ILPA submission to the working group making recommendations for improvements to the Part 54 Practice Direction on Judicial Review

1. ILPA is a professional association with some 1000 members, the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on a wide range of stakeholder and advisory groups including the Administrative Court User Group. ILPA is grateful for the extra time given for the submission of these suggestions.

Compliance with time limits in the Practice Direction for filing documents

2. Based on the Administrative Court Users' Group meeting on 23rd June 2009, ILPA understands that timely receipt of papers is a particular concern.

3. As to the time limits for filing skeleton arguments, ILPA suggests that the time limits should be changed. They are stated to be 21 working days and 14 working days before the hearing. Periods of 21 and 14 days ordinarily refer to calendar days - constituting three and two weeks respectively. There is no apparent reason for choosing these periods for working days. ILPA submits that the time limit for service of the claimant's skeleton argument should be no more than three weeks before the hearing.

4. The experience of members who do file skeleton arguments 21 working days in advance is that it usually has no effect on whether or not defendants serve their skeleton in response 14 working days before the hearing, or give any earlier consideration to settlement. Members continue to report a problem with the Secretary of State for the Home Department not conceding or otherwise seeking to settle cases until very shortly before the substantive hearing.

5. ILPA members also report frustration with the proportion of cases in which the Secretary of State for the Home Department fails to comply with the time limits for lodging an Acknowledgement of Service or Detailed Grounds, appearing to assume that an extension will be routinely granted. Some members report that the Secretary of State for the Home Department fails

to comply with these time limits in the majority of claims. ILPA would welcome a firmer line.

Replies to Acknowledgements of Service

6. At the Administrative Court Users Group, a representative of defendants complained about claimants filing a reply to the Acknowledgement of Service prior to permission being decided on the papers. It was suggested that this is inappropriate because there is no provision for it in the Civil Procedure Rules and that steps should be taken to prevent such replies being served.

7. ILPA would observe that the reason that replies are filed to the Administration of Service is often because the defendant's summary grounds do not reflect what was envisaged by the procedure. In *Ewing v ODPM* [2005] EWCA Civ 1583 [2006 1 WLR 1260, Carnwath LJ said that:

> *"43 Neither the rules nor the practice direction expand on what is meant by a "summary" of grounds. However, the "summary" required under this rule must be contrasted with the "detailed grounds for contesting the claim" and the supporting "written evidence", which are required following the grant of permission: CPR r 54.14. In construing the rule, it is necessary also to have regard to its purpose, and place in the procedural scheme. If the parties have complied with the pre-action protocol, they should be familiar with the general issues between them. The purpose of the "summary of grounds" is not to provide the basis for full argument of the substantive merits, but rather (as explained at p 71, para 24 of the Bowman Report: see para 15 above) to assist the judge in deciding whether to grant permission, and if so on what terms. If a party's position is sufficiently apparent from the protocol response, it may be appropriate simply to refer to that letter in the acknowledgement of service. In other cases it will be helpful to draw attention to any "knock-out points" or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition). As the Bowman Report advised, it should be possible to do what is required without incurring "substantial expense at this stage."*

8. In practice, ILPA members report that 'summary grounds' are often substantial and detailed arguments going well beyond the decision under challenge.

9. It is reasonable to discourage replies that simply repeat arguments set out in the claim form. However, ILPA considers that it would be a false economy to seek to prevent a reply to an Acknowledge of Service which raises new points which (reasonably) were not predicted when the claim form was filed and to which the claimant has a good rebuttal. If the claimant is not able to make the judge aware of that response and permission is refused in reliance on the defendant's summary grounds, it is more likely that the claimant (and if applicable the Legal Services Commission) will be advised that there is merit in renewing the permission application orally. That causes additional delay and expense whether or not the judge grants the renewed application.

10. Given that the purpose of the permission stage is to determine whether

there is an arguable claim and the purpose of the summary grounds to identify knock-out points or procedural bars, it is clearly useful in many cases that the judge has the claimant's reply to points which had not been addressed in the claim form. Indeed, the claimant's reply may on occasion persuade the judge that he can form a sufficiently certain view of the merits to refuse permission on the papers.

11. The position is particularly acute in relation to challenges to removal. The Secretary of State for the Home Department regularly asks the judge to rely on the arguments in the summary grounds to declare the application clearly without merit so that renewal of the application will not prevent expulsion. These are often asylum/Article 3 of the European Convention on Human Rights cases and it cannot be right that the claimant be formally precluded from replying where s/he believes the Acknowledgement of Service to be misleading or to raise a new point to which there is a clear rebuttal.

12. While new points may be raised in the summary grounds, it is also common, particularly where the defendant is the Secretary of State for the Home Department, for a fresh decision to be served for the first time with the Acknowledgement of Service. The Acknowledgement of Service may rely wholly upon the new decision to defeat the claim. Where a fresh decision is served and relied upon in this way, there is currently no mechanism for ensuring that claimants have a fair opportunity to consider and respond to it, whether by way of reply or amended grounds, before the matter is put before a judge for decision. Representatives may contact the court asking that the matter not be put before the judge but not all representatives and claimants in person are aware of the need to do so or the timescale in which the matter is otherwise likely to go before a judge. ILPA submits that defendants should be required to state if the Acknowledgement of Service relies in whole or in part upon a fresh decision not previously served on the claimant and in such cases, the Practice Direction should provide for claimants to have a period in which to indicate whether they wish to file any amended grounds/ reply to the fresh decision.

13. ILPA would submit that replies should not be restricted where they seeking to clarify the issues upon the permission application, respond to new points of substance raised by the defendant which had not been raised previously, or identify statements by the defendant which the claimant states are factually wrong or misleading.

Requirement for bundles/ supporting documents

14. Paragraphs 54.6-7 require that the claim form be accompanied by certain documents. Paragraph 5.9 states that

> *"The claimant must file two copies of a paginated and indexed bundle containing all the documents referred to in paragraphs 5.6 and 5.7."*

15. It is unclear whether the Practice Direction is requiring a claim form with the list of documents attached (paragraphs 5.6-7) *plus* two paginated bundles containing these documents or simply two paginated bundles with these

documents. The practice of the Administrative Court Office varies. ILPA would be grateful for clarification.

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