

# The Bingham Centre for the Rule of Law

## Response to Ministry of Justice Consultation Paper CP25/2012 *Judicial Review: Proposals for Reform*

### Introduction

1. The Bingham Centre for the Rule of Law submits the following response to the Ministry of Justice's Consultation Paper CP25/2012, *Judicial Review: Proposals for Reform*. This response was prepared for the Bingham Centre by:
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  - Michael Fordham QC, Fellow of the Bingham Centre and of Blackstone Chambers
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  - Professor Andrew Le Sueur, Professor of Public Law, Queen Mary University of London
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  - Lucy Moxham, Research Fellow in the Rule of Law at the Bingham Centre, and
  - Justine Stefanelli, Maurice Wohl Research Fellow at the Bingham Centre.
2. This response focuses on a subset of issues that arise from the Consultation Paper and which have particular constitutional implications for the rule of law. These issues are of a foundational nature, and necessarily shape any assessment of the specific proposals contained within the Consultation Paper.
3. We welcome the fact that the Consultation Paper explicitly acknowledges the crucial constitutional role played by judicial review: that it “can be characterised as the rule of law in action”, and that it is a “key mechanism” by which the Executive branch of government can be held to account.<sup>1</sup>
4. We agree. As Lord Dyson recently put it, “there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review”.<sup>2</sup> Indeed, it is difficult to overstate the fundamentality of the values protected by courts via judicial review, and it is equally hard to exaggerate the significance of ensuring that individuals are able to enforce those values in practice.
5. A key question that arises is whether the Consultation Paper, notwithstanding its formal recognition of the significance of judicial review, properly acknowledges the fundamental constitutional importance of the courts' jurisdiction to hold all

<sup>1</sup> Ministry of Justice, *Judicial Review: Proposals for Reform* (London 2012) at [11].

<sup>2</sup> *R (Cart) v Upper Tribunal* [2011] UKSC 2 at [122].

branches of government to account by reference to the principles of good administration that have been so carefully crafted over the years by the courts and also by Parliament. Overall, however, we conclude that the Consultation Paper displays insufficient recognition of the place of judicial review within the constitution of the United Kingdom, and inadequate sensitivity to the mutual respect, as between the political and judicial branches, that is needed in order to maintain the delicate balance of power that sustains our uncodified constitution. In particular, we believe that the proposals threaten two key features of the rule of law, namely, access to justice and legal accountability.

6. In framing this response we fully recognise that government decisions should not be unduly delayed or obstructed by unmeritorious challenges. However, the filters, restrictions and curtailed procedures of the Application for Judicial Review already provide unique protections for government against such challenges, and properly balance the need for expeditious public decision-making with the need for legal accountability. We suggest some approaches and reforms which might be helpful without disturbing this delicate balance, particularly in paragraphs 55-68 below.

### **Preliminary matters: evidence-based and “joined-up” policy-making**

7. At several points, the Consultation Paper asserts that judicial review exerts a negative effect on the governmental process. For instance, the foreword implies that judicial review is an obstacle to economic growth and recovery and that it contributes to “red tape”.<sup>3</sup> Elsewhere, judicial review is characterised as a “burden”,<sup>4</sup> as a process that often leads to empty, or pyrrhic, victories;<sup>5</sup> and as something that has “an unduly negative effect” on public bodies.<sup>6</sup> Meanwhile, proposals are advanced on the basis of unidentified “anecdotal evidence”,<sup>7</sup> or “concerns” that unnamed parties are assumed to hold but on no articulated factual basis,<sup>8</sup> and phenomena that are said to “seem” to exist.<sup>9</sup> Moreover, to the extent that hard evidence is supplied, it does not self-evidently justify the proposals made. For example, much is made in the Paper of increases in the volume of judicial review litigation, yet this in fact is accounted for almost entirely by immigration cases that are likely soon to fall within the purview not of the High Court but of the Upper Tribunal. We develop this point below.
8. The claims about judicial review referred to in the previous paragraph are significant and form an important part of the Consultation Paper’s basis: taken together, they drive both the case for change, and the case for the particular changes advocated by the Paper. However, those cases rely to far too great an extent on assertions that are inadequately justified or not justified at all by reference to supporting evidence. Proposing significant changes to the judicial review system in this way represents a fundamental failure to formulate policy on

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<sup>3</sup> Consultation Paper, above n 1 at 3.

<sup>4</sup> Consultation Paper, above n 1 at [7].

<sup>5</sup> Consultation Paper, above n 1 at [32].

<sup>6</sup> Consultation Paper, above n 1 at [35].

<sup>7</sup> Consultation Paper, above n 1 at [64] and [78].

<sup>8</sup> Consultation Paper, above n 1 at [35].

<sup>9</sup> Consultation Paper, above n 1 at [49].

the basis of demonstrable and contestable evidence and perpetuates myths about the purpose and effect of our public law.<sup>10</sup>

9. It is also disappointing that by failing to situate the proposals concerning judicial review within the wider administrative justice landscape, the Consultation Paper eschews any attempt at “joined-up” policy-making. It is a fact of life that almost all grievance-redress mechanisms deal with many more complaints, applications or claims than go on to receive a full adjudication or investigation.<sup>11</sup> The caseload of other administrative justice institutions puts the relatively very small judicial review case load in perspective.<sup>12</sup> Finally, on this point, it is notable that the proposals concerning judicial review are not linked with, or considered in relation to, changes elsewhere in the administrative justice system, such as the winding up of the Administrative Justice and Tribunals Council. It is regrettable that, in these ways, the Consultation Paper fails to examine judicial review within this broader context.

### **Judicial review: negative and positive effects**

10. The Consultation Paper states that the Government believes that the “threat” of judicial review has “an unduly negative effect on decision-makers” and that there is “some concern” that the “fear” of judicial review “is leading public authorities to be overly cautious” in their approach to decision-making because they are “too concerned about minimising, or eliminating, the risk of legal challenge”.<sup>13</sup> Two specific points may be made in response to these assertions.
11. First, the argument implicit in the assertions appears to be that public authorities should be shielded from judicial review to a greater extent than they are at present because of their tendency – if exposed to judicial review – to do things that the law does not actually require of them. Thus public authorities are cast as victims of judicial review.

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<sup>10</sup> See, e.g., Charlie Elphicke MP, “Make Ministers Accountable to Parliament, Not Judges” in Legatum Institute, *2020 Vision: An Agenda for Transformation* (London 2012) at 7-9. Like the Consultation Paper, Elphicke’s essay makes unsubstantiated assertions about judicial review – e.g. that it creates a “spectre of paralysis [that] haunts every Government Department”. Elphicke also proposes that judicial review be confined to the ground of unreasonableness. This would eliminate the longstanding and universally accepted grounds of illegality and procedural unfairness, in blatant breach of the rule of law.

<sup>11</sup> Take, for instance, the Parliamentary and Health Service Ombudsman. In 2011-12, the Ombudsman received 23,889 enquiries. “Help and advice” was provided in response to 19,517 of those enquiries, of which 4,732 were looked at “closely”. Of those 4,732 cases, 759 were put right without a formal investigation, while 421 were accepted for formal investigation; the remainder were found to disclose no case to answer. See further Parliamentary and Health Service Ombudsman, *Moving Forward: Annual Report 2011-12* (HC251 2010-12) at 8-9.

<sup>12</sup> E.g. the Local Government Ombudsman received 20,906 complaints and enquiries in 2011-12, of which 10,627 were allocated to investigators (Commission for Local Administration in England, *Delivering Public Value: Annual Report 2011-12* (London 2012) at 13). Meanwhile, in the First-tier Tribunal 370,800 cases were received on social security and child support and 112,500 on immigration and asylum (Ministry of Justice, *Annual Tribunal Statistics, 1 April 2011 to 31 March 2012* (London 2012) at 4-5). See also the figures, above n 11, for the Parliamentary and Health Service Ombudsman.

<sup>13</sup> Consultation Paper, above n 1 at [35].

12. However, no evidence is offered in support of the claim that public authorities are induced by the “fear” of judicial review to do things that administrative law does not actually require them to do.
13. It is surprising that the Consultation Paper fails entirely to consider what might reasonably be considered a far more obvious solution to this putative problem – namely, ensuring that public authorities are in the first place properly appraised of what public law does and does not require of them. We note in passing that when it addressed the folklore surrounding the Human Rights Act, the Department for Constitutional Affairs proposed precisely such an educative strategy in order that public bodies might comply with their actual, as opposed to their supposed, legal obligations under the Act.<sup>14</sup>
14. Second, the Consultation Paper assumes that the threat (or possibility) of judicial review is likely to have a *negative* effect on decision-makers. As well as the supposed general risk of public authorities doing things that the law does not require of them, it is further asserted that the requirements imposed by administrative law are liable to impose burdens on Government,<sup>15</sup> erect obstacles to efficient decision-making,<sup>16</sup> undermine economic growth and recovery,<sup>17</sup> and generally distract from the business of governing.<sup>18</sup>
15. Yet the Consultation Paper fails to acknowledge that the possibility (or reality) of judicial review might in fact exert a positive effect upon Government and that it actually improves the quality of decision-making. To understand this it is necessary to consider the actual grounds of judicial review, which, in summary, require decisions to be made that are legal, procedurally fair and rational. Legality requires that all relevant considerations are taken into account and irrelevant considerations ignored. Procedural fairness requires all relevant interests to be properly addressed and assessed, thus gaining more information of a decision’s likely effect. And rationality seeks to avoid arbitrary and illogical decisions. All these qualities, apart from promoting basic justice to the public who, after all the official decision-makers are there to serve, also seek simply to enhance the quality of the decision-making process by ensuring outcomes that fulfill the purpose intended by parliament when it conferred the power on the decision-maker.
16. It is not necessary to look very far for examples – the collapse of the Department for Transport’s rail franchising operations in the face of impending judicial review of the West Coast decision being an obvious recent instance.<sup>19</sup> More generally, as the Cabinet Secretary acknowledged in the foreword to the 2006 edition of *The Judge Over Your Shoulder*, administrative law is “a key source of guidance for improving policy development and decision-making in the public service”.<sup>20</sup>
17. We acknowledge that the positive effect of judicial review may be constrained by some decision-makers’ limited capacity to absorb legal decisions and reflect them

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<sup>14</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (London 2006), ch 6.

<sup>15</sup> Consultation Paper, above n 1 at 3.

<sup>16</sup> Consultation Paper, above n 1 at 3.

<sup>17</sup> Consultation Paper, above n 1 at [7].

<sup>18</sup> Consultation Paper, above n 1 at [34].

<sup>19</sup> “West coast mainline rail contract halted in shock move”, *The Guardian*, 3 October 2012 (<http://gu.com/p/3ap3a>, accessed 18 January 2013).

<sup>20</sup> Treasury Solicitor’s Department, *The Judge Over Your Shoulder* (London 2006) at 3.

in front-line practice.<sup>21</sup> Yet there is evidence to suggest that there can be a positive relationship between judicial review challenges and the performance of public authorities. For example, Lucinda Platt, Maurice Sunkin and Kerman Calvo found that local authorities that experience a relatively high level of judicial review challenges tend to be relatively poorly performing authorities<sup>22</sup> – a finding that sits uncomfortably with the Consultation Paper’s (at least implicit) assumption that many challenges are specious or merely tactical. Moreover, Platt *et al* also found that judicial review challenges “have the potential to drive improvement” in the performance of local authorities<sup>23</sup> by acting “as a form of shock, alerting authorities to gaps or responsibilities that demand a much more conscious reflection on what is delivered and the systems in place”.<sup>24</sup>

18. None of this is to suggest that public authorities will necessarily welcome judicial review challenges to their decisions. It is, however, crucial to disaggregate public bodies’ internal perspective, from which judicial review may (but not necessarily will) be regarded as an unwelcome irritant, and a broader, non-institutional public perspective, from which the benefit (or otherwise) of judicial review falls to be measured according to a different calculus.
19. More generally, it is imperative to move beyond the assumption (sometimes implicit in the Consultation Paper) that the courts and the administration are necessarily pitted against one another as combatants in a zero-sum game. Judicial review should not be assumed to be the enemy of efficient administration.
20. Finally, on this point, it is important to recognise that judicial review applies to a very wide range of bodies exercising public functions, some of which are often unregulated and supervised only indirectly by Government and Parliament.<sup>25</sup> Proposals relating to judicial review generally ought to be sensitive to this broad field of application. Yet there is no indication in the Consultation Paper that consideration has been given to the proposals’ (potentially diverse) implications across the range of contexts in which judicial review lies.

## Volume of judicial review litigation

21. A significant part of the case advanced in the Consultation Paper relates to the growth in the volume of judicial review litigation in recent years and decades.<sup>26</sup> We make the following comments on this aspect of the Paper.

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<sup>21</sup> See, e.g., Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart, 2004).

<sup>22</sup> Lucinda Platt, Maurice Sunkin and Kerman Calvo, “Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales” (2010) 20 *Journal of Public Administration Research and Theory* i243 at i249.

<sup>23</sup> Platt *et al*, above n 22 at i249-i250.

<sup>24</sup> Platt *et al*, above n 22 at i253.

<sup>25</sup> For instance, arms length bodies such as Ofcom are subject to judicial review. For a recent example, see *R (Gaunt) v Ofcom* [2011] EWCA Civ 692, [2011] 1 WLR 2355.

<sup>26</sup> Consultation Paper, above n 1 at [26]-[37]. As a preliminary point, we note that at paragraphs 31 and 32, the Consultation Paper refers to statistics on the volume of applications for permission to bring judicial review proceedings. It would aid public understanding of the arguments put forward in the Consultation Paper if the underlying data were presented in full. For example, for each year, the number of claims being refused permission; the number of claims proceeding to a full hearing; and the success rate. In addition, it would be helpful to understand the number of renewed applications

22. First, the Consultation Paper assumes that the growth in volume is problematic, at least to the extent that the overall figure includes an increasingly long tail of tactical or otherwise unmeritorious applications for permission to apply for judicial review. The Consultation Paper does not, however, substantiate this claim. The only evidence it offers in support is the fact that only a small minority of applications for permission ultimately proceed to a final hearing.<sup>27</sup> Yet it does not necessarily follow that cases which terminate at an earlier stage represent an illegitimate use of the judicial review procedure. Indeed, a substantial number of claims that do not make it to trial are withdrawn after the public authority concedes; this suggests that the prospect of judicial review, far from being a distraction from effective administration, may serve to trigger the abandonment of flawed decisions at an early stage.
23. Second, there is a striking if unarticulated tension in the Consultation Paper. On the one hand, the need to promote economic growth is presented as a key driver of the reform proposals.<sup>28</sup> Yet, on the other hand, the Paper acknowledges that the growth in volume of judicial review litigation is largely accounted for by challenges to immigration decisions.<sup>29</sup> The Consultation Paper fails to make a case for limiting the availability of judicial review of a category of decisions whose size is not significantly increasing.
24. Third, a related – and also unacknowledged – tension exists, in that the Consultation Paper proposes changes to procedural rules governing judicial review in the *High Court* while acknowledging that the Crime and Courts Bill, if enacted in its present form, will allow all immigration, asylum and nationality judicial review cases to be heard by the *Upper Tribunal*.<sup>30</sup> This would represent not a cosmetic change, but a change of great substance, by transferring out of the High Court a substantial part of its judicial review caseload. It is regrettable that the proposals concerning judicial review in the Consultation Paper appear to take so little account of this impending major reform.
25. Fourth, it is surprising that the Consultation Paper contains no evaluation of the reforms introduced following the Bowman Report.<sup>31</sup> That Report identified post-permission settlement of judicial review claims as a major problem, and recommended mechanisms – most notably the Pre-Action Protocol and the adoption of an *inter partes* permission procedure – that were intended to encourage pre-litigious interaction and settlement, and to discourage parties from obtaining and using permission as a bargaining tool. Yet the Impact Assessment accompanying the present Consultation Paper acknowledges that shorter time limits may render pre-action interaction *less* feasible, thereby incentivising recourse to litigation and driving *up* the volume of applications for permission to seek judicial review.<sup>32</sup>

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and the number of applications granted permission following an oral renewal. Finally, it would also be helpful if the underlying data were broken down per area (e.g., immigration, criminal, etc.). Without this information, the public only has a very imperfect knowledge on an important issue of public interest.

<sup>27</sup> Consultation Paper, above n 1 at [30].

<sup>28</sup> Consultation Paper, above n 1 at 3-4.

<sup>29</sup> Consultation Paper, above n 1 at [29].

<sup>30</sup> Consultation Paper, above n 1 at [25].

<sup>31</sup> Sir Jeffrey Bowman, *Review of the Crown Office List* (London 2000).

<sup>32</sup> Ministry of Justice, *Impact Assessment No 184* at [2.29].

26. Fifth, the Consultation Paper suggests that even those cases that progress to a full hearing and result in a decision in favour of the claimant may be of limited value in that they may amount only to “pyrrhic victories”.<sup>33</sup> It is undeniably the case that success on a number – but by no means all – of the judicial review grounds will result in the matter being referred back to the decision-maker in the way described in the Consultation Paper. But to suppose that such victories are unimportant is to fall into serious error; indeed, that supposition fundamentally misconceives the nature and purpose of judicial review.
27. Judicial review is about far more than merely helping some claimants to secure the substantive decision they want. Judicial review has the vital constitutional function of ensuring, in accordance with the principle of the rule of law, that public authorities’ decisions are within the scope of the powers conferred upon them by Parliament, procedurally fair and rational. Viewed in this way, there is no such thing as a pyrrhic judicial review victory: every victory – whatever the eventual outcome for the individual – is a victory for the rule of law.
28. Two further points should be noted in relation to so-called pyrrhic victories. First, judicial reviews brought on procedural grounds often produce tangible substantive benefits that transcend the particularities of the case. Take, for example, *Lumba*, in which a procedural challenge resulted in the Government being required to publish its policy on immigration detention.<sup>34</sup> Second, if a court considers that a procedural flaw, although unlawful, did not operate to the detriment of the individual – because the same decision would have been reached even if an unimpeachable procedure had been followed – then it can resort to its discretion to refuse a remedy. (Wisely, however, the courts exercise great caution in this area, recognising that, as Megarry J put it, “the path of the law is strewn with examples of open and shut cases which, somehow, were not”.)<sup>35</sup> And even if a court does conclude that adherence to a given procedure would have made no difference and that relief should be withheld, it does not follow that the case was pointless. To adopt such an assumption is to overlook the public dimension of judicial review proceedings, the function of which transcends the resolution of a dispute between two parties, and extends to holding Government to account by reference to relevant legal standards.

### Judicial review proceedings generally

29. Before examining the Consultation Paper’s specific proposals concerning changes to judicial review proceedings, it is necessary to make the following preliminary, but important, point. The defensibility of the proposals to impose *more restrictive* conditions upon judicial review necessarily falls to be considered in the light of the *present restrictiveness* of the conditions applicable to judicial review proceedings. In fact, those conditions are already highly restrictive.
30. First, the time limit – which the Consultation Paper proposes to make even shorter in some cases – is already very tight. We develop this point below. For the time being, it suffices to note that public authorities as potential defendants to judicial review proceedings benefit from a time limit that is extraordinarily short compared with the limits applicable to other types of civil claim.

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<sup>33</sup> Consultation Paper, above n 1 at [32].

<sup>34</sup> *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

<sup>35</sup> *John v Rees* [1970] Ch 345 at 402.

31. Second, a number of hurdles have to be cleared before an intending claimant is able to initiate judicial review proceedings proper – including (normally) compliance with the Pre-Action Protocol for Judicial Review, and the securing of permission. It is self-evident from the relevant statistics that the permission stage is far from a trivial hurdle.<sup>36</sup>
32. Third, judicial review proceedings differ markedly from – and are in many senses substantially less demanding of the courts’ time than – many other forms of proceedings, given a highly restrictive approach to discovery and the examination and cross-examination of witnesses.<sup>37</sup>
33. By any measure, these features of judicial review proceedings mean that public authorities, as potential defendants to judicial review claims, already benefit from very substantial protections, and that the system already contains significant features that moderate the extent of the burdens placed upon the courts by judicial review cases. While it does not inevitably follow that a more restrictive approach would be objectionable, the restrictiveness of the existing approach necessarily calls for particularly close scrutiny of the Consultation Paper’s proposals for even greater limits on access to judicial review.
34. A final, and related, general point concerns Article 6 of the European Convention on Human Rights. Since the Human Rights Act 1998 entered into force, it has become increasingly clear that judicial review plays a crucial role in reconciling certain forms of administrative decision-making with the requirements of Article 6. Among other things, that provision requires decisions which are determinative of civil rights and obligations to be taken by a tribunal that is independent of the Executive. If, as is inevitably the case, an administrative body making an Article 6 decision lacks such independence, then a breach of Article 6 can only be avoided if the decision can subsequently be challenged before a “court of full jurisdiction”.<sup>38</sup> That requirement is generally taken to be satisfied by the possibility of judicial review. It is, however, self-evident that the more limited the availability of judicial review, the less likely it is that the possibility of review will be capable of securing compliance with Article 6.

## Time limits

35. The rule of law requires that individuals and other relevant parties have an adequate opportunity to challenge Government decisions before an independent and impartial judicial body. The smaller the window of opportunity for challenge, the less adequate the opportunity can be said to be. It is against this background the Consultation Paper’s proposals concerning the time limits applicable to judicial review cases fall to be evaluated.
36. The existing time limit for judicial review is already very tight: claims must be brought promptly and in any event not later than three months after the grounds to make the claim first arose, subject to a limited judicial discretion to extend time.<sup>39</sup> It would be unduly dogmatic to argue that any narrowing of the timeframe

<sup>36</sup> Ministry of Justice/National Statistics, *Judicial and Court Statistics 2011* (London 2012) at 65.

<sup>37</sup> The position may be more liberal in human rights cases, however: *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650; *R (Wilkinson) v Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419.

<sup>38</sup> See, e.g., *Albert and Le Compte v Belgium* (1983) 5 EHRR 533.

<sup>39</sup> Civil Procedure Rules Part 54, r 5 and Part 3, r 1; Senior Courts Act 1981, s 31(6) and (7).

within which challenges are permitted would contravene the rule of law. It would be similarly dogmatic to refuse to acknowledge that other policy factors – such as the need for effective decision-making – may legitimately be placed in the balance. However, the rule-of-law requirement of an adequate opportunity for challenge means that any narrowing of the timeframe, and any policy reasons advanced in support of such a change, must be subject to close scrutiny.

37. We note that the Consultation Paper concedes the point that a one-size-fits-all approach to time limits may not be appropriate. We welcome this recognition. However, we regret the Consultation Paper's failure to follow through on the logic of its own premise by acknowledging that a *more generous* timeframe may be appropriate in some circumstances – a point that has been made persuasively by Dawn Oliver.<sup>40</sup>
38. Our final preliminary point is a practical one. The assumption appears to be that reducing the time limit will promote the Government's aims of ameliorating the supposed negative effects of judicial review. However, as Varda Bondy and Maurice Sunkin have pointed out, cutting the time limit will not necessarily have that effect: indeed, it might have the opposite effect by causing more premature claims to be made.<sup>41</sup>
39. The Consultation Paper proposes a 30-day time limit for judicial review challenges to procurement decisions.<sup>42</sup> The Consultation Paper appears to offer three arguments in support of this proposal, although the relationship between those arguments is hard to discern from the text of the Paper.
40. The first argument appears to be that because a 30-day limit applies to challenges brought under the Public Contracts Regulations 2006 (as amended), a 30-day limit should apply to challenges brought by way of judicial review. While we accept that there may be an argument for aligning the time limits for challenges under the Regulations and by way of judicial review, we find no convincing case in the Consultation Paper for a 30-day time limit. A 30-day limit in Regulations cases was adopted because the Court of Justice of the European Union ruled in the *Uniplex* case that the normal requirement of promptitude offended the requirement of legal certainty.<sup>43</sup> However, *Uniplex* merely required a time limit of certain duration; it did not specifically require a 30-day limit. The thinking behind the adoption of a 30-day limit can be discerned from the Cabinet Office's response to the public consultation on the *Uniplex* judgment.<sup>44</sup> However, it is surprising to see no positive case made in the Consultation Paper for a 30-day limit in judicial review proceedings, particularly bearing in mind the possibility that arguments may play out differently given the absence in judicial review proceedings of any legal requirement deriving from EU law to dispense with the promptitude requirement.
41. Second, the Consultation Paper says that "there is a concern" that challenges to procurement decisions "seem to be on the increase".<sup>45</sup> This bare assertion of an

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<sup>40</sup> Oliver, "Public Law Procedures and Remedies – Do We Need Them?" [2002] PL 91 at 98-100.

<sup>41</sup> Bondy and Sunkin, "Who is Afraid of Judicial Review? Debunking the Myths of Growth and Abuse" (2013) UK Constitutional Law Blog (<http://wp.me/p1cVqo-pQ>, accessed 22<sup>nd</sup> January 2013).

<sup>42</sup> Consultation Paper, above n 1 at [56]-[57].

<sup>43</sup> *Uniplex (UK) Ltd v NHS Business Service Authority* [2010] 2 CMLR 47.

<sup>44</sup> See

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Uniplex%20consultation%20response%2018%20Aug%202011.pdf> (accessed 9<sup>th</sup> January 2012).

<sup>45</sup> Consultation Paper, above n 1 at [49].

unattributed perception cannot properly serve as an adequate justification for restricting the availability of judicial review. Insofar as the increase in procurement challenges can be shown, it is not clear what conclusions should be drawn therefrom. Indeed such challenges may be driven by increasingly dubious practices, or other reasons.

42. Third, the Consultation Paper says that contracts involved in procurement cases “often involve large sums of money and the delivery of important public services” and says that “delays in awarding these contracts can have a significant impact on users of those services, and implications for the costs of their delivery”.<sup>46</sup> This may be so. However, these assertions fall far short of a persuasive case in favour of limiting the availability of judicial review in general, and go no distance towards establishing that a 30-day limit in particular strikes the right balance between the conflicting interests at stake in such cases. No thought appears to have been given to the possibility that the importance of the issues – whether measured in financial or other terms – may point just as, or more, strongly towards a *longer* time limit, in order to ensure ample opportunity for scrutiny.
43. It is not clear from the Consultation Paper whether the proposed time limit of 30 days for procurement cases (or 6 weeks for planning cases) is intended to be subject to the existing additional requirement of promptness. We take it that the promptness requirement would be removed, especially since the *Uniplex* problem<sup>47</sup> is being relied on. It would be particularly invidious if that requirement were retained alongside shorter time limits. The Consultation Paper clearly states that powers to extend time would be preserved.<sup>48</sup> That is plainly vital and since it is accepted and relied on we say no more about it.
44. In answer to Question 1, so far as it relates to procurement, we therefore conclude that no adequate case has been made out for the adoption of a 30-day time limit.
45. In the light of this, we make no comment in relation to Question 2, save to repeat our point, made above, that the Ministry of Justice’s own Impact Assessment recognises that claimants may seek to circumvent the Pre-Action Protocol, and that this may encourage litigation in a manner directly contrary to the policy underlying the Bowman reforms.
46. Question 3 presupposes that a 30-day time limit should be introduced – a step that we do not consider to be justified by the arguments advanced in the Consultation Paper. We also note in relation to Question 3 that reliance upon judicial discretion to extend time as a means by which to circumvent the potential unfairness of a shorter time limit would sit uncomfortably with the stance adopted elsewhere in the Paper, according to which flexibility is said “not [to] facilitate good administration or provide certainty for claimants”.<sup>49</sup>
47. In response to Question 4, we do not consider there to be any (other) categories of cases in which a shorter time limit might be appropriate. We do, however, repeat the point, made above,<sup>50</sup> that once the possibility of different time limits for different categories of cases is conceded, it becomes difficult to justify treating the present three-months-and-promptly limit as necessarily constituting the

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<sup>46</sup> Consultation Paper, above n 1 at [50].

<sup>47</sup> See above at [40].

<sup>48</sup> Consultation Paper, above n 1 at [59].

<sup>49</sup> Consultation Paper, above n 1 at [44].

<sup>50</sup> See above at [37].

appropriate maximum. We therefore question the premise underlying Question 4, which appears to be that only *reductions* in the existing time limit ought to be considered. We also note that the Paper consults only about planning and procurement cases. No proposal is made in respect of other areas, and it would not be acceptable for the time limit to be reduced in other areas on the basis of suggestions made in response to this Consultation Paper but which were not themselves the subject of further, specific consultation.

### Ongoing breach/multiple decisions

48. The Consultation Paper proposes that whether a claimant has complied with the time limit should be calculated by reference to the date on which the grounds for the claim first arose.<sup>51</sup> Where two or more related administrative acts are concerned, the three-month period would therefore begin to run when the first act was committed, making a subsequent act adopted more than three months later immune from review (unless the court exercised its discretion to extend time).
49. No clear reason for this proposal is offered by the Consultation Paper, save that its inclusion in a section headed “Tackling delays in bringing late claims” offers an oblique and implicit hint of the underlying thinking. It is also said that claimants who challenge subsequent administrative acts adopted more than three months after the initial act are “essentially frustrating the application of the three month time limit”. But this reasoning is circular: the three-month time limit is frustrated only if the period for calculation is taken to have begun when the first, rather than the subsequent, act was committed.
50. We note that the Consultation Paper does not actually ask for views on *whether* the Civil Procedure Rules should be changed in the way proposed: rather, consultees are invited to comment (in Question 5) on how the wording of the Rules should be altered, and (in Question 6) on whether there are any risks in taking the proposal forward. Our view is that the proposal should not be taken forward. The Consultation Paper makes no clear case in favour of the proposal and makes no attempt to grapple with the reasoning of the courts in ongoing breach/multiple decision cases. Indeed, the approach would, if adopted, overrule established authority – including the House of Lords’ decision in *Burkett*<sup>52</sup> – at a stroke. To the fact that the Paper makes no persuasive positive case in favour of this proposal, we would add the following four reasons for rejecting it.
51. First, there are good policy reasons for not *requiring* prospective claimants to challenge the initial component of a series of related administrative decisions. This point was recognised by the House of Lords in *Burkett* when it held that while a local authority’s resolution to grant outline planning permission was susceptible to judicial review, time began to run afresh when outline permission was actually granted eight months later.<sup>53</sup> For instance, as their Lordships noted in *Burkett*, an initial decision may fall by the wayside or be revoked; equally, the position as between the parties might change, reducing the likelihood of litigation. The proposal in the Consultation Paper thus risks encouraging potentially premature or needless challenges to administrative acts adopted at a relatively early stage in complex decision-making processes, which in turn raises the

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<sup>51</sup> Consultation Paper, above n 1 at [64].

<sup>52</sup> *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 1 WLR 1593.

<sup>53</sup> Above n 52.

prospect of matters being diverted into the courts that would never otherwise have ended up there.

52. Second, if the proposal in the Consultation Paper were adopted, considerable practical difficulties would likely arise. In particular, it would become necessary to determine whether any given administrative act was rendered unchallengeable on account of its being sufficiently closely related to a prior act adopted more than three months earlier. Determining what should count as a sufficiently proximate relationship and applying that definition to specific pairs or sets of administrative acts would likely be far from straightforward.
53. Third, it is necessary that the full significance of the proposal in the Consultation Paper be appreciated. Subject to one caveat, the proposal would not merely temporarily *limit* judicial review of administrative decisions sufficiently closely related to decisions taken more than three months earlier. Rather, it would be to *exclude* review of them entirely. The rule-of-law implications of this are clear. The caveat is that it would presumably remain possible for the court to extend time in its discretion. Given the courts' fully warranted antipathy to legislative attempts to oust their supervisory jurisdiction, it is likely that they would use that discretion generously. It is therefore highly likely that the considerations which presently inform the courts' approach to determining when time begins to run would still be considered, in that they would inform the exercise of the discretion to extend time.
54. Fourth, the test of "the date on which the grounds first arose"<sup>54</sup> is not new. It is the existing test. The Courts have carefully addressed in the case-law the principled, just and balanced approach to that test, in the context of ongoing breaches and multiple decisions. They have also addressed and applied the discretion to extend time, which like the test would be retained. The proposal rightly keeps the test and the discretion, and yet seeks somehow to rewrite the case-law, and without engaging at all with the analysis which courts have adopted and the reasons for it. This is an incoherent and unjustified Governmental interference with the proper application of the law.
55. The upshot, then, is that the proposal would be unlikely to secure the Government's objectives. Indeed, it is far more likely that the proposal would yield outcomes that would run directly counter to those objectives. The proposed approach would introduce enormous uncertainty and risk, leading to defensive and protective claims being brought prematurely. Meanwhile, the introduction of additional (and unclear) criteria would lead to satellite arguments and appeals. It is impossible to see how these collateral effects of the proposed approach could fail to frustrate the objectives identified in the Consultation Paper of greater certainty and clarity, fewer unnecessary challenges and judicial review being treated as a "last resort".<sup>55</sup>

### **Permission: general**

56. In common with many other aspects of the Consultation Paper, the premise upon which the proposals concerning permission are formulated is unsupported by clear evidence. The Consultation Paper says that the Government is "concerned" that the present permission arrangements afford claimants "too

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<sup>54</sup> See above at [48].

<sup>55</sup> Consultation Paper, above n 1, at [14].

many” opportunities to argue their case,<sup>56</sup> and that this creates uncertainties and consumes additional judicial resources.<sup>57</sup> However, whether this claim is sustainable – and, therefore, whether the resulting proposals concerning permission are defensible – depends on matters with which the Consultation Paper does not engage (either adequately or at all).

57. First, the Consultation Paper makes no attempt to quantify the scale of the uncertainty and the amount of resources consumed by the present arrangements as compared with the revised arrangements that are proposed. This makes it very difficult to determine the significance of any putative “gain” – measured in terms of certainty and use of resources.
58. Second, the extent to which opportunities over and above those afforded by the initial stage of the permission process might properly be regarded as excessive depends, in part, upon the robustness of that initial stage. The less robust it is, the harder it is to characterise further opportunities as excessive. It is surprising, therefore, that the Consultation Paper makes no mention of significant empirical research casting substantial doubt upon the robustness of the initial stage of the permission process. Varda Bondy and Maurice Sunkin found that of the eight judges they looked at who made substantial numbers of permission decisions within their study period, success rates varied dramatically: one judge granted permission in 46 per cent of the (non-immigration/asylum) cases that came before him, while one of his colleagues granted permission in only 11 per cent of cases.<sup>58</sup> Bondy and Sunkin note that this problem may become more acute now that the Administrative Court has opened several regional centres.<sup>59</sup>
59. Third, the Consultation Paper advances the stark proposal of significantly curtailing the availability of oral renewal. It is regrettable that less Draconian possibilities – such as avoiding the unnecessary and time-consuming resistance of permission<sup>60</sup> and limiting the amount of court time that renewals are permitted to consume – were not considered.

### **Permission: “Prior judicial hearing” and “substantively the same matter”**

60. We turn now to some more specific points concerning the detail of the proposals. The tests of “prior judicial hearing” (PJH) and “substantially the same matter” (SSM) bear no relation to the general stated aim of avoiding weak claims,<sup>61</sup> spurious claims,<sup>62</sup> hopeless, frivolous and vexatious claims;<sup>63</sup> nor to the specific stated aim of preventing the use of judicial review as a “tactical device ... to delay decisions”.<sup>64</sup> Claims can be spurious and tactical without meeting the PJH/SSM

<sup>56</sup> The Consultation Paper says (at [73]) that claimants “may have up to four opportunities to argue the case for permission”. However, the Paper does not clearly identify what these four opportunities are; only three are referred to at [67]-[68]. See further Adam Wagner, “Quicker, costlier and less appealing: plans for Judicial Review reform revealed” (2012) UK Human Rights Blog (<http://wp.me/pJiO3-4ga>, accessed 22<sup>nd</sup> January 2013).

<sup>57</sup> Consultation Paper, above n 1 at [72].

<sup>58</sup> Bondy and Sunkin, “Accessing Judicial Review” [2008] PL 647 at 664-665.

<sup>59</sup> Bondy and Sunkin, above n 58, at 667.

<sup>60</sup> See below at [63].

<sup>61</sup> Consultation Paper, above n 1, at [7] and [72].

<sup>62</sup> Consultation Paper, above n 1, at [11].

<sup>63</sup> Consultation Paper, above n 1, at [69].

<sup>64</sup> Consultation Paper, above n 1, at [79].

tests. Equally, claims that *do* meet those tests may not be remotely spurious or tactical. Paper permission will be refused if the paper judge is not persuaded that the case is arguable. A PJH/SSM case is not frivolous or tactical just because a paper judge considers it unarguable. Indeed, the Consultation Paper presumably envisages that PJH/SSM cases are ones which even the paper judge would not characterise as “totally without merit”, since such cases are the subject of a separate proposal. For example, a case involving a PJH may well have involved a question of law (hence “judicial” in PJH). The claimant is required to raise all known relevant points at a PJH, not hold them back for judicial review, and it would hardly be surprising if the point of law raised in judicial review proceedings amounted to substantially the same matter as that which was raised at the PJH. However, that does not mean that seeking judicial review in such circumstances is spurious or abusive/tactical. If implemented, this unfocused, unevidenced and unanalysed proposal would mean, for example, that a coroner ruling on a question of law would only be open to challenge by a judicial review route which curtailed oral permission.

61. If the aim is to make the procedure “operate quickly and proportionately”,<sup>65</sup> then there are other steps that could be taken. For instance, if 11 weeks for paper permission is too long, then greater categories of case could be dealt with on the papers by Deputy High Court judges. Alternatively, paper permission could be avoided. Many cases can properly proceed direct to an oral permission hearing. Defendants could assist by indicating whether a case is one which should proceed direct to oral hearing. A paper judge who, on first looking at the papers, agrees can so direct, thereby saving further time on the papers.
62. At oral permission hearings, a significant proportion of cases which the paper judge thought were unarguable, are granted permission. That means – by definition – they have been judicially assessed as not being frivolous, abusive or hopeless. The proposal to remove such cases from the system, based on unjustified classifications, raises very serious concerns relating to access to justice and the rule of law.
63. Far too many cases which are properly arguable involve permission being contested by defendants – including Government itself. This wastes judicial resources. A good rule change would be that where a permission judge concludes that permission should not have been resisted, because the defendant should have realised that the claim was not hopeless, or frivolous or vexatious,<sup>66</sup> the defendant should have to pay half the claimant’s costs of lodging the claim. If Government is truly concerned to avoid unnecessary use of judges’ time at the permission stage, it is unclear why the proposals are not even-handed. Why do they only operate against the claimant, leaving defendants to utilise as many judicial resources as they wish in resisting permission in arguable cases?

#### **Permission: “totally without merit”**

64. We turn to the proposal concerning cases assessed as “totally without merit” (TWM). The problem here is that the paper judge – by definition – has decided that the case is hopeless, frivolous or vexatious (CP §69).<sup>67</sup> Many claimants succeed in many cases in persuading a judge on oral renewal that this initial characterisation is incorrect. If the paper judge backs her/his initial assessment

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<sup>65</sup> Consultation Paper, above n 1, at [11].

<sup>66</sup> Consultation Paper, above n 1, at [69].

<sup>67</sup> Consultation Paper, above n 1, at [69].

with a certification, this demonstrably important right of access to justice is removed – yet Government says access to justice is not intended to be curtailed. Nor should the paper judge be put in the position of asking whether it is possible that a judge at an oral renewal might see the case differently. That is invidious, and impossible.

65. If certification is to be used at all, it should be used in the first instance as a warning in relation to (a) the claimant's representatives' duty to consider whether renewal can be justified and (b) a marker relevant to costs orders at a renewal hearing (the renewal judge who refuses permission may consider a defendant's costs order (as an exception to Mount Cook)) or possibly disallowing the claimant's representatives costs from the LSC. In a truly vexatious or abusive case, the courts have powers to make wasted costs orders against the claimant's lawyers. Those powers are used, appropriately, in judicial review cases.

### **Permission: concluding remarks**

66. The right of oral renewal is one of the most important safeguards, as to access to justice and the rule of law, in the judicial review process. Oral hearings are at the heart of the legal process: they enable judges to engage with an advocate, and explore the impressions formed on the papers. These proposals seek to insulate public authorities, including central Government, from a layer of judicial protection which holds them accountable under the rule of law. If implemented, they would promote injustice.
67. When there was a proposal in 1985 to remove the right of renewal in the Court of Appeal, in relation to leave to move for judicial review, there was rightly an outcry as to the constitutional implications for the rule of law. The Court of Appeal in *Stipplechoice* professed itself to be "troubled" by that proposal, given "the merits of the present rules which allow unrestricted access to the Court of Appeal, in this field, where so much of the litigation is directed to preventing alleged abuses of power".<sup>68</sup> The 1985 proposal was rightly withdrawn.
68. The right to apply orally for permission in the High Court is an essential part of the constitutional protection under the rule of law.
69. We therefore make no response to Questions 7, 8 and 9, which consult merely upon the implementation of the proposal to curtail oral renewals. We reject the underlying premise that oral renewals should be curtailed. In answer to Question 10, we do not 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. In response to Question 11, we do not consider that there are *any* categories of judicial review proceedings to which the proposed approach would be appropriate. In response to Question 12, we reject the underlying premise that there are categories of cases in which the possibility of oral renewal should be removed.

### **Fees**

70. It would be difficult, and unduly dogmatic, to argue that rule-of-law considerations preclude any change to the fee arrangements presently applicable to applications for permission to seek judicial review, and we do not seek to make any such

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<sup>68</sup> *R v Commissioner for the Special Purposes of the Income Tax Acts, ex parte Stipplechoice*, *The Times*, 23<sup>rd</sup> January 1985.

argument. We do, however, entertain serious concerns about the proposals concerning fees.

71. As we stated above, the rule of law requires that individuals and other relevant parties have an adequate opportunity to challenge Government decisions before an independent and impartial judicial body. It is self-evident that the extent to which a given individual has an adequate opportunity to do so will be affected by a variety of factors, including financial ones. The possibility that court fees may be set in such a way as to fall foul of the requirements of the rule of law is one that was considered – and found to have eventuated – in the *Witham* case.<sup>69</sup> In that case, it was held that an increase in court fees and the removal of an exemption in favour of those with limited means was *ultra vires* the Executive's authority, on account of the incompatibility of the measures with the common law constitutional right of access to justice.
72. It does not follow that the proposal in the Consultation Paper concerning the introduction of a fee for oral renewals necessarily conflicts with that common law constitutional right. It is, however, surprising, to say the least, to find no indication in the Consultation Paper that the fees question may engage this constitutional right – let alone any assessment of whether the right may be breached by the specific proposal made.
73. Any adequate assessment of this matter would have considered not only the particular fee level proposed, but also the relationship between initial permission decisions on the papers and oral renewals. As noted above, Bondy and Sunkin's empirical research shows high levels of variation between permission rates at the initial stage of the process, thereby casting substantial doubt upon its robustness. The matter is compounded by the fact that – as Bondy and Sunkin's work also demonstrates – success rates on oral applications tended to be substantially higher than applications considered on the papers only.<sup>70</sup> In the light of this, it is arguable that an oral element is sometimes essential if meritorious cases are to be allowed to progress. On this view, oral renewals cannot be dismissed as an unnecessary luxury – and the question whether charging fees for oral renewals is compatible with the common law right of access to justice falls to be considered against that background.
74. For the foregoing reasons, our answer to Question 14 is in the negative, and we make no response to Question 15.

### **Concluding remarks: the constitutional role of judicial review**

75. The best indicator as to whether a country has the rule of law is this: Can the ordinary person challenge a decision by a public official with a reasonable chance of redress if the decision is unlawful? In countries under the rule of law, courts or other tribunals are hospitable to such challenges and hear them openly and fairly. Countries without the rule of law stack the odds in favour of governmental decisions which are difficult or impossible genuinely to question.
76. The absence of a codified constitution and continued adherence to the notion of parliamentary sovereignty may give the impression that the extent to, and conditions upon, which judicial review should be available is legitimately a matter of choice for the political branches. But, properly understood, judicial review is in the first place an essential and indispensable feature of the constitutional system

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<sup>69</sup> *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

<sup>70</sup> Bondy and Sunkin, *The Dynamics of Judicial Review Litigation* (London 2009) at 56.

that legitimises the power of those branches. In the absence of a codified, power-allocating, power-limiting constitutional text, the existence of the courts' powers of judicial review are essential if the fundamental requirements of the rule of law are to be satisfied.

77. Moreover, judicial review is a crucial component of the system for holding Government to account. As Lord Griffith put it in *ex parte Bennett*, "The great growth of administrative law during the latter half of [the twentieth] century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended."<sup>71</sup> Great care must be taken to ensure that the capacity of the modern law of judicial review – the development of which Lord Diplock famously described as "the greatest achievement of the English courts in my judicial lifetime"<sup>72</sup> – as a means of holding Government to account is not diminished by rendering the supervisory jurisdiction inaccessible in the first place.
78. The rule of law does not merely require that judicial review be available in some notional, theoretical sense. It requires that individuals have a real and adequate opportunity to challenge Government decisions before independent courts or tribunals. The proposals in the Consultation Paper fall to be evaluated in that light. The opportunity to challenge official decisions in different ways has been one of the significant contributions of this country to the rule of law over the past fifty years. It has been fashioned both by parliament and the courts. It has surely improved not only the justice but also the quality of the decisions themselves. This is because our carefully crafted principles of good administration require decision-makers to have proper regard both to all relevant legal considerations and to the interests of the public which, after all, they are there to serve. The need for efficient and expeditious decision-making is of course important. However, it must be balanced against the need for legal and other forms of accountability, which should not be lightly diminished.

DR MARK ELLIOTT  
SIR JEFFREY JOWELL QC  
23<sup>rd</sup> January 2013

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<sup>71</sup> *Rv Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 at 62.

<sup>72</sup> *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641.