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Response of Young Legal Aid Lawyers to "Judicial Review: proposals for reform" CP25/2012

Introduction

1. This is the response of Young Legal Aid Lawyers (YLAL) to the Ministry of Justice consultation paper Judicial Review: proposals for reform[1] (the "consultation").

2. YLAL is a group of lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protect the interests of the vulnerable in society and uphold the rule of law.

3. While the consultation does not relate specifically to legal aid we are responding because of the impact which the proposals have on access to justice.

4. The consultation poses a number of questions. We have responded to these below. However, at the outset we wish to raise a number of general concerns about the political basis for the consultation.

The political context of the consultation

5. Judicial review represents a vital – and frequently the only – tool by which the citizen can hold the state to account. It ensures that the Government and other public bodies act fairly, lawfully, rationally and in accordance with human rights. Judicial review is fundamental to the proper functioning of our democracy in that it serves to maintain the rule of law and ensures that public bodies act in accordance with the will of Parliament. As Lord Dyson said, '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'[2].

6. The starting point therefore, is that any attempt to restrict access to judicial review should be carefully scrutinized and only such changes as are strictly necessary may be justified.

7. Prime Minister David Cameron and Justice Secretary Chris Grayling have intimated that the purpose of the proposed changes to judicial review is to boost economic

[1] Judicial Review: proposals for reform CP25/2012, Ministry of Justice, December 2012 https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf

[2] *R (on the application of Cart) v The Upper Tribunal* [2010] EWCA Civ 859 paragraph 122

growth. David Cameron announced the proposals in a speech to the Confederation of British Industry (CBI) outlining his 'key steps to Britain thriving in this global race'[3]. To similar effect, Chris Grayling states in the foreword to the consultation that the proposals aim to 'tackle red tape, promote growth and stimulate economic recovery'[4]. Economic progress is the first of two themes underpinning the consultation.

8. It is very unclear, however, how restricting access to judicial review will stimulate the economy. Only a small part of the consultation relates to planning and procurement; areas which might conceivably be linked to economic growth. The Government relies on the fact that in 2011 it took an average of 11 weeks for decisions on permission to be made on the papers and 10 months for a judicial review to reach a conclusion[5]. It is argued that such delays impede development. It seems to us that these issues would be dealt with more effectively by increasing court resources and by ensuring that public authorities make decisions in a lawful manner in the first place, eliminating the need for judicial review.

9. Further, the growth in judicial review over recent years on which the Government relies[6] has largely related to challenges to immigration decisions. The consultation itself acknowledges this, noting that in 2011 immigration cases represented over three quarters of all applications for permission to apply for judicial review[7]. Further, any additional burden created by these cases – as the consultation notes[8] – has largely been met through allowing certain cases to be heard in the Upper Tribunal and by the establishment of further Administrative Court centres in Birmingham, Manchester, Cardiff and Leeds.

10. When immigration cases are discounted the growth is significantly less marked. Research by Christopher Hood and Ruth Dixon of the Department of Politics and International Relations, University of Oxford (based on Government statistics) indicates that there were 2,551 applications in 2011 for judicial review not relating to immigration compared to 2,384 in 1995[9]; an increase of only 7% in 16 years. Hood and Dixon also found that this 7% rise in claims corresponded with the 7.7% increase in the population of England and Wales over the same period of time.

11. Taking a longer view, Hood and Dixon's data indicates that non-immigration judicial review has increased from 160 applications per year in 1974 to 2,551 in 2011. This statistic needs to be read with caution. Prior to the House of Lords' decision in *O'Reilly v Mackman* [1983] 2 AC 237, claimants were able to raise public law matters within general civil proceedings. The House of Lords' decision meant that in future purely public law matters could only be dealt with through the judicial review process. The number of civil claims brought on public law grounds before 1983 is

[3]David Cameron, http://www.number10.gov.uk/news/speech-to-cbi/ speech to the CBI, Monday 19 December 2012
[4]The consultation, p3
[5]4 The consultation, p11 paragraph 33
[6]Referred to by David Cameron as "a massive growth industry"; speech to the CBI, http://www.number10.gov.uk/news/speech-to-cbi/ Monday 19 December 2012. See also Chris Grayling: **"**the number of applications has rocketed in the past three decades, from 160 in 1975 to 11,200 last year – an increase of almost 7,000%", http://www.justice.gov.uk/news/press-releases/moj/grayling-unclogging-the-courts-to-bring-swifter-justice Ministry of Justice Press Release, Monday 19 November 2012
[7] The consultation, p9 paragraph 29. According to Ministry of Justice Statistics, there were 11,200 permission applications made in 2011 of which 8,649 related to immigration; see table 7.12 Judicial and Court Statistics 2011, Chapter 7: Appellate courts http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/appellate-courts-tables-chp7-2011.xls, Ministry of Justice 28 June 2012
[8]The consultation p8 paragraph 24
[9]http://xgov.politics.ox.ac.uk/index.php/publications-and-datasets.html

unknown[10]. However, in our view this increase in the judicial scrutiny of state actions is commensurate to the increased role that the state has taken on in public life over the last 40 years. We do not regard either of these trends as a negative development. The point has been aptly made by Lord Browne-Wilkinson:

> [Judicial review's] social importance is self-evident. Growth in executive interference in the lives of individuals, inevitable in a modern state, has exposed us all to the risk that executive power may be exercised in an unbridled or abusive manner. If, as some thought, the common law had proved so senile and impotent that it could not develop to meet this change in society, the rule of law would not have regulated administrative action. Governments are not notorious for introducing legislation which limits their own powers. Happily, the common law has proved to be fertile not impotent.[11]

12. The second theme underpinning the consultation is the idea that many judicial review applications are 'completely pointless'[12]. With that in mind the consultation evinces an intention to 'ensure that weak or frivolous cases which stand little prospect of success are identified and dealt with promptly at an early stage in proceedings'[13]. While we do not object to the idea that frivolous cases should be weeded out, we are unconvinced that the evidence relied on by the Government supports the assertion that there are a large number of frivolous applications. In particular the Government relies on the fact that:

> Of the 7,600 applications for permission considered by the Court in 2011, only around one in six (or 1,200) was granted. Of the applications which were granted permission, 300 were granted following an oral renewal (out of around 2,000 renewed applications that year).[14]

While this statistic may be correct, it does not take into account the instances where the application for judicial review is withdrawn, either before or after the permission stage. For example, relying on the fact that there were 11,200 permission applications received in 2011, it can be inferred that a total of 3,600 applications were withdrawn and not considered. Applications may be withdrawn for a number of reasons. However, in our experience, it is frequently because the Defendant public body recognises the strength of the Claimant's case and agrees to settle, thereby securing a favourable outcome for the Claimant.

13. Research conducted in 2009 by the Public Law Project[15] found that, out of the 1,500 judicial review claims studied, 34% of issued cases were settled before reaching the permission stage and 56% were settled before the final hearing. The most common incentive to settle cases was recognition of the merits of the case by the Defendant. Furthermore, the point at which proceedings would settle depended not so much on the strength of the claim, but on the point at which the Defendant involved lawyers who then properly considered the strengths of the claim.

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[10] Varda Bondy and Maurice Sunkin, *Judicial Review Reform: Who is afraid of Judicial Review? Debunking the myths of growth and abuse*,.10 January 2013,. P1 para 6.
[11] Lord Browne-Wilkinson, Foreword to Supperstone & Goudie, Judicial Review, London: Butterworths, 1992.
[12] "Of course some are well-founded – as we saw with the West Coast mainline decision. But let's face it: so many are completely pointless. Last year, an application was around 5 times more likely to be refused than granted"; David Cameron, http://www.number10.gov.uk/news/speech-to-cbi/ speech to the CBI, Monday 19 December 2012
[13] The consultation, p4 paragraph 6.
[14] The consultation, p10 paragraph 31.
[15] VardaBondy& Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, The Public Law Project, 2009, p 33

14. Worryingly, the consultation takes no account of cases that settle early in favour of the Claimant. Within the document, no attempt is made to analyse the number of cases which settle out of court, at a reduced cost to the public purse, or to consider why they have settled. This missing data is vital context to the debate.

15. Instead the consultation opts, in a number of places, to rely on non-specific "anecdotal evidence"[16]. In our view this is wholly insufficient. Any attempt to curb citizens' access to judicial review can only be based on a sound body of evidence. Such evidence is distinctly lacking.

16. In light of the above, we find the political motivation behind this consultation deeply concerning. We ask that the Ministry of Justice consider these points very carefully before implementing any of the proposals.

17. Our responses to the specific questions raised by the consultation are now set out below.

The time limits within which judicial review proceedings must be brought

Planning and procurement:

18. The consultation proposes that the time limit for issuing judicial review proceedings in procurement and planning cases should be reduced to 30 days and six weeks respectively. The proposal is based on the analogous timescales in which appellants may lodge statutory appeals in these areas.

19. We are not convinced that this change is necessary. The time limit for bringing judicial review proceedings is set out in rule 54.5(1) of the Civil Procedure Rules:

> CPR 54.5(1)
> (1) 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.

This needs to be read in the context of section 31(6) Senior Courts Act 1981 which provides:

> (6)Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
> (a) leave for the making of the application; or
> (b) any relief sought on the application,
> if it considers that 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.

The three-month time limit contained in CPR 54.5(1) has been carefully calculated to strike a balance between the need for certainty in public affairs and the need to allow claimants sufficient time to prepare their case and seek to settle matters without the need for litigation. It should be remembered that the three-month limit is a maximum; a claimant must still act *promptly* within this time. If the defendant can show that the claimant has failed to act promptly or has delayed unduly then the claim will be out of time. The existence of a 30 day or six week time limit in respect of the analogous statutory appeal procedures in a procurement or planning case may be a relevant

[16] For example, paragraphs 64 and 79.

factor for the court to consider in assessing whether the Claimant has acted promptly. Our view is that there is sufficient in-built flexibility within the current rules to meet the justice of any individual case without reducing the time limits.

20. If the time limit is reduced we would be concerned that claimants may feel obliged to issue judicial review proceedings protectively at an early stage, without having explored all opportunities to settle the case out of court. This would not be in the public interest.

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?

No, for the reasons given above.

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?

Not applicable - in light of our answer to question one.

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?

Not applicable - in light of our answer to question one.

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

Not applicable - in light of our answer to question one.

Continuing breach cases:

21. The second proposal relating to time limits is that the current wording of the Civil Procedures Rules, and in particular Part 54.5, should be amended to make clear that any challenge to a continuing breach or cases involving 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. The Government's view expressed in the consultation is that allowing a claimant to challenge a decision from the latest point of a continuing breach is 'frustrating the application of the three month time limit'[17]and runs counter to the 'current legal position'[18].

22. We strongly oppose this change. In our experience, a recurrent example of a continuing breach is where a Local Authority fails to carry out an assessment. For instance, the Local Authority may refuse to assess a vulnerable child under section 17 Children Act 1989 with a view to providing him or her with support or accommodation under that Act. Another common example is where a Local Authority refuses (and continues to refuse) to assess a disabled adult under section 47 National Health Service and Community Care Act 1990 with a view to providing them

[17] The consultation, p17 paragraph 64
[18] The consultation, p17 paragraph 65

with support to enable them to live safely in the community. These are scenarios which our members encounter on a daily basis. Typically in these cases a challenge may be brought at any point while the Local Authority continues to refuse to carry out its legal obligation to undertake an assessment.

23. To amend the rules so that the time limit for issuing judicial review proceedings runs from the first instance that the grounds arise would stultify the effect of this legislation, defeat the will of Parliament and deny vulnerable sections of the population from the support to which they are entitled.

24. Effectively, this change would mean that if a challenge were not brought within the initial three-month period then the defendant would be relieved of its legal obligations. An apposite example would be a case where a British Citizen was being tortured abroad with the complicity of the British Government. Under the proposal, if that individual failed to bring judicial review proceedings within the initial three-month period then his claim would be out of time. He would be barred from seeking an injunction in public law proceedings and his torture could continue. This would be utterly absurd. Allowing a claimant to challenge a continuing breach simply reflects the fact that public bodies should not be allowed to shirk their legal obligations on a continuing basis. There is no principled basis for allowing them to do so. The Government seems to have overlooked this.

25. Allowing public bodies to act unlawfully on a continuing basis is antithetical to the idea of fair and efficient public administration. In the examples we have given above involving vulnerable children and disabled adults, an authority's failure to assess and intervene at an early stage is likely to lead to knock-on costs to the public purse, as without intervention the needs of the individual will become more acute. This cannot be in the public interest.

26. Further, it is our view that the proposal would create uncertainty. There are a number of situations where the act of a public body only becomes unlawful after it has continued for a certain amount of time. For example, in the context of the treatment of detained persons, excessive delays in constituting a parole hearing engage Article 5(4) of the European Convention on Human Rights (ECHR) while minor ones do not[19] and extensive periods of cellular confinement engage Article 8 of the ECHR while short ones do not[20]. In these cases the relevant date for limitation purposes would be unclear; this would generate uncertainty and could lead to claims being issued prematurely in order to protect the interests of the claimant.

27. In our view the current legal position is mirrored in the permission decision of Burton J. in *R (G) v Secretary of State for Justice* [2010] EWHC 3407 (Admin) at paragraph 11:

> I deal first with the question of a continuing breach. There is no doubt about the principle, particularly in European law but obviously extendable to Human Rights legislation, in many authorities that where there is a continuing obligation, a continuing state of affairs, which continue not to be put right by the Defendant, time does not run against a claimant at least until that state of affairs has come to an end.

28. Our view is that the law as it currently stands properly balances the competing interests at play in judicial review proceedings and should not be changed.

[19] *R (on the application of Daniel Faulkner) v Secretary of State for Justice and Anor* [2010] EWCA Civ 1434

[20] *King & Ors, R (on the application of) v Secretary of State for Justice* [2012] EWCA Civ 376

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.

We oppose any amendment to the CPR.

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?

Yes. The proposal is likely to lead to an increase in the number of claims issued, for the reasons given above.

The procedure for applying for permission to bring judicial review proceedings

29. Under this heading there are two proposals. The first would remove the right to an oral renewal in cases where there has already been a prior judicial process involving a hearing considering substantially the same issue as raised in the judicial review claim. The second would remove the right to an oral renewal in cases which the judge, on written submissions, has determined to be "totally without merit".

30. The concerns which are said to underpin these proposals are (i) that there are too many frivolous claims being brought[21] and (ii) that there is undue delay in the system[22].

Frivolous cases:

31. In relation to the assertion that there are too many frivolous claims, we have already expressed our concern at paragraphs 11-14 above that there is an insufficient evidence base to justify this assertion. In addition we would ask the Government to take into account the very effective role which is played by legal aid in filtering out weak cases. At present the Legal Services Commission (LSC) Funding Code[23] states that public funding for full representation in judicial review cases will always be refused where the prospects of the claim proceeding are either poor (less than 50%), unclear or borderline (where it is not possible to say that prospects of success are definitely better than 50%) unless it can be established that the case has a wider public interest, is of overwhelming importance to the funded person or raises significant human rights issues.

32. The application of this test in judicial review proceedings is supplemented by section 16 of the LSC Funding Code: Decision-Making Guidance. In particular:

[21] "The Government is concerned that the procedures for considering whether permission should be granted allows claimants too many opportunities to argue their case, particularly where their case is weak." The consultation p19 paragraph 72.

[22] "…the numerous opportunities to renew applications can lead to substantial delays, and incur significant costs to public authorities which they may have little prospect of recovering from the claimant. For example, in 2011, it took on average 11 weeks to for a decision on whether to grant or refuse permission on the papers, and a further 21 weeks on average if the matter went to an oral reconsideration hearing." The consultation, p19 paragraph 74.

[23] Para 7.3.5 the Funding Code: Criteria http://www.justice.gov.uk/legal-aid/funding/funding-code

> §16.6.7 Prior to 1 April 2010 the Funding Code Criteria for Full Representation in Judicial Review included a "Presumption of Funding" in cases where the court had granted permission for the review to proceed. The presumption applied only in cases which had significant wider public interest, overwhelming importance to the client or raised significant human rights issues. In such cases legal aid would be guaranteed unless, in light of information which was not before the court at the time permission was granted, it appeared unreasonable to fund the case. The Presumption of Funding has now been abolished which means that in all cases the Commission must independently be satisfied that the case meets all relevant criteria.
> …
>
> §16.7.2 …If permission is refused on the papers the court will serve reasons for making its decision. If the client wishes to request that the decision be reconsidered at a hearing an amendment to the certificate must be sought. The application must clearly set out in the form of a counsel's opinion or solicitor's report that specifically address the judge's reasons, why the decision should be reconsidered orally.

The effect of these provisions is that legal aid is not available for weak cases. Even where permission has been granted by the High Court it is still necessary to convince the LSC that the case is meritorious, and in instances where permission is refused a specific application will need to be made to the LSC confronting the Judge's reasons in order to persuade the Commission that the case is sufficiently meritorious to warrant oral reconsideration.

33. There are also strict controls over the use of 'devolved powers' by legal aid providers to grant emergency certificates for public funding in judicial review cases. From 1 April 2003, the devolved power to grant or amend emergency certificates for most immigration cases, including judicial review, was removed from the normal scope of the General Civil Contract. Only firms who have been given specific authorisation by the LSC to exercise devolved powers in such cases can do so[24]. The 2010 contract brought other categories of law in line with immigration, meaning devolved powers could only be specifically granted to providers, except for certain high priority judicial reviews like homelessness challenges[25]. Therefore there is not only central scrutiny over applications for public funding when submitted to the LSC but scrutiny of providers who operate under LSC contracts and carry out emergency work.

34. The relevance of this is that legal aid provides an important filter reducing the number of weak cases in the system. This should be taken into account when considering whether to implement these proposals.

35. In this context the Government also expresses concern within the consultation that a number of claims are unimportant as 'even where the claimant is successful, it may only result in a Pyrrhic victory with the matter referred back to the decision-making body for further consideration in light of the Court's judgment"[26]. We do not accept that such cases should be regarded as 'Pyrrhic' victories. Having a decision-maker remake a bad decision fairly, lawfully and rationally is frequently the very outcome which the Claimant is seeking. There should also be no reason to presuppose that the new decision will result in an unfavourable outcome for the Claimant.

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[24] 3C-151 Volume 3, Funding Code

[25] LSC, "Devolved powers in Judicial review cases under the 2010 Standard Civil Contract and the 2012 Standard Civil Contract (Family and Housing)" http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/statement-on-devolved-powers.pdf This monitoring function by the LSC was recognized by Mr Justice Silber in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin), paragraphs 77 to 78

[26] The consultation p11 paragraph 32

Delay:

36. In making proposals to amend the procedure for permission applications the Government has also expressed concern about the level of delay in the system. However, the cause of the delay is not clear to us. Before seeking to change the procedure to make it more difficult for claimants to apply for judicial review, we would urge the Government to analyse the cause of this delay. For example, if the root cause of the delay is a lack of resources within HM Courts and Tribunals Service, or is exacerbated by the Treasury Solicitor seeking to extend time limits to file an acknowledgment of service, then it would not be appropriate to change the rules at the expense of the Claimant.

37. We now turn to the specific proposals.

Removing the right to an oral renewal where there has been a prior judicial process:

38. This proposal is that in cases where the Claimant has been refused permission on the papers, and the matter is one which has been the subject of a prior judicial hearing, the Claimant's right to ask for an oral renewal of the application for permission should be removed. A "judicial hearing" is defined as:

> …a hearing before the civil and criminal courts (the magistrates' courts, county courts, the Crown Court, the High Court and the Court of Appeal) the tribunal system (including the First-tier Tribunal) and the judicial functions of coroners and inquiries which are set up by statute.[27]

39. We agree with the general principle that litigants should not be allowed multiple opportunities to argue bad points. However, with regard to this proposal the devil is in the detail and we are very concerned about the wide definition of a judicial hearing. Our reading of the proposal is that in any case where judicial review is sought of a decision of a lower court or tribunal and permission is refused, the Claimant would not be entitled to an oral renewal hearing. We find this proposal particularly concerning.

40. If the intention is to bring the procedure for judicial review of court decisions generally in line with the procedure used where the Claimant seeks judicial review of a decision of the Upper Tribunal[28], then this intention is misguided. The adoption of the 'second-tier appeals criteria' in *Cart* was considered by the Supreme Court to be a rational and proportionate restriction on the right to judicial review in the narrow category of cases that arose that case. The *Cart* case dealt with the situation where a claimant had received an adverse decision from a public body (the respective appeals in that case concerned a decision of the Child Support Agency, the UKBA and the DWP), had lost their appeal to the First-Tier Tribunal and then had been refused permission to appeal by the Upper Tribunal. In these cases, by applying for judicial review the Claimant is seeking a third judicial consideration of the same issue. It is understandable why public policy might militate against allowing judicial review too readily. The same rationale however would not apply to a decision, for example, of a magistrate or a coroner. In those cases the court under review is the first instance-decision maker and not an appellate court.

41. It needs to be remembered that the jurisdiction of the Court of the Queen's (or King's) Bench to review the decisions of inferior courts and tribunals has existed

[27] The consultation, p21 paragraph 83.
[28] See the Supreme Court decision in R (Cart) v the Upper Tribunal [2011] UKSC 28

since at least the 1600's[29]. This jurisdiction is fundamental to the purpose of judicial review itself and to the rule of law. We would oppose any attempt to diminish this jurisdiction. We can see no justification for a decision made by a bench of lay magistrates – for example – being subject to a lesser degree of judicial scrutiny than a decision made by a social worker. Yet this would be the effect of the proposal.

42. We are also concerned over the concept of whether a claim deals with 'substantially the same matter' as the one considered previously. This has the potential to result in time consuming analysis, extending the litigation rather than curtailing it.

43. We note that the Government has already addressed the issue of judicial review claims when there has been a prior judicial hearing in a case through the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). LASPO will remove legal aid for judicial review claims in immigration cases where a claim is brought in relation to an appeal or judicial review of the same or substantially the same issue and where the court found against the applicant or appellant less than one year previously; or a judicial review of removal directions made not more than one year after a decision to remove the individual or any appeal against such a decision was determined[30]. In introducing these provisions, the Government recognized the importance of ensuring safeguards were in place to deal with changes in circumstance, and the protection of fundamental rights:

> However, we consider that there should be some important exceptions to these exclusions principally to take into account potential changes in an individual's circumstances over time, and to ensure that cases where an appeal has not already taken place are not inadvertently captured. We also consider that challenges to detention pending removal should remain in scope (as they relate to the applicant's liberty).[31]

44. If this proposal is adopted – and we do not believe that it should be – it would need to take into account any change in the factual circumstances or the law following the initial judicial hearing. In such a case, adopting the language of the consultation, we would not regard the subject matter of the claim as being 'substantially the same matter' which had already been determined.

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?

No. See above.

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?

No. See above.

[29] See *Coke's Institutes* volume IV p71 cited in "An Introduction to English Legal History" J H Baker (Butterworths, 2nd Edition 1979)
[30] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, paragraph 19 http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted
[31] Reform of Legal Aid in England and Wales: the Government Response, June 2011, pp.12-13 http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf

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?

No. See above.

Removing the right to an oral renewal in cases which the Judge, on written submissions, has determined to be "totally without merit":

45. The second proposal is that the right to an oral renewal hearing should be removed in cases where the judge, on considering the papers, has deemed the case to be totally without merit. While we accept that public money should not be spent on cases which are genuinely totally without merit, we cannot accept the proposal in its current form owing to the concerns highlighted below.

46. First, the judicial review process is fact sensitive and judge specific. Different judges will arrive at different conclusions following the paper permission stage and decisions on permission can vary markedly on the same, or substantially the same, grounds. This is clearly demonstrated by the Government's own statistics which show that roughly 1 in 4 cases (i.e. 300 of the 1200 cases granted permission in 2011) were granted permission at a renewal hearing having been refused permission on the papers by a judge at first instance. In the same vein, concern has been highlighted from within our membership of cases which were described as totally without merit by the single judge considering the papers, where permission was subsequently granted at an oral hearing. Put simply, judges are fallible and it is essential that safeguards are in place to ensure that decisions on permission are subject to review and reconsideration. We consider that a short oral hearing is the best means of doing this and is commensurate with the promotion of access to justice (see below).

47. Second, the Government has failed to provide the evidence to justify this change. In particular there is no analysis of the number of cases deemed totally without merit that were granted permission at a renewal hearing and/or in which the claimant was ultimately successful at a substantive hearing. Nor is there any analysis of the amount of resources, if any, that such a proposal would save.

48. Third, the proposal overlooks the pivotal role which oral advocacy plays in our judicial system.

49. Fourth, the proposal may impact disproportionately on litigants in person. One cannot expect litigants in person to produce polished legal pleadings. A renewal hearing is therefore often the only opportunity that a litigant in person will have to bring their case to life by standing in front of a judge for 20-30 minutes, to be asked appropriate questions about their case and for a judge to make sense of what will often be a confused set of substantive grounds and claim form. Even short oral submissions can alter a judge's view and cases deemed without merit may be successful.

50. The renewal hearing is therefore an invaluable safeguard which ensures that meritorious cases do not slip through the legal net.

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?

No.

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?

n/a

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?

If the proposal were introduced then a safeguard should be included for changes in circumstances.

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?

n/a

The fees charged in Judicial Review proceedings

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

We sympathise with the rationale but are concerned that any increase in fees may inhibit access to justice by preventing middle income individuals (those not on benefits or who are not eligible for legal aid) from pursuing meritorious claims. It needs to remembered that judicial review performs a wider function in ensuring good governance and so it is appropriate that fees are subsidized, to an extent, by the tax payer.

In any event no decision should be made until consideration of the November 2011 consultation *Fees in the High Court and Court of Appeal*, CP 15/2011, Ministry of Justice, is complete.

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?

We do not have a view on this issue.

Impact assessment

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?

Gypsies and travellers may be disadvantaged disproportionately by the planning proposals.

Immigrants and asylum seekers may be disadvantaged disproportionately by the proposals as a whole owing to the large number of judicial reviews in this area.

Vulnerable and disabled children and adults may be disproportionately affected by the proposal to curtail time limits in continuing breach cases.

Young Legal Aid Lawyers
22 January 2013