Response to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Reform'

Submitted by the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, Lord Justice Maurice Kay (Vice President of the Court of Appeal (Civil Division)) and Lord Justice Richards (Deputy Head of Civil Justice)

1. This response to the Ministry of Justice's consultation paper entitled 'Judicial Review: proposals for reform' is submitted by the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, Lord Justice Maurice Kay (Vice President of the Court of Appeal (Civil Division)) and Lord Justice Richards (Deputy Head of Civil Justice). It follows consultation with the Senior President of Tribunals and a number of senior judges who sit in the Administrative Court and the Upper Tribunal. However, it has not been possible to consult all relevant judges.

2. In support of the administration of justice and the effective operation of the courts, the judiciary has already taken steps to increase the speed and efficiency of judicial review proceedings. Recent steps include:

    a. Administrative Court centres were established at Birmingham, Cardiff, Leeds and Manchester in 2009. Since Easter 2012, they have assisted with paper applications for permission to apply for judicial review received in London. In addition to dealing locally with cases which would otherwise have come to London, these measures assist in reducing delays in London;

    b. Since 1 October 2012 the Master of the Administrative Court has been empowered by CPR rule 54.1A to make certain procedural orders in judicial review proceedings which could previously only be made by judges, helping to speed the throughput of work in the Administrative Court;

    c. A totally without merit ('TWM') certification procedure was introduced in the Court of Appeal in 2006. It has recently been extended to judges hearing appeals at other tiers of the court hierarchy (see CPR rule 52.3(4A) and the Civil Procedure (Amendment No. 2) Rules 2012 (SI 2012/2208)). The Court of Appeal's TWM powers are available in relation to appeals against refusal of permission to apply for judicial review. Where used, they prevent oral renewal of applications for permission to appeal after refusal on paper;

    d. A TWM certification procedure is also used at the permission stage in judicial review proceedings in the High Court. While a TWM certification does not remove the right to oral renewal, if a judge

refusing permission certifies that a claim is TWM, any legal representative requesting an oral renewal must certify by signature that he/she has considered the reasons for refusal of permission but considers the claim to be arguable (see Administrative Court Office Form 86B, revised October 2012);

e. Following the Supreme Court's ruling in *Cart*[1], on 1 October 2012 a truncated procedure was introduced in relation to applications for judicial review made following a refusal by the Upper Tribunal to grant permission to appeal against a First-tier Tribunal decision. The time limit for bringing such applications has been shortened, and if the High Court refuses the application for permission on the papers there is no right to oral renewal (see CPR r 54.7A(8)). An appeal against the High Court's refusal lies to the Court of Appeal on the papers only (CPR r 52.15(1A)).

3. Since judicial review applications in asylum and immigration matters constitute the majority of the workload of the Administrative Court, specific steps have been taken to increase the efficiency of these claims. These include:

a. A limited category of immigration and asylum work has, since 17 October 2011, been transferred from the Administrative Court to the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC"). Further to the passage of clause 20 (on the transfer of immigration or nationality judicial review applications) of the Crime and Courts Bill, it will be possible to transfer further work to UTIAC. It is anticipated that this will lead to a significant reduction in the workload of the Administrative Court;

b. If an urgent application is made to stay removal or deportation, lawyers are required to declare the reason for the urgency and the justification for any late application. The Administrative Court has made it clear that lawyers who fail to comply with these requirements must attend court personally to explain their failures (*R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070(Admin));

c. The President of the Queen's Bench Division has recently presided over three further cases in the Divisional Court to underline to immigration law practitioners various of their duties (a duty to disclose all relevant matters (*Awuku* [2012] EWHC 3298); a duty to satisfy themselves that a claim is one that can properly be made (*Awuku (No 2)* [2012] EWHC 3690); and a duty to act competently and with their obligations to the court uppermost (*B & J* [2012] EWHC

[1] *R (on the application of Cart) v Upper Tribunal*; *R (on the application of MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) and another* [2011] UKSC 28.

3770)). Breach of theses duties may lead the court to refer the practitioner to the relevant regulatory body;

d. In order to make a further improvement in the efficient handling of urgent applications made to the Administrative Court at the end of the day or out of hours, which are particularly burdensome applications for the Court and its administrative staff, there is now better contact between the Courts and the UKBA and a new protocol has been agreed;

e. When a judge refuses permission on the papers and certifies that an immigration or asylum claim is TWM, they will commonly also make an order that an application for renewal should be no bar to the Claimant's removal from the United Kingdom.

4. All these steps aim to reduce delays and decrease the burden on the Administrative Court's finite resources.[2]

5. The judiciary welcomes further measures which help to increase the efficiency of the court process where such measures are consistent with access to justice and the rule of law.

6. We have considered the consultation paper carefully. Our comments are set out below.

Questions 1 -6: time limits

Question 1 – is it appropriate to shorten time limits in procurement and planning cases?

7. We have no objection in principle to the proposal to shorten the time limits in planning and procurement judicial reviews so as to mirror the time limits for statutory appeals, while maintaining the Court's discretion to extend time.

8. CPR 54.5 provides that the claim form must be filed: (a) promptly, and; (b) in any event not later than 3 months after the grounds to make the claim first arose. The requirement to act 'promptly' may require proceedings to be brought within (and sometimes substantially within) the 3 month period in any event. In the case of planning judicial reviews the six week period for statutory applications and appeals has at times, at least in the past, been considered relevant to the requirement of promptness. However, as noted in the consultation paper at paragraph 40, EU law has limited the cases where

[2] Please note that the consultation paper's reference at paragraph 33 to the average 11 week waiting time for a permission decision on the papers includes the 21 days permitted under the Rules for the Defendant(s)/Interested Party(ies) to lodge an Acknowledgement of Service.

the uncertain requirement of promptness can displace the fixed outer time limit: see *R (Buglife) v Medway Council* [2011] EWHC 746 (Admin) and *R(Berky) v Newport City Council and others* [2012] EWCA Civ 378 1824 (Admin), for a discussion of how CJEU jurisprudence in *Uniplex* affects the application of the 'promptly' requirement in judicial review claims involving directly effective EU law. The introduction of a shorter fixed time limit for procurement and planning cases is therefore capable of having some practical effect, though we do not perceive there to be any serious current problem in these areas.

9. At the same time it must be recognised that the likely practical consequences of the proposed reduction in time limits are significant. They include:

    a. As foreshadowed by question 2, it is unlikely that parties will have time to comply with the Pre-Action Protocol for Judicial Review before the expiry of the time limits. An associated risk is that parties will be less likely to resolve disagreements outside court. The pre-action protocol prescribes a letter before claim setting out the decision under challenge and why it is considered to be unlawful, and a letter of response. It strongly encourages Claimants to seek appropriate legal advice before sending a letter before claim. It provides that Defendants should normally respond within 14 days. It would be rare to accomplish obtaining legal advice and exchanging letters in under six weeks and, in our view, barely possible to do so in under 30 days. There is no obvious step in the pre-action protocol that can be cut back so as to enable the protocol to operate on an accelerated basis;

    b. It has always been clear that the pre-action protocol does not affect the time limit for bringing judicial review applications. If the time limit is shortened, we suspect that Claimants will lodge precautionary applications before the expiry of the time limit, while writing to ask the Court to take no immediate action on the claim;

    c. There is likely to be an increase in the number of applications for an extension of time. It is possible that a greater proportion of extension of time applications will succeed.

10. In relation to the proposed time limit for procurement cases, we understand the rationale for providing that claims should be brought within 30 days of 'when the Claimant knew or ought to have known of the grounds for the claim': although that formulation differs from the normal judicial review formulation, whereby time runs from the time when the grounds to make the claim first arose (CPR 54.5), it corresponds to the relevant time limit for statutory appeals which it is intended to mirror.

It should be noted that one consequence of this change would be that, in respect of any given set of grounds, the starting point for time running could vary from Claimant to Claimant.

11. Our principal concern with this proposal, however, relates to the definition of 'procurement cases' to which the time limit is to apply, namely 'proceedings which are based on decisions or actions within the ambit of the Public Contracts Regulations 2006'. From paragraph 50 of the consultation paper it appears that this may be intended to cover situations that are excluded from the Regulations themselves. It is not clear that that definition is apt to achieve that result or why such a result is considered appropriate. In any event, clarity and precision are required in order to reduce the scope for litigation as to the circumstances in which the shortened time limit applies.

12. In relation to the proposed time limit for planning cases, we do not understand the rationale for providing that claims should be brought within 6 weeks of 'when the Claimant knew or ought to have known of the grounds for the claim', instead of the normal judicial review formulation whereby time runs from the time when the grounds to make the claim first arose. In this case, unlike procurement cases, the proposed wording does not correspond to the time limit for statutory applications and appeals which it is intended to mirror: for example, the time limit under s.288 of the Town and Country Planning Act 1990, referred to in paragraph 53 of the consultation paper, runs from the date of the order or decision being challenged. Reference to the date when the Claimant knew or ought to have known of the grounds of the claim would mean that time could begin to run at a later date than would apply under the normal judicial review formulation, and that, in respect of any given set of grounds, the starting point for time running could vary from Claimant to Claimant.

13. We do not understand it to be suggested that any change be made to s.31(6) of the Senior Courts Act 1981. This provides that the Court may refuse to grant permission or any relief sought on the application where it considers that there has been undue delay in making the application and the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. We agree that no change to that provision is called for.

Question 2 – will there be sufficient time for parties to fulfil the pre-action protocol?

14. As discussed above, the short answer to this question is "no". If the time limits are reduced as proposed, it may be sensible to dispense with the pre-action protocol in procurement cases, since it will be nearly impossible to complete within 30 days.

Question 3 – does the Court's power to allow an extension of time ensure access to justice?

15. Yes. The maintenance of the Court's power to allow an extension of time is a prerequisite to our agreement in principle to the reduction of time limits in procurement and planning cases.

Question 4 – are there any other sorts of cases in which a shorter time limit might be appropriate?

16. We are not aware of other areas where it would be appropriate to shorten the three month time limit. A short time limit (16 days) has already recently been introduced for applications for judicial review of decisions of the Upper Tribunal refusing permission to appeal from the First-tier Tribunal (see paragraph 2(e) above and CPR 54.7A(3)).

Question 5 – when time starts to run in continuing breach and multiple decision cases

17. The formulation in CPR 54.5 that time starts to run from when 'the grounds to make the claim first arose' currently applies to all applications for judicial review. We do not consider that any alteration to that wording is necessary or appropriate to cover what the consultation paper describes as continuing breaches or multiple decisions. Paragraph 64 of the consultation paper refers to 'anecdotal evidence' of cases where application of the three month time limit is 'frustrated' by reliance on a continuing breach or on the latest in a series of decisions, but we are not aware of any serious problem that requires to be addressed. Judges are well used to dealing robustly with arguments advanced merely as devices to avoid claims failing on grounds of delay. This is, moreover, a complex area involving substantive law as well as procedural considerations and calling for extreme care. In our view, it is an area ill-suited to development by procedural rule change.

18. In relation to continuing breaches there may be good reasons why, for example, although the breach has been a continuing one the grounds to make the claim should be held to arise only when the breach first affects the Claimant (such as when an unlawful policy or regulation is first applied to him or he is first affected by a failure to fulfil an obligation under domestic law or to implement an EU directive) or why a claim should be entertained despite a failure to claim within three months from when the grounds to make the claim first arose (for example, in the case of continuing unlawful immigration detention). [3]

[3] For illustrations of the problem of determining when time begins to run in relation to continuing breaches in the fields of human rights and EU law, see Lord Hope's comments in *Somerville v Scottish Ministers* [2007] UKHL 44 (para 51), applied by Baroness Hale in *A v Essex County Council* [2010] UKSC 33 (para 113), and Burton J's comments in *R (C) v Secretary of State for Justice* [2010] EWHC 3407 (Admin) (para 11).

There are also cases where it is difficult to gauge when a continuing situation constitutes a breach so that time begins to run (e.g. when the delay in making a decision finally becomes unlawful). The kinds of issue that arise in such cases cannot readily be dealt with by a simple rule change.

19. In relation to multiple decisions, one problem is that of identifying the point at which a 'decision' amenable to judicial review first arises (and also in what circumstances judicial review may lie even in the absence of such a decision): for example, in the planning field it has been held by the House of Lords that, even if the grounds relied on are broadly evident in a local authority's resolution to grant planning permission, time begins to run only from the date of grant of planning permission itself, though the Court has jurisdiction to entertain an application made prior to this.[4] Again, this is not the kind of issue that can readily be dealt with by a simple rule change. The consultation paper appears also to have in mind the situation where a public authority takes a decision but then agrees to reconsider the matter and thereafter takes a fresh decision to the same or similar effect. Serious issues of principle would, however, arise in relation to any attempt to bar a challenge to the fresh decision on the ground that the claimant had failed to bring a timely (and otherwise pointless) challenge to the first decision.

Question 6 – are there risks in bringing forward the point at which time starts to run

20. In addition to the difficulties in principle referred to above, we agree that there are practical risks in taking forward the proposal, including the risks identified in the consultation paper (of encouraging claims to be brought which might otherwise have been resolved without reference to the Court). Change to the formulation of CPR 54.5 may also introduce uncertainty in contexts where the law is at present clear, and lead to litigation on the interpretation of the new formulation.

<u>Questions 7 – 13: applying for permission – oral renewal</u>

21. As noted above, a procedure for certifying paper applications for permission to appeal TWM, and thereby preventing Claimants from requesting that the application be reconsidered at a hearing, has been in place in the Court of Appeal since 2006. It has been sufficiently effective for its application to have been extended, in 2012, to appellate hearings outside the Court of Appeal. We are supportive of a TWM procedure being made available within judicial review proceedings.

22. Were the TWM certification procedure to be made available within judicial review proceedings, in our view it would be unnecessary also to introduce an automatic restriction on oral renewals where there had been a prior judicial

[4] *R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23.

hearing. The TWM procedure is effective on its own to combat the mischief of a proliferation of oral hearings arguing the same point since, where a prior hearing on substantially the same matter has properly addressed and answered the points now raised by the Claimant in seeking permission for judicial review, the application is likely to be assessed as TWM.

23. In any event we see real problems in the proposal to restrict an oral renewal simply on the basis that the matter has been the subject of a prior judicial hearing. The fact that there has been a hearing before a court, tribunal or 'body exercising the judicial power of the State' will not be an automatic guarantee that the matter has been properly considered. The range of situations covered by that formula is very wide and its blanket application could give rise to injustice: consider, for example, the case of a self-represented litigant with poor literacy whose prior hearing was before lay magistrates and where the only legally trained person present was the justices' clerk. Such a case might also be one where an oral renewal would assist in identifying the true point of an application and whether it was arguable.

24. Our answers to the specific questions in this section should be read in the light of the comments above.

Question 7 – definition of prior judicial hearing

25. As set out above, we believe there are difficulties with an automatic restriction on the right to oral renewal where there has been a prior judicial hearing, independently of the definition given to this phrase.

Question 8 – whether a prior hearing raised substantially the same matter should be determined by a judge

26. We agree that if this proposal were to be implemented such a determination could only properly be taken by the judge considering the application for permission.

Question 9 – defendant to make the case that there should be no right to an oral renewal

27. We agree that if this proposal were to be implemented it should be for the Defendant to make the case in the Acknowledgement of Service that there is no right to an oral renewal. This might lead to Defendants making fuller responses to judicial review permission applications than at present, and requesting additional time in which to do so. There is an argument that Claimants should have a right to reply to any contention in an Acknowledgement of Service that there is no right to an oral renewal.

Question 10 – no right to oral renewal where a paper application has been assessed as TWM

28. We agree that a TWM procedure should be introduced at the permission stage of judicial review applications, and that the effect of a TWM decision should be: (a) to remove the right to ask for oral renewal, and; (b) that an application for permission to appeal to the Court of Appeal against the refusal of permission to apply for judicial review should be on the papers only.

29. We note that this is likely to lead to:

    a. High Court Judges taking more time to consider paper applications before certifying a case TWM. The need for additional paperwork time will need to be considered, and;

    b. An increase in the number of paper applications made to the Court of Appeal. The effect of this increased workload will need to be monitored.

Question 11 – are there any categories of judicial review proceedings in which it would be inappropriate to introduce a TWM procedure?

30. No. The problem at which a TWM procedure is directed is one that can arise in any category of judicial review case. See also the observations of Lady Hale and Lord Dyson respectively at paragraphs 36 and 125 of the Supreme Court's decision in *Cart*.

Question 12 – are there any circumstances in which it would be appropriate to allow a claimant an oral renewal hearing despite a TWM certification?

31. No. This would confuse the meaning, and undermine the effect, of a TWM certification. If a judge considers that an oral renewal should be permitted, the judge will not make a TWM certification. It is right to note, however, that an option supported by some judges is that Claimants should be allowed to respond to a TWM certification on the papers, following which the judge who made the certification would have a discretion to review it.

Question 13 – which option would be more effective in filtering out weak or frivolous cases early?

32. As noted above, we believe that the TWM procedure would be effective in filtering out weak cases early while minimising the risk of injustice. The TWM certification would be applied where appropriate to cases where there had been a relevant prior judicial hearing, while avoiding the difficulties that accompany the prior judicial hearing proposal. We favour the introduction of the TWM process alone.

Questions 14 – 15: fees

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

33. We do not have any objections in principle to the introduction of a fee for an oral renewal hearing.

Question 15: do you agree that the fee should be set at the same level as the fee payable for a full hearing?

34. We refer to the response of the judiciary of the Court of Appeal (Civil Division) to the Ministry of Justice's consultation CP 15/2011 on fees in the High Court and Court of Appeal. In response to question 11 of that paper, we commented on the difference in administrative and judicial resources incurred by an oral permission to appeal hearing and a full appeal hearing, for which reason it was inappropriate to set the same fee. In the introduction, we also said that the level of fees must not be such as to deter access to the Court. Our comments in that paper apply equally in answer to this question.

Question 16 – impact assessment and equality impacts

35. We make no response to this question.