



Bar Council response to the Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the consultation exercise by the Civil Procedure Rule Committee entitled Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. As part of its response to the Civil Courts Structure Review undertaken by Lord Justice Briggs, The Bar Council made written submissions on Routes to Appeal, first in November 2015 and then in March 2016,. In the second of those we concentrated on how possible changes could or should operate. We remain concerned that the sources of the civil court system's current problems have not been acknowledged, in particular the increase in the numbers of litigants in person within the system and the absence of funding options for many litigants following the cuts to civil legal aid and the introduction of the Jackson costs reforms. This has led to an increase in the number of litigants without sufficient legal advice and a consequent increase in the workload of the Appellate courts. We also remain of the view that the problems

¹ Civil Procedure Rule Committee (2016), Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction, available here: <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/appeals-to-the-coa-proposed-amendments-to-cpr-cprc-outline.pdf>

to which these reforms have given rise have been exacerbated by inadequate funding of the court system (rather than inherent problems with its existing structures and personnel).

5. We appreciate the need to tackle the workload of the Court of Appeal so that the time between decisions at first instance and Appeal can be reduced. Justice delayed is often justice denied; and in any event substantial delays lead litigants to lose confidence in the process. However, the Civil Procedure Rule Committee, as stewards of our system of civil justice, must ensure that those reforms which they introduce to reduce delay do not serve equally to undermine confidence in its quality. It is our view that the extent of the changes proposed would undermine the confidence of the users of the system and leave them with the clear impression that it no longer had within it the checks and balances needed to make it fair. As proposed the route to appeal not only has a higher threshold but is also dependent on the reaction of one gatekeeper judge to a set of paper submissions. The safeguards for those who have suffered a bad decision at first instance are not enough. The risk of damage to the reputation of the court and to its role in the proper and efficient administration of justice, which the proposed reforms are intended to address, would remain in a different form.

6. A significant number of assumptions have had to be made in order to forecast the impact of the proposed reforms. We suggest that it would be prudent to introduce those reforms which were less controversial and assess their impact before proceeding to other measures which carried a greater risk of unintended consequences.

7. The assumption has been made that the proposed reforms would free up more judicial hours than are needed to meet the annual shortfall, thus allowing the backlog to be addressed. However it does not necessarily follow that the remedies for the two should be the same. Similarly, there is no reason why the changes to the system should not be targeted. The measures to address the backlog could be temporary and/or directed at particular categories of appeal. The Data Analysis shows that a large part of the problem relates to two out of the eight subject categories, Public Law and Immigration/Asylum. If decisions have to be made which affect the existing structure, by removing from appellants rights that they previously had and reducing their access to appellate courts (or full appellate courts), then the effect of those decisions should be mitigated as far as possible.

(1)(i) Amendment of CPR Part 52.3(6)(a) to create a test of “a substantial prospect of success” for permission to appeal to the Court of Appeal in a first appeal, in place of the current test of “a real prospect of success”

Question A: Do you agree that the threshold for permission to appeal to the Court of Appeal should be raised to “a substantial prospect of success”? If not, why not?

8. In our March 2016 submissions we observed that we did not regard a change in the threshold to raise the permission hurdle to be justified simply on the grounds of workload and lack of resources. We remain of the view that, in relation to renewed oral applications, a greater willingness to say that an appeal is totally without merit and/or a reformulation of that test would be the only acceptable alteration to the present permission thresholds. We also wish to make it clear that we would support the judiciary in seeking more resources to meet the rising demand for appellate justice.

9. We are concerned that any change to the threshold would be seen as a restriction on access to justice, and a failure to recognise that a major reason for the increase in the number of appeals is the removal of financial assistance for litigants at first instance together with the changes to costs rules. If such changes have left litigants less satisfied with first instance justice, then to deny them the right to a substantive appeal hearing on cases which have a real prospect of success risks undermining the rule of law and is not consistent with the overall corrective role of the appellate system. Our concerns are heightened by the association of this proposal with the proposal that an appellant's right of oral renewal be removed, simultaneously raising the bar and restricting the appellant's opportunity to clear it.

10. On one reading of the test as proposed, it is difficult to see how some appeals, the determination of which is necessary to the efficient functioning of the system, would find their way to the Court of Appeal at all. We have in mind case management appeals such as that in *Denton v TH White Limited* [2014] EWCA Civ 906 or cases which involve an element of judicial discretion, for example matters relating to quantum in personal injury cases. This would lead to a decline in the ability of the court to fulfil one of its roles, that of guiding the practice of practitioners and judges both in the lower courts and outside them.

11. We further question whether it is always possible in practice to say whether an argument's prospects are "substantial" rather than merely "real". It is difficult to have confidence that the distinction between those tests will be applied consistently by different judges; one judge's substantial prospect is another judge's real prospect. The potential for confusion is even greater where the old "real prospect" test is to be retained on appeals to other courts. In our view, a reform which it is impossible to apply consistently is no reform at all.

12. Finally, it is not clear to us that such a proposal will necessarily result in less work. It would be reasonable for an appellant to consider that, if a judge has held they have a "substantial prospect" of success, then they are well on the way to victory. In those circumstances, they may be less willing to compromise before the hearing of the appeal than is currently the case, meaning this proposal would not succeed even on its own terms.

13. It is not clear to us and, we suspect, not clear to the Committee, how many cases a change in the threshold for permission would affect and, if it were to be introduced, we suggest that this should be assessed before considering whether it was necessary to restrict the appellant's rights further.

Question B: Do you think that amendment of CPR Part 52.3(6)(a) will assist in reducing delays in determination of appeals in the Court of Appeal?

14. It is likely that the amendment will have an effect on reducing delays but the extent of that effect is difficult to judge. That is why it should be assessed if it is introduced, before further measures are taken to remove the rights of appellants.

Question C: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

15. It is not possible to say at this stage.

Question D: Do you have any other suggestions for assisting the Court of Appeal to reduce delays in the hearing of appeals?

16. We have previously² supported a greater willingness to use the power to prevent an appeal proceeding on the grounds that it is “totally without merit”. We would consider a more restrictive test. We would also support strict time limits for oral submissions at applications for permission to appeal.

(1)(ii) Amendment of CPR Part 52.3 to remove a right of oral renewal for an application for permission to appeal to the Court of Appeal, but with a power in the single LJ reviewing the application on the documents to call the application in for an oral hearing

Question E: Do you agree that the right of oral renewal for an application for permission to appeal should be removed and replaced by a system allowing for determination of such an application by a single LJ on the documents coupled with a case-management power to call the application in for an oral hearing if it assessed to be appropriate to do so? If not, why not?

17. As we set out both in our November 2015 and March 2016 submissions,³ we consider the right to renew an application orally to be an important feature of the appeal system. The casting of the right of oral renewal as a ‘second bite of the cherry’ fails to recognise the place this safeguard has in the integrity of the overall appeal process. It permits the users of the system to do so with confidence. The fact that there are a number of appeals which are refused on paper and then allowed on oral renewal should not be a matter for regret, as paragraph 33 of the Committee’s Background Information appears to suggest. Rather it demonstrates that it is not always possible for a LJ to achieve a just outcome on the documents.

18. It is re-assuring that ‘in most cases’ where permission is refused then granted orally the appeal is dismissed. However that does not mean that the first LJ was ‘right’. The test he or she had to apply at that stage was not whether the appeal would be successful but whether it had a realistic prospect of success. Our reading of the statistics relating to the outcome of appeals between March 2015 and March 2016 where permission was refused on paper and then granted orally is that overall the appellant achieved a successful outcome in nearly one in 4 cases (23%). In some areas, the success rate was much higher. To us, this demonstrates the value of the safeguard.

19. We do not take comfort from the proposal that there will nonetheless be a route to an oral hearing via the discretion of the LJ looking at the case on the papers. That is because that

² Bar Council (March 2016), Bar Council Response to the Civil Courts Structure Review: Interim Report. para 74; see also Annex 2, which contains Bar Council (November 2015), Bar Council submission to the Civil Courts Structure Review. Available here:

http://www.barcouncil.org.uk/media/423295/2016.03.08_civil_court_structure_review_-_bar_council_response_to_interim_report_-_final.pdf

³ Bar Council (March 2016), as above, para 69 and Annex 2 para 72.

LJ will be the same judge who has refused the application. Just as an application for permission to appeal in front of the trial judge is not, in many cases, a proper opportunity, so leaving the discretion as to whether to grant an oral hearing to the judge who has refused permission is, and will be seen as, an inadequate safeguard. It will be perceived as allowing the judge to mark his or her own homework. One of the reasons why the Bar has confidence in a system where the rights of those it represents can be determined by LJs who do not have a background in the area of the law on which they are adjudicating, is the opportunity orally to renew the application and correct any misunderstanding.

20. We do not support the abolition of the right of oral renewal. We favour the retention of the existing system, and think the extension of the power to bar an oral hearing on the basis that it is totally without merit should be considered.

21. If, however, the proposed change were to be considered inevitable, we would strongly recommend further safeguards, and suggest two options in particular. Firstly, if the single LJ considering the matter on paper were to reach the view that there is no substantial prospect of success, but that he would have given permission if the test had remained that of “real prospect”, then there should be an automatic right to an oral hearing. Secondly, as an alternative, if the single LJ concludes on the papers that permission should not be granted, the papers should be referred to another LJ for a second opinion and, if he disagrees, there should be a right to an oral hearing. This would retain a level of safeguard but should reduce the number of oral hearings.

22. We do not in any event consider that a reform as fundamental as this should be introduced until the effect of other measures has been ascertained.

Question F: Do you think that amendment of CPR Part 52.3(4) and (4A) will assist in reducing delays in determination of appeals in the Court of Appeal?

23. If the figures for the year to March 2016 are representative, then not only will there be fewer hearings for permission to appeal, there will be up to 124 fewer appeals per year and up to 28 appellants whose cases would have been successful will not trouble the court. We regard that and the consequent damage to the reputation of the system as an unacceptable price to pay.

Question G: Do you agree that CPR Part 52.15(1A) and Part 52.15A(2) should be amended as proposed? If not, why not?

24. For the reasons set out above we do not agree.

Question H: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

25. Other than making the obvious point that the appellants and respondents most affected are those appellants who would have been successful, we do not have anything to add to the paragraphs above.

Question I: Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be made more efficient or effective?

Question J: Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be changed so as to help reduce delays in the Court of Appeal?

26. Our proposals are those set out in paragraph 13 above.

(1)(iii) Proposal to amend CPR Part 52 rule 15.16 to remove the automatic right to an oral hearing for reconsideration of decisions on other applications made in the course of proceedings in the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application on the documents

Question K: Do you agree that CPR Part 52.16 should be amended as proposed? If not, why not?

27. We have not seen evidence as to how much LJ time would be saved by the proposed changes and we assume that they are proposed to achieve consistency. However different considerations apply because these cases are ones in relation to which permission to appeal has been given. The assumption should be that they will be determined at an oral hearing and any interlocutory matter of sufficient importance should also be dealt with in that way. We have two additional observations in relation to the proposed changes. If some change is considered inevitable and bearing in mind that interlocutory decisions can be determinative of the appeal as a whole it would, in our view, not be satisfactory for any interlocutory decision to be finally determined without two persons considering it. In the usual course of events we would expect that to be first the court officer and then the LJ but it could be two LJs. The second point is that whatever decision is made in relation to other matters, the right to an oral hearing should be retained in cases where the appeal stands to be dismissed for failure to comply with an order rule or practice direction.

Question L: Do you think that amendment of CPR Part 52.16 will assist in reducing delays in determination of appeals in the Court of Appeal?

Question M: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

Question N: Do you have any other proposals for amending CPR Part 52.16 to make the procedure for consideration of ancillary applications more efficient and effective?

Question O: Do you have any other proposals how the procedure for considering ancillary applications in the Court of Appeal could be changed so as to help reduce delays in the Court of Appeal?

28. We do not have anything to add to paragraph 22 above.

Question P: Do you agree that Practice Direction 52C should be amended as proposed? If not, why not?

29. We agree that the practice direction in relation to the filing of bundles could be made more user friendly. We suggest that the practice direction may need some further refinement. In particular:

- There is nothing which addresses expert evidence either in the direction for the permission to appeal bundle or the appeal hearing bundle;
- It is not clear to us why key documents should be excluded if they are not 'contemporaneous' and not clear with what the documents must be 'contemporaneous';
- The provisions as drafted do not deal with transcripts of the judgment or evidence;
- The provision for two reviews to achieve the same end (sub-paras 6 and 10) appears onerous and likely to lead to costs being wasted; and
- We think that it might assist in reducing the size of the bundle, if there was provision for the parties to agree summaries of documents (for example summaries of witness statements or expert evidence) and/or that the power to agree that extracts of similar documents be included.

Question Q: Do you think that amendment of Practice Direction 52C as proposed will make it more user-friendly for litigants and assist in limiting the volume of documentation placed before the Court of Appeal in determining appeals?

Question R: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

Question S: Do you have any other proposals for amending Practice Direction 52C to make it more user-friendly for litigants?

Question T: Do you have any other proposals for amending Practice Direction 52C to limit the documentation presented to the Court of Appeal for determination of appeals?

30. We refer to our answer under paragraph 24 above.

**Bar Council
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