



JCPC CONSULTATION MEETING

At: 12:00pm on **Monday, 22 July 2024**
Remotely via Teams

Chaired by Lord Briggs

MINUTES

1. Introduction

Lord Briggs welcomed the attendees. He explained that the meeting had been convened as part of the JCPC's further consultation on amending its rules. The Court had received a number of consultation responses relating to proposed rule 23, which provided that the Court would review appeals as of right to determine whether they (i) offended *Devi v Roy* [1946] AC 508 by seeking to overturn concurrent findings of fact, or (ii) were "totally without merit", i.e. on the face of it bound to fail with no prospect of success. This approach was, up until the consultation, being followed by the Court in accordance with one of its practice directions.

Lord Briggs stated that the JCPC had received many consultation responses from all round the JCPC jurisdictional base. He noted that, prior to the rules consultation, the Court had received support for its approach to appeals as of right, which was designed to avoid (i) delays being caused by the listing and hearing of appeals that were bound to fail, and (ii) costs being incurred by respondents in order to address factual *Devi v Roy* points. However, the responses to the JCPC's consultation expressed concern that the Court was potentially encroaching on rights of appeal deeply embedded in most of the constitutions from which it hears appeals.

2. Overview of the new proposed appeal review process

Lord Briggs explained that, in light of the consultation responses, the JCPC had reconsidered and proposed to take the following approach to reviewing appeals as of right:

- 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.

Lord Briggs explained that the JCPC’s appeal review process would not be put into a rule in the revised rules, but would remain set out in a practice direction, so that it could be adjusted as necessary. The new practice direction would be published either over the summer or with the new JCPC rules. To note: the revised JCPC rules are now expected to come into force in December 2024 in line with the Court’s new case management portal.

Lord Briggs noted that the new proposed approach was discussed at the Court’s user group meeting on 10 July 2024, and also at a remote meeting with Caribbean practitioners chaired by Lord Hodge on 18 July 2024. This meeting was therefore the third opportunity for an open discussion of the proposal in its current form. Lord Briggs noted that the JCPC would publish the original consultation responses it received, together with an explanation of the new proposal, in its final written consultation response. **To note: this was published on 13 August.**

Lord Briggs invited comments and questions on the new proposed appeal review process.

3. Application of the new approach

Theo Solley asked whether there would be any retrospective application of the JCPC’s new approach to cases the JCPC had previously dealt with that had not been afforded the benefit of a hearing. He understood that the majority (if not all) of these cases had been dismissed on the basis that they sought to challenge concurrent findings of fact, although one may have been dismissed on another basis as well.

Lord Briggs explained that the new approach would be applied going forward, not retrospectively. Where the JCPC had finally dealt with appeals under the existing practice direction procedure (for which the Court was satisfied it had the requisite jurisdiction), those orders stand. The Registrar confirmed that one previous appeal as of right was dismissed on the basis that it was totally without merit. However, it was also determined to fall foul of *Devi v Roy*, so the Court would not be revisiting that case.

4. The case management hearing

4.1. *Listing and directions*

Steffan Taylor asked whether there was a plan to streamline the case management hearing so that it would not spiral into a document-heavy preparation task. He also asked about the listing of case management hearings and how long this would take.

Lord Briggs explained that, if necessary, directions would be given to the parties to ensure that the case management hearing does not get out of hand. He noted that, by the time the parties are invited to the case management hearing, the Court will have received the appellant's notice and grounds of appeal, the judgments of the courts below and (likely) a response from the respondent. If the Court has not received anything from the respondent, it may invite a short response. Lord Briggs noted that the case management hearing would be in abbreviated form, and the extent to which it would be necessary to give detailed directions to the parties would depend on experience. However, the Justices would have at the forefront of their minds the need to prevent the process from becoming expensive satellite investigation and something that increases, rather than reduces, costs.

The Registrar explained that the case management hearings would be listed as quickly as possible, but noted that this would depend on the Court's existing list.

4.2. *Sequencing of document filing*

Philip Rule KC asked what documents would be filed by the time of the case management hearing, and whether the hearing would take place before or after the parties' written cases are filed. Camilla Hart posed a similar question.

The Registrar explained that the Court wished to avoid requiring the parties to file reproduced records, statements of facts and issues and their written cases before knowing whether a full appeal would definitely be listed. Therefore, time would not start to run for the submission of those documents unless and until the Court confirms that the appeal will be listed for a normal appeal hearing. The idea is that the case management hearing would be short and only address the *Devi v Roy* issue, so additional documents would not be necessary. However, the Registrar noted that the Justices would be able to direct the filing of additional documents in advance of the case management hearing if they wished. Lord Briggs noted that the key document for the purposes of the case management hearing would be the appellant's grounds of appeal.

4.3. *Skeleton submissions*

Theo Solley asked whether, in advance of the case management hearing, the parties would be expected to file skeleton submissions of some kind.

Lord Briggs explained that the appellant would be expected to respond at the case management hearing to the Court's warning that their appeal may fall foul of *Devi v Roy*. Therefore, the appellant would have an opportunity to put in writing in brief form why they say that the Court's provisional impression is a wrong one, and similarly the respondent would be given the opportunity to address this point. In this way, there would be scope for the parties to put in skeleton submissions, but this is not the same thing as putting in full written cases.

Theo Solley suggested that this be communicated to practitioners, such as by specifying in the practice direction a page limit for the parties' submissions. This may be a way of preventing larger documents from being submitted.

Lord Briggs noted that the Court would probably have to proceed by way of experience. The Court has not yet decided on a particular word limit, but if it receives documents that are as long as appellants' full written cases, it may have to specify restrictions. Lord Briggs noted that the advantage of setting out the Court's approach in a practice direction, rather than a rule, is that changes can be made more easily.

4.4. Panel

Thomas Roe KC asked whether it would be specified in the practice direction that the single Justice who directs the case management hearing would be precluded from sitting on the panel for that hearing.

The Registrar said this would not be the case given the limited number of Justices at the Court. Lord Briggs added that the view of the single Justice would only be provisional in nature. Thomas Roe KC agreed with the Court's approach and suggested that this be noted in the practice direction to ward off arguments from parties objecting to the same Justices being involved at the screening stage, the case management stage and the full hearing stage.

5. The panel's decision

Theo Solley asked whether more detailed reasons for dismissing an appeal would be handed down by the JCPC as part of this new procedure, rather than a single declaration as to the outcome of the Justices' decision. He indicated that there was an expectation on the part of practitioners that fuller reasons would be provided by the Court to the relevant JCPC jurisdictions, which would have a desirable onward effect.

Lord Briggs explained that the current plan was to give more by way of reasons than the JCPC would do for an ordinary permission to appeal application. The Court would provide something in between a full judgment and briefer reasons. Lord Briggs noted that, if the Court is not persuaded by the appellant at the case management hearing, this would result in a dismissal of the appeal and not a strike out.

6. Costs

Nicola Diggle noted that the proposed new procedure should not incur much in the way of costs, but asked whether there will be costs consequences for the party who is unsuccessful at the case management hearing.

Lord Briggs said his instinctive reaction was that the case management hearing would have costs consequences, although he noted that it was open to the respondent to decline to participate in the case management hearing. The respondent's absence would not mean the Court is unable to conduct the review exercise properly and fully. Lord Briggs noted that it would be assistance if the respondents set out their position on costs in whatever documents they want to put forward, as this would be preferable to separate correspondence on costs taking place after the hearing.

7. Timings

Louise di Mambro asked whether the new practice direction would be introduced as part of the Court's broader revision of its practice directions, or would be brought in before then. She also asked whether the consultation response the JCPC was due to publish would include a final draft of the Court's new rules. The Registrar explained that it had not yet been decided whether the practice direction would be brought in over the summer period, or whether the Court would wait until it revises all its practice directions. She noted that the Court could append the revised draft rules to its consultation response, which would be published by mid-August 2024.

8. Other feedback

Thomas Roe KC observed that the new proposal was in line with the suggestion he had made in his consultation response, and confirmed that it would therefore have his support. Philip Rule KC observed that the new approach responds to issues of open justice and deals with the expectation that parties should be able to address the Court in a measured way in this context.

Lord Briggs noted that the JCPC was grateful for all the input received on what turned out to be a contentious issue. He reiterated that the JCPC would be publishing its response to the consultation in due course.

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