

Courts and Tribunals (Judiciary and Functions of Staff) Bill

House of Lords Committee Stage

10 July 2018

Introduction

The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise on the equality and human rights implications of laws and proposed laws. This briefing sets out our analysis of and support for the following proposed amendments to the Courts and Tribunals (Judiciary and Functions of Staff) Bill:

- **Amendments 8 and 10** which set restrictions on which judicial functions can be delegated to authorised staff
- **Amendments 9 and 11** providing the right to apply for judicial reconsideration of a decision made by authorised staff

As we explained in our Second Reading Briefing, the Bill presents an opportunity to address the Government's approach to reforming the courts system and to consider how it can ensure human rights compliance and equal access to justice. We set out the full relevant legal framework against which the court reform proposals should be assessed in our response to the consultation "[Fit for the future: transforming the](#)

[court and tribunal estate](#)¹. Our focus in this briefing is on Clause 3 and the Schedule to the Bill which provide for delegation of some judicial functions to authorised non-judicial staff.

We accept that enabling appropriate decisions to be made by authorised staff could mean the users of the courts and tribunals will experience a more efficient service, which would be welcome. Delegation of some judicial functions to court and tribunal staff already takes place in some jurisdictions. Our concerns are that the Bill does not set any restrictions on the judicial functions which can be delegated; does not provide detail about the qualifications or experience which staff will have to have before they can undertake those functions; and means that decisions which can have a significant impact on the outcome of cases may be made by HMCTS employees rather than independent judges.

Our priorities are

- **ensuring that such delegation does not prejudice the right to a fair trial required by Article 6 of the European Convention on Human Rights (ECHR) and in particular the requirement that rights are determined by an independent and impartial person.**
- **ensuring that such delegation helps rather than hinders court and tribunals to meet the needs of those with particular characteristics protected by the Equality Act 2010.**

We have focused on amendments which support these priorities.

Restrictions on delegation of judicial functions to authorised staff

Commission's recommendation

Support amendments 8 and 10, which detail the restrictions on which judicial functions can be delegated to authorised staff.

¹ EHRC response to MOJ consultation "Fit for the future; transforming the court and tribunal estate" (29 March 2018) (available at https://www.equalityhumanrights.com/sites/default/files/reponse_to_the_consultation_on_the_strategy_to_transform_the_courts_and_tribunal_estate.pdf).

Why are the amendments needed?

Clause 3 and the Schedule to the Bill do not set any restrictions on the judicial functions which can be delegated to staff but provide that delegation, along with what qualifications or experience is required, will be governed by the relevant procedure rule committee (PRC). The Bill sets out that the Lord Chief Justice, Senior President of the Tribunals or their delegates will have to approve staff before they are authorised to carry out delegated judicial functions.

These amendments would introduce important protections for human rights and equality in line with both of the priorities stated above.

We recommended in our Second Reading briefing that the Government clarify how it will ensure that decisions about which judicial functions to delegate and who will exercise those functions will be made with due regard to the aims of the Public Sector Equality Duty (PSED)². The Equalities Statement³ relating to the Bill does not appear to assess the equality impact of providing no restrictions in the Bill on which judicial functions can be delegated or to whom. There is no indication, for example, of how the Government will ensure PRCs will be enabled to comply with the PSED in making their decisions on which functions will be delegated. We reiterate our concern that the acknowledged lack of data about court users and their protected characteristics under the Equality Act 2010 means that it is likely that the PRCs do not have an adequate evidence base to understand the impact of its decisions on court users and to ensure those decisions meet the needs and remove barriers to court users with protected characteristics, such as disabled court users.

In its human rights memorandum on the Bill⁴ the Ministry Of Justice (MOJ) suggests that the intention is for authorised staff to only make

² S.149 of the Equality Act 2010

³MOJ: Courts and Tribunals (Judiciary and Functions of Staff) Bill Equalities Statement: Authorised staff: legal advice and judicial functions (available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710510/CTJFS-bill-final-authorised-staff-measures-equalities-statement.pdf)

⁴ Memorandum Courts and Tribunals (Judiciary and Functions of Staff) Bill – European Convention on Human Rights (available at:

case management decisions which are uncontentious and so not of sufficient importance to engage Article 6. It goes on to suggest that should Article 6 be engaged by any of those decisions, the independence it requires is guaranteed by the provisions in the Schedule which provide that authorised staff will be independent of the Lord Chancellor when taking such decisions, and subject only to the direction of the Lord Chief Justice.

The MOJ's factsheet⁵ on delegation of functions to staff also refers to the delegation of uncontroversial and routine matters, but says that in future it expects that authorised staff will be able to carry out a range of functions and responsibilities, including case management powers and some mediation roles but that they are unlikely to involve contested matters. The reference to authorised staff carrying out mediation does suggest that it is envisaged they will have a role beyond merely making non-contentious decisions on purely procedural matters such as hearing dates. Furthermore, case management decisions can have a significant impact in shaping the issues and progress of a case and, ultimately, its outcome. For example, a decision on the appropriate timescales within which a party should take a step in proceedings can have a significant impact, because failures to comply with that timescale can subsequently lead to some or all of a party's case being struck out.

Therefore, as currently drafted, decisions which can have a significant impact on the outcome of cases will be made by HMCTS employees rather than independent judges. We recognise that each PRC has the relevant expertise in practice and procedure and accept the need for decisions about practice and procedure to be left to PRCs rather than being set out in the Bill. We also appreciate that rules made by PRCs will be consulted upon and subject to debate via the negative resolution procedure where there is objection from either house. However both the MOJ's Delegated Powers Memorandum⁶ and factsheet⁷ highlight that this power will be new to some jurisdictions and that in others, which

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710509/CTJFS-bill-ECHR-memo.pdf.

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710515/CTJFS-factsheet-authorized-staff.pdf

⁶ Ibid 1

⁷ Ibid 2

already have this power, its use has evolved differently resulting in staff carrying out different functions in different jurisdictions. The Memorandum⁸ also recognises the need for safeguards in relation to the exercise of the power to delegate. In our view, to safeguard the independence and quality of decision-making and avoid lack of clarity or inconsistency across jurisdictions, the restrictions on what judicial functions can be delegated should be clearly defined in the Bill.

These amendments would provide clarity and certainty as to the parameters within which the power to delegate judicial functions can be exercised whilst also ensuring consistency across jurisdictions but without fettering the PRCs in relation to court rules on practice and procedure.

We therefore recommend supporting these amendments.

Right to apply for judicial reconsideration of a decision made by authorised staff

Commission's recommendation

Support amendments 9 and 11, which provide the right to apply for judicial reconsideration of a decision made by authorised staff.

Why are the amendments needed?

Clause 3 and the Schedule to the Bill provide for judicial functions to be delegated to staff across criminal, civil and family courts and tribunals.

These amendments would ensure compliance with Article 6 ECHR, in line with the first priority above.

Article 6 ECHR provides that the determination of a person's civil rights and obligations or any criminal charge must be undertaken by 'an independent and impartial tribunal established by law'. The requirements of independence apply not only to the 'tribunal' but also to any judge or

⁸ Ibid 1- para 36

other officer authorised by law to exercise judicial power.⁹

As the MOJ¹⁰ acknowledges, in considering independence, guarantees against outside pressures are relevant – as is the question whether the body presents an appearance of independence.

The Bill provides that authorised staff will be independent of the Lord Chancellor when carrying out delegated judicial functions but they remain court staff and do not take the judicial oath of independence. As the Government’s Human Rights memorandum on the Bill¹¹ acknowledges, one way of ensuring that decisions are Article 6 compliant is to ensure that any party affected by the decision of an authorised member of court or tribunal staff will have the right to have the decision considered afresh by a judge. This is currently provided for, for example, in the Tribunal Procedure Rules but it is not currently included as a requirement in the Bill. As the Bill is currently drafted, a PRC could decide not to include a right to apply for reconsideration by a judge in relation to staff-made decisions.

This amendment would remove that risk by providing in the Bill itself that a party affected by a decision made by authorised staff would always have the right to apply for the decision to be reconsidered by a judge. That would guarantee the “independent and impartial” determination required by Article 6.

We are aware of two objections to this approach, which can each be addressed as follows:

- first, it has been said that including a requirement for a reconsideration on the face of the Bill unnecessarily fetters the ability of the PRCs to set their own rules. We accept the need for decisions about detailed practice and procedure to be left to PRCs.

⁹ This is explained at paras 10-16 of the MOJ’s ECHR memorandum on the Bill (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710509/CTJFS-bill-ECHR-memo.pdf).

¹⁰ MOJ – Memorandum Courts and Tribunals (Judiciary and Functions of Staff) Bill – European Convention on Human Rights (May 2018) (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710509/CTJFS-bill-ECHR-memo.pdf)

¹¹ Ibid.

However, we believe the importance of the Article 6 rights involved means it is appropriate to include this safeguard in the Bill itself.

- second, it has been suggested that including a right to apply for judicial reconsideration will negate the benefits of delegating decisions to staff because a dissatisfied party will inevitably apply for a review by a judge. This objection was dealt with by Lord Briggs in the Final Report of his Civil Court Structure Review¹². He accepted that an unfettered right to reconsideration was a “necessary long stop” and cited evidence from real-life precedents suggesting that where such a right exists elsewhere, the numbers of reconsideration applications are low. That should particularly be the case if, as the MOJ suggests, the decisions being made by authorised staff are “non-contentious”¹³.

We do not consider those objections are strong enough to outweigh the importance of ensuring the independent judicial scrutiny of decisions required by Article 6. We therefore recommend supporting these amendments.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission’s work at: www.equalityhumanrights.com

For more information on this briefing, please contact:

Parliamentary lead:

Katherine Perks (Tuesday, Wednesday, Thursday)

Katherine.Perks@equalityhumanrights.com

Tel: 020 7832 7813

Legal lead:

¹² Civil Courts Structure Review: Final Report by Lord Justice Briggs July 2016 (available at: <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>). The issue is specifically dealt with at paras 7.7-7.9.

¹³ Something which applied to the Salford Legal Advice Project referred to by Lord Briggs at para 7.9 of his report.

Rhodri McDonald

Rhodri.McDonald@equalityhumanrights.com

Tel: 0161 829 8434