Bar Council response to the "Judicial Review: proposals for reform" consultation paper

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to the Ministry of Justice consultation paper entitled "Judicial Review: proposals for reform".[1]

2. The Bar Council is the governing body and the Approved Regulator for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

Overview

3. The Bar Council welcomes the Government's acknowledgement that judicial review is a critical check on the power of the State, providing a necessary and effective mechanism for challenging decisions of public bodies. The Bar Council agrees too with the Government that the interests of justice are best served by ensuring that weak or frivolous cases are identified and dealt with promptly, and that strong claims are resolved quickly. The problem with the proposals for reform is that they will have the effect of inhibiting access to justice and weakening the accountability of the executive without achieving the aims of speed and efficiency. Indeed, in some respects they are liable to add to delay.

4. Above all, the proposals to remove oral hearings in certain circumstances will damage access to justice and will also damage the principle of open justice that is a cornerstone of the common law. Our experience leads us to believe that rigorous case management by the judges of the Administrative Court, which may be bolstered (if deemed advisable) by amendments to Part 54 of the CPR, would achieve greater speed and greater efficiency without inhibiting access to justice.

5. Many judicial review cases involve important rights of the individual, and it is of obvious importance that there should be ready access to the courts to ensure that complaints of unlawful interferences with those rights are examined swiftly and thoroughly. But it is also important to appreciate the importance of judicial review for the business community.

[1] Ministry of Justice [2013] [Judicial Review: proposals for reform]

It is ironic that these proposals should have as their precursor a speech by the Prime Minister to the CBI. Much of the business of the Administrative Court concerns challenges brought by businesses themselves to heavy-handed or wrong-headed decisions by regulatory and other public bodies. Those decisions, if uncorrected, prevent those businesses from carrying out economic activity that contributes to growth and recovery. Erecting additional obstacles to bringing judicial review proceedings and obtaining permission to proceed makes it harder for businesses - especially smaller enterprises - to obtain a remedy where red tape goes wrong.

6. There is a danger (in a short consultation) that proposals which have the apparent attraction of being targeted at a genuine problem are accepted without being fully thought through. One obvious example in the present consultation is the proposal to align the time limit for challenges to the grant of planning permission by local planning authorities to challenges to the grant or refusal of planning permission by the Secretary of State on appeal. For the reasons set out below, we do not consider that the two circumstances are directly analogous. If it is thought necessary to address the current judicial review time limit in the case of local planning authority decisions, a more systematic reform is required.

7. Finally, as part of this Overview, we express concern at the Consultation Paper's assertion that, even where the claim is successful, it may only result in a "pyrrhic victory" when the matter is remitted to the decision-making body. That assertion does not reflect the full position. Oral rehearings act as a useful check by judges. Even more importantly, the public law decision-maker will be bound to take a fresh decision in accordance with the law as declared by the court. An unfair decision will need to be taken again fairly. A decision based on irrelevant factors will need to be taken again based only on relevant factors. There cannot be – and must not be – any foregone conclusion that the decision will be the same. Moreover, it is inherently in the public interest that public authorities take fair and lawful decisions. The scrutiny imparted by judicial review proceedings serves to ensure high standards of public decision-making generally and permits public confidence in the decision-making process. The public interest in lawful decision-making goes above and beyond the eventual outcome for any particular claimant.

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?

8. For the reasons that follow, we do not consider the analogy with appeals in planning cases sound. We consider that the arguments for shortening the time limit across the board, and in relation to all grants of planning permission, are significantly outweighed by the arguments against. Instead, encouragement – and resources—should be provided for active and robust case-management in order to minimise the administrative and commercial prejudice that pending judicial review proceedings can cause.

<u>Planning cases</u>

9. In planning cases, the analogy with the six-week time limit for a statutory challenge to an appeal or call-in decision under Town and Country Planning Act 1990 is inapposite.

By the time an appeal or application has wound its way through the inquiry process to a decision, the persons who might bring a s. 288 claim will already have gone through the process of preparing their case in the appeal, assembling their evidence and arguments. The six-week time limit applies regardless of whether the "person aggrieved" is the original applicant for planning permission, the local authority, or an objector who participated in the inquiry.

10. By contrast, judicial review claims in planning cases are invariably directed at a decision by a local authority to grant planning permission in the face of objections. Where a local authority *refuses* planning permission, the disappointed applicant (the prospective developer) has a full right to appeal on the merits, with a time limit of six *months*. We do not suggest that the judicial review time limit should be set at that period. Rather, the point is that there is no case for *shortening* the current limit in all cases.

11. It is true that a pending claim for judicial review can cause prejudice in planning cases, since funding and other arrangements for implementation of development may be time-limited and it may not be possible or desirable to build "at risk". However, a pending claim may potentially have that effect whenever commenced – within six days, six weeks or three months. Ironically, even at present, disputes about time limits can be one of the most potent causes of delay and of increased cost in judicial review cases. The experience of many practitioners in this field is that such disputes can significantly increase the volume of evidence and argument that the parties must prepare and that the court must consider, so lengthening the time taken to complete the permission stage. Shortening the time limit would tend to increase the number of cases affected by satellite arguments about whether proceedings have been brought in time and whether time should be extended. Thus the likelihood is that such a step would add to delay rather than reducing it.

12. We consider that the key to avoiding undue prejudice as a result of pending judicial review proceedings is to ensure that the proceedings are determined quickly. In the most urgent cases, judicious use of the "rolled-up" procedure, expedited hearings and transfers to an Administrative Court centre outside London can result in a case being completed in a matter of weeks from the commencement of proceedings. We would favour amendments to CPR Part 54 and/or Practice Directions to encourage the use of these techniques, and would have no objection to an approach that identified certain kinds of case – which might well include planning – as requiring particularly swift resolution. That would be aided by ensuring that sufficient High Court and designated judges are available to deal with case management decisions and expedited substantive hearings in London and the regional centres.

13. We do however accept that there will be cases where the commercial and public interest requires greater and speedier certainty that a grant of planning permission can be considered as immune from challenge than the present position allows. As originally conceived, the judicial review time limit required the challenge to be brought "promptly" and in any event within three months. Case law developments have thrown the legitimacy of the "promptness" requirement into doubt. The practical result is that no grant of planning permission can safely be regarded as immune from challenge until, at the earliest, the last day of the three month period. This is true no matter how heavily involved the claimant has

been in the process leading up to the grant of planning permission and no matter how urgent the subject matter of the proposed development. The present system simply does not allow for the achievement of certainty at any earlier point in time.

14. In our view, the solution to this problem is not to proceed on the basis of a claimed but false analogy with challenges (under TCPA 1990, s.288) to decisions of the Secretary of State, but in the creation of a new system which does provide for appropriate protection of the interests of both developers and third party objectors. It would be possible, for example, to provide statutory machinery under which if it was thought necessary for there to be a shorter time limit, that time limit would run from the date that a decision had been subject to prescribed publicity requirements. This suggestion is limited to planning cases, and in particular to situations where it is thought appropriate to achieve certainty in respect of the actual grant of planning permission by a local planning authority. It would itself need to be carefully considered and be the subject of both careful drafting and consultation. A message that we wish to convey is that any proposed reform of time-limits will raise complex issues and that any claimed analogy with that under s288 is, as we have said, false.

Procurement cases

15. We recognise that in procurement cases, the analogy with a claim under the 2006 Regulations will be closer than that between judicial review proceedings and statutory challenges in planning cases. We do not, therefore, strongly disagree with the proposal to shorten time limits in such cases. However, our view on balance is that essentially the same points about satellite litigation and case management apply. As outsourcing and contracting out of many kinds of public service provision continue to expand, it is crucial that the public, including the business community, have confidence in the lawfulness and integrity of the procurement process. Creating new procedural obstacles to judicial review challenges is inimical to that goal, and the potential risks of delay can be mitigated by judicial case management as we have set out above. Anecdotal accounts to us from practitioners in the field indicate that shortening the time limit for bidders has increased the number of claims lodged under the 2006 Regulations, in a manner in line with our concerns. It would be unfortunate if that were replicated in procurement judicial review cases.

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?

16. The Pre-Action Protocol, properly used, can play an important role in resolving disputes before proceedings are commenced, reducing the number of cases brought to court and thus the overall problem of congestion and delay in the Administrative Court. The experience of practitioners is that even under the present rules, where a claimant has properly sought to use the Protocol before bringing a claim but it has nevertheless been necessary to bring proceedings within the existing three-month limit, some defendants still seek to argue that there has been undue delay. A shorter time limit would make the Protocol difficult if not impossible to operate. The right approach is to encourage claimants and defendants to make proper use of the Protocol, underpinned if necessary by the availability of appropriate sanctions (as to costs and otherwise) under the CPR and Practice

Directions. The overall effect would be to reduce delays and thus the prejudice stemming from pending proceedings, further undermining the case for a shorter time limit.

17. The Pre-Action Protocol does not need to be followed in s.288 cases. If the suggestion made above of the provision of a short time limit following on from the satisfaction of prescribed publicity requirements is, after consideration, finally adopted, the Pre-Action Protocol could similarly be dispensed with.

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?

18. No. As indicated above, that would increase the costs and preparation burden on the claimant (as well as the burden on the court) and would encourage satellite litigation about whether to grant an extension of time. That would be contrary to the interests of justice generally and access to justice in particular.

19. If a shorter time limit following prescribed publicity were adopted, there would be a case for making the time limit absolute and not subject to discretionary extension.

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

20. No. Different time limits for different kinds of challenge would create confusion, and there is no principled reason for differentiating between different kinds of public law challenge.

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.

21. The Bar Council does not agree that the CPR should be changed. The proposal would amount to an inducement to litigate protectively which in our view should be thoroughly discouraged as potentially wasting time and resources.

22. The Consultation Paper treats two kinds of case together, namely those cases in which a claimant challenges continuous breach, such as ongoing delay by a public authority, and cases in which a public authority has taken more than one decision. But a distinction needs to be drawn between these two kinds of case.

<u>Continuous breaches</u>

23. In cases of continuous breach, it would in our view be unlawful and wholly unjust to prevent a claimant from challenging a public authority after a certain length of time. An unlawful detention remains unlawful. A failure to provide a vulnerable adult or child with adequate care remains unlawful. The longer the delay, the more serious the public law wrong. It would be contrary to the interests of justice, and would shield public authorities

from scrutiny and accountability, if claimants were to be denied the right to challenge such illegality after three months.

24. The proposal would also require a claimant when lodging proceedings to have already assessed the date on which illegality commenced without yet having had sight of the public authority's case against it. That would be unfair.

25. Nor would the proposal necessarily assist defendants. In order to impugn a claimant's timeliness, a public authority would in effect need to argue that a public law wrong (such as delay in taking a decision) had been ongoing for more than three months, thereby effectively conceding the illegality of its actions. The proposal may therefore have the indirect effect of inhibiting public authorities from challenging the timeliness of claims.

Successive decisions

26. In our view, the current provisions of the CPR and the current case law are sufficiently muscular to prevent a claimant from pegging a claim for judicial review to a communication from a public authority that merely reiterates or adheres to an earlier decision. It is open to public authorities, including central government departments, to argue that a claimant has pegged its claim to something that is not a fresh decision, without requiring a change in the law.

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?

27. The proposal would be highly likely to encourage claims to be brought which might otherwise be resolved without reference to the court. It would discourage co-operation between the parties and may in effect compel a party to bring a case to court on a protective basis when he or she may otherwise positively prefer to reach an informal resolution.

28. In our experience, for example, colleges of further education denied a Tier 4 sponsor licence regularly prefer to negotiate with the Home Office in order to preserve a good working relationship rather than have a court battle. These are often SMEs who can ill afford to divert resources to legal costs. Lawyers representing prisoners who face delays in the prison or parole systems may well find it quicker to iron out the delay with the relevant public authority rather than go to court, which saves public funds and alleviates pressures on court listings. Acute concerns arise too in relation to disabled children and adults, and indeed all users of community care services. In very many of these cases there are lengthy negotiations before lawyers are involved. It would be harsh to expect children or disabled adults (or their litigation friends) to bring claims within three months of the start of a continuing breach, but also counterproductive as claims would need to be brought earlier than necessary in order to come within time.

29. The court would retain discretion to extend time in appropriate cases, but this would create satellite litigation and give rise to time and expense incurred on the question whether this discretion should be exercised.

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?

30. The Bar Council strongly disagrees with the proposals to remove the right to an oral hearing of an application for permission to apply for judicial review. Oral renewal hearings serve two functions. First, they ensure that no one is denied the right to challenge the executive without being heard by a judge. Secondly, they ensure open justice and public access to cases where the individual seeks to hold the Government to account. These are strong public interests. The Consultation Paper does not justify their erosion.

31. Oral argument has been authoritatively described as central to the common law, adversarial system of justice. It 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" (Laws LJ in *Sengupta v Holmes (Lord Chancellor intervening)* [2002] EWCA Civ 1104 at [38]). In the same case, Keene LJ referred to "the benefit enjoyed by the court of listening to oral argument" as being a "fundamental part of our system of justice and it is a process which as a matter of common experience can be markedly more effective than written argument."

32. In his well-known dictum in *John v Rees* [1970] Ch 345 , 402, Megarry J observed:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change".

It would therefore be potentially unjust for a judge to prevent an oral renewal as a matter of his or her own discretion: such a course would leave no place for the sort of realities which concerned Megarry J.

33. It is important to recall that the purpose of the permission requirement in judicial review proceedings is to protect public bodies from unmeritorious challenges. That presupposes that the permission stage will be conducted in a way that provides a proper, rather than a perfunctory, opportunity to evaluate the likely merits. Removal of the right of oral renewal would mark a shift from properly protecting public bodies to improperly restraining access to the courts.

34. Turning to the specific proposal, there is a strong concern that it will be extremely difficult to determine whether there has been a "prior judicial hearing" of substantially the same matter. It would be inadvisable for the parties' and court's resources to be spent on the determination of this issue, as opposed to determining the substantive challenge itself.

35. For these reasons, we object to the proposal to prevent oral renewals in cases which have been the subject of a "prior judicial hearing" as a matter of principle. We also do not consider that any substantial number of cases will fall into this category. Judicial immigration decisions outside the High Court are now substantially within the FTT/UT system, as are the large number of other tribunal decisions within that system. The proposed reforms would accordingly have no impact on these decisions; and the procedural position regarding access to judicial review after refusal of permission to appeal to the UT has been settled by *Cart*, and the subsequent reforms to the CPR implementing *Cart*. It is no doubt possible to think of other court or tribunal decisions to which the proposed reform could potentially apply, but it is not easy. It is possible to judicially review magistrates' courts, county courts and the crown court, but the proposed reform would not create a system which is coherent. There is a right of access to the High Court from these courts by Case Stated. If decisions by planning inspectors on planning cases are arguably seen as "prior judicial hearings", then it must be borne in mind that there is a right of appeal on a point of law in such cases under s.288 of the TCPA 1990. This is not subject to any requirement for permission.

36. The Parole Board might arguably be a body which makes "prior judicial decisions". Judicial review is the only method of challenging a Parole Board decision as wrong in law. Decisions are important and affect the liberty of the subject. It would be wrong to produce a situation in which there was a possibility of having no oral hearing within the only available appeal route.

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?

37. Subject to our comments under Question 7 above, we agree.

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?

38. Subject to our comments under Question 7 above, we agree.

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?

39. For reasons set out under Question 7, we strongly disagree. The proposal would mean that a claimant could be deprived of any opportunity at all to be heard in court by a judge. In this way, the proposal goes further than (for example) provisions of the CPR which constrain the right to oral renewal in the Court of Appeal, where the aggrieved party will have already had access to a court or tribunal. In an open, just society, oral hearings are not expendable. They are part and parcel of the rule of law.

40. We recognise the need for parties to respect the court's processes which means not bringing abusive claims. It means, equally, that public authorities should not defend indefensible claims and should respond in timely fashion to claimants' efforts to avoid proceedings through the Pre-Action Protocol. It is imperative, however, that the solution to abusive claims should preserve the right to be heard by a judge at some stage in the claim. We would advocate the greater and stronger use of judicial case management powers as being the appropriate way in which to regulate the use of the court.

41. There are two existing situations where the certification of a claim as totally without merit is in play under existing procedures. The first is in the immigration context, where 54APD 18.4 enables a High Court judge to certify an application as clearly without merit. This has an important practical effect in the context of the Secretary of State's policy on staying removal from the UK. It does not prevent oral renewal. The second is an ability of a Court of Appeal judge to certify, which does prevent oral renewal in the Court of Appeal.

42. We do not consider that the Court of Appeal power should be seen as creating any sort of precedent or parallel for what is proposed. At present, any judicial review that is the subject of such a certificate will have been the subject of oral argument in the Administrative Court, and Court of Appeal judges are by definition highly experienced. By contrast, the pressures on the Administrative Court permission list are very considerable. A Deputy High Court judge may well be working in an area of law with which he is unfamiliar. A power to prevent oral renewal in this context may very well lead to considerable injustice.

43. The phrase "totally without merit" has its origins in procedures relating to vexatious litigants and civil restraint orders (see, for example CPR 23.12). In that context, where a court certifies an application as being "totally without merit", there will only be an impact on the litigants ability to have an oral hearing if the court goes on to make a civil restraint order. The court will normally only do so if there have been *repeated* applications that are "totally without merit" – in other words an unreasonable and oppressive appetite for litigation. This is a very different context from the proposal, in which the Administrative Court judge would prevent an oral examination of the merits of the decision he had taken.

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?

44. We do not believe that this approach would be appropriate for any kind of case.

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?

45. We strongly disagree with the proposal. There are many kinds of case where obvious injustice may occur, most notably where a claimant has through inability not put his case adequately at the paper stage. Mentally ill, vulnerable, child claimants and litigants in person may not get it right first time. It would be unjust for them to suffer adverse consequences of the sort envisaged by the proposal.

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?

46. The Bar Council is opposed to the implementation of either or both of these proposals.

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

47. The Bar Council would be concerned at any level of court fee that may inhibit access to justice. Beyond that, other organisations will be better placed to comment.

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?

48. See question 14.

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.

49. Other organisations will be better placed to comment.

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