Clayton Comments

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IMPORTANT CHANGES PROPOSED FOR PRIVY COUNCIL PROCEDURE: DO YOU KNOW THAT CONSULTATION ENDS ON 17 MAY 2024?

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On 15 April 2024 the Privy Council began consulting on new Privy Council Rules which will significantly change the appeals procedure. On 17 May 2024 the consultation ends. But very few people seem to be aware of this deadline. Even fewer seem to realise that the proposed Rules involve a radical departure: that in the most significant appeals it decides (appeals where the Court of Appeal has granted leave or appeals where the Constitution permits appeals as of right), the Privy Council can now dismiss these appeals- without ever holding a hearing where oral submissions are made.

In fact, the ***Consultation on the proposed revision of the Judicial Committee of the Privy Council Rules*** argues for a number of changes: see https://www.jcpc.uk/docs/2024-04-15-JCPC-consultation-document.pdf . The email address for responding to the consultation is: jcpcrulesconsultation@jcpc.uk

The ***Consultation Paper*** stresses that the Privy Council has developed a case management system known as the portal, designed to deliver an end-to-end service to all users and several proposed Rules built on this. The new Rules are also said to reflect current practice in the ***Privy Council Practice Directions*** and include greater use of electronic documents rather than documents being produced and exchanged in hard copy. The questionnaire designed by the ***Consultation Paper*** implies that all of the proposed Rules are mundane and technical.

However, the most substantial new Rule concerns the introduction of a merits review aimed at the most important appeals the Privy Council determines:

- appeals where the Court of Appeal, itself, has granted leave in the rare but crucial cases so big points of principle can be clarified; or
- appeals to the Privy Council as matter of right under the Constitutions of the countries which use the Privy Council.

In particular, an appeal as of right is an important constitutional safeguard for Privy Council appeals. That constitutional right affords reassurance to the appellant and, more widely, gives confidence to investors in the financial and other core sectors of the domestic economy which appeals to the Privy Council.

Until now, an appeal as of right 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.

Obviously, a Constitutional right of appeal may be questioned if the appeal is something like an abuse of process. But this new plan goes very much further.

The problems the *Privy Council Consultation Paper* creates.

The new merits review proposed by ***Rule 23*** is problematic from many points of view:

- ***Rule 23*** raises 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.

- 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) 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 on the Justice giving 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 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 both under the UK Equality Act and the Human Rights Act. In many of the countries which appeal to the Privy Council, there is a strong tradition of oral advocacy. 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.

Importantly, the ***Consultation Paper***, itself, is deeply flawed and powerfully suggests that the consultation should be extended beyond the 17 May 2024 deadline:

- The ***Paper*** is difficult to find on the Privy Council website and it is apparent that many Privy Council practitioners are unaware of the Consultation or of ***Rule 23***.
- The ***Paper*** give no prominence to the proposed merits review and incorrectly states that ***Rule 23*** will work in the same way as the 2023 changes to the ***Privy Council Practice Direction 4***.
- ***The Paper*** fails to explain why the consultation exercise for the UK Supreme Court Rules and the Privy Council Rules both end on 17 May 2024- even though the Privy Council consultation started 2 weeks later. On the face of it, a consultation targeted at overseas responses takes more time.
- ***The Paper*** does not transparently identify the persons has asked to consult- unlike the Supreme Court consultation, which expressly pinpoints named individuals and organisations.

The details of the new merits review

The Privy Council will introduce a new ***Rule 23*** procedure to governs the most important appeals which the Privy Council considers: appeals (i) where leave has been granted by the Court of Appeal or where the appellant has an appeal of right under the Constitution.[1]

Rule 23 prescribes that the appeal will be considered by a single Privy Council justice:[2] and ***Rule 23(3)*** says that the Panel must:

> *decide whether* [to] *direct that-*
>
> *(a) the appeal shall proceed in the same way as an appeal for which permission had been granted by the Judicial Committee; or*
>
> *(b) the appellant shall file submissions within 21 days as to why the appeal should not be dismissed without a hearing on the grounds that it is devoid of merit.*

If the appeal is referred to three Privy Council Justices, ***Rule 23(4)(5)(6)*** requires them to consider the following:

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[1] See proposed ***Rules 20(1)*** and ***23(1)***.

[2] See proposed ***Rule 23(3)***.

> *(4) Where a direction is made under paragraph (3)(b), any submissions filed by the appellant will be considered by three or more members without a hearing and the Judicial Committee shall direct either—*
>
> *(a) that the appeal shall proceed in the same way as an appeal for which permission had been granted by the Judicial Committee; or*
> *(b) that the appeal is dismissed.*
>
> *(5) A direction given under paragraph (3)(a) or (4)(a) may specify the number of members before whom the appeal will be heard.*
>
> *(6) The decision on the review of the merits must be notified to portal parties via the portal and by appropriate means to non-portal parties. An order shall be prepared and sealed to record a decision to dismiss the appeal under this rule.*

In fact, the ***Consultation Paper*** erroneously refers to ***Rule 22*** (as being the Review of Merits of the Appeal) rather than ***Rule 23***. More significantly, the ***Paper*** also states that it incorporates into the Rules the procedure introduced in 2023 (see ***JCPC Practice Direction 4*** paras 4.7.1 to 4.7.4).[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.

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[3] ***JCPC Practice Direction 4*** states:

> ***Review procedure for full appeals***
> *4.7.1 Where a notice of appeal is filed and permission has not been granted by the Judicial Committee (1), a review will be undertaken before the appeal is listed.*
>
> *The procedure is as follows:*
> *Upon receipt of the Notice of Appeal, the papers will be referred to a single Justice for an initial review of the chronology of proceedings and grounds of appeal. The single Justice may do one of the following:*
> *a. Direct that the appeal be listed for hearing before a panel of 3 Justices;*
> *b. Direct that the appeal be listed for hearing before a panel of 5 Justices;*
> *c. Direct that the appellant(s) be invited to file submissions within 21 days as to why the appeal should not be summarily dismissed on the basis that it:*
> *i- falls foul of the rule in Devi v Roy [1946] AC 508, i.e. seeks to overturn concurrent findings of fact; and/or*
> *ii- is otherwise devoid of any merit.*
>
> *4.7.2 If the single Justice directs that the appeal should be listed, the usual procedure for appeals will continue.*
>
> *4.7.3 If the single Justice directs that the appellant(s) be invited to file submissions, a letter will be sent to the appellant(s) by the Registry, copied to the Respondent(s) for information, inviting such submissions within 21 days.*
>
> *4.7.4 Upon receipt of the appellant's submissions, or following the conclusion of the 21 day period if no submissions have been filed, the papers will be referred to a panel of Justices to consider whether the appeal* ***ought to be summarily dismissed,*** *or whether it should proceed to a full appeal hearing. If the former, an order will be made and (if appropriate) sent to the Privy Council for approval by the King in the normal way. This will be a final decision of the JCPC and is not open to reconsideration or appeal.*

In reality, the new ***Rule 23*** raises fundamental issues of principle, as indeed, did the changes effected by ***Practice Direction 4*** which were implemented without any consultative process. ***Rule 23*** is more than a procedural modification**.** ***Rule 23*** removes an oral hearing of an appeal with a final determination the appeal based purely on considering the papers. ***Rule 23*** overrides entrenched constitutional guarantees for appeals to the Privy Council and prevents any possible legislative scrutiny before oral hearings are eliminated.

Furthermore, there are obvious difficulties with the new procedure proposed.

First, although this is not entirely clear, ***Rule 23(4)*** probably means that the three justices will determine whether the case can go forward under ***Rule 23(3)(b)*** because the appeal is "*devoid of merit*". Nevertheless, it would be clearer if **Rule 24(4)(a)** expressly said so.

Secondly and more fundamentally, what does the phrase "*devoid of merit*" require the appellant to show? Although the phrase is mentioned in passing in a few Privy Council and Supreme Court decisions, it is difficult to identify a clear meaning for "*devoid of merit*". The ***Oxford English Dictionary*** defines "*devoid*" as "*c1400= with of: Empty, void, destitute (of some attribute) entirely without or wanting. (Originally, participial like bereft, and like the latter only*".

For instance, compare the meaning of "*devoid of merit*" with "*totally without merit*". Under the English Civil Procedure Rules, the Court can dismiss any application as being "*totally without merit*"[4] or a Statement of Case (or pleading)[5] on the same ground. If it does so, the Court must consider, at the same time, decide whether to make a civil restraint order[6] which means that the individual must get the judge's permission before making any application to the court covered by the Order. Similarly, a Judge in judicial review proceedings may reject certify a permission application and certify it as "*totally without merit*". Certification prevents the claimant from seeking an oral hearing to renew the permission application.[7] "*Totally without merit*" when refusing permission for judicial review means a case that is bound to fail and does not have to be abusive or vexatious.[8]

What precisely is the difference between "*totally without merit*" and "*devoid of merit*"? The two phrases do not impose the same legal test. So how do they differ?

The phrase, "*devoid of merit*", has been mentioned in a few Privy Council cases. In *Central Bank of Trinidad and Tobago v Maritime Life (Caribbean)* Lord Hamlyn appeared to approve the approach of the Trinidad High Court Judge (whether there was evidential material which gave rise to an arguable case with a realistic prospect of success that the appellant had acted unlawfully in terms of public

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[4] ***CPR 23.12***

[5] ***CPR 3.3(9)***

[6] ***Civil Procedure Practice Direction 3C para 2.2*** states "*Where the court makes a limited civil restraint order, the party against whom the order is made-*

(1) will be restrained from making any further applications in the proceedings in which the order is made without first obtaining the permission of a judge identified in the order;

(2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and

(3) may apply for permission to appeal the order and if permission is granted, may appeal the order."

[7] See the ***Administrative Court Guide 2023*** para 9.31-9.33

[8] See the Court of Appeal decision in *R (Wasif) v Secretary of State for the Home Department (Practice Note)* [2016] 1 WLR 2793.

law standards)[9] and similar views of the Court of Appeal.[10] In *Sookhan v The Children's Authority of Trinidad and Tobago* Lord Stephens refers to the High Court devoid of merit and unarguable so that the application for leave to apply for judicial review was dismissed.[11]

Nevertheless, the phrase, "*devoid of merit*" is that it has no clear legal meaning so different panels of Justices may apply it differently.

Thirdly, the difficulty arising from the phrase "*devoid of merit*" is compounded by the failure of ***Rule 23*** to impose any obligation on the Privy Council to provide reasons when it makes s an adverse decision. Both the Privy Council[12] and the UK Supreme Court[13] must give brief reasons for refusing permission for an appeal to go before the full Court. In the important decision in *Flannery v Halifax Estate Agencies*,[14] 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.

In an appeal as of right or where the Court of Appeal has granted leave to appeal, there is a particularly powerful rationale for the three Justices giving reasons why the appeal should be dismissed on the papers.[15] The failure to impose any requirement to give reasons is anomalous and difficult to understand.

Indeed, because of the strong public interest involved in the significant class of appeals involved, it may well be more appropriate for the Justices to provide reasons for rejecting the appeal which are intelligible, adequate and enable the reader to understand what conclusions were reached on the principal issues, as Lord Brown held in *South Bucks District Council v Porter* (No 2).[16]

Fourthly, the new procedure appears to unlawfully discriminate against appellants on grounds of nationality when they appeal to the Privy Council.

In many of the countries which appeal to the Privy Council, there is a strong tradition of oral advocacy. Written submissions often play a lesser role. As a result, there is a real danger that deciding appeals on paper will impact on the real and practical ability of appellants (like those who without resources to instruct very experienced lawyers, or those from poorer communities who represent themselves) to develop their written arguments with sufficient precision, in advance, and under pressure.

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[9] [2022] UKPC 37 [62]
[10] Above [63-66]
[11] [2021] UKPC 29.
[12] ***Privy Council Practice Direction 3*** [3.3.3]
[13] ***Supreme Court Practice Direction 3*** [3.3.3]
[14] [2000] 1 W.L.R. 377
[15] See eg ***De Smith on Judicial Review*** paras 9.120-121
[16] [2004] 1 W.L.R. 1953

The difficulties faced by these appellants could indirectly discriminate against them on grounds of nationality under the UK Equality Act 2010.[17] Indirect discrimination[18] means that "*a provision, criterion or practice is discriminatory 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.*

The same result can be based on the UK Human Rights Act. Under s 6(3)(a) a Court breaches the Act if it acts incompatibly with Convention rights. The prohibition against discrimination under Article 14 of the European Convention of Human Rights prevents nationality discrimination[19] and covers indirect discrimination [20]

The scope of the consultation

The ***Consultation Paper*** states that the ***Paper*** has been sent to practitioners, members of the judiciary, court staff, law societies and bar associations, and to Ministries of Justice. It says that the ***Paper*** has been sent to <u>at least</u> one contact for most of the Privy Council, and in a number of jurisdictions, many more. The Privy Council Office can also provide it. However, the ***Paper***'s description is not meant to be exhaustive or exclusive. Responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Unfortunately, however, the ***Consultation Paper*** is <u>not</u> easy to find on the Privy Council website. The Consultation is not flagged on the home page of the Privy Council website. If someone clicks on the site under heading "*Civil Procedures and Documents*" and clicks again on "*Latest News*", he or she can scroll down to "*JCPC rules consultation 15 April 2024 The JCPC publishes its consultation on revising its rules*".

In other words, finding the ***Consultation Paper*** <u>assumes</u> that a person knows about its existence in the first place.

Furthermore, the significance of ***Rule 23*** is not prominently featured in the ***Consultation Paper*** itself. Or mentioned in the ***Consultation Questionnaire*** which states:

> *We would welcome responses to any of the following questions set out in this consultation paper.*

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

[18] Section 19 of the Equality Act

[19] In <u>*Biao v. Denmark*</u> (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.

[20] In <u>*R (SC) v Secretary of State for Work and Pensions*</u> [2022] AC 223 at [49] Lord Reed PSC quoted a passage from the ECtHR in <u>*Guberina v Croatia*</u> (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*."

1. Do you foresee any practical difficulties with reducing the methods for filing of documents with the Registry as proposed?
2. Do you foresee any practical difficulties with removing a deemed date of filing with the Registry for the remaining methods of filing?
3. Do you foresee any practical difficulties with reducing the methods for service of documents on other parties as proposed?
4. Do you foresee any practical difficulties with removing a deemed date of serving documents on other parties for the retained methods of service?
5. Do you foresee any practical difficulties with the proposed time limits for these steps in preparation for the hearing including the filing and serving of the key documents bundle and main hearing bundle?
6. Do you foresee any practical issues in complying with the transitional provisions in Rule 63?
7. Do you wish to add any other comments?

Unfortunately, discussions with experienced lawyers acting in Privy Council appeals indicate that very few practitioners in countries served by the Privy Council are aware of the ***Consultation Paper***- even though the ***Paper*** says that "*a series of stakeholder meetings is also taking place, via Teams, at times that we hope will suit the time zones across the jurisdictions served by the JCPC:*

22 April 2024, 08:00 BST – 09:30 BST
24 April 2024, 12:00 BST – 13:30 BST
24 April 2024, 19:00 BST – 20:30 BST
29 April 2024, 19:00 BST – 20:30 BST
30 April 2024, 08:00 BST – 09:30 BST
2 May 2024, 12:00 BST – 13:30 BST

This transparency problem is exacerbated because the Privy Council consultation period is just 4 weeks- from 15 April to 17 May 2024.

Comparisons with the consultation on changing the Rules of the UK Supreme Court
By contrast, the UK Supreme Court consulted on its proposed Rule changes for a longer period.[21]

The ***Supreme Court Consultation*** 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.

Furthermore, the Supreme Court consultation identified specific consultees who will be approached:

Statutory consultees:
The Lord Chancellor;
The General Council of the Bar of England & Wales;
The Law Society of England and Wales;
The Faculty of Advocates;
The Law Society of Scotland;
The General Council of the Bar of Northern Ireland; and
The Law Society of Northern Ireland.

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

> ***Additional consultees:***
> *The Law Officers of England and Wales, Northern Ireland, Wales and Scotland;*
> *The Scottish Government;*
> *The Welsh Government;*
> *The Northern Ireland Executive;*
> *The Lady Chief Justice of England and Wales;*
> *The Lady Chief Justice of Northern Ireland;*
> *The Lord President of the Court of Session;*
> *Treasury Solicitor, Government Legal Department;*
> *General Counsel and Solicitor for HM Revenue & Customs;*
> *Comptroller-General of the Intellectual Property Office;*
> *Senior Costs Judge of England and Wales; and*
> *UKSC Court User Group (which includes solicitors and barristers who regularly act in cases before the Court).*
>
> *However, the Consultation paper states that this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.*

By contrast, the ***Privy Council Consultation Paper*** has not transparently identified any specific consultees.

Conclusion

The ***Rule 23*** proposal is perplexing:

- The proposal arises out of the fact that domestic states define their own right of access to appeal to the Privy Council by virtue of their own Constitutions.
- Consequently, the Privy Council does not control the right of access to appeal- as the UK Supreme Court does in UK appeals.
- In practice, it is rare for the English Court of Appeal to grant permission to appeal to the Supreme Court so that the Supreme Court uses its permission process to pick and choose the appeals it wishes to hear.
- However, the justification for requiring a merits review where the Court of Appeal grants leave to the Privy Council (which does not apply to the UK Supreme Court) needs cogent explanation.
- Appeals as of right are the creation of domestic Constitutions and the Privy Council is normally cautious about restricting rights of appeal, especially where there are concerns that ***Rule 23*** overrides Constitutional guarantees of rights of access to the Privy Council.
- Imposing restrictions on appeal rights in the most important appeals is particularly sensitive exercise when dismissing appeals solely on papers may be challenges as indirect nationality discrimination: because nationals who practise in Privy Council countries have strong traditions of oral advocacy when compared to advocacy on paper.

The importance of the proposed ***Rule 23*** is plain. Many Privy Council practitioners now unaware of the Consultation will, nevertheless, want to make representations. The rationale for extending the consultation deadline beyond 17 May 2024 is not easy to refute.

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