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Comments
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PRIVY COUNCIL REVERSE ITS PR0POSALS TO CHANGE ITS PROCEDURE

On 15 April 2024 the Privy Council began consulting on new Privy Council Rules which would significantly change the appeals procedure.[1] On 17 May 2024 that consultation ended.

The proposed Rules involved a radical departure. The consultation proposed the idea of a "*merits review*" in a new ***Rule 23***. In the most significant appeals the Privy Council decides (appeals where the Court of Appeal has granted leave or appeals where the Constitution permits appeals as of right), the Privy Council would now be permitted to dismiss these appeals- without ever holding a hearing where oral submissions are made.

Inevitably, such a momentous change provoked negative consultation responses.

Remarkably, however, on 23 May 2024 the Privy Council reacted to widespread condemnation by abandoning it, in an announcement published on its website:

> ***An update on the JCPC rules consultation and the suspension of the operation of PD 4.7.1***
> ***23 May 2024***
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> *In the light of the responses to our consultation on the proposed new rules, the Board has decided not to proceed with proposed* ***Rule 23*** *and is suspending the operation of* ***PD 4.7.1*** *pending further consultation on a suitable case management arrangement*.

The Privy Council's change of mind is not altogether surprising. Many serious criticisms of the merits review proposal can be made (as well as the introduction of a similar procedure under the Privy Council Practice Direction procedure- which had not been subject to consultation when it was recently introduced).

For example, on 7 May 2024 I argued that the merits review ***Rule 23*** procedure was wrong in principle.[2]

What is particularly impressive, however, is how speedily the Privy Council has responded to the grave concerns voiced during the consultation process about the proposed ***Rule 23***- by abandoning the idea entirely.

Numerous arguments were raised about the detrimental impact of ***Rule 23***. For example:

- appeals as of right to the Privy Council entitles a person to an oral hearing. This constitutional right of appeal can only be removed by the domestic country, itself- as when Barbados, Guyana, Belize and Dominica left the Privy Council as its apex Court to join the Caribbean Court of Justice.
- the proposed ***Rule 23*** raised fundamental issues of principle; it removes an oral hearing of an appeal and means the final ruling on the appeal can be based solely on the papers; in substance, Rule 23 appears to override entrenched constitutional guarantees and prevents any possible legislative scrutiny before oral hearings are eliminated;

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[1] https://www.jcpc.uk/docs/2024-04-15-JCPC-consultation-document.pdf

[2] https://www.claytoncomments.com/wp-content/uploads/2024/05/PROPOSALS-FOR-IMPORTANT-CHANGES-TO-PRIVY-COUNCIL-PROCEDURE-7.5.24.pdf.

- that the legal test requiring three Justices to consider whether an appeal is "*devoid of merit*" is different from that prescribed in ***JCPC Practice Direction 4*** (on which it is said to be based)[3] and, arguably, more restrictive;
- the phrase, "*devoid of merit*," has no clear legal meaning and may be applied by different panels of Justices differently;
- there is no obligation under ***Rule 23*** on the Justices to give reasons for refusing to allow an appeal to go forward- which is out of step with the current procedure when permission to appeal is refused[4] and is much more significant omission in cases involving leave from the Court of Appeal or appeals as of right under domestic Constitutions.
- ***Rule 23*** looks like it unlawfully discriminates against Privy Council appellants on grounds of nationality[5] which constitutes indirect discrimination[6] under the UK Equality Act and also under the UK Human Rights Act since the prohibition against discrimination under Article 14 covers nationality discrimination[7] and must be justified as proportionate. [8] In many of the countries which appeal to the Privy Council, there is a strong tradition of oral advocacy.

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[3] Unfortunately, the Consultation Paper is incorrect: the merits test is different in the Practice Direction and, apparently, harder to satisfy than Rule 23 now proposes. ***JCPC Practice Direction 4 para 4.7.4*** requires the Justices "*to consider whether the appeal ought to be summarily dismissed, or whether it should proceed to a full appeal hearing*". By contrast, the new Rule 23 uses a different legal test, replacing" whether the appeal ought to be summarily dismissed" under Practice Direction para 4.7.4 with whether the appeal is "*devoid of merit*" under Rule 23(3)(a) as proposed.

[4] Both the ***Privy Council Practice Direction 3 [3.3.3***] and ***UK Supreme Court Practice Direction 3 [3.3.3]*** Supreme Court state that they must give brief reasons for refusing permission for an appeal to go before the full Court. Furthermore, in the important decision in *Flannery v Halifax Estate Agencies* [2000] 1 W.L.R. 377 the English Court of Appeal held that judges are under a duty to explain why they reached his decision. Although the scope of what is required to fulfil that duty depends on the subject matter of the case, the Court of Appeal decided that, where reasons and analysis are advanced on either side, judges have had to enter into issues canvassed and explain why he preferred one case over the other. A failure to supply reasons in those circumstances offended against requirements inherent in the duty of showing fairness to both parties and of producing a decision soundly based on the evidence and will constitute a good free-standing ground of appeal.

[5] Section 9(1) of the Equality Act 2010 states that "*Race includes- (a) colour; (b) nationality (c) ethnic or national origins*"

[6] Section 19 of the Equality Act states

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-*
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> > *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> > *(c) it puts, or would put, B at that disadvantage, and (d)A cannot show it to be a proportionate means of achieving a legitimate aim.*
> *(3) The relevant protected characteristics are- … race …"*

[7] In *Biao v. Denmark* (2017) 64 E.H.R.R. 1 the Grand Chamber decided that the applicants, a naturalised Danish citizen of Togolese origin living in Denmark and his Ghanaian wife, complained that their request for family reunification in Denmark had been rejected for non-compliance with statutory requirements. The Grand Chamber held that the relevant statutory rule constituted a difference in treatment between Danish citizens of Danish origin and those of non-Danish origin.

[8] In *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [49] Lord Reed PSC quoted a passage from the ECtHR in *Guberina v Croatia* (2016) 66 EHRR 11 [71] to the effect that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group provided that the policy or measure has no "'*objective and reasonable*' justification, that is, if it does not pursue a *'legitimate aim*' or if there is not a "*reasonable relationship of proportionality*' between the means employed and the aim sought to be realised.

Consequently, deciding appeals on paper alone may well have a real and practical impact on an appellant's ability to present his or her appeal effectively.

- By contrast, the UK Supreme Court consulted on its proposed Rule changes for a longer period.[9] The Supreme Court Consultation launched in respect of its changes of procedure began on 2 April 2024 and ends at 4pm on Friday 17 May 2024. No explanation why Supreme Court users have been given two weeks more to consult than the Privy Council users. But obtaining responses from those who reside outside the UK would on the face of it, justify a longer period for consultees to respond to the Privy Council Consultation Paper. Some kind of explanation for the difference is needed.

The reaction of the Privy Council to these kinds of consultation responses was prompt and pragmatic.

The Privy Council took the view that the idea of a merits review (as formulated in the proposed Rule 23 or in ***JCPC Practice Direction 4 para 4.7.4***) does not pass muster.

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[9] https://www.supremecourt.uk/docs/uksc-rules-consultation.pdf