

# **Judicial Review and Courts Bill – European Convention on Human Rights**

## **Introduction**

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Judicial Review and Courts Bill (the “Bill”). On introduction in the House of Commons, the Secretary of State for Justice made a statement under section 19(1)(a) of the Human Rights Act 1998 (“HRA 1998”) that in his view the provisions of the Bill are compatible with Convention rights.

## **Summary of the Bill**

2. The Bill covers judicial review and courts measures as follows:

### **Judicial Review Measures**

2.1. It makes two new remedial powers available to the court in judicial review proceedings: (i) the discretion to include provision in a quashing order for it not to take effect until a date specified in the order (“suspended quashing order”) and (ii) the discretion to remove or limit the retrospective effect of a quashing order (“prospective quashing order”). In deciding whether to award the remedies, the court must consider a non-exhaustive list of factors. There is also a presumption that the court must use any one of the powers where it considers that it would, as a matter of substance offer adequate redress in relation to the relevant defect, unless it sees good reason not to do so.

2.2. It removes the ability to apply for judicial review of a decision of the Upper Tribunal (“UT”) to refuse permission (or leave) to appeal from the First-tier Tribunal (“FtT”) further to an application under section 11(4)(b) of the Tribunals, Courts and Enforcement Act 2007. This follows the Supreme Court ruling in *R (on the application of Cart) v The Upper Tribunal [2011] UKSC 28*. This is referred to as “Cart JRs” below. This case was also heard alongside a Scottish case raising the same issues, judgment for which was given separately (*Eba v Advocate General for Scotland [2011] UKSC 29*). The ouster will operate subject to certain exceptions.

### Criminal Procedure Court Measures

2.3. These are intended to improve efficiency in the courts by expediting the pre-trial processes in the magistrates' court, eliminating the need for some pre-trial procedures to enable preliminary proceedings to be conducted in writing if the defendant so wishes, and to enable efficient transfer of cases between courts where appropriate. The Bill also introduces a procedure to enable defendants to plead guilty to minor offences and accept a financial penalty online. It also abolishes local justice areas to create a single magistracy in England and Wales.

### Non-criminal Court and Employment Tribunal Measures

2.4. These are intended to contribute to efficiency, and ease of use for litigants, in civil and family courts and tribunals by establishing an Online Procedure Rule Committee to make rules (Online Procedure Rules) governing practice and procedure for proceedings conducted online rather than by "traditional" paper-based means (with provision to ensure a paper-based alternative is available in appropriate cases and that those who are "digitally excluded" will be able to access appropriate support in engaging with the online process); and transferring the existing separate powers to make procedure regulations for employment tribunals and rules for the Employment Appeal Tribunal to the Tribunal Procedure Committee, as a power to make unified Employment Tribunal Procedure Rules.

### Coroners Measures

2.5. This will allow virtual hearings in coroners' courts; allow a coroner to discontinue an investigation where the cause of death is natural causes, without a post-mortem examination; allow inquests to proceed without a hearing in non-contentious cases; allow virtual hearings in coroners' courts, replicate the provision in the Coronavirus Act 2020 which disapplies the obligation for a coroner to hold an inquest with a jury in circumstances where a death is thought to have been caused by COVID-19 and allow the merger of coroner areas within a local authority area where the new coroner area would not be the entire local authority area. The amendments do not engage Article 6 provisions because the Coroner's Court does not determine any civil rights or obligations or make any findings of criminality.

3. The ECHR rights raised by provisions in the Bill are a right to life (Article 2), fair trial (Article 6) and effective remedies (Article 13). The measures in the Bill have been analysed by reference to Convention articles where appropriate.

## **ECHR Analysis**

### **Article 2**

4. Article 2 protects individuals' right to life.

#### *Coroners Measures*

5. The power to conduct non-contentious inquests in writing (Clause 37) and the use of audio or video links at inquests (Clause 38) may arguably, under certain circumstances, engage Article 2 in cases where the State or agents of the State played a role in an individual's death. Whilst it is highly unlikely that an inquest that engages Article 2 would ever be suitable to be dealt with in writing, the procedure that the inquest takes would not alter any obligations on the State under Article 2. Whilst Article 2 is potentially engaged in inquests in which the State played a role in a death, the proposals are all capable of operating in a way that is Article 2 compliant because they concern the procedure that governs how the inquest is to be held, rather than the underlying issues to be determined in the inquest.

### **Article 6**

6. Article 6 protects individuals' rights to a fair trial.

#### *Judicial Review Measures*

##### *Remedies*

7. Clause 1 contains provision making two new remedial powers available to the court in Judicial Review proceedings.
8. Clause 1 is capable of engaging Article 6. Whilst Article 6 requires certain procedural safeguards, it does not require that any particular remedy is awarded in a particular case. The full panoply of existing remedies will remain available and this provision will provide courts with more flexibility in using remedies where they think it appropriate. Further, courts are public authorities under section 6 of the

Human Rights Act 1998 and so are required by that section to exercise their remedial discretion compatibly with the Convention rights. The Department therefore does not consider that the availability of the new remedial discretions will cause any issue of compatibility with Article 6.

### *Cart JRs*

9. Since the measure concerns proceedings which are analogous to leave to appeal, it may engage Article 6 where the dispute in question concerns civil rights and obligations (*Hansen v Norway, application no. 15319/09*).
10. Applying the general principles on access to a court set out by the Grand Chamber in *Zubac v Croatia (application no. 40160/12)*, the Department's position is that Article 6 does not require a further right of judicial review in relation to decisions concerning permission to appeal from the FtT to the UT. Permission to appeal will already have been considered by both the FtT and the UT (which provide the procedural safeguards required by Article 6), and the UT is regarded as a senior judicial body. The Department therefore considers that the measure does not interfere with individuals' rights under Article 6.
11. In any event, the Department's position is that any interference with Article 6 would be in pursuance of a legitimate aim to alleviate a significant burden on the court system. Having carried out its own analysis on the caseloads and success rates in relation to Cart JRs, the Department is of the view that this measure is proportionate to that aim.

### *Criminal Procedure Court Measures*

#### *Detailed summary*

12. The Bill creates an online procedure enabling an adult defendant to be offered the opportunity to plead guilty to specified minor non-imprisonable summary-only offences and receive an automatic online conviction and a pre-determined standard statutory penalty. It also enables defendants to provide information in writing (including and preferably online - henceforth "in writing") without needing to appear in person, including for an indication of plea, and enables matters such as mode of trial and sending to the Crown Court to be dealt with in writing. It gives the magistrates' court a power to determine trial venue where the defendant does

not engage in writing or attend allocation proceedings. It enables indictable-only cases to bypass the scheduled first appearance in the magistrates' court if no appearance is required, and to be sent on remand to the Crown Court in writing. The Bill gives the Crown Court a power to remit cases back to the magistrates' court for trial with consent or for sentence on remand in writing.

*Criminal Courts: Automatic online conviction and standard statutory penalty for certain minor criminal offences*

13. Clause 3 amends section 29 of the Criminal Justice Act 2003 and introduces new sections 16G to 16M to the Magistrates' Courts Act 1980 ("MCA 1980"), which make provision for certain summary only non-imprisonable offences, which are to be specified in secondary legislation (subject to the affirmative procedure), to be eligible for an automatic online conviction with a standard statutory penalty. These are offences which are relatively simple and straightforward and can be dealt with in a more proportionate way. Within that category currently, many plead guilty, are given a routine fine, and no significant discretion is used around sentencing. These provisions will only apply to defendants aged 18 or over at the date of the offence. Under this procedure, defendants who enter a guilty plea online will be able to choose to be convicted and accept a predetermined financial penalty without the involvement of a court. The policy is that an offence will only be specified where it does not have an identifiable victim, where it is relatively straightforward, and where a standard penalty may be appropriate. The intention is to start with relatively simple offence types e.g. travelling on a train without a valid ticket, to test the concept before expanding the process. Offences and penalties and other liabilities will be specified in secondary legislation subject to the affirmative resolution procedure. Where an offence is specified as eligible for this procedure, prosecutors will retain a discretion not to make the procedure available if a case is unsuitable where aggravating factors are present, such as repeat offending. The penalty imposed when the defendant accepts the offer of an online conviction will comprise of a fine of the amount specified in the secondary legislation; a surcharge of an amount specified in secondary legislation; prosecution costs of an amount set by the prosecutor; where the offence is specified in secondary legislation as eligible for compensation, compensation of an amount set by the prosecutor below a cap specified in secondary legislation; and where the offence is specified in primary legislation as eligible for penalty points on a driving record, penalty points

of an amount specified in secondary legislation. This information will be presented to the defendant to enable them to make an informed decision. A penalty imposed via this procedure will be enforced as if it had been imposed by the court. New section 16M MCA 1980 gives the magistrates' court a wide discretion to set aside a conviction imposed via this procedure, or to re-sentence a defendant so convicted, if it considers the conviction or the sentence to be unjust.

*Criminal Courts: conducting preliminary proceedings in writing*

14. Clauses 6, 7, 8, 9, 10, 11, and 12 enable various procedural steps in a criminal case to take place in writing, by removing statutory requirements for hearings at which the defendant must be present and by establishing alternative written procedures which the defendant can choose to follow instead. The aim is to enable the courts to dispose of uncontested procedural hearings more efficiently for all, and to allow case management steps to be taken in advance of the first in-court hearing. The first in-court hearing can, in the event of an indicated not guilty plea, be the trial and, in the event of an indicated guilty plea, be the hearing to formally convict and sentence.
15. The relevant procedural steps which can be conducted through an out-of-court, written procedure are as follows:
  - 15.1. short-cutting the allocation procedure so that a defendant charged with an either-way offence is asked from the outset whether they will consent to a summary trial if offered by the court;
  - 15.2. indicating a plea;
  - 15.3. allocating either-way offences to the magistrates' court or Crown Court (although adult defendants maintain the right to elect a Crown Court trial). This procedure includes allocating youth cases to the Crown Court where exceptions to the general rule of trial in the youth court apply. (Those exceptions are set out in section 51A(12) Crime and Disorder Act 1998.)
  - 15.4. sending of indictable cases (whether indictable-only or either-way offences allocated to the Crown Court) to the Crown Court for trial;
  - 15.5. enabling the Crown Court to remit an either-way offence to the magistrates' court for trial, with the defendant's consent, or for sentence.

16. Indicating a plea in writing and determining venue in writing will require the consent of the defendant. If the defendant does not engage in writing or appear at the allocation hearing the magistrates' court, if satisfied that the defendant knew of the proceedings and does not consider there is an acceptable reason for failure to attend, may proceed to allocate the case in the defendant's absence on the basis of an assumed not-guilty plea, but defendants continue to have an opportunity to elect jury trial.
17. Remitting a case from the Crown Court back to the magistrates' court for trial or sentence, in accordance with the Allocation Guideline requires the consent of the defendant (for trial) where the defendant is an adult at the point of that decision to remit. Allocation guidelines are guidance produced by the Sentencing Council on when an either way case should be tried summarily e.g. if a case has no factual or legal complications, a magistrates' court would be encouraged to bear in mind its power to commit for sentence after a trial and retain jurisdiction despite the fact that the likely sentence would exceed their powers. This would mean that the Crown Court could return a case that falls within that guidance (despite the fact that the magistrates' court might have to commit for sentence to the Crown Court after the trial). There is no right to elect in respect of a committal for sentence. Accordingly, the right to jury trial is unaffected.
18. All the above clauses raise points under Article 6 (right to a fair trial). For the purposes of this Memorandum, the Department has assumed that in principle Article 6 is engaged throughout the preliminary processes by which criminal charges are ultimately determined at a later trial. In so far as certain decisions under the new written/online procedure in relation to Article 6 are engaged, the ECHR implications are considered separately below. In relation to access to legal advice the operational intention at the outset is that the defendant will only be able to access the online portal via a solicitor's office link. The online portal will provide access to the online/written plea and allocation processes. Defendants will be given the option of accessing the portal through an online address and given a unique case number. A defendant is to be represented by a solicitor in order to proceed with the new written/online plea and allocation procedures (especially as members of the public will not have access to the online portal via the Common Platform). The presence of a legal representative will ensure that defendants

understand the process and will be able to identify any vulnerabilities. In relation to automatic online conviction for minor non-imprisonable summary offences the offender will be advised to seek legal advice before using the procedure. The Single Justice Procedure, already in existence, ensures defendants are questioned about legal advice etc. before proceeding.

*Article 6 and the right to an oral hearing in criminal proceedings (automatic online convictions and preliminary proceedings in writing)*

19. In criminal proceedings, the determination of a criminal charge will generally require an oral hearing, but there are exceptions, even at the stage of a substantive determination (*Jussila v Finland* [2007] 45 EHRR 39). The determination of a criminal charge includes the trial itself, and probably also any prior decision which has an important effect on the proceedings as a whole (*Salov v Ukraine* [2007] 45 EHRR 51).

20. The Department considers that in relation to criminal proceedings, enough safeguards are in place in our proposals to ensure compatibility with the Article 6 right to an oral hearing, or that the right is only limited in appropriate circumstances (in circumstances where Article 6 is engaged but the interference is justified). Automatic conviction safeguards include: the court having the power to set aside a conviction or a penalty if deemed to be unjust; it only being available to adults who plead guilty; the defendant being provided with all information needed to make informed decision (including the consequences of pleading guilty and accepting a criminal conviction). Preliminary proceedings in writing safeguards include: it will be at the discretion of the court to offer a defendant the option to engage online for indication of plea/allocation decisions and it will be entirely voluntary for a defendant to take the court up on this. In circumstances where the court/defendant does not wish to proceed online or where a defendant fails to engage online, the preliminary proceedings will default back to a traditional courtroom hearing.

21. It is already possible for the magistrates' court to deal with matters without any hearing at all. The Criminal Procedure Rules detail how certain matters may be considered without a hearing. These are largely pre-trial and enforcement matters. Pre-trial and enforcement matters do not generally have a determinative effect on the proceedings as a whole. The option of holding a hearing will remain, however,

and it will remain the case that in deciding whether to conduct any particular matter without a hearing, the court must act in accordance with the overriding objective of the Criminal Procedure Rules to deal with cases justly, which explicitly includes recognising the rights of a defendant, particularly those under Article 6 (see Rule 1.1(2)(c)). Finally, as a court is a public authority pursuant to section 6 of the Human Rights Act 1998, it must act compatibly with the ECHR, and therefore the court will have to order an oral hearing if Article 6 requires one.

22. The Department is therefore content that these provisions in Part 2 Chapter 1 do not give rise to an issue of compatibility with Article 6, in so far as the right to an oral hearing is concerned.

*Article 6 and waiver in respect of the right to an oral hearing in criminal proceedings (automatic online convictions and preliminary proceedings in writing)*

23. As a supplementary argument, it is possible in principle for a defendant to waive their rights to the protections guaranteed by Article 6, either expressly or impliedly, as long as that is done clearly and unequivocally, given freely on the basis of proper information as to the right being waived, and with such safeguards as are necessary in light of the significance of the right being waived (*Tolmachev v Estonia* [2015] ECHR 659).

24. Before a defendant can be said to have impliedly waived an Article 6 right, it must be shown that they were aware of the right, could reasonably have foreseen what the consequences of his conduct would be, and has chosen not to exercise them (*Jones v United Kingdom* [2003] EHRR CD 269 and *Colozza v Italy* [1985] 7 EHRR 516).

25. The proposals in Part 2 Chapter 1 are based on the informed consent of the defendant with alternatives for those who do not consent and safeguards for those cases where consent may be invalid. As a general point it is important to note that people who cannot, or may find it difficult to, engage with online processes will not be disadvantaged. There will be assisted online channels for defendants. Defendants would be able to seek help to engage with the procedures if they wished, and in any event their engagement in writing is not mandatory.

26. The Department considers that, where consent is relied on, these new procedures will ensure that the defendant is given enough information to make a proper decision to waive their Article 6 rights (particularly, the potential outcomes of following the written procedure compared to the in-court procedure); and that there will be adequate safeguards to protect against the consequences of the procedures applying in any case where the consent is invalid or open to doubt (for example, in the case of vulnerable defendants who may not understand the implications of the relevant process). The Department considers that these new procedures are compatible with Article 6.
27. Consent is particularly important in so far as the proposals relating to criminal procedure changes and the new automatic online conviction procedure are concerned. In relation to the criminal procedure changes, a defendant can choose to indicate their plea in writing for all offences, and, for adults charged with either way offences and defendants aged under 18 whose case is to be allocated, also to have the trial venue determined in writing. If the defendant does not wish to engage in writing on both of these matters, then the defendant must appear in court in person and the case proceeds in accordance with the existing procedures at a hearing before the court in the defendant's presence. For those who require an allocation decision, if the defendant does not engage with the written procedure, and also does not appear before the court, the decision on venue may be made in the defendant's absence if the court is satisfied that the defendant has been properly served; however an adult defendant retains a right to elect jury trial until the start of the summary trial.
28. In terms of safeguards, defendants will be given adequate information to ensure any waiver is effective for the purposes of Article 6. For adults charged with either way offences, the core information to be provided is set out in new sections 17ZA and 22A(1A) MCA 1980, and for those aged under 18 it is set out in new section 24ZA MCA 1980, and includes information that allocation decisions can be dealt with in the defendant's absence if he does not engage in writing or attend court. For other offences the Criminal Procedure Rules and Criminal Practice Directions may prescribe what explanations or information the court is required to send to the defendant to make a proper decision to consent to which procedure to follow. These will include an explanation of: the nature of the charge; how the written

procedure operates and any differences; the consequences of indicating a guilty plea or not guilty plea and how indicating a guilty plea may have significant consequences (such as the case being listed for a hearing where the court will formally convict and sentence for the offence); information as to the right for the defendant to seek independent legal advice and representation and advice as to how the defendant can seek such legal support and find out whether it is free or not. Before the defendant is asked to indicate any written plea, the online system will ask them to confirm they understand the consequences.

29. In case of an ineffective waiver, the following apply: the defendant can change their indicated plea. When the defendant attends court in person, which may be for the hearing to formally convict and sentence in respect of the indicated guilty plea or for a trial in respect of an anticipated not guilty plea, then the defendant will be required to enter a formal plea. Accordingly, the court can assess the extent to which the defendant is making an informed decision. To address any concerns that a plea may be entered on a person's behalf without his or her knowledge or consent, the court will be able set aside any steps of the proceedings of which the defendant was unaware.
30. Further, in circumstances where earlier steps in the proceedings are set aside (for example, a written indication of a guilty plea) on the grounds that decisions taken in accordance with the written information have been based on incomplete information or a lack of informed consent to the written procedure, there are evidential restrictions in general criminal law (section 78 PACE 1984) which enable the court to exclude evidence which it would be unfair to admit.
31. The proposals in relation to the automatic online conviction and standard statutory penalty also rely on waiver. Defendants will need to actively opt-in to choose to be convicted via this new procedure, by entering a guilty plea online and accepting the conviction and penalty. This new procedure will not apply to defendants who do not engage and pleading not guilty will mean the case is automatically listed for trial. If the defendant wishes to plead guilty but does not wish to accept the standard penalty or the online conviction, they can instead choose to have a magistrate consider that information via the Single Justice Procedure or have their case heard in court.

32. It is intended that defendants will be presented with a range of information (prescribed by the Criminal Procedure Rules) to allow them to make an informed decision to go down this route, including all the relevant evidence against them and the potential consequences of accepting the conviction and penalty, such as the disclosure regime. They will be given full details of the prospective fixed fine (and additional elements such as the surcharge, costs and compensation and penalty points if relevant) and details of the enforcement regime. They will also be given details of the range of sentences that would be available to the magistrates' court for that offence, and the factors the magistrates' court may consider when determining the appropriate sentence (such as means). As an additional safeguard the online system will also automatically ask the defendant a series of questions, the answers to which may prompt the system not to offer the online conviction option where it is inappropriate (e.g. if the defendant asserts there were mitigating factors or they wish a court to consider their means).
33. Defendants will not be penalised for opting out of this procedure, again ensuring the waiver is effective for the purposes of Article 6. Some defendants who do not proceed down this route may receive a higher fine from a sentencing court in light of any aggravating factors and/or the defendant's means; but equally some defendants may receive a lower penalty from a sentencing court in light of mitigating factors present and/or the defendant's means. It will depend on the facts of the individual case.
34. In relation to the safeguards in case of an ineffective waiver, the court will have the power to set aside a conviction, in the event that the court is satisfied that the defendant did not understand the consequences of their decision or the conviction was in any other way unjust. The court would also have the power to resentence the defendant if they find the conviction should stand, but a different sentence should be imposed.
35. The Department is therefore satisfied that, where waiver is relied upon, defendants will be effectively waiving their Article 6 rights and enough safeguards are in place to protect vulnerable defendants who may not be able to do so.

*Article 6 and open justice*

36. In relation to open justice:

36.1. The general rule under both the common law (*Scott v Scott*, [1913] UKHL 2) and Article 6 (*Axen v Germany* (1983) 6 EHRR 195) is that hearings be in public, because of the public interest in scrutiny of the judicial procedure.

36.2. 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* [2000] at paragraph 29).

36.3. The principle of open justice applies to interlocutory hearings as well as final hearings (*Graiseley Properties Ltd v Barclays Bank plc* (2013 EWHC 67 (Comm) at [16]).

36.4. Where there is no hearing, open justice will be served by the public having access to record of the court's decisions in the same way as Single Justice Procedure decisions are reported.

37. The Department is therefore content that in relation to the provisions in Part 2 no issue of compatibility with Article 6 arises in so far as open justice is concerned.

38. The provisions relating to conducting preliminary proceedings in writing in the criminal courts also apply to under 18s in the youth court. Safeguards are already in place to ensure the best interests of the child are primary and protected because the court has statutory duty to protect the welfare of children. The procedural safeguards which already apply to the youth court (for example, automatic reporting restrictions, appropriately authorised Bench, and use of age-appropriate language) will continue to apply in respect of online procedures. In relation to engaging with preliminary criminal procedures in writing, defendants under 18 will have access to information and legal advice to assist them in making this decision. In addition, there are new provisions to involve the parent or guardian of any child or young person charged with an offence: see Clause 13 for amendments to section 34A Children and Young Persons Act 1933.

39. Clause 12 provides, in relation to a defendant in the youth court who turns 18 before the start of the trial, for a power for the youth court to transfer the case to the magistrates' court or in the case of an either-way offence to offer the opportunity to the defendant to elect to be tried by the Crown Court.

## Non-criminal Court and Employment Tribunal Measures

### *The online procedure*

29. Clauses 17 to 24 may engage Article 6 throughout the process by which civil rights or obligations are ultimately determined.

### *Article 6 and the right to an oral hearing*

30. In relation to oral hearings:

30.1. 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 judgment of 26 April 1995, Series A no. 312*); 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 [2009] ECHR 1571*).

30.2. 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 [2005] UKHL 10*).

30.3. 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.

31. 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. 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.

32. The Department is therefore content that the provisions in clauses 17 to 24, do not give rise to an issue of compatibility with Article 6, in so far as the right to an oral hearing is concerned.

#### *Article 6 and waiver*

33. 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. 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 App. 1643/06, 28 October 2010*).

34. 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 only be made where all parties consent.

35. In civil proceedings, then, the issue of waiver tends to arise where parties consent to issues being determined on the papers where rules provide for determination at an oral hearing. Where consent is relied upon, if necessary, rules may ensure that affected parties are given enough information to make a proper decision to waive their Article 6 rights in this regard. Accordingly, and having with regard to the limited application of waiver in civil proceedings, the Department considers that waiver will continue to be compatible with Article 6 in the online procedure.

#### *Article 6 and open justice*

36. In relation to open justice—

- 36.1. The general rule under both the common law (*Scott v Scott* [1913] AC 417) and Article 6 (*Axen v Germany* [1983] ECHR 14) is that hearings be in public, because of the public interest in scrutiny of the judicial procedure.
- 36.2. 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 no. 35115/97, ECHR 2000-XII*).
- 36.3. The principle of open justice applies to interlocutory hearings as well as final hearings (*Graiseley Properties Ltd v Barclays Bank plc* [2013] EWHC 67 (Comm)), although they are of course likely to be of less interest to the public or press.
- 36.4. Where there is no hearing, open justice will be served by the public having access to the court's decisions

37. 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 have (for example) been employed in respect of remote hearings in a number of jurisdictions under the provisions of Schedule 24 to the Coronavirus Act 2020.

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

### **Article 13**

39. Article 13 protects individual's rights to an effective remedy.

### **Judicial Review Measures**

#### *Remedies*

40. This right will be engaged in circumstances where domestic remedies for an arguable breach of the ECHR are being considered in respect of clause 1. However, the measures do not limit the availability of any existing right for such a breach and their use remains open to the court's discretion. The presumption in

favour of any of the remedial discretions only operates in circumstances where its exercise would offer adequate redress in relation to the relevant defect and it may be rebutted where there is good reason to do so.

41. Further, the Court is required to consider the interests or expectations of persons who would benefit from quashing of the impugned act. This would include, for example, those who would be prevented from redress where the court had limited the retrospective effect of a quashing order. Further, it would be open to the court to impose further safeguards through the conditions on a suspended quashing order or prospective quashing order. For example, it could provide as one of the terms of the order that no action could be taken under the impugned act during a period of suspension. The Department considers that these are adequate safeguards to ensure that any individual exercise of the new remedial discretions provides an effective remedy in cases concerning violations of Convention rights.

#### *Cart JRs*

42. Article 13 does not guarantee a right of appeal/right of recourse against a judicial decision (*Csepyová v. Slovakia*, application no. 67199/01). As a general rule, Article 13 is not applicable where the alleged violation of the ECHR has taken place in the context of judicial proceedings (*Kudła v. Poland*, application no. 30210/96). An exception to this principle is where the complaint relates to breach of the Article 6 requirement for proceedings to be dealt with within a “reasonable time”.

43. As such, it is the Department’s view that Article 13 will not be generally engaged. However, where Article 13 could be engaged, due to the exception in *Kudła v Poland*, clause 2 would not prevent a claim alleging breach of the “reasonable time” requirement in respect of the relevant proceedings.

Ministry of Justice

19 July 2021