to the judicial review may apply to the court to the intervener to pay its costs incurred as a result of the intervention.

Assessment of costs – children and protected parties

7.9 Amendments were made by SI 3299/2014 coming into force on 6 April 2015 to address the growing number of applications at approval hearings for payment out of the child/protected party's damages to meet the success fee provided for in the conditional fee agreement or entered into between the litigation friend and the solicitor for the child\protected party. These Rules further amend the Rules to enable costs to be assessed summarily where the costs payable comprise only the success fee claimed by a child's or protected party's legal representative under a conditional fee agreement or the balance of any payment under a damages based agreement. The Civil Procedure (Amendment No. 8) Rules 2014 (S.I. 2014/3299) are amended in consequence of this.

8. Consultation outcome

8.1 The Civil Procedure Rule Committee must, before making Civil Procedure Rules, consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act 1997). Where the Committee initiates amendments then consultation is undertaken where deemed necessary.

8.2 These judicial review reforms were the subject of a public consultation held between September 2013 and November 2013. 325 responses were received from a range of stakeholders, including professional lawyers, the judiciary, representative bodies, businesses, public authorities and interested individuals. The majority of responses were opposed to the Government's proposals. There was, however, a body of support for reforms, principally among businesses and public authorities.

8.3 The Government response to the consultation, setting out the reforms the Government intends to take forward, was published on 6 February 2014. Having carefully considered all the responses to the exercise, the Government concluded that these reforms are necessary to tackle the problems identified (this is available on the Justice Consultation Hub which can be accessed via this link: https://consult.justice.gov.uk/digital-communications/judicial-review or by writing to Judicial Review Team, Post Point 4.38, 4th Floor, Ministry of Justice, 102 Petty France, SW1H 9AJ to request a copy).

9. Guidance

9.1 The forthcoming changes will be published on the Civil Procedure Rules Website once the Statutory Instrument is laid. The Ministry of Justice will also write to key stakeholders detailing the changes in April 2015.

10. Impact

10.1 The judicial review reforms will impact on claimants (individuals, businesses and third sector organisations)defendants (primarily public sector organisations),and third parties to judicial review applications, as well as the courts and tribunals system, the legal aid agency and legal providers.

10.2 An Impact Assessment has not been prepared for this instrument in particular. However, Impact Assessments were published alongside the Government response to the consultation and accompany the Criminal Justice and Courts Act; they are available at http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts.html. Alternatively you can request a hard copy by writing to Judicial Review Team, Post Point 4.38, 4th Floor, Ministry of Justice, 102 Petty France, SW1H 9AJ.

10.3 In summary, the Impact Assessments indicate that the changes may result in a reduction in the volume of judicial reviews, as well as quicker resolution of cases. The main benefits to claimants would arise from legal cost savings if interveners were ordered

to pay the costs that they caused the party to incur. Defendants would benefit through reduced delays and uncertainty in implementing decisions. Businesses may benefit from quicker implementation of public decisions, and quicker resolution of judicial review cases.

10.4 Interveners may also face the costs imposed by their intervention. Further, legal providers may face costs associated with reduced business, as the volume of judicial review cases is reduced.

11. Regulating small business

11.1 Relevant bodies have been consulted during the development of these provisions. The reforms apply to any claimants and lawyers bringing a judicial review and this could include businesses, regardless of size. The impact assessments published alongside the consultation and during the Parliamentary passage of the Criminal Justice and Courts Act 2015 did not identify any reason why the reforms should have a disproportionate effect on small or micro businesses.

11.2 Research indicates that the top 200 legal companies in terms of turnover employ over two-fifths of all solicitors in private practice and generate approximately two-thirds of total fee income. This suggests that, although there are a large number of small firms, the market is quite concentrated, with larger firms accounting for a considerable share of the legal service market. We therefore do not anticipate that the requirements will have any disproportionate impact on small firms over and above those that apply to any other party in Judicial Review proceedings.

11.3 In order to minimise the impact upon firms, guidance about the provisions being commenced in the Criminal Justice and Courts Act 2015 will be issued in a Ministry of Justice circular; this will be distributed to key stakeholders and will be made available online. Information will also be available through the CPR website.

12. Monitoring & review

12.1 These rules will form part of the Civil Procedure Rules 1998 that are kept under review by the Civil Procedure Rule Committee. The Civil Procedure Rule Committee will make any subsequent amendments to these rules.

13. Contact

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