JUDICIAL REVIEW: PROPOSALS FOR REFORM

RESPONSE TO THE MINISTRY OF JUSTICE'S CONSULTATION

SUBMISSION BY THE ODYSSEUS TRUST

1. The Odysseus Trust[1] promotes good governance and the effective protection of human rights, and is directed by Lord Lester of Herne Hill QC, together with two Parliamentary Legal Officers, Joanna Dawson and Sophia Harris, and a Legal Researcher, Caroline Baker.

2. This submission responds to the Ministry of Justice's consultation on proposals for the reform of judicial review.

3. We endorse the principled objections of the Bingham Centre and their analysis of the constitutional importance of judicial review and its positive and negative effects. We add to their disappointment at the Consultation Paper's lack of evidence based and joined-up policy making. We agree with their observations on the volume of judicial review litigation and with their analysis of judicial review proceedings generally. We add the following observations.

4. The abbreviated period of only six weeks, spanning Christmas and New Year, for the public consultation is unjustified especially since the proposals envisaged raise issues of such constitutional importance concerning the protection of the citizen against the abuse of public powers by government and other public authorities of the State. We agree with the Secondary Legislation Scrutiny Committee that "*the tightness of this timescale [for the Judicial Review Consultation] cannot be convenient for anyone but Government.*"[2]

5. The Consultation Paper (paragraph 28) compares the number of applications for Judicial Review brought in 1974 with the number brought in 2011. This is misleading. Modern Judicial Review was created by the introduction of Order 53 into the Rules of the Supreme Court brought into force in 1977.

6. The proposals do not promote good administration and public accountability under the rule of law and the Consultation Paper fails to explain or analyse the role of judicial review of administrative action in ensuring that decisions are lawful, rational and fair.

7. The Consultation Paper relies inappropriately on the jurisprudence of the European Court of Human Rights in interpreting and applying Article 6(1) of the European Convention on Human Rights (ECHR). In effect the Government invoke the wide margin of appreciation

[1] For more information about the work of the Trust, please visit our website www.odysseustrust.org

[2] House of Lords Secondary Legislation Scrutiny Committee, 22nd Report of Session 2012-13, The Government's new approach to consultation – "Work in Progress", HL Paper 100, 10 January 2013, para. 37

accorded by the European Court to weaken the well-established common law principles of judicial review. This approach seriously undermines the checks and balances developed in our parliamentary system of government under the rule of law and is constitutionally inappropriate.

8. The constitutional principle of the rule of law requires that everyone, including the Government and those who act for them, is equally subject to the law and that the law applies equally to all.

1. TIME LIMITS FOR BRINGING A CLAIM

9. The proposal to reduce the time limit for making an application for judicial review from three months to only 30 days for procurement cases and six weeks for planning cases is not justifiable. Indeed, the normal time limit ought to be extended to six months.

1.1 Procurement and Planning

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?

10. We do not agree with this proposal.

11. For judicial review applicants who have not previously been involved in the process and who, for that reason, are excluded from the appeals route, imposing the same time limits as for an appeal is inappropriate and unfair. Time limits of 30 days and six weeks are too short for them properly prepare a case and will, therefore, involve greater legal expense and costs.

12. Judicial review is also the only remedy for unsuccessful tenderers under the Public Service Contract Regulations 2006 including legal aid firms who fail to secure a Legal Services Commission contract. We agree with the Law Society that reducing the time limit for such legal aid firms to make an application to 30 days is objectionable.

13. Presumably public procurement and planning cases will be subject to the "promptness" requirement although the Consultation Paper does not pronounce either way. Judicial review applications in public procurement and planning cases may well have to be made before the 30 day or six-week period has passed. This increases the legal uncertainty for applicants and respondents and will increase the costs of preparing and defending an application.

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?

14. No response.

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?

15. We do not agree. The "promptness" requirement means that for some cases, applications will be out of time even if they are within the 30 day or six-week time limit. This is a disproportionate infringement on the right to access to justice. The court's discretion to extend the time limit for making an application is not sufficient to remedy the legal uncertainty caused by the "promptness" requirement. For the court to exercise its discretion, an applicant must show a good reason why the court should extend the time limit beyond both "prompt" and three months. However, the existence of a good reason for delay does not necessarily lead the court to exercise its discretion since the court will always have particular regard to the need for certainty in many administrative contexts.[3]

16. The particular difficulties of procurement and planning applications is that they require evidence, usually in the hands of the public authority and often voluminous, and that they often affect the rights of third parties.

17. Delay caused by gathering evidence has been held not to be excusable.[4] Applicants who have not been involved in the procurement or planning process will need to gather evidence from the public authority and other parties. There would be a clear denial of justice if the court were to maintain its reluctance to exercise its discretion where an applicant had delayed in order to gather evidence to establish grounds for an application.

18. Where an application affects third party rights, "promptly" has been held to mean "*with the utmost promptitude.*"[5] A shorter time limit combined with a requirement of "utmost promptitude" places an even greater burden on applicants whose only recourse against a decision is by judicial review.

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

19. No, we agree with the Law Society that there is already a significant problem in securing funding promptly from the Legal Services Commission. A reduced time limit, combined with this delay, will significantly impede access to justice.

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[3] See, for example, *R v Institute of Chartered Accountants in England and Wales, ex p Andreou* (1996) 8 Admin LR 557, [1996] COD 489, CA.

[4] *R v Department of Transport, ex p Presvac Engineering Ltd* (1991) 4 Admin LR 121, (1991) Times, 10 July, CA.

[5] *R v Independent Television Commission, ex p TV Northern Ireland Limited* [1996] JR 60 [1991] TLR 606, per Lord Donaldson MR at p. 61.

1.2 Time limits in cases where there are continuing grounds

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

20. We do not agree with this proposal and dispute the Consultation Paper's analysis of how the current law "*ought to function*." (paragraph 64).

21. In *Uniplex* the ECJ held that the time limit must begin to run "*only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable […]*".[6] In default, the national court must exercise its discretion to extend the time limit so that the claimant has a "*period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date which the claimant knew, or ought to have known, of the infringement […]*"[7]

22. For challenges raising EU law points, the English court is currently obliged to disapply Part 54.5 where that is incompatible with EU law. The court would be equally obliged to disapply a newly formulated Part 54.5 where that is incompatible with the ruling in *Uniplex*.

23. To require the time limit to begin to run from the first instance of grounds arising is incompatible with the requirement that the claimant knew or ought to have known of the grounds. The first instance of the grounds arising is a fixed event in time. The claimant's actual or imputed knowledge of that event is subjective and, in a situation of continuing breach, likely to coalesce at some time after the initial breach and after there have been several breaches.

24. Under section 118 of the Equality Act 2010, the six-month time limit for bringing a claim under the Act for continuing discriminatory treatment begins to run at the end of the period of time of the alleged conduct. This will often be last discriminatory act or the effective date of termination of employment.

25. Under European human rights law, in continuing situations, the six-month time limit prescribed by the Convention for introducing an application begins to run from the end of the continuing situation and is inapplicable to on-going situations for which there is no domestic remedy.[8] Generally, the six-month time limit for introducing an application is the date on which the applicant (and/or representative) has sufficient knowledge of the final domestic decision.[9] Where domestic law does not provide for service of the decision, the six-month

[6] Case C-406/08 *Uniplex v NHS Business Services Authoirty*, ECR 2010 Page I-00817, para. 47.
[7] *Ibid*, para. 48.
[8] *Case of Iordache v. Romania* (Application No 6817/02) Third Section, 14 October 2008, para. 50.
[9] *Case of Koç and Tosun v. Turkey* (Application No 23852/04) 13 November 2008, Admissibility Decision.

time limit runs from the date the decision became final since this is the date the parties were definitely able to find out its content.[10]

26. The reformulated Part 54.5 would be inapplicable to cases raising EU legal issues. A reformulated Part 54.5 would also be inapplicable to a case raising a discrimination law point or a human rights point. A new Part 54.5 would therefore only apply to domestic law cases raising no discrimination or human rights issues.

27. The Consultation Paper correctly states that the largest category of Judicial Review applications is immigration and asylum cases (paragraph 29). It likely that an immigration or asylum case would raise EU, human rights or discrimination law points. New Part 54.5 would therefore be applicable only in a quarter of cases at most (paragraph 29). It would make no sense to amend Part 54.5 in such a way that it cannot apply to many of the cases to which it is relevant.

28. This proposal would also enable public authorities to benefit from their own poor practices, contrary to the principles of good administration and the rule of law. In such circumstances, as the Bingham Centre point out, the court is likely to exercise its discretion to give permission despite Part 54.5.

29. As the Law Society point out, there are many administrative decisions which are taken at a particular point but which only have effects on the individual after several months. The Government's preferred formulation of Part 54.5 would remove the right of review from applicants who are unaware of decisions taken which affect them but which have not yet been implemented. Such a rule would, in fact, encourage public authorities to postpone implementation until after the three-month limit to avoid the possibility of a judicial review, where possible. This is contrary to the principle of good administration and is a denial of the right to access a court or tribunal.

30. As the Bingham Centre state, reformulating Part 54.5 is unlikely to achieve the Government's aims as set out in the Consultation Paper since this is likely to encourage premature applications, so increasing the burden on court resources, and obliging the court to assess the link between acts and decisions, leading to satellite litigation and appeals.

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?

31. There are considerable risks in taking forward this proposal. Applications may well be made before the issues have fully crystallised so that permission to amend the grounds for judicial review will have to be sought from the court, creating satellite litigation and increasing costs

[10] *Case of Papachelas v. Greece* (Application no. 31423/96) Grand Chamber, 25 March 1999, para. 30.

for both claimants and respondents.

32. The proposal may prevent or discourage the use of alternative dispute resolution and result in the pre-action protocols being routinely disapplied.

2. APPLYING FOR PERMISSION

33. We agree with the Bingham Centre's general observations on the Consultation Paper's proposals to remove the right to oral renewal.

34. The right to oral renewal has been preserved in previous reforms of judicial review, notably at the introduction of Part 54 of the Civil Procedure Rules in 2000 following the Bowman Report which were carried out after far more extensive analysis of the administrative jurisdiction than appears in the Consultation Paper.[11]

35. As the Consultation Paper acknowledges (paragraph 31), in 2011 300 applications were granted following oral renewal. This increased the proportion of permissions for judicial review from around one sixth to just under a fifth (or 19.7%). That is a significant increase demonstrating the importance of oral renewal to the correct assessment of judicial review applications.

36. The 2009 study of judicial review litigation by Bundy and Sunkin demonstrated the importance of the right to oral renewal, in particular, that it "*may go some way towards ironing out the variations in rates of initial grant of permission as between individual judges.*"[12]

37. Neither of the proposals removes the right to appeal to the Court of Appeal. Denying applications the right to oral renewal is likely, therefore, to increase the number of applicants appealing to the Court of Appeal, merely transferring the burden from the High Court to the Court of Appeal.

2.1 Option 1: Removing the Right to an Oral Renewal where there has been a prior judicial process

38. We do not agree with this proposal.

39. As with many of the proposals, this proposal is, as the Consultation Paper makes clear, based on "*[a]necdotal evidence*" (paragraph 79) only. The Government have not demonstrated by evidence based research that this proposal solves a particular problem of judicial review.

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[11] *Supra* nº. 2.

[12] BONDY, V AND SUNKIN, M, "*The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing*", the Public Law Project, 2009, p. 56.

40. As the Consultation Paper states (paragraph 79), a proportion of cases to which this proposal would apply are granted permission and some are successful. The Government do not provide information about the proportions of those granted permission or those which are successful; however, the fact that some are granted permission and some succeed indicate that there is a demonstrable need for justice in those cases.

41. Removing the right to oral renewal for such cases would amount to a denial of justice.

42. This proposal is also likely to lead to considerable satellite litigation, at appeal level, over whether or not substantially the same matter has been adjudicated in a prior judicial hearing.

43. We agree with the Bingham Centre's proposals for improving the oral renewal procedure by removing the consideration on the papers stage.

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?

44. We agree that the existing definition of a court should be used as the basis for determining whether there has been a "prior judicial hearing". This has the merit of consistency across legislation.

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?

45. Yes. However, the judge should not be able to take into account preliminary and procedural hearings in determining whether or not the same issue has already been the subject of a prior judicial hearing. These are stages in the litigation process which enable an issue to be properly tried. They cannot, therefore, be taken to have dealt with an issue such that all the arguments have been argued.

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?

46. Yes. This would avoid the considerable administrative burden which would otherwise be placed on the court if it had to examine each case from this angle. The respondent public authority is also best placed to ascertain whether or not it has already defended the same allegations in another forum.

2.2 *Option 2: Removing the right to an oral renewal where the case is assessed as totally without merit*

47. As the Consultation Paper states (paragraph 88), this limitation on the right to oral renewal is already available in three-quarters of all judicial review applications since it already operates in immigration and asylum matters.

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?

48. We do not agree with this proposal.

49. We agree with the Bingham Centre that many claimants succeed in persuading a judge on oral renewal that the initial characterisation of "totally without merits" is incorrect. Removing the right of oral renewal in such circumstances would amount to a denial of justice.

50. Removing the right of oral renewal will merely lead to more appeals against refusal of permission which, even if they are only determined on the papers by the Court of Appeal, will increase the burden of cases on that Court.

51. We share the view of the Law Society that removing the right of oral renewal may lead to an increase in rolled up hearings where the Court of Appeal decides the question of permission and the outcome of the judicial review at the same time. These are complicated for the Court to deal with and will contribute to an increase in the burden of cases.

52. We also agree with the Law Society that assessments that an application is "totally without merit" should be done properly and should be reasoned. This will help to curtail what abuse of the right to oral renewal does exist and may help the Court of Appeal to dispense with appeals for permission more quickly and cheaply.

53. We agree with the Bingham Centre that a "totally without merits" assessment should be taken as a warning to the claimant's representatives in considering whether renewal can be justified and as a marker in relation to costs orders at the renewal hearing so that the judge may consider awarding costs to the defendant.

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?

54. Drafting grounds for a judicial review application is a complicated process. With the restrictions in legal aid, there will be more litigants in person using the judicial system, including making judicial review applications. We would oppose any reform that obstructs or impairs effective access to the courts for those who are not poor enough for legal aid but are

not rich enough to retain lawyers. Removing the right to oral renewal could well have this effect for litigants in person unable to express themselves clearly enough to avoid a "totally without merit" assessment. In such a case, justice would be denied.

55. We also oppose any reform which could have the effect of refouling to a country where individuals will be tortured or subjected to cruel, inhuman or degrading punishment contrary to Article 3 ECHR or to a country from which they may be refouled. Deportation by the UK of such an individual is a clear breach of the Article 3 ECHR obligations as well as the United Kingdom's obligations under the Geneva Convention relating to the Status of Refugees.

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?

56. Drafting clear grounds for judicial review is even more difficult for individuals who are particularly vulnerable such as torture victims, children, those with mental health issues and non-English speakers. There are currently cases where such individuals are without representation. Following the changes in legal aid, more cases are likely to be brought by such vulnerable people and, because their grounds for judicial review may be more likely to be unclear or confused, their applications are more likely to be assessed as "totally without merit".

57. The vulnerability of such individuals mean that judicial proceedings are already more difficult for them than for the population as a whole. To make them subject to an additional requirement that their application must not be "totally without merit" on the papers is a higher barrier for them than for the rest of the population and disadvantages them disproportionately. Removing the right to oral renewal in these circumstances would be an illegitimate infringement on their right to access a court.

58. In the case of those with mental health problems, this may result in unlawful indirect disability discrimination prohibited by the Equality Act 2010. In the case of children, indirect discrimination on the grounds of age prohibited by the Equality Act 2010. Such vulnerable people need to be given every reasonable opportunity to have effective access to justice.

59. Oral renewals should, therefore, always be available for these applicants and those in similar situations.

2.3 Combining Options 1 and 2

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

60. We disagree with both options and disagree that the two proposals could be implemented

together. Combining the two proposals would create a considerable, and unjustifiable, barrier to justice.

3. FEES

61. The inevitable effect of imposing court fees is to create barriers to access to justice for those who are unable to afford the fee but are not poor enough to obtain a fee remission. The higher the fee, the more people are affected. Given the importance of judicial review in holding the Executive to account, we are opposed to high fees for judicial reviews.

62. We are not opposed in principle to the introduction of a fee for an oral renewal but we agree with the Bingham Centre's concerns over fees.

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

63. The Government has not made a case for the introduction of their proposed fee of £215 at this stage. The Consultation Paper states that the Government "*estimate that the average cost of an oral renewal hearing is £475*" (paragraph 101). We do not know the basis on which this estimate is made. An appropriate fee cannot be set in the absence of such a proper analysis of the cost of the oral renewal system.

64. We note that on the Government's figures (paragraph 31) just under one third of refused applications go on to oral renewal. Using the Government's estimate, the oral renewal system thus costs only £950,000. This is a very small price for ensuring, as far as possible, access to justice for redress against the misuse of Executive power.

65. Furthermore, the Consultation Paper makes no mention of HM Courts & Tribunals Service remission system.[13] Were a fee for oral renewal to be introduced, it must also be subject to the already existing remissions system.

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?

66. Were a fee be introduced for the oral renewal stage, we agree that it should be set at the same level as the fee for a full hearing provided that the fee for the full-hearing is then waived.

[13] Set out in detail in the consultation on fees in the Employment and Employment Appeal Tribunals, Ministry of Justice, Charging Fees in the Employment Tribunals and Employment Appeals Tribunal, CP22/2011, 14 December 2011, Section 5.

4. EQUALITY IMPACTS

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

67. It is obvious that those with protected characteristics, because they are more likely to be unrepresented and poorer, will be disproportionately affected by the proposals in the Consultation Paper.

68. As the Consultation Paper acknowledges (paragraph 110), since the majority of judicial reviews are immigration and asylum matters, it is reasonable to assume that the proposed reforms will have a greater negative effect on those with the race and religion protected characteristics. Those with mental health issues and children will be disadvantaged to a greater extent by shorter time limits.

69. The Consultation Paper acknowledges that the Government have little information and have not conducted any research on the use of judicial review by those with protected characteristics (paragraph 110). The Government are thus unable to ensure that the Consultation Paper's proposals do not prevent them from fulfilling their general duty under the Equality Act 2010. Until the Government have such information as will allow them to undertake a full equality impact assessment of the Consultation Paper's proposals, they should not take those proposals forward. This is especially true because, as previously mentioned, the Consultation Paper does not present any evidence for the suggested changes to judicial review and is based on amorphous and undefined "*concerns*" (paragraph 26).