# JCPC CONSULTATION MEETING

At: 17:00pm on **Thursday, 18 July 2024**
At: The UK Supreme Court,
Remotely via Teams

## Chaired by Lord Hodge

# MINUTES

### 1. Discussion of case management proposal

Lord Hodge welcomed the attendees. He explained that the meeting was to discuss a replacement to the proposed rule 23 which had been part of the JCPC's consultation on updating its rules (ie, the strike out procedure for cases which were either devoid of merit or which offended against the principle in *Devi v Roy*). That rule had been proposed to introduce a degree of case management and proportionality into the procedure for appeals as of right and to avoid respondents being exposed to heavy costs.

Lord Hodge noted that the responses to that consultation had raised concerns with the proposed rule 23, including that it would be unconstitutional. The JCPC has listened to those concerns and propose a new scheme for appeals as of right to assist in minimising costs while preserving parties' rights to a hearing before the JCPC.

Lord Hodge set out as follows:

- All appeals as of right from JCPC jurisdictions will be reviewed once the appellant's notice of appeal and the respondent's notice of objection have been filed. The appeals will only be reviewed to determine whether they appear to fall foul of *Devi v Roy*. If they do, they will be sent to a single Justice for directions. The single Justice may direct that the parties be invited to a short case management hearing before three Justices. The respondent will be invited to attend but need not attend or make submissions.

- At the case management hearing, the appellant will be invited to make submissions as to why the appeal should not be dismissed on *Devi v Roy* grounds: either because the appeal does not seek to challenge concurrent findings of fact; or because there are exceptional circumstances of the sort contemplated in *Devi v Roy*. The hearing will last 30 minutes if only the appellant wishes to be heard; it will last for an hour if the respondent wishes to be heard as well. The hearing will offered be listed to take place remotely, but there will be an option for the parties to attend in person if they wish.

- If, following the case management hearing, the Justices determine that the appeal does fall foul of *Devi v Roy* (and are satisfied that there are no exceptional circumstances), the appeal will be dismissed. If the panel of Justices is persuaded otherwise by the appellant, directions will be given for a full hearing of the appeal. Generally, the full hearing will not take place on the same day as the case management hearing.

- Appeals will not be subject to this review, either at the screening stage or the hearing stage, on the basis of a totally without merit test.

The aim of this, Lord Hodge explained, is to achieve a degree of case management, encourage the appropriate use of resources, and conserve the right of parties to be heard by the JCPC.

Lord Hodge then invited comments on the proposal from the attendees.

**2. Application of the new approach**

Sandra Minott-Philips asked whether the rule against concurrent findings applied only to the facts or also to concurrent findings of law by lower courts. Lord Hodge answered that it only applies to concurrent findings of fact, not law. The JCPC will, when it receives an appeal as of right, review the grounds of appeal and identify how critical any challenge to concurrent findings of fact is to the arguments advanced.

Michael Hylton stated that he felt that the proposal was reasonable. He asked, if the panel of three justices felt that an appeal was not barred under *Devi v Roy* following a case management hearing, whether there would be a subsequent hearing. Lord Hodge explained that if the appellant persuades the justices that there is no challenge to concurrent findings of fact/it is only peripheral to the issues in the appeal or, if there is a challenge to concurrent findings of fact, it is an exceptional case, then the case will proceed to a full hearing.

Lord Hodge added that for the period of time that the previous approach (as outlined in rule 23) was in force, only 8 cases were struck out. [***Please note that in fact 7 were struck out and the 8th was withdrawn after the Appellant was asked for submissions.***] He also noted that, if it is devoid of merit, parties may get advance warning, but there will still be a hearing.

Colin McKie asked whether the three justices that will sit on the case management panel will also sit in the appeal. Lord Hodge and the Registrar explained that the same Justices may sit on the panel conducting the full hearing. All those Justices have determined in the case management hearing is that there is no *Devi v Roy* block. They have not determined anything else. There is therefore no issue with them sitting on the panel for the full hearing. It would also be practically difficult if they did not, given that the JCPC only has a small number of Justices.

Anand Beharrylal asked whether the PD would be amended to require that an appellant flag where there is a challenge to concurrent findings of fact in their notice of appeal. Lord Hodge thanked him for the suggestion and noted that the JCPC would consider requiring such notice, adding that the notice of acknowledgment would also allow a respondent to raise such a point.

Anand Beharrylal also noted that guidance could be given to local courts on the relationship between *Devi v Roy* and the rule in *Alleyne-Forte* that there be a genuinely disputable point. In his view, given how well-established *Devi v Roy* is, it may be arguable for a respondent to say that there is no genuinely disputable point if there are concurrent findings of fact being challenged. Lord Hodge, in response, noted that the JCPC does not tell local courts how to organise their affairs. in an ideal world, an appellant would inform the local court that there is a concurrent finding of fact that they are challenging which may then influence the granting of permission. However, this proposal is targeted at appeals as of right, where the local appellate court often has little discretion

in granting permission to appeal. It is likely at the stage of the JCPC considering an appeal as of right that the weeding of appeals which offend against *Devi v Roy* will have to take place.

Lord Hodge also reiterated that the case management hearing would not be used to exclude a full appeal which is devoid of merit, but which does not challenge concurrent findings of fact.

Anand Beharrylal then noted that, in his view, local appellate courts often fell into error in granting leave to appeal to the JCPC. He felt that it was an area which the local courts could benefit from some guidance. Lord Hodge noted his concern and explained that such guidance would have to be contained in a judgment.

Lastly, Anand Beharrylal stated that he was very keen for the proposal to be adopted. It is helpful in cases to have an indication to go back to one's client and say that there is a "warning light" and that they should reconsider their appeal.

Michael Hylton noted that another advantage of the proposal would be that in many cases litigants are not aware of the *Devi v Roy* point, nor how seriously the JCPC takes it. The proposal would therefore provide a warning to appellants even before the matter comes to the JCPC.

Kiel Taklalsingh also endorsed the proposal. He noted, speaking for the less experienced counsel appearing before the JCPC, any early warning is welcome, particularly when advising clients early on. Lord Hodge noted this point and explained that the proposal is that parties will get advance notice of the use of the case management process. Equally, where the JCPC considers a case to be devoid of merit, parties will get advance notice that it is only listed for half a day before three justices. Although the same composition of panel and amount of time may also be used for very small points which the JCPC considers it can address quickly, if a party receives that composition and time allocation it may be an advance warning that it is an appeal which is devoid of merit.

Sandra Minott-Philips also stated that she would appreciate the advance warning that the proposal would give. She did, however, express some concern about the use of panels of three. Panels of three are normally used for applications for leave to appeal, not substantive appeals. Until the previous year, she had had no experience of their use in a substantive appeal. She noted that appellants may see themselves as having a greater chance of winning before a panel of five than a panel of three. Lord Hodge explained that the JCPC had historically sat as a panel of three where the legal point was one which can be readily determined and is fairly clear cut. He also explained that, if the JCPC were to inform parties that they were before a panel of three, it would also explain why that was the case. Sandra Minott-Philips stated that such an explanation would be helpful.

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