

CJRS 4/2008

**Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

**Revised Proposal for Amendments to
Order 53 – Applications for Judicial Review**

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out (i) the reasons for the proposed amendments to Order 53 as contained in the latest draft Rules of the High Court (Amendment) Rules 2008 (“Draft RHC”); and (ii) the Judiciary’s revised proposal for amendments to RHC Order 53.

2. It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Background

3. At the Subcommittee meeting on 21.2.2008, the Judiciary Administration was requested to provide supplementary background information on Order 53 of the Draft RHC relating to judicial review, including information on the reasons for and the impact of the proposed changes.

Existing Procedural Framework

4. The statutory framework of the procedures for judicial review proceedings is currently found in Order 53 of the Rules of the High Court (“RHC”) (Cap. 4A).

5. The scope of judicial review is currently defined by reference to the types of remedies sought under O.53, r.1(1), which provides that -

“Cases appropriate for application for judicial review (O.53, r.1)

(1) An application for-

(a) an order of mandamus, prohibition or certiorari, or

(b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.”

6. An application for judicial review is a two-stage process – (1) The applicant must first apply for leave to move for judicial review; and (2) If leave is granted, the applicant can proceed with a substantive application for judicial review where, if grounds for review are made out, the court may decide to intervene by granting the applicant appropriate relief.

7. Presently, the leave application is made *ex parte* and usually decided without an oral hearing. Neither the proposed respondent nor any interested party is served with the application or the supporting evidence. They are not brought into the picture unless and until the applicant succeeds in obtaining leave.

8. If the applicant secures leave and proceeds with the substantive application, the application has to be made by originating motion to a judge sitting in open court, unless ordered otherwise by the judge granting leave. The notice has to be served on all persons directly affected. Any respondent who intends to use an affidavit at the substantive hearing has to file it in the Registry within 56 days after the service upon him of the notice of motion or summons.

Final Report on CJR

9. The Working Party on CJR noted in its Final Report that the present remedy-based approach in deciding the scope of judicial review proceedings is unsatisfactory, and there is merit in adopting some aspects of the changes to the procedural framework for judicial review proceedings in the Civil Procedure Rules (“CPR”) of England and Wales. Taking into account the consultation response to the Interim Report, the Working Party on CJR made **Recommendations 144-148** in the Final Report.

Proposed Amendments to Order 53 in the Latest Draft RHC

10. The Steering Committee on CJR has proposed amendments to Order 53 in latest Draft RHC (attached as Annexes B and C to paper **CJRS 1/2008**, LC Paper No. **CB(2)1000/07-08(01)**), which seek to give effect to Recommendations 144-148 in the Final Report. The main changes are -

- (a) Defining what comprises an application for judicial review and the remedies available in simpler and more accessible terms (Rule 1A);
- (b) Requiring the service of the application for leave on the respondent and all interested parties (Rule 2B);
- (c) Requiring that the party or anyone else supporting or opposing the application, to set out the grounds of opposition whether at leave stage or later (Rule 2C(4)(a) & 5A); and
- (d) Empowering the court to screen out wholly unmeritorious and vexatious applications (Rules 3(3A) & (3B)).

11. The Steering Committee has conducted two rounds of consultation on the proposed amendments, and save for some technical and textual comments, there was no objection in principle to the above changes.

Revised Proposal for Amendments to Order 53

12. Having regard to the consultation response, the Steering Committee originally took the view that the proposed amendments on service of the application for leave, by involving the interested parties at an earlier stage, would be conducive to improving the present procedural framework for judicial review proceedings.

13. However, in the light of observations of the Subcommittee and also taking into account the views expressed through deputations, the Steering Committee has looked at the matter again and accepts that in some cases, the procedural changes proposed for the service of the application for leave (see paragraph 10(b)&(c)) may not be altogether desirable. The Steering Committee has therefore decided to remove the

proposed amendments regarding the service requirement at the leave application stage.

14. Nevertheless, the Court would (as is the position under the existing Rules) exercise its discretion, in appropriate cases, to order that notice be given to the proposed respondent or interested parties at the leave application stage. This discretion, together with the Court's case management powers under the existing and the proposed Rules, will, in appropriate cases, bring about the benefits expected of the original changes proposed for the leave application stage. However, as stated above, the revisions as to service at this stage need not be pursued. Subject to any further views the Subcommittee may have, the Steering Committee will proceed with this revised proposal.

Judiciary Administration
March 2008