

## **The Courts and Tribunals (Online Procedure Bill) – European Convention on Human Rights**

### **Introduction**

1. Only the clauses which contain substantive ECHR issues are discussed. The Department considers that the Clauses of and Schedules to this Bill which are not covered by this memorandum do not give rise to any substantive ECHR issues. Lord Keen of Elie, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

“In my view, the provisions of the Courts and Tribunals (Online Procedure) Bill are compatible with the Convention rights.”

2. An earlier Bill (the Prison and Courts Bill), which included similar provisions, was introduced into the House of Commons on 23 February 2017, but did not complete Committee stage before the dissolution of Parliament prior to the general election.

### **Summary of the Bill**

3. The provisions in the Bill were announced in the Queen’s speech in June 2017 as part of wider reforms to modernise the courts system. It creates a new Online Procedure Rules Committee that will be able to create new online procedure rules in relation to the civil, family and tribunal (including employment tribunals and the Employment Appeal Tribunal) jurisdictions.

### **Clauses 1 to 9**

#### **The online procedure**

4. Clauses 1 to 9 of, and both Schedules to, the Bill make provision for establishing new online procedures capable of applying to civil, family and tribunal proceedings specified by the Lord Chancellor, or in the case of employment tribunals the Secretary of State (currently for BEIS). A new Online Procedure Rule Committee will provide new, simplified rules to support the online procedures.
5. The Committee’s rule making powers will be the same as those which apply to the current individual rule committees, for example, the Civil Procedure Rule Committee and the Family

Procedure Rule Committee. Initially it is intended that the new Committee will deliver the rules required to support a new civil 'online procedure' to provide an online dispute resolution for low value money claims up to a value of £25,000, as recommended by Briggs LJ in the final report of his Review of Civil Court Structures published in July 2016.

6. In respect of the civil 'online procedure' it is likely that the procedure will consist of:
  - an 'investigatory' stage, in which the online system will gather the essential facts and evidence from all parties to enable them and the court to understand the respective cases<sup>1</sup>;
  - a 'conciliation' stage, in which the parties will be encouraged to mediate;
  - simple case management; and
  - determination by a judge either on the papers if the parties agree, or by video or telephone live link if the judge considers it appropriate<sup>2</sup>.
  
7. The intention is, as far as possible, to make the online procedure the required procedure for starting and defending cases within its remit. However, this will not be the only means of accessing the court in these cases. Paper based procedures will remain available for those who need them:
  - the Lord Chancellor, or, where applicable, the Secretary of State, will have the power to provide by secondary legislation for the circumstances in which the Online Procedure Rule Committee may make parallel rules, where necessary, for paper based procedures, so that proceedings may be retained within the scope of the online procedure and utilise other aspects of it, such as court referrals to mediation;
  - the Lord Chancellor/Secretary of State will have the power to, by secondary legislation, provide for the circumstances in which the Online Procedure Rule Committee may make rules to transfer cases out of the online procedure and into the traditional court process where the complexity or importance of a case makes that appropriate;
  - the Lord Chancellor/Secretary of State will have the power to specify in secondary legislation the circumstances in which a party initiating proceedings may use either the online procedure or the standard current procedures; and the circumstances in which the online procedure will cease to apply to particular proceedings.

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<sup>1</sup> As is currently being piloted under CPR Practice Direction 51R – *Online Civil Money Claims Pilot*.

<sup>2</sup> The civil courts already employ telephone and video-conferencing see, in particular: CPR Practice Direction 51V – *The Video Hearings Pilot Scheme*.

## Article 6

8. Clauses 1 to 3, 5, 7 and 8 raise issues under Article 6 ECHR (right to a fair trial).
9. For the purposes of this Memorandum, the Department has assumed that *in principle* it is possible that Article 6 is engaged throughout the process by which civil rights or obligations are ultimately determined. Whether *in fact* Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question.

## Article 6 and the right to an oral hearing

10. In relation to oral hearings:

- In civil proceedings, there is no presumption under Article 6 that an oral hearing is necessary. The need for an oral hearing is a fact sensitive issue. It will depend on the importance of the proceedings and the questions considered at those proceedings and whether the determination is such as to require an oral hearing (*Fischer v Austria*<sup>3</sup>); and in the case of interlocutory proceedings it will depend on whether those proceedings are themselves determinative of a civil right or obligation (*Micallef v Malta*<sup>4</sup>).
- There is no reason why a hearing which takes place remotely via virtual hearing or live link should be any less capable in principle of being fair than a hearing at which all parties are physically present (see *Polanski v Conde Nast Publications Ltd*<sup>5</sup>).
- However, where there is a significant conflict of evidence, it is unlikely that a live audio link or wholly audio hearing would be appropriate as it would not be possible for the parties or the court to consider that evidence properly, particularly if cross-examination is required.

11. In relation to civil proceedings, the starting position is that decisions on the papers will only be made where all parties consent (see the discussion of waiver below). The decision as to what alternative type of hearing will be available in any particular case will be taken by the court with relevant considerations, including the views of the parties, to be included in the online rules. It should be noted, however, that the Department is currently exploring whether there may be categories of claims where, even in the absence of consent by the

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<sup>3</sup> (1995) 20 EHRR 349 §44

<sup>4</sup> (2010) 50 EHRR 37

<sup>5</sup> (2005) 1 WLR 637 HL §14

parties, it may be appropriate – and compatible with Article 6 – for the assumption to be that the claim be determined on the papers, unless there is specific reason why the claim ought to be determined after a hearing. The Department considers that there should therefore generally be no issue as to compatibility with Article 6 given that (a) an oral hearing is still taking place, albeit that it might do so through remote means, or (b) where determination of a claim is to take place on the papers without the parties' express consent, that would only occur if compatible with Article 6.

12. The Department is therefore content that the provisions in clauses 1 to 9 do not give rise to an issue of compatibility with Article 6 ECHR, in so far as the right to an oral hearing is concerned.

#### Article 6 and waiver

13. In relation to the ability to waive Article 6 rights in civil proceedings, case law has tended to focus on waiving rights to a court hearing in favour of arbitration and, in particular, voluntary and enforced arbitration<sup>6</sup>. Nonetheless the authorities are clear that a person may waive their right provided that such waiver is permissible and is established freely and unequivocally (*Suda v. The Czech Republic*)<sup>7</sup>.
14. As stated above, the intention, as far as possible, is to make the online procedure the required procedure for starting and defending cases within its remit. People who cannot, or may find it difficult to, engage with digital processes will not be disadvantaged. There will be assisted digital channels through which defendants would be able to seek help to engage with the procedures if they wished, and regulations may provide for parallel rules, where necessary, for paper based procedures. As is the case, currently, decisions on the papers will continue to only be made where all parties consent, but, as noted above, online rules which might in future permit paper-based decisions without express consent would only be made where compatible with Article 6.
15. In civil proceedings, then, the issue of waiver tends to arise where parties consent to issues being determined on the papers where rules otherwise provide for determination at an oral hearing. Where consent is relied upon, if necessary, rules may ensure that affected parties

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<sup>6</sup> While parties to civil proceedings may be encouraged to mediate, it is not proposed that 'conciliation' should be anything other than voluntary.

<sup>7</sup> Judgment of 28 October 2010 §§ 48-49

are given enough information to make a proper decision to waive their Article 6 rights in this regard. As such, with regard to the limited application of waiver in civil proceedings, the Department considers that waiver will continue to be compatible with Article 6<sup>8</sup>.

### Article 6 and open justice

#### 16. In relation to open justice:

- The general rule under both the common law (*Scott v Scott*<sup>9</sup>) and Article 6 ECHR (*Axen v Germany*<sup>10</sup>) is that hearings be in public, because of the public interest in scrutiny of the judicial procedure.
- It is not enough that the proceedings are theoretically open to the public, practical steps must be taken to ensure that the public in informed and effective access is granted (*Riepan v Austria*<sup>11</sup>).
- The principle of open justice applies to interlocutory hearings as well as final hearings (*Griseley Properties Ltd v Barclays Bank plc*<sup>12</sup>), although they are of course likely to be of less interest to the public or press.
- Where there is no hearing, open justice will be served by the public having access to the court's decisions

17. In respect of civil, family and tribunal proceedings, telephone, live link and wholly video hearings are already permissible. By way of example, in the case of wholly video proceedings, the intention is that there will be viewing screens in court premises to facilitate access. Such hearings will also be accompanied by listing practice to ensure that interested members of the public or press may attend at the appointed time. These practical steps meet the requirements in respect of publicity and are currently being employed in respect of the *Video Hearings Pilot Scheme*, which is being piloted under Practice Direction 51V<sup>13</sup> of the Civil Procedure Rules 1998 and was previously piloted in respect of appeals to the tax tribunal.

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<sup>8</sup> With regard to potential determinations on paper without party consent, please see footnote 6.

<sup>9</sup> (1913) UKHL 2

<sup>10</sup> (1983) 6 EHRR 195

<sup>11</sup> Judgment of 14 November 2000 §29

<sup>12</sup> (2013) EWHC 67 (Comm) §16

<sup>13</sup> Which may be found at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51v-the-video-hearings-pilot-scheme>

18. The Department is therefore content that in relation to the provisions in the Bill no issue of compatibility with Article 6 ECHR arises in so far as open justice is concerned.

Ministry of Justice

30 April 2019