JUDICIAL REVIEW: PROPOSALS FOR REFORM (CP25/2012)

RESPONSE BY THE

CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION

1. The Constitutional and Administrative Law Bar Association ('ALBA') is the professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles. It is predominantly an association of members of the Bar, but amongst its members are also judges, solicitors, lawyers in public service, academics and students. It has over 1,000 members who include barristers who have acted for claimants and defendants in judicial review proceedings and in statutory appeals including in immigration, public procurement and planning cases. This response has been prepared by a sub-committee of the executive committee.

2. This response will address the issues raised in the same order as the Consultation Paper, but at the outset we register our concerns about the way in which these proposals have arisen and the manner in which they are presented.

3. Firstly, we are concerned about the unacceptably short time frame for the consultation, particularly given that it was started shortly before the Christmas and New Year holiday period. This reduces the effective consultation window to some 5 weeks, causing special difficulty for organisations which have to consult within their own membership when responding. It also makes it extremely difficult for consultees to gather evidence as to the potential discriminatory impact of the proposed changes. No explanation has been given as to why such a short consultation period has been adopted and we consider that there may, in due course, be a sound argument that the whole consultation is flawed, with the result that any changes introduced following it could be unlawful. In the context of changes,

which have constitutional significance, to procedural rules of judicial review which have been in place (in broadly their current form) for some 30 years, any justification for the consultation timeframe imposed seems to ALBA to be very hard to sustain.

Evidential basis and the case for change

4. The proposals outlined in the paper are described as being "simple and proportionate" (foreword) and as meeting a "pressing need", but there is an almost total absence of any empirical or statistical justification for the proposals. Broad assertions are made about matters such as the impact on costs and innovation [para 3, 34] or a "belief" that the threat of judicial review has a negative effect on decision-making [para 35] but these are nowhere substantiated and the paper instead relies on unattributed and unspecific "anecdotal evidence" [para 64, 79]. A central claim is that proceedings create delays and add to the costs of public services "in some cases stifling innovation and frustrating much needed reforms" but no attempt is made to quantify the costs or delays or to examine the costs of *unlawful* action. Nor is any single example given of an innovation or reform that was wrongly delayed or frustrated as a result of the current procedures. The result is that the paper fails to present any adequate justification for the changes sought.

5. These proposals intrude on the right of unimpeded access to the courts that has long be recognised as a common law right of fundamental importance (see e.g. *R v Legal Aid Board ex p Duncan* [2000] COD 159 (transcript at 456) and *Ahmed v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534 at 146) and it is wrong to treat judicial review as a kind of bothersome red tape that can be removed or substantially altered without harm. What is at stake is a right of such weight that "the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right" – *R v Lord Chancellor ex p Witham* [1985] QB 575 at 585. Any limitation will be carefully scrutinised by the courts. In these circumstances we doubt whether the changes can properly be introduced by means of secondary legislation at all.

6. This right is not only protected by the common law. The paper rightly notes that many applications for judicial review will raise issues under Article 6 of the ECHR (right to a fair hearing by a court of criminal charges and the determination of civil rights and obligations) although it misunderstands the reach of that Article – a point we return to below. There are other relevant provisions that the paper does not refer to but which also guarantee the right of access to the court. In particular:

    i. Article 13 ECHR requires that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

    ii. Article 47 of the Charter of Fundamental Rights of the European Union provides:

    > Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
    >
    > Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

7. Many European provisions relating to specific subjects also contain a guarantee of access to the court – for example Article 39 of the Procedures Directive (2005/85/EC) dealing with procedures on Asylum claims.

8. We accept that it is inherent in the idea of access to the courts that it may be subject to regulation (see e.g. *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at para 57) through measures such as time limits, threshold permission requirements and so on. The object of measures like this is not to limit the number of cases as an end in itself but to ensure, as far as possible, that the resources of the court and the parties are not diverted to dealing with

excessively weak or stale claims. But any restrictions of this nature will inevitably risk permitting some wrong decisions to stand, when otherwise they would have been successfully challenged. Every time this happens there is likely to be some injury to the rule of law, and to confidence in the integrity of the executive. For these reasons, limitations on access to the court can only be introduced after the most careful consideration, and where they are genuinely justified. They must be proportionate in the sense that they pursue a legitimate aim and they strike a fair balance having regard to the nature of the rights at stake (see e.g. *Seal v United Kingdom* (2012) 54 EHRR 6 at para 75 in connection with Art 6 and Wyatt & Dashwood: European Union Law).

9. In keeping with this, previous changes to procedure have been undertaken only after careful thought. Modern judicial review procedure has been shaped by two major reviews over the last 40 years, each of which was the product of full deliberation by distinguished experts:

    i. In 1978, the new form of RSC O. 53 was introduced following a Law Commission working paper and report. For the first time this required all applications for judicial review remedies to be made through a single gateway subject to a 3 month time limit and a requirement for permission. Before then many challenges that would today be called judicial reviews were ordinary private law claims for declarations or injunctions and they were not subject to any such requirement.

    ii. The current CPR O. 54 was introduced following a report by Sir Jeffrey Bowman[1] who was charged with putting forward costed recommendations for improving the efficiency of the Crown Office List that did not "compromise the fairness or probity of the proceedings, the quality of decisions, or the independence of the judiciary". We note that these last objectives receive no consideration in the present paper.

10. In contrast, and as far as we can tell, the present proposals were first foreshadowed in public at least in a speech given by the prime minister to the

[1] Other members of the committee were Lord Justice Simon Brown, Alan Cogbill (director of civil justice and legal aid reform in the lord chancellor's department, Professor Jeffrey Jowell Q.C., Mr Justice Keene, Bernadette Kenny (director of operational policy, LCD) and Anne Owers (director of the organisation justice).

CBI in November 2012 and there is no evidence of any research having been conducted before the consultation paper was published. It is unacceptable to seek to bring about far reaching change on the basis of the flimsy evidence presented in the paper. We do not consider that the material produced amounts to the kind of relevant and sufficient reasons necessary to justify the measure proposed (see e.g. *Sabeh El Leil v France* (2012) 54 EHRR 14 at para 67).

11. These proposals have to be assessed against a background where the process for applying for judicial review already imposes restrictions far beyond those that apply in other kinds of litigation. In an ordinary claim – which may have significant implications for the authority and for third parties – a claimant may start proceedings without any requirement for permission and most cases do not need to be started with all the supporting evidence in place. The usual time limit is 6 years, although there are shorter time limits for personal injury claims and for some specialist jurisdictions (e.g. discrimination claims). The initiative then passes to the defendant to apply to strike out the claim if they consider that it is not arguable or abusive. In contrast the permission requirement and short time limits already provide a very substantial degree of protection for Defendants (a point noted by Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237) and many commentators have argued that the existing procedures already strike the balance too far away from affording access to justice (see e.g. the Report of the Committee of the Justice/All Souls Review of Administrative Law in the United Kingdom, 'Administrative Justice - Some Necessary Reforms', 1988 – which recommended doing away with the leave requirement and 3 month limitation altogether). Even senior judges have commented that the parties to judicial review do not start with a level playing field. In *R v Lancashire County Council ex p Huddleston* [1986] 2 All ER 941 Sir John Donaldson MR observed that "the vast majority of the cards will start in the authority's hands". There is no general duty to give reasons for public law decisions and the existing time frame makes it extremely difficult for claimants to secure pre-action disclosure within the time limited for issuing proceedings. Claimants frequently lack basic material about the decision-making process, yet it is for them to make out an arguable case of error in a process that is front-loaded

so that they must bring forward their whole case and all of their evidence at the outset. If the government is intent on making it more difficult to gain access to the courts then serious consideration ought to be given to making it easier to have access to the decision-making process, so that claimants can decide on a better informed basis what decisions to challenge. With this in mind ALBA notes with some concern that in a consultation exercise running together with this one there are proposals to the opposite effect. The DCLG paper "Streamlining the planning application process" proposes (at para 56-68) to remove the (recently-introduced) requirement that planning authorities provide reasons *for* the grant of planning permission.

Growth in Judicial Review and success rates

12. The paper draws attention to the growth in judicial review claims and to the current level of some 11,000 cases per annum in support of its claim that there have been "significant changes in the way that judicial review has been used to challenge the decisions and actions of public authorities" and that "this has led to concerns that it has been developed far beyond the original intentions of this remedy" [para 26]. We find these claims difficult to understand and in particular we wonder what is thought to be the original "intention" of the remedy. Judicial review developed as a common law remedy over – as to its substance - hundreds of years and today it performs the same function that it always did, of ensuring that public bodies act within the limits of their legal powers, whether substantive or procedural. The grounds for judicial review, and the procedure to be followed, have continued to develop and there is, for example, now a better understanding about what kinds of decisions and decision-makers can be subject to judicial review. But the consultation paper fails to identify the developments which it suggests are the subject of concerns; the nature of those concerns and by whom they are held; and the meaning of the suggestion that the developments go beyond any original conception (whatever that may be) of the remedy. In making this point we are not simply picking at the imprecise language used in

the paper. It is necessary to know, with examples, what cases the paper has in its sights before being able fully to comment on the proposals.

13. When one looks at the figures in more detail then it can be seen that even the vague claims made in paras 26-7 are not made out.

14. No real comparison can be drawn with claims before 1977, when the modern procedure was introduced. At that time, many claims that would now be called judicial reviews were brought by way of ordinary action for a declaration or injunction.

15. For the more recent history, the graph at figure 1 shows that most of the growth in numbers is in the field of immigration. This is consistent with the research findings of Maurice Sunkin and Varda Bondy[2]. Many immigration cases have now been transferred to the Upper Tribunal and the remainder are likely to be transferred under measures to be introduced in the Crime and Courts Bill (see CP Para 25). The effect is that these figures are already out of date or will shortly become so, and it is wrong to seek to introduce changes to address a perceived problem that may already have been addressed. There is certainly no need to take such action without further study and research and the appropriate response is to follow and review the progress of claims in the Tribunal jurisdiction. For the avoidance of doubt we note that, in making this point, we do not subscribe to the view that there are too many immigration claims or that they are subject to systematic abuse or that they are issued purely to delay matters. The experience of the members of the ALBA committee who have been involved in drafting this response is that the high level of immigration claims is in large part caused by poor decision-making on the part of the Home Office. This view has the authoritative support of the Independent Inspector of the United Kingdom Border Agency, whose report on the handling of legacy asylum and immigration cases published on 22nd November 2012 stated in the Foreword that "*I was… disappointed to find that a lack of governance was again a contributory factor in what turned out to be an extremely disjointed and inadequately planned transfer of work. Such was the inefficiency of this operation that at one point*

[2] (SUMMARISED AT HTTP://UKCONSTITUTIONALLAW.ORG/2013/01/10/VARDA-BONDY-AND-MAURICE-SUNKIN-JUDICIAL-REVIEW-REFORM-WHO-IS-AFRAID-OF-JUDICIAL-REVIEW-DEBUNKING-THE-MYTHS-OF-GROWTH-AND-ABUSE/)

over 150 boxes of post, including correspondence from applicants, MPs and their legal representatives, lay unopened in a room in Liverpool." The problem is compounded by the fact that the Home Office frequently fails to respond fully or promptly to pre-action correspondence (a failing also displayed by many other decision-makers) so that the claim can only properly be evaluated after proceedings are issued. Often the decision under challenge is then withdrawn (and this may explain a substantial number of the cases that are not the subject of any judicial decision – see below). But even if permission is refused at this stage the problem may well still lie with poor and unresponsive decision-making in the first place which placed the claimant in the position when they had no option but to issue proceedings but without full information. No conclusions can be drawn about the immigration caseload without a good deal more research.

16. On any view the claims that are brought in judicial review (over all subject areas) represent only a tiny proportion of the total number of public law decisions made by central and local government, and which affect the interests of individuals and businesses. The claim that judicial review is in some way out of control or that it has become ubiquitous cannot be substantiated from the statistics. When one tries to identify specific subject areas then the relatively small number of challenges in any given area becomes still more apparent. For example, in a written response to a Parliamentary question about the statistics referred to by the Prime Minister in his speech to the CBI Lord McNally explained that only 169 of the 11,056 judicial reviews issued between 1st January 2012 and 31 November 2012 related to planning (Hansard HL 11 Dec 2012 – Col WA 221). In a written answer to a Parliamentary question tabled by Frank Dobson MP, the statistics provided by Jeremy Wright MP disclosed that in 2009, 2010 and 2011 there were between approximately 150 and 200 planning-related applications for judicial review, and the number of those for which a substantive hearing was allowed (i.e. permission was granted) was in the order of 1 in 3 to 1 in 4 (Hansard HC 26 Nov 2012 - Column 60W).

17. Nor it is right to say that only about 1 in 6 claims succeed, at least when one is considering civil (non-immigration cases). For this cohort the grant of

permission is in fact 26% (for 2011 Sunkin/Bondy ibid)[3]. But to this there must be added the cases that succeed without the need for a hearing. From the figures given at para 31 of the paper it appears that some 3,400 cases are never determined (11,000-7,600[4]). Again, the available research suggests that most of these cases will have been compromised on terms favourable to the Claimants. Even these figures must under-state the effectiveness of judicial review as a remedy because they do not reflect those cases where:

i. The claimant receives the relief that they seek following the pre-action protocol letter and so where, by definition, there will be no judicial review claim but where the arguments raised were nonetheless effective. They would not have been effective if the remedy of judicial review had not been available to back up the pre-action letter.

ii. Permission is refused because by the time of the hearing the decision has been revised so that the issues before the parties have changed. It frequently happens that the Defendant will, after issue of proceedings, concede a substantial part of the claim, but there is still some issue between the parties. At the hearing the court may well conclude that the remaining issue does not justify the claim proceeding to a full hearing. This is counted by the paper as a failure but it is wrong to infer this. It may well represent a considerable level of success for the Claimant – a success achieved through the proceedings.

18. Viewed overall, the true message from the statistics is that there is overall no disproportionate use of judicial review. The claims that are brought or intimated are effective to secure legal compliance in a substantial proportion of cases and the existing system does operate effectively to weed out those cases that have no reasonable chance of success at the permission stag,e with the result that only those with real merit proceed to a full hearing. Even

[3] This is itself may understate the true success rate because the reasons for refusing permission are not given. Permission might well be refused because the Claimant has achieve the practical outcome that they seek and so the claim is academic.

[4] This is obviously not precise because the cases determined may well have been issued in the previous year and not all claims issued in 2011 will have been dealt with then. But this is a consistent feature of the statistics.

if the failure rates were as high as the paper suggests it would still not follow that the process is being routinely abused or misused by the deliberate institution of weak claims or by the use of judicial review as a delaying tactic. Nor would it make out a case for the kinds of change being proposed. The mere fact that a claim fails (or fails to obtain permission) on the legal merits does not mean that it was hopeless or abusive. Without further analysis the paper simply cannot make any statement as to the numbers of case that are wholly without merit. The scope for judicial review as a delaying tactic is extremely limited. A claim does not operate as an automatic stay and for this purpose a specific order of the court is needed. If at that stage the claim appears to be weak or misguided then no relief will be granted. If abuse does exist then the court already has ample power to deal with it through costs sanctions (e.g. *Hamid* [2012] EWHC 3070 (Admin) – failure to use the new urgent consideration procedure).

19. Before leaving this point we address paragraph 32 of the consultation paper where the authors state:

    "but even where the Claimant is successful, it may only result in a pyrrhic victory with the matter referred back to the decision-making body for further consideration in light of the Court's judgment"

20. This misunderstands the nature and function of judicial review and is wrong as a matter of fact and principle. As a matter of fact, conscientious decision-makers often do reach different decisions on reconsideration when they are directly properly as to the law. But even if the outcome is the same, the difference is still between a lawful decision and an unlawful one. If the decision under challenge is in fact illegal or procedurally unfair, and is quashed then that represents complete success for the claimant and an important triumph for democratic legitimacy. Consider a case where an affected individual has been given no right to be heard in breach of the rules of natural justice. The decision is quashed and the matter is remitted. After a hearing the original decision is affirmed. It is demeaning to the claimant, and ignores the importance of the rule of law, to suggest that the original victory was in some way meaningless. What was at stake was the fundamental right of the claimant to participate in a decision affecting them and to understand the outcome.

Delays and defensive behaviour

21. At para 33 the paper notes that there are substantial delays in processing claims for judicial review. We agree. The statistics show that there is a substantial backlog of cases. But in ALBA's view, one very important reason for the high workload of the court is the approach taken by government bodies to judicial review, as touched upon above. These matters include, in some cases, failures to respond to pre-action letters, defence of meritorious claims until shortly before permission hearings, and poor quality decision making in the first place. In the experience of ALBA members (some of whom regularly appear for the government in judicial review litigation) these are particularly acute in the immigration field, precisely where the volume of claims is highest, and this means that the impact of this kind of government behaviour is most pronounced. Some administrative steps can be taken to reduce the backlog and we touch on these below, but ultimately this is a matter of the allocation of court resources. Too few judges have been made available to the Administrative Court to deal with permission applications.

22. In any event, the practical solution to delays in the Administrative Court is not to limit the ability of claimants to litigate as proposed in the paper. Other measures that might be taken include:

    i. Greater use of the power to transfer to the Upper Tribunal.

    ii. Greater use of the Regional Offices.

    iii. Greater use of the power to call a case in for a hearing without a paper determination where it is clear that there will be a renewal in any event or where circumstances otherwise justify it. In many cases, particularly where both sides are represented by experienced legal teams, it may well be obvious that there will be an oral hearing if permission is refused on the papers. In such cases it is a false economy to have a written and oral stage since it only causes further delays. It is suggested that listing a case for an oral hearing in such circumstances is a matter that could properly be delegated to court staff in the administrative court office.

23. These measures ought at least to be considered before the more drastic steps proposed in the paper are adopted.

24. The paper makes various assertions about the effect of delays (e.g. para 36) but it does not produce any evidence or examples to show that there is any significant problem with the process of judicial review preventing vital infrastructure or other projects from going ahead. Overall, the number of such projects affected by judicial review is tiny and where there is a real need for urgency then the court can accommodate it. The paper rightly points out that there is a general problem with delay but the court can and does list cases as a matter of urgency where needed.

Defensive behaviour

25. At paragraph 35 the paper states:

> *"It is not just the immediate impact of Judicial Review that is a concern. We also believe that the threat of Judicial Review has an unduly negative effect on decision makers. There is some concern that the fear of Judicial Review is leading public authorities to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge".*

26. No evidence is given for this "belief" and in the absence of anything to substantiate it the paper does not come close to establishing sufficient grounds to limit access to the courts. The implication is that public bodies go further than they need to and so (presumably) waste resources through unnecessary procedures and the like. This is simply not made out. Defendants in judicial review claims are almost uniformly experienced or professional decision makers with access to expert advice and well able to make and maintain robust decisions in the face of specious complaints or threats of judicial review. Moreover, para 35 gives no weight to the countervailing point, which is the subject of a considerable academic literature, that the threat of judicial review aids good decision-making and causes public bodies to reflect on the action they are taking and to ensure that it is lawful. We would argue that the benefits of this far outweigh any unquantified fear of litigation.

27. In any case, it is hard to see where this point leads in terms of the proposals in the paper. The implied suggestion is that authorities ought in some way to be freed from the risk of judicial review at the time they are making their decisions. But that would entail a change in the substantive law or some provision ousting the power of the court to intervene altogether. Far reaching suggestions of that kind are, quite rightly, not pursued. However, if the suggestion is that the proposals will result in fewer claims being brought and therefore less concern on the part of decision-makers that their decisions will be challenged, then it might appear that the proposals are being pursued for an improper purpose in that they are an attempt to limit meritorious (as well as unmeritorious) judicial review claims.

SPECIFIC PROPOSALS

Time limits

Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

28. No. The comparison with the time limit for an appeal is inapt and does not justify any reduction in the time limit. Statutory challenges in the planning sphere (sections 288 and 289 of the Town and Country Planning Act 1990, and section 113 of the Planning and Compulsory Purchase Act 2004, for example) occur where parties to the underlying appeal have been closely involved in a structured process, are often represented by legal advisors, and will have been directly notified of the appeal decision when it is issued. That decision will include information which explains the procedure for challenging the decision in the High Court, as well as the time limit for doing so - that time limit does not include a requirement to act promptly. The pre-action protocol is of relatively little relevance in relation to such decisions because once taken they cannot usually be undone, unless they are quashed by the court. Whilst it is the case that challenges to decisions concerning applications under the Planning Act 2008 (major infrastructure proposals) must be made by judicial review, promptly, and within 6 weeks, in such cases potential challengers will have been registered as 'Interested Parties' from the outset of the process of examination of the proposal, and will have been directly informed of procedural, and substantive, decisions at all stages by the Examining Authority.

29. Judicial review of planning decisions by local authorities (or the Secretary of State), on the other hand, often involves challenges by individuals who may not have been aware that the relevant decision was taken until days or weeks afterwards (in most cases they will not have been directly notified of the decision). They will then have to obtain legal advice, and comply with the pre-action protocol by writing to the relevant public authority to set out their

concerns about the legality of the decision. Often they will need to ask that public authority to provide information which is, notionally, publicly available, but difficult to track down, and which formed part of the corpus of information upon which the decision was based. They may need to apply for legal aid, or contemplate applying for a Protective Costs Order. There will be, in short, a great deal for many prospective judicial review claimants to do before they make an application to the Administrative Court, a step which is not taken lightly because of the costs involved in doing so. At the same time claimants will be aware, or will become aware, of the need for them to act promptly in those cases where the promptness requirement still applies. There is no valid comparison between planning judicial review, and statutory challenge in planning.

30. There is a further potential impediment to third parties being fully informed about planning decisions affecting them. The DCLG has just launched a consultation "Streamlining the planning application process" (January 2013) (https://www.gov.uk/government/consultations/streamlining-the-planning-application-process) that proposes to remove the current (and only recently-introduced) requirement for planning approvals to include in the notice of consent a summary of reasons for the approval along with a summary of the policies relevant to the decision (see paragraphs 56 et seq of the consultation). The rationale is that the material can be found elsewhere. This is not the appropriate place to debate the correctness underlying this proposal. The important thing is that whereas applicants and their advisers will be very familiar with the background material relevant to the approved scheme, third parties will have to find and assimilate any material (such as an officers' report) to discern the reasoning behind the decision-making. Indeed, members of the public may be aware of a *resolution* of a local authority to grant planning permission, because that is the event which tends to attract publicity, but may not be aware of the formal grant of planning permission (the decision that must be challenged) which can occur weeks or months later depending on whether there are matters such as planning obligation agreements to be concluded. Since the formal notice of the grant of planning permission is only sent to the applicants, third parties may not even know of a planning consent being issued until it is published in the press (if it is

published at all, as that depends upon the levels of local interest) or available on, say, a council website. Legally the consent exists once notice of it is sent to an applicant/agent and therefore time would run ordinarily from this moment and not, as a matter of law, a third party's knowledge of it being issued.

31. There is no discussion in the Consultation Paper of whether the promptness requirement is to be retained in cases where the time limit is reduced to six weeks (30 days). The assumption must be, therefore, that the promptness requirement will be retained. There is no attempt to address the implications of a time limit that has been halved, coupled with a requirement to act promptly (which conceivably could require a claimant to make an application before half of the shortened time limit period has elapsed, depending upon the facts in any given case). This is all the more surprising given the fact that the application of the promptness requirement is likely to be unlawful in cases which involve the assertion of European Union law rights because 'promptness' is too uncertain (see the decision of the Court of Justice of the European Communities in *Uniplex* [2010] 2 CMLR 47, and the Court of Appeal in *R* (*Berky)* [2012] EWCA Civ 378 [2012] 2 P. & C.R. 12).

32. Our observations above relate to planning cases, but the same reasoning applies to procurement decisions. Individuals who have standing to bring a claim under the Regulations are likely to be disappointed tenderers who will have been closely involved in the process and will follow and be informed of the outcome. It is wrong to extend rules relating to them to claims that may be brought by strangers to the process. There is a further problem in relation to procurement case as to how one defines the scope of the claim subject to the shorter time limit. There are two issues:

    i. Some judicial reviews in this field relate not to the outcome of a procurement exercise but to the design of the process or even the decision to tender at all. Recent examples include cases brought in relation to tenders for legal services contracts. These challenges fall outside the Regulations and the grounds for bringing them ordinarily arise before the tendering exercise starts. We cannot see why any special rule ought to apply in these cases because there is no real

comparison with the procurement process under the Regulations, nor do they fall within the "ambit" of the Regulations simply because the subject matter is procurement. Such claims have far more in common with ordinary judicial review claims to challenge any other decision and the same rules should apply to them. This strikes a fair balance because it can be particularly difficult to obtain information and so a shorter time limit would cause real difficulty. The court would in any case have the power to refuse permission or relief if the claim was not prompt to do so would cause prejudice to good administration. So a 3 month time limit does not harm the public interest in ensuring that procurement proceeds swiftly where appropriate.

ii. Secondly the paper suggests that the restricted time limit should apply to "proceedings which are based on decisions or actions within the ambit of the Public Contracts Regulations (whether or not the claimant is an economic operator or the public contract is excluded from the regulations)". We are not clear what is being suggested here. We understand (but disagree with) the suggestion that the same time limit should apply to a substantive decision under the Regulations whether the claim is brought under those Regulations or by judicial review. But we do not understand what is meant by a contract being excluded from the Regulations yet being within their ambit. If the Regulations do not apply then there is no reason for the time limit under the regulations to apply by analogy. The existing power of the court to refuse relief on the grounds of delay is a sufficient protection against unmeritorious or vexatious claims.

Question 2: Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol? If not, how should these arrangements be adapted to cater for these types of case?

33. If the relevant time limit is reduced to 6 weeks, or 30 days, particularly if the promptness requirement is retained (in cases which do not involve European Union law rights), then it seems likely that more cases will be brought more

quickly, because claimants will act on a protective basis to avoid being held to be out of time. More cases will be brought without any real pre-action discussion with the public authority concerned, because there will be insufficient time, and perhaps also in circumstances whereby a claimant is unsure of the strength of his or her case, because not all of the necessary information about the decision can obtained within the shorter time limit. There is likely to be an increased cost to public bodies in having to respond to such additional claims.

34. There will be, in short, insufficient time to fulfil the requirements of the pre-action protocol, and more importantly the useful purpose which that protocol can serve (such as narrowing the issues in dispute, encouraging settlement where possible, and so on) will be impaired or indeed nullified. There is no practical way in which the requirements of the pre-action protocol could be "adapted" to work within the proposed shorter time limits.

Question 3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

35. The suggestion of reliance upon the power of the court to extend time in appropriate cases is, with respect, misconceived. The present caselaw suggests that such a power would be exercised only in limited circumstances. No properly-advised litigant would rely upon the possibility that a court would allow a claim brought out of time – it would be folly to so do.

Question 4: Are there any other types of case in which a shorter time limit might be appropriate? If so, please give details.

36. No. We are opposed to the proposed changes to judicial review time limits, certainly in the absence of any real evidence as to the need for these changes, and we are not aware of any other types of case in which a shorter time limit might be appropriate.

37. This question also highlights the dangers of proceeding without real and substantial evidence of a problem. The time limit to apply for judicial review is already very short and should be reduced further only if there is a compelling reason to do so. This will require evidence of a real practical problem caused by the existing time limit that cannot be addressed in different and more proportionate ways. It is not sufficient to refer to some related appeal period by analogy, in order to demonstrate the need for change as this is unlikely to be a valid comparison. If this proposal is to be taken forward then there needs to be a further consultation process directed at the specific changes contemplated.

38. On a related matter we suggest that the pressure to issue claims could be lessened if the parties were permitted (as between themselves) to extend the time limit while they comply with the pre-action protocol. At present the time limit cannot be extended by consent and this leads to case being issued unnecessarily as a protective measure. Any such extension would not prevent some third party from arguing that relief should be refused because of prejudice to good administration but it would have the effect that as between the parties to the agreement, neither could rely on delay covered by the period of the agreement.

Time limits in cases where there are continuing grounds

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

39. We consider that the current wording is clear and does not need any amendment. It provides that the time for bringing a claim for judicial review starts from the date on which the grounds for judicial review first arose. In our experience, there are few cases where the simple presentation of fresh argument will cause grounds to arise again. The examples given in one of the leading texts (see Fordham: Judicial Review Handbook 6th edn Para 26.2.8(b)

heading "Delay: resistance to use of later targets") show that permission will rarely be granted where there has been an attempt to revive "stale" grounds in this way. If permission is granted then it is likely to be because the courts consider that the fresh material has actually given rise to a fresh decision or fresh material has made it appropriate to extend time. The consultation paper does not provide any examples of what are said to be problematic cases and if they exist then they need to be analysed to determine what was actually decided.

40. In any case we consider that the proposed change is liable to create many difficulties of interpretation, which will lead to much satellite litigation and precipitate challenges. We also consider that it is unsound in principle.

41. We deal first with principle.

42. The proposal confuses several kinds of case:

    i. Firstly, a continuing act, for example imprisonment, or maintaining a prosecution. This will continue, for essentially the same reasons, throughout.

    ii. Secondly, a series of decisions (multiple decisions in the language of the proposal). Examples might be in a community care case where a person's condition changes over time or where new evidence becomes available, whether or not in the context of threatened judicial review proceedings. In our experience it is quite common for there to be a "moving target" of this kind in case involving benefits or similar social services entitlements or where the factual circumstances are subject to frequent change.

    iii. Thirdly, there is the example of a single act but where the parties continue to argue about it and where the consequences endure over time. For example, a decision to close a library, where the parties engage in protracted correspondence.

43. In the first two kinds of case the ordinary rules of limitation would either treat the continuing act as being done at the end of the period (the approach in

the Equality Act 2010) or would treat the cause of action as one that accrued from day to day. In either case time would only start to run from the end of the period (although the Claimant might not be able to seek damages for an earlier period).

44. If a different rule is to apply in judicial review claims then it requires special justification. The reason apparently given is that to adopt the general rule would "essentially frustrate the application of the 3 month time limit".

45. We consider that this reasoning fails to consider what the 3 month time limit is for, or to consider it in the context of the objects of judicial review more generally. The 3 month limit is not an end in itself but is there to protect good administration. One aspect of this is that public bodies need to be able to move forward, confident that their past decisions will not be unpicked when they may have allocated time and resources on the assumption that they are correct and when third parties may have done the same. It may be questioned whether this is a necessary in many cases which involve a simple relationship between an individual and a decision-maker but it is outside the scope of this response to consider a wholesale revision of time limits.

46. We fail to see how, in scenarios i and ii above, it frustrates the objects of a limitation period, or is in any way objectionable, for time to run from the latest date.

47. If an authority is continuing to act in a way that is unlawful, then they should be liable to be prevented by the court from doing so. It cannot make any difference that they are doing so because of a mistake that lay some time in the past. The paper cannot mean to suggest that somebody should remain in custody because the claim was not brought within 3 months of the first decision. As always, there is the safeguard that the court may exercise its discretion against permission or relief if it would cause prejudice. The fact that remedies are in most cases discretionary rather than mandatory, meaning that a remedy could be withheld if the court concluded that there had been an abuse of the court's process by the manner in which the claim was brought, is an important point which the Consultation Paper fails to addresse.

48. Likewise, if an authority makes a series of distinct decisions, then the affected citizen has a right to have each of them taken lawfully and there is no conflict with good administration in allowing an individual to challenge the last of them. If this is simply a device to re-open a matter from long ago then the courts can be relied on to prevent that, through their decisions on permission to apply for judicial review, and exercising their discretion whether or not to order a remedy.

49. The only potential issue arises in relation to scenario iii above, but in that case permission is routinely refused in accordance with existing principles and no new rules, or gloss on the existing rules, is necessary.

50. We also consider that the proposed rule is impracticable. It is extremely difficult to identify what is the first "instance of the grounds", not least because grounds for judicial review do not arise in the same way as other causes of action but may depend on a combination of legal or factual matters involving an initial error and then the claimant being sufficiently affected to have standing. Consider a disputed byelaw. Is the first "instance" when it is passed or when the claimant is affected by it? In any case the proposed gloss will lead to endless argument about whether the new decision is truly a new decision or only a further "instance". Such satellite litigation is unlikely to lead to improvement in the time taken to deal with judicial review applications, or the burden on public authorities.

51. Finally, the proposed change is an invitation to issue proceedings early on a precautionary basis and so will lead to a greater, rather than lesser, number of judicial review applications.

52. In summary, we do not think that a case has been made that there is any problem requiring change. If there is a problem then the present proposal will make matters worse.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

53. We have covered the risks in answer to Q5 above.

Applying for Permission

Option 1: restricting the right to an oral renewal where there has been a prior judicial hearing of substantially the same matter

Question 7: Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a "prior judicial hearing"? Are there any other factors that the definition of "prior judicial hearing" should take into account?

54. The consultation paper has omitted a necessary question here, possibly as a result of oversight, and so we deal with it under this question. The first issue is not how to define "prior judicial hearing" but whether the right to an oral hearing should be restricted in these cases at all. We do not agree that there should be any such restriction.

55. In the first place, and in common with many of the other points that we make in response, we do not think that the paper has made out any case for charge from the existing procedure, nor has it shown that the putative target of this measure is the cause of any particular problem that needs to be addressed. The complaint seems to be [para 76] that "unfounded or misconceived cases are taking up too much time and causing too much uncertainty". This misunderstands the statistics (see above). However, even if this was accurate as a general proposition, there has been no attempt to analyse how many cases would fall within the proposed rule. The paper asserts at paragraph 78 that "many judicial review proceedings involve matters which have already been the subject of legal proceedings" but our own experience is that this is not the case. The vast majority of cases in the Administrative Court involve non-judicial decision-makers. Judicial reviews of prior judicial decisions are likely to comprise only a tiny proportion of the

caseload of the Administrative Court, and will bear a correspondingly small part of the responsibility for any delays in the overall system.

56. The one significant exception to this that ALBA can see, is that the proposal may catch Parole Board hearings. For reasons that are historical (rather than anything else) there is no statutory right of appeal, on a point of law or otherwise, from Parole Board decisions. Judicial review in effect fills that gap. We have never heard it suggested that the availability of judicial review here is disproportionate, and given that parole decisions engage Article 5, and have major implications for the liberty of the individual, we think this would be a very hard position to sustain. Judicial review aside, there is only one stage of judicial consideration before the Parole Board. The consultation paper does not appear to appreciate the implications of the proposals for this kind of case and, so far as we can see, was not aimed at it. Whilst the numbers of such cases are significant, they are not so significant that the removal of a right to oral hearings in such cases is likely to have make a material change to the backlog in the Administrative Court, and it would be highly undesirable.

57. A related point can be made about the "uncertainty" being caused by such judicial reviews. The point seems to be that delays caused waiting for an oral hearing after permission has been refused on the papers are unacceptable. But this can only have a marginal impact. Moreover, the paper does not consider who is likely to be affected by the delays. For example, if the target of a judicial review claim is a decision of a magistrates court, then the main affected party is the claimant him or herself. It is obviously important that criminal proceedings are resolved promptly and victims and witnesses should not be kept in limbo but these disadvantages have to be weighed against the crucial importance of the claim for the Defendant. It is also unclear to us how it is said that judicial review can be used as a "tactical device simply to delay decisions and the consequences flowing from them" [para 79]. As we have already noted, an application for judicial review does not operate as a stay of proceedings without a further order and if the claim is weak (as implied here) then no such relief will be granted.

58. We also consider that the change is wrong as a matter of principle, impractical and may well be unlawful.

59. The paper seeks to draw an analogy with the position with regard to the Upper Tribunal following the decision in *R (Cart) v Upper Tribunal* [2011] UKSC 28 and the changes now made to CPR 54.7A. However, this is misplaced. The decision in *Cart* followed a complete re-structuring of the Tribunal system as a result of which the government's initial claim was that the Upper Tribunal was not amenable to judicial review at all. The High Court and the Court of Appeal disagreed, but held that the grounds for judicial review ought to be limited to jurisdictional or other fundamental errors or denials of justice. The Supreme Court did not set the bar for judicial review that high, but held that it was the same as the 'second appeals' test. It recommended that the rules should be re-considered and this led to what is now Rule 56.7A. A crucial part of the reasoning leading to the conclusion and recommendation was that a decision to refuse permission to appeal to the Upper Tribunal will already have been the subject of two judicial decisions including determination by a specialist judge at High Court level. The procedural changes are therefore inseparable from the substantive decision made in that case about the scope of and test for judicial review in the new Tribunal system.

60. The present proposal is not made against this legislative background and is explicitly intended to apply to all judicial decisions. The analogy with *Cart* is therefore not appropriate.

61. We now turn to why we think the change is likely to be unlawful. It is disproportionate. It operates as a blanket rule in any case where there has been a prior judicial process. The aim of the measure is to reduce pressure on the courts and delay from having to deal with hopeless cases, but the rule does not differentiate between weak and strong claims or have regard to the importance of the case. The intention appears to be that all are barred from an oral hearing. It can therefore be seen that the impact on claimants is uniformly severe. But, as we have suggested above, the corresponding benefits are tiny (particularly when one considers the other procedural

safeguards that would be needed) and cannot outweigh the right to a hearing.

62. This is a further reason why the change is unlawful. The cases caught by the proposal cover a wide range of subject areas types, some of which will touch on other fundamental rights and may well engage Article 6 ECHR (as accepted in para 77) or Article 47 of the Charter. The Convention caselaw makes clear that ordinarily the right to a hearing means a right to an oral hearing (*Goc v Turkey 11 July 2002 ECtHR GC at para 46-7; Jussila v Finland* (2007) 45 EHRR 39). *Miller v Sweden* (2006) 42 EHRR 51 was a case dealing with disability benefit. The Claimant's application was rejected by the social insurance office and he appealed. He requested an oral hearing but the county administrative court rejected his application and dismissed the appeal. The Court held that there had been a violation of Article 6. In particular it said:

"29 The Court reiterates that in proceedings before a court of first and only instance the right to a "public hearing" under Art.6(1) entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing. The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the ***nature of the issues to be decided by the competent national court, not to the frequency of such situations****. It does not mean that refusing to hold an oral hearing may be justified only in rare cases. For example, the Court has recognised that disputes concerning benefits under social-security schemes are generally rather technical, often involving numerous figures, and their outcome usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social-security cases".*

63. At para 34 the court held that the issues were not straightforward or clear cut and that

"*the Court considers that the issues raised by the applicant's judicial appeal were not only technical in nature. In its view, the administration of justice would have been better served in the applicant's case by affording him a right to explain, on his own behalf or through his representative, his personal*

situation, taken as a whole at the relevant time, in a hearing before the County Administrative Court.

"*35 In these circumstances it could hardly be said that the applicant's claim was incapable of giving rise to any issue of fact or of law which was of such a nature as to require an oral hearing for the determination of the case*".

64. What emerges from *Miller* is that:

    i. It is necessary to show exceptional circumstances before the court can depart from the need for an oral hearing.

    ii. Exceptional circumstances can be demonstrated by case type but this depends on the issues before the court and **not on the classification of the earlier decision-maker**. The issues must be such that they are especially suited to a paper determination.

    iii. The question whether a dispute is capable of being resolved on the papers must be answered by asking whether it is "incapable of giving rise to any issue of fact or of law which was of such a nature as to require an oral hearing for the determination of the case".

65. It is self-evident that these tests cannot be met by a rule that adopts a blanket approach to <u>any</u> judicial determination whatever the subject matter. It requires a careful analysis on a case by case basis. The court must be satisfied to a high degree that it has all the relevant material and that a hearing will not add to it.

66. We also consider that the rule may well be unlawful because it fails to provide equivalent access when compared to other avenues of appeal. This may mean that, so far as EU rights are concerned, it fails to meet the requirement that the vindication of such rights is not subject to less favourable conditions than apply to similar domestic rights. Where there is a right of appeal to the high court or court of appeal with permission then the usual rule is that the application may be renewed to an oral hearing if it is refused on the papers, even if the original decision-maker was a judge. Why

should a different rule apply where the only route of challenge is by judicial review?

67. At para 77 the paper suggests that its proposed rule will only apply where there has already been an Article 6 compliant hearing or where Art 6 is not engaged because the claimant has failed to make out an Art 6 case to be determined. This misunderstands the operation of Art 6.

68. The fact that there has been a prior hearing is relevant but not decisive. It is well established that where there is a right to appeal or to challenge an earlier decision then the appeal process must itself satisfy Art 6, and in any event the process must be assessed as a whole so Art 6 is not exhausted at the point of the original decision. Secondly, the question whether or not there has been an Art 6 compliant hearing may well be the very point at issue in the judicial review. So one cannot use this as a basis for saying that a hearing at the review stage is unnecessary.

69. Secondly, it is simply wrong to say that a claimant who fails to establish their substantive claim has no Article 6 right. The right is to a determination as to whether or not the right exists and so applies to any arguable claim under domestic law, even if the court decides that there is no cause of action – *Z v UK* 34 (2002) EHRR 3.

70. We also consider that the rule is liable to be impractical and counter-productive.

71. It will disadvantage litigants in person and those with disabilities as they may well be less able to present their arguments in writing and cannot anticipate the types of point that may be taken against them.

72. It is bound to lead to more appeals since this will be the only way in which an adverse decision might be challenged.

73. If a change along these lines it to be introduced, we do not agree that the existing definition of a court in the Contempt of Court Act 1981 should be

used. This proposal fails to recognize that the definition in that Act serves a wholly different purpose. It is intended to identify the kinds of decisions that ought to be protected by the measures contained in that Act directed to maintaining the integrity of the judicial process. The present proposal is instead concerned with identifying legal error. The point is apparently that where there has been a prior judicial process then there can be a high level of assurance that the court has "got it right" and so only a cursory paper-based sift is needed at the next stage. Experience shows that this is not the case as a general proposition, but it is obviously not the case when one considers the range of decision-makers caught by the definition in the 1981 Act. It can include part time decision-makers with no legal qualifications or experience (for example lay magistrates or deputy coroners). There is no reason to accord to these decisions any kind of presumption that they are especially likely to be right or to restrict challenges to them.

74. Therefore, if this change is to be introduced, then we recommend that it should only apply to judicial decision-makers who are:

    i. Full time judicial office holders whose appointment has required a legal practice qualification of a level of seniority comparable to a circuit judge or higher – this gives some assurance that they are sufficiently experienced.

    ii. Operating within a specialist jurisdiction where the subject matter is apt for determination on the papers alone - so meeting the test in *Miller*.

75. We think these limitations are essential if the proposal is to be implemented, but in practice we consider that this is likely to apply to very few decisions. This in itself further calls into question whether the reform is practical or cost effective.

76. If the change is to be introduced then we also consider that it is necessary:

    i. Formally to allow Claimants a right of reply to the Defendant's acknowledgment of service. It is unacceptable for the Defendant to have the last word and yet to prevent an onward challenge. This will,

in itself create further delays of the kind that the paper says it wishes to avoid.

ii. To introduce some limitation on the level of judge whose refusal of permission will limit the right to renew. Formerly, permission decisions had to be made by full time High Court judges assigned to the Administrative Court. Such decisions may now be made by deputies. Part time appointees may well lack the necessary experience and breadth of knowledge necessary. Therefore, this change should only apply to refusals of permission by full time judges of the Administrative list.

Question 8: Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

77. The judge dealing with the application for permission to apply for judicial review should decide this question, if it is to be decided at all.

78. We do not agree with the proposed test "substantially the same matter". In our view this is fraught with difficulty and is unacceptably vague. In itself it is a reason why this proposal ought not to be adopted and, again, it is bound to lead to large amounts of satellite litigation. If there is a case for limiting judicial review because of the special characteristics of a prior judicial determination then there is no reason not to apply the rules of *res judicata*, or 'issue estoppel', to determine what issues are subject to the restricted procedure. These rules are well known and the effect will be that a claimant will only fall under the narrowed procedure if the claimant would be prevented from litigating their application again because of issue estoppel. This means that the identical issue must have been determined by the prior judicial process.

79. But this throws up a further problem. What if, as is likely to be the case, the new application raises new matters (which may have arisen recently) in addition to the older matters? The relationship between the old and new

matters may well be difficult to determine on the papers and the new matters might shed light on whether the other matters had been correctly decided at all. It is unfair to deny the claimant a renewed hearing on the whole of their claim in that case and equally it would be absurd and wasteful to have a two track procedure whereby part of the claim was on the papers only and part subject to oral renewal. So the restricted rule ought only to apply where the entirety of the claim has already been determined in a prior judicial process.

80. Finally on this point the rule, if introduced, should not be mandatory. A claim may raise a point of genuine difficulty where the court considers that there should be a hearing or that the Claimant should not be shut out despite the refusal on the papers.

Question 9: Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

81. If this change is to be made then the burden should lie on the Defendant to demonstrate that the restricted rule applies. They should do so in their AOS, as by that stage it ought to be clear whether the rule applies. If the point is not taken or if the decision is that the matter does not fall within the restricted rule then that should be an end of the matter and the Defendant should not be permitted to raise the point again in opposition to any renewed hearing that does take place.

"Totally without merit" cases

Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as "totally without merit", there should be no right to ask for an oral renewal?

82. We do not agree. A 'totally without merit' assessment in this sense has no place in the judicial review process. As we have pointed out above, the

consultation paper has misunderstood the statistics and has incorrectly drawn the inference from the statistics that "few cases stand any chance of success". Even if few cases overall did succeed, that would not justify the conclusion that any significant proportion of those cases are totally without merit. The propositions are entirely logically separate.

83. There are already adequate safeguards against abusive applications for judicial review, and sanctions can be applied in wholly unmeritorious case (as explained in paragraph 88 of the paper). At present, a decision that a case is totally without merit can only preclude an oral renewal where that decision is made in the context of an appeal under CPR part 52. However, this is subject to certain safeguards:

    i. Only certain appropriately qualified or specialist judges may so certify (CPR 52.3(4A)). In any case if a determination were made by a county court judge then it would itself be subject to judicial review.

    ii. The power is exercisable on appeal only under the CPR, where the decision under appeal will already have been the subject of a determination in accordance with the CPR and there will be a fully reasoned judgment.

    iii. The appellant will have had an opportunity to present their claim for permission to appeal orally to the court below, and the court determining the application for appeal will have access to the reasons given by the court below.

84. No real analogy can be drawn between this type of case and the typical administrative law case, where the applicant will not have had any comparable opportunity to participate in the decision making process and will not have had the benefit of disclosure and possibly not even reasons - and where there may well not have been any hearing. In that type of case the oral renewal hearing may well be the only opportunity that there will be for the issues to be fully examined.

85. The oral procedure for applying for permission to apply for judicial has long been a feature of the process. It is important not only as between the parties but so that justice is seen to be done in public. We have already highlighted the importance of an oral hearing for Convention purposes, but the same applies as a matter of common law which requires any departure from the rule that hearings and judgments be given in public to be justified by necessity and not convenience. So, in *Al Rawi v Security Service* [2012] 1 AC 531 Lord Dyson said:

> "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256 , 259, per Lord Hewart CJ, Attorney General v Leveller Magazine Ltd [1979] AC 440 , 449 H –450 B , per Lord Diplock, and recently R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening) [2011] QB 218 , paras 38–39, per Lord Judge CJ.
>
> 11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In Scott v Scott [1913] AC 417 , Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting "a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security". Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity".

86. A paper based system, without any possibility of an oral hearing violates this principle because the bare reasons given will not be made public and even if they were they would in many cases give insufficient indication as to why the decision had been made. This could be met in part by having full written judgments for all such paper refusals - but that would be more burdensome and costly than allowing an oral renewal and so would not meet the objectives set out in the paper.

87. The benefits of oral argument are well known and have been referred to on many occasions. They were explained by Laws LJ in *Sengupta v Holmes* [2002] EWCA Civ 1104:

"oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. Knowledge of it should, in my judgment, be attributed to the fair-minded and informed observer; otherwise the test for apparent bias is too far distant from reality. It is a commonplace for a hearing to start with a clear expression of view by the judge or judges, which may strongly favour one side; it would not cross the mind of counsel on the other side then to suggest that the judge should recuse himself; rather, he knows where he is, and the position he has to meet. He often meets it".

88. Academic studies about the permission process have come to the same conclusion. Maurice Sunkin and Varda Bondy conducted a review of the permission process following the Bowman reforms, published in [2008] PL 647 (copy attached). Respondents were often supportive of the initial paper process but they were unanimous in endorsing the need for a right to renew orally. The paper recorded:

"Overall, then, the paper procedure received approval from the majority of the interviewees, but with stronger endorsement from defendant solicitors and with greater regret over the loss of advocacy on the part of claimant solicitors. Consistent across both groups of solicitors was an emphasis on the importance of the right to renew orally as a check on the quality of decision taking at the written stage.

A leading Q.C. who acts for claimants as well as defendants, summed up the pros and cons of the loss of oral hearing from an advocate's perspective:

"You can't beat looking the judge in the eye, finding out where the concerns are or what has or hasn't been understood, and being able to respond orally. But it's costly and involves a lot of hanging around waiting to get on …"."

89. Claimants were right to see the need for a check on the quality of decision making. The same paper analysed permission decisions according to the judge deciding them and found very wide levels of variation with different judges granting permission in between 11% and 46% of cases. There may of course be many reasons for this, but the bare figures suggest that it is not appropriate to leave decision making in the hands of a single judge who decides the case without any possibility of oral argument. The risk of inconsistency is increased when one adds in the fact that many permission decisions are now made by deputy high court judges who may not have great

judicial experience and who may or may not have any relevant expertise in the areas where they are asked to consider permission. If the proposal is to be introduced then it must be subject to an number of minimal safeguards:

i. It should only apply to decision makers who are full time High Court judges or above.
ii. Applicants must have a chance specifically to address the question whether the claim ought to be certified as totally without merit. As a minimum the court ought not so to certify a case unless the point has been raised, with reasons in the AOS and the Claimant has had an opportunity to respond to the AOS. In order to prevent abuse we suggest that there should be costs sanctions for Defendants who wrongly assert that a claim is totally without merit.

90. We see no reason at all why a determination by a High Court Judge that a case is totally without merit should have any impact on the Court of Appeal. That Court already has the power to block an oral hearing in totally without merit cases and it can make its own mind up about whether or not to exercise it. We therefore strongly oppose the suggestion in para 90 that: "An appeal to the Court of Appeal could be made, but in line with the *Cart* changes it would be restricted to the papers only".

91. If this change is introduced then we have no doubt that it will adversely affect litigants in person and any claimants who may be less confident or able to express themselves on paper.

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

92. We oppose this proposal in its entirety and cannot suggest any cases for which it would be appropriate.

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

93. Please see above. This proposal should not be introduced. If it is, then there should always be a discretion to permit the application to proceed to a hearing in any event (as is currently the case in the Court of Appeal). A hearing ought not to be refused in any case where the issues are of overwhelming importance to the parties or where the case raises an issue of substantial public importance.

Combining options 1 and 2

Question 13: Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

94. Neither option should be implemented. If they are to be implemented then they should be cumulative.

95. If, despite the consultation responses, the government is minded to proceed with either of these proposals then it should only do so after much fuller assessment. It should introduce 'totally without merit' assessments on a trial basis so that they do not remove the right to an oral hearing (but might be relevant on the issue of costs). The court should then keep statistics as to how many of these cases are renewed and what the outcome is. Similar statistics should be kept for cases falling within the prior judicial determination definition being proposed. Only then can there be any properly informed decision as to the scale of any problem and the possible solutions for it.

Fees

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

96. ALBA observes that this proposal is premature in that, as the paper acknowledges (para 98), there is already an outstanding consultation process in relation to fees in the High Court and Court of Appeal. No reason for a further process partly cutting across one already in progress has been provided. More fundamentally, however, fees should as a matter of constitutional principle be considered in the light of the case law which has established the right of access to the courts as a constitutional right in England and Wales. The ability of a citizen to have access to the courts has consistently been recognised by our domestic caselaw as being as a constitutional right not to be removed save by express words in statute- see for example *R v Lord Chancellor ex p. Witham* [1997] EWHC Admin 237, [1998] QB 575, 581E: "*Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically - in effect by express provision - permits the executive to turn people away from the court door.*"

Proposals for reform

97. The paper proposes a new fee for renewal of permission applications (paras 98, 103-106). We question how this proposal is intended to meet the objective identified in the paper and our concern is that the object of this proposal is to reduce the number of renewals. If is the case then we consider it is unlawful. A reduction in caseload cannot be an end in itself when deciding whether to charge a fee, or its level. It operates at a blanket level and discourages both meritorious and unmeritorious claims. Therefore it is not rationally or proportionately connected to the object of reducing *unarguable* claims. It is also discriminatory because it impacts adversely on those who cannot afford the fee but whose means are not so reduced that they qualify for remission, again without consideration of the merits of their claim. The paper seeks to address this at para 103 where it says that fees will:

"encourage the applicant to weigh up the potential benefits of the application against the costs which would, we believe, help to discourage claimants from bringing weak cases that stand little chance of success".

This shows little understanding of the choices that litigants of limited means have to make. The fear of failure will weigh much more heavily on poorer claimants than on others and they may well be deterred from bringing strong claims. The proposal to waive the fee for the full hearing if the application for permission is successful does not meet this point because fear of losing the fee altogether with already have had its deterrent effect.

98. Whatever the object of the proposal, we consider that there is a real issue as to whether a fee increase, coupled with the current trend of reducing cases where Legal Service Commission Funding is available, would be compatible with the UK's obligations under EU law generally and the Aarhus Convention (on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) in particular.

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

99. We do not agree. If there is to be a fee for renewal then it should reflect the fact that from the claimant's point of view a permission hearing will be take up much less of the court's resources than a full hearing. The analogy with an appeal is not apt because a higher proportion of cases may settle between the grant of permission and the full hearing and the claimant ought not, in that case, to have to pay the full fee with only an uncertain chance of recovery.

Equality Impacts

Question 16: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

100. As a general point we do not consider that the approach in the consultation paper is adequate to meet the Department's obligations under s. 149 of the Equality Act 2010. This squarely places the duty to have due regard on the Department and it must conduct its own proportionate investigations necessary to satisfy itself that it has enough material to discharge this duty. The Department cannot avoid this obligation by saying that it does not keep the relevant statistics. No explanation has been given as to why it has not done so, but in any case the Department is best placed to obtain further information and to analyse the information that it does have. The discussion above shows that more useful information could be obtained from the court statistics if they were analysed properly. Some academic work has been carried out on the working of the Administrative Court and some of this has been referenced in this response. The authors of this response do not have the resources to carry out further research on this topic.

101. Subject to the above point, it has been impracticable to collect data about adverse impact given the unreasonably short consultation period. However, it is self evident that the proposed shift to a more paper-based procedure will prejudice those for whom English is not their first language or who, for reasons of disability or otherwise, have difficulty expressing themselves in writing. We do not know what proportion of the caseload is taken up by individuals with these characteristics as we do not have access to

any relevant statistics but we would expect it to be significant. This will be a particular problem for self-represented litigants who are likely to increase in number as public funding has been removed from areas (such as immigration and welfare benefits) that are likely to produce applications for judicial review.

23rd January 2013