ILPA Response to Ministry of Justice Consultation on Judicial Review

Introduction (chapters 1-3)

1. The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government (including UK Border Agency) and other consultative and advisory groups.

2. ILPA is particularly concerned at the timing and length of the consultation period, a total period of six weeks coinciding with the Christmas and New Year break, leaving just twenty-four working days for responses. ILPA considers that this is not compatible with the principles set out in the Cabinet Office Consultation Principles which require that the time for response is both proportionate and realistic, and recommends a twelve-week consultation period where the proposals are complex and there has not been significant prior engagement with those consulted.[1] So far as ILPA is aware, there has been no prior engagement with stakeholders in respect of these proposals.

3. The Ministry of Justice's consultation paper on Legal Aid said in 2011, in support of the proposal to retain legal aid for judicial review proceedings:

   "…*proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities*"[2] and that public law proceedings "*enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance*".[3]

4. The consultation paper is inaccurate in some respects and risks misleading: for example,
   (1) it is not only immigration and asylum judicial reviews which may be considered by the Upper Tribunal Immigration and Asylum Chamber but also, for example, age disputes under the Children Act 1989 and certain judicial reviews of First-tier Tribunal decisions[4];
   (2) an oral renewal hearing is normally limited to 30 minutes and not a "full reconsideration"[5]; and

[1] The Consultation Principles, which were implemented in autumn 2012, state that 'Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks. In some cases there will be no requirement for consultation at all and that may depend on the issue and whether interested groups have already been engaged in the policy making process. For a new and contentious policy, such as a new policy on nuclear energy, the full 12 weeks may still be appropriate. The capacity of the groups being consulted to respond should be taken into consideration.' http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf
[2] Paragraph 4.98.
[3] Paragraph 4.99.
[4] Chapter 2, footnote 6, Consultation Paper CP25/2012.
[5] Paragraph 21 Consultation Paper CP25/2012.

(3) there are no "particulars of claim" in judicial review proceedings[6] . These errors may result in responses, whether to the full consultation or to the online survey, being unreliable as the responses may agree or disagree with a proposal that does not accurately represent the situation. The consultation paper is for this reason also inconsistent with the Cabinet Office's Consultation Principles.[7]

5. In addition, the conclusions drawn from the statistics have the potential to mislead because the statistics themselves are incomplete. For example, there is little or no consideration of the fact that significant numbers of judicial review claims settle pre- and post-permission, suggesting that far from being unmeritorious, or deliberate "delaying" tactics, the claims were properly and responsibly brought and conducted, and that the parties managed to achieve a resolution of the claim without using further court time and resources. Comprehensive statistics, identifying this class of case discretely, should be collated and provided.

6. Moreover, the consultation papers appears to rely heavily on unspecified 'anecdotal evidence', which is not described in any detail or supported by any specific examples, statistics or analyses and which it is thus not possible to scrutinise.

7. The consultation paper focuses on the increase in immigration and asylum judicial reviews. ILPA's responses to the questions posed by the consultation focus on immigration and asylum cases because this is our main area of expertise. We also count among our membership those with substantial experience of age assessment judicial reviews, unlawful detention judicial reviews and community care judicial reviews.

8. While immigration and asylum judicial reviews make up a significant proportion of judicial reviews, it does not follow that these cases are brought as an abuse or delaying tactic[8]. Any consideration of the use of judicial review in these cases needs to take account of the context which includes at the least:

    a. ***The conduct of the UK Border Agency as a litigant***

        - The consistently poor management, service delivery and decision-making of the UK Border Agency. For just one recent example, refer to the Independent Chief Inspector of Borders and Immigration's recent report on his inspection of the handling of legacy asylum and migration cases by the UK Border Agency[9];

[6] Paragraph 22 Consultation Paper CP25/2012.

[7] These require that information provided in consultation papers should be 'should be easy to comprehend – it should be in an easily understandable format, use plain language and clarify the key issues, particularly where the consultation deals with complex subject matter'.

[8] Paragraphs 28, 29, Consultation Paper CP25/2012.

[9] Published 22 November 2012; available at http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/UK-Border-Agencys-handling-of-legacy-asylum-and-migration-cases-22.11.2012.pdf In his foreword, the Chief Inspector observed that 'I have commented previously about the importance of effective governance during major business change initiatives. I was therefore disappointed to find that a lack of governance was again a contributory factor in what turned out to be an extremely disjointed and inadequately planned transfer of work. Such was the inefficiency of this operation that at one point over 150 boxes of post, including correspondence from applicants, MPs and their legal representatives, lay unopened in a room in Liverpool.

I found that a considerable number of cases dealt with by this new unit fell within CRD criteria but had not been progressed by CRD. Furthermore, an examination of controlled archive cases showed that the security checks – which the Agency stated were being done on these cases – had not been undertaken routinely or consistently since April 2011. I also found that no thorough comparison of data from controlled archive cases was undertaken with other government departments or financial institutions in order to trace applicants until April 2012. This was unacceptable and at odds with the assurances given to the Home Affairs Select Committee that 124,000 cases were only archived after 'exhaustive checks' to trace the applicant had been made.'

- The consistent failure of the UK Border Agency to respond to pre-action protocol letters in a timely manner or at all[10];
- The practice of the UK Border Agency in serving non-appealable immigration decisions at the same time as or after detention and service of removal directions, leading to urgent applications for judicial review with little or no time for compliance with pre-action protocol procedures (see the evidence cited by Silber J in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin) at paragraphs 50-54);
- The consistent failure of UK Border Agency to abide by court decisions, for example the refusal of the UK Border Agency to grant permission to work to asylum seekers with outstanding 'fresh claims' in line with the Court of Appeal's decision in *R (ZO (Somalia)) v SSHD* [2009] EWCA 442, pending the appeal to the Supreme Court, despite the fact that there was no stay of the Court of Appeal's order (see *Bahta*[11]);
- The delay in amending rules and/or guidance to caseworkers to implement such decisions, for example such as occurred following the decision of the Court of Justice of the European Union in *Ruiz Zambrano* (Case C-34/09);
- The refusal to stay removal of like cases pending test case litigation save in cases where judicial reviews are actually issued (as has occurred for example in litigation about the safety of removal under the Dublin Regulation to Greece and Italy).

b. ***The complexity of immigration law and the frequency of change.*** There have been six Acts of Parliament in this field since 2002; in 2012 alone there were nine statements of changes in the Immigration Rules and ten judgments were handed down by the Supreme Court in immigration-related cases. Lord Taylor of Holbeach, in the debate on the current Crime and courts Bill 2012, has observed:

> *"I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them."*[12]

c. ***Importance of what is at stake in immigration and asylum cases.*** These cases were described by Lord Avebury in debate on the Crime and Courts Bill in July 2012 as 'the most sensitive of cases.'[13] See further below.

d. ***Complexity of appeal rights*** (described by Lord Hope in *BA (Nigeria)* [2009] UKSC 7 as an "elaborate system") and the removal of appeal rights through frequent legislative amendment;

e. ***Reduction in the availability of good quality legal advice*** in light of the reduction in the availability of legal aid (and the forthcoming removal of legal aid from non-asylum immigration cases), reducing the likelihood of sound decision-making first time around and of individuals being able to access good quality legal advice about their prospects of success and alternative remedies.

9. The aim of the proposals is said to be 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"[14]. ILPA considers that the existing procedures, particularly the permission filter already achieve that aim and that the statistics cited in chapter 3 of the consultation show that this is the case: that the majority

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[10] *Bahta & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2011] EWCA Civ 895.
[11] *Bahta & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2011] EWCA Civ 895.
[12] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012: Column 1087; for examples of judicial comment on the complexity of immigration law, see the examples cited at pp. 16-17 of ILPA's response to the Ministry's Green Paper: Legal Aid Reforms, available at: http://www.ilpa.org.uk/data/resources/4121/11.02.503.pdf
[13] *Hansard*, HL Report, 2 July 2012, Columns 497-498.
[14] Introduction paragraph 6 Consultation Paper CP25/2012.

of applications do not obtain permission[15] suggests that the permission stage is acting as an effective filter. The existing permission stage strikes the right balance between ensuring access to justice, enabling citizens to hold Government to account, and preventing the procedure being misused by the bringing of unmeritorious claims.

10. Moreover, where an applicant has been granted legal aid to bring a claim, s/he has already passed through the merits test required for legal aid to be granted. In this regard it should be noted that there are strict controls over the use of "devolved powers" by legal aid providers to grant emergency certificates for public funding in judicial review cases without reference to the Legal Services Commission. From 1st 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 Commission to exercise devolved powers in such cases may do so. There is not only central scrutiny over applications for public funding when submitted to the Legal Services Commission but there is also scrutiny of those who operate under Legal Services Commission contracts and undertake emergency work.

11. Legal aid already provides an important filter reducing the number of weak cases in the system. This should be taken into account in considering whether to implement these proposals.

12. ILPA disagrees with the suggestion that the quashing of an unlawful decision and remittal to the decision maker to make a lawful decision in accordance with the Court's judgment is a "pyrrhic victory"[16]. That appears to suppose that the new decision, lawfully made, will be the same, which is inconsistent with the notion of a fresh and lawful reconsideration. The Court's order that the decision-making body give further consideration to the matter means it will have concluded that it is not inevitable that the decision will be the same.

13. ILPA disagrees with the suggestion that "the threat of Judicial Review has an unduly negative effect on decision makers"[17] or that the deterrent effect of the possibility of judicial review of unlawful decision making is a reason for proposing changes to the system. Deterring decision- makers from reaching unlawful, irrational or unfair decisions is desirable, and if the availability of judicial review causes public authority decision makers to stop and think before reaching rash decisions, something that is in everybody's interest. There is no suggestion that the serious and widespread defects in UK Border Agency's decision making identified by the Independent Chief Inspector (above) are in any way the result of judicial review. On the contrary, judicial review is often the means by which these defects are brought to light.

14. If the stated justification for these proposals is in part the rise in the number of applications for judicial review, of which a significant proportion are said to be immigration/asylum cases, then now is not the right time to be implementing these proposals. ILPA made a similar point in its February 2012 response to the consultation on fees in the High Court and Court of Appeal, in which it pointed out that two significant recent developments were likely to reduce the number of such cases being handled by the High Court and Court of Appeal and that these should be allowed time to have an effect before the proposals were implemented. These were:

    First, the transfer on 15 February 2010 of immigration appeals to the unified tribunals system. This transfer will affect the number of appeals to the Court of Appeal in immigration and asylum cases...

    Moreover, the transfer of immigration and asylum appeals will also reduce the workload of the High Court. Prior to transfer, applicants who wished to challenge an initial decision by the Asylum and

[15] As set out in paragraph 31 consultation paper CP25/2012.
[16] Paragraph 32 consultation paper CP25/2012.
[17] Paragraph 35 consultation paper CP25/2012.

Immigration Tribunal could apply for reconsideration pursuant to section 103A of the Nationality Immigration and Asylum Act 2002. Applications for reconsideration were considered initially by the Asylum and Immigration Tribunal, but if rejected, could be renewed on the papers for reconsideration by a High Court Judge. Since transfer, applications for permission to appeal from the First-tier Tribunal are considered first by the Firsttier Tribunal and then, if refused, may be renewed to the Upper Tribunal. While it is in principle possible to seek judicial review of a refusal of permission to appeal by the Upper Tribunal, the grounds on which judicial review may be sought are very limited: R (Cart) v Upper Tribunal [2011] UKSC 28; [2011] 3 W.L.R. 107.[18]

The second major development is the transfer of fresh claim judicial reviews to the Upper Tribunal on 17 October 2011. According to the Equality Impact Assessment prepared for this consultation, 77% of judicial review applications issued in 2010 concerned immigration or asylum issues. In ILPA's view it is likely that a significant proportion of these were fresh claim judicial reviews. The transfer of fresh claim judicial reviews is therefore likely to have a very significant impact on the workload of the Administrative Court. This impact is likely to be increased by the encouragement given by the Court of Appeal in R (FZ) v LB Croydon [2011] EWCA Civ 59; [2011] P.T.S.R. 748 to the transfer of age dispute judicial reviews into the Upper Tribunal under the discretionary powers in section 31A of the Senior Courts Act 1981.

15. In addition, the proposed transfer of other classes of immigration and asylum judicial review being considered as part of the Crime and Courts Bill, currently before Parliament, would also reduce the number of cases being considered in the Administrative Court.

Questions 1-3

16. ILPA does not propose to comment on questions 1-3 as these relate to areas of law outside of its expertise.

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

17. Not in areas within ILPA's expertise. Immigration and asylum cases are very frequently brought on an urgent basis and in far less than three months.

18. The consultation paper has not proposed a reduction of the time limit in immigration and asylum cases. We consider that this is a sensible approach and that the three-month time limit allows for a chance to open negotiations with a view to resolving the case out of court. This is not withstanding that these negotiations are often hindered by the UK Border Agency's conduct as a litigant as set out above. Further, in immigration and asylum cases the issues at stake are often significant including life and death and permanent separation of a family. As Silber J observed in *Medical Justice:*

"The importance of these challenges is very significant as removing somebody is a life-changing decision and to advise on and to make such a challenge requires knowledge by the adviser to the person served with the removal directions of first all the relevant details of that person's immigration history and second of all information on why that person should not be removed which might relate to his personal life or to conditions in the country to which he or she might be returned." (Paragraph 59)

19. It is right that applicants have time to obtain legal advice and representation, consider evidence and pre-action disclosure, secure funding, and engage in pre-action correspondence. Moreover, the closure of Refugee and Migrant Justice and the Immigration Advisory Service in 2010 and 2011 and other cuts in public funding mean that it is now substantially more difficult to find representatives to bring judicial review proceedings than it was even a few years ago. Applicants who lack English language and ties with UK communities also face particular difficulties accessing legal representation.

[18] As the consultation paper records, the Civil Procedure Rules have since been amended to introduce shorter time limits and remove the right to oral renewal in such cases.

These observations, which we make of immigration and asylum cases, are also relevant to applications brought by this client group in other areas of law and may also hold in other areas of law whatever the immigration status of the client.

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. These proposals are misconceived. The existing rules require a claim to be issued *promptly,* or within three months of when the grounds for bringing the claim first arose. In *R v Secretary of State for Trade and Industry ex p Greenpeace (No 1)* [1998] Env LR 415, the Court of Appeal held that a judicial review claim must be brought against the 'substantive act or decision which is the real basis of his complaint' (at 424). The consultation paper is therefore wrong to suggest (at paragraph 63) that where clarification or reasons for a decision are sought, or a request for reconsideration is made, the later decision is automatically treated as the starting point for time running. However, it would equally be wrong to suggest that the earliest decision should always start time running. It will often be the later decision, reached with the benefit of further submissions pointing out the problems with the authority's initial stance, which is the more considered decision, and which the authority would prefer to defend. As the above citation shows, the Court is familiar with identifying the real subject matter of the complaint and will not permit attempts to manufacture a decision as a device to extend time.

21. In the case of continuing breaches, the proposals are unworkable. For example, a claimant may not find out about a public authority's policy or practice until it is applied to him and that policy or practice may have already been in existence for more than three months: is it intended that he should not be able to challenge the policy or practice in such circumstances? This would effectively render much administrative decision making by public bodies immune from judicial scrutiny. It is moreover inimical to the rule of law in a democracy, and contrary to the Government's stated intention to maintain respect for the rule of law, to preclude, for example, a detainee challenging the lawfulness of the Home Secretary continuing to detain him/her simply because the detention could have been challenged his past detention more than three months ago.

22. Moreover, it can be difficult to ascertain when the grounds for bringing a claim in respect of a continuing breach first arose. For example, in unlawful detention cases, it is often difficult to pinpoint the precise moment at which detention became unlawful. There have been a series of recent immigration cases in which the UK's detention of mentally ill men under immigration act powers has been held to breach Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman or degrading treatment or punishment.[19] These cases can be approached as case studies for examining the difficulties in identifying when the grounds for bringing a claim first arose, as well as the risks of injustice were the proposed changes to be made.

23. The proposals therefore risk stymieing the constitutional right of access to the court by precluding the bringing of proceedings where it is unclear when the breach commenced.

24. The "anecdotal evidence" referred to in paragraph 64 of the consultation paper is unparticularised and as such is an insufficient basis for comment on these proposals. ILPA would be grateful for the

[19] R (HA) (Nigeria) v SSHD [2012] EWHC 979 available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html;
R (BA) v SSHD [2011] EWHC 2748 (Admin) (26 October 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html; R (S) v SSHD [2011] EWHC 2120 (Admin) (5 August 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html ; and *R (D) v SSHD* [2012] EWHC 2501 (Admin).

opportunity to consider better particulars of this evidence and to provide comment as appropriate. We are unable to comment further without further detail, for example were these cases where there was substantial intervening correspondence resulting in what was effectively a new decision, based on new grounds?

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?

25. ILPA considers that these proposals carry precisely the risks identified in the question. It is in nobody's interests if litigants feel forced to launch claims for judicial review which could have been avoided had they been permitted the time to raise their concerns with the authority and seek to obtain a resolution without resorting to litigation. For example, a claim would need to be issued against an initial decision made by an authority even where the authority has already agreed to reconsider that decision, in case the authority reached a further adverse decision on reconsideration but more than three months after the first decision. Besides being wholly undesirable, this would have the absurd consequence that a litigant might have judicially to review an unreasoned decision rather than request and wait for the authority to provide reasons.

2. 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?

26. ILPA is opposed to both option 1 and option 2, which seek to restrict the right to an oral hearing, for the reasons set out below. If, despite the arguments set out below, the Government wishes to proceed with these proposals, then ILPA does not agree that the definition of a "court" proposed should be used for these purposes. It is unduly broad. The proposals are advanced on the basis of an extension of the procedure used in *Cart*[20]cases, but as set out below, there are fundamental differences between judicial reviews of some of the inferior courts and tribunals which would be included in these proposals and of the Upper Tribunal.

27. These proposals threaten access to justice. In *MD Afghanistan* [2012] 1 WLR 2422, the Court of Appeal referred to "*a general rule of our civil procedure that, in the absence of any order or legislation to the contrary, a party who has applied for an order which has been refused by a judge on the papers, without oral argument, has the right to renew his application orally before a judge of co-ordinate jurisdiction*"[21]. In light of this general rule a cogent argument based on clear empirical evidence would be required to restrict the general right of oral renewal. The consultation paper does not advance any proper basis for such a restriction.

28. These proposals are being advanced on the basis of "anecdotal evidence" which has not been included in the paper, with no indication of how widespread the supposed "problem" is said to be. The Ministry should particularise the statement that "...a very small proportion of these cases are granted permission"[22] by providing the figures and the basis of calculation. As set out above, the calculation can only be representative of a true picture when it includes the number of cases settled out of court, after an application has been lodged. ILPA agrees that judicial review should not be used merely as a 'tactical device' to delay resolution of claims but there is no *evidence* that there is such a problem on any significant scale, and the case has not been made that the existing permission procedure cannot address this issue.

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[20] *R (Cart) v UT; R (MR (Pakistan)) v UT (Immigration & Asylum Chamber) & SSHD* [2011] UKSC 28, see also *Eba v Advocate General for Scotland* [2011] UKSC 29.
[21] Paragraph 21.
[22] Consultation paper CP25/2012 paragraph 79.

29. The evidence cited earlier in the consultation paper underlines the importance of the oral renewal stage. According to paragraph 31, of the 1,200 cases in which permission was granted by the Court in 2011, 300 were granted following an oral renewal, therefore 25% of grants of permission were made at the oral hearing stage. Moreover, those statistics suggest that only around a third of unsuccessful applicants for judicial review renewed their applications to an oral hearing.

30. It is misleading to refer in support of these proposals to claimants "rarely" succeeding[23] when the consultation paper has earlier cited statistics showing that around one in six permission decisions are positive[24]. While a minority, this does not merit the adjective 'rare'. As many as 25% of these were granted permission at the oral hearing stage and almost half of all substantive hearings result in the claim being allowed[25]. As we have noted, significant numbers settle, pre- or post-permission.

31. The proposals to restrict the right to an oral hearing are in particular likely to disadvantage litigants in person, the numbers of whom are likely to increase as a result of the restrictions in the availability of legal aid from April 2013, and who may find it particularly difficult to present their arguments cogently on paper. The loss of the opportunity to present their case orally, and for the Judge to seek clarification of points which are unclear from the written argument, is likely to result in injustice and, as in other cases, in an increase in the number of appeals to the Court of Appeal.

32. The changes made to the Civil Procedure Rules to restrict oral renewal of applications for permission in cases involving challenges to Upper Tribunal decisions are based on two fundamental features:

- The Upper Tribunal is designated as a superior court of record by s. 3(5) of the Tribunal, Courts and Enforcement Act 2007; and
- Decisions of the Upper Tribunal which are amenable to judicial review are normally decisions refusing permission to appeal from the First-tier Tribunal. In such cases the appeal will already have been considered not only substantively by the First-tier Tribunal (normally at a hearing), but, in addition, both the First-tier Tribunal and the Upper Tribunal will have rejected the application for permission to appeal.

33. In *Cart*, Baroness Hale observed at paragraph 56, in holding that the 'second appeals test' should be applied to limit applications for judicial review of decisions of the Upper Tribunal:

> *'But no system of decision-making is perfect or infallible. There is always the possibility that a judge at any level will get it wrong. Clearly there should always be the possibility that another judge can look at the case and check for error. That second judge should always be someone with more experience or expertise than the judge who first heard the case (it is to be hoped that the new structure will not perpetuate the possibility, exemplified in the Sinclair Gardens case [2006] 3 All ER 650 , that a non-lawyer member might be entrusted with deciding whether a tribunal chaired by a legally-qualified tribunal judge had gone wrong in law, but this is left to the good sense of the Senior President rather than enshrined in the legislation). But it is not obvious that there should be a right to any particular number of further checks after that. The adoption of the second-tier appeal criteria would lead to a further check, outside the tribunal system, but not one which could be expected to succeed in the great majority of cases'.*

34. In agreeing with Lord Phillips that it would be unnecessary to allow for oral hearings of applications for permission to apply for judicial review in such cases she observed that:

[23] Consultation paper CP25/2012 paragraph 74.
[24] Consultation paper CP25/2012 paragraph 31.
[25] Consultation paper CP25/2012 paragraph 32.

The previous procedures for statutory reviews in immigration and asylum cases[26] *showed that there is nothing inherently objectionable in a paper procedure,* ***particularly if there has been an oral hearing of the first application for permission to appeal****. (*Paragraph 58, emphasis added.*)*

35. Lord Phillips said in support of his conclusion that Parliament had not ousted the jurisdiction of judicial review by describing the Upper Tribunal as a 'superior court of record':

But, in exercising the power of judicial review, the judges must pay due regard to the fact that, even where the due administration of justice is at stake, resources are limited. Where statute provides a structure under which a superior court or tribunal reviews decisions of an inferior court or tribunal, common law judicial review should be restricted so as to ensure, in the interest of making the best use of judicial resources, that this does not result in a duplication of judicial process that cannot be justified by the demands of the rule of law. (Paragraph 89)

36. He concluded however that *in the interests of proportionality*, judicial review permission applications should be restricted in such cases to paper applications (paragraph 93). His reasons for so concluding rested on their already being, within the Tribunal system, a system for review of decisions of first-instance tribunal judges (by way of renewal of the application for permission to appeal to the Upper Tribunal).

37. By contrast the proposals made would apply the same restrictive procedure to challenges to decisions of other inferior courts and tribunals, to which the same features do not apply, and in cases in which there has been no other opportunity to have the decision of the first-instance tribunal judge or decision-maker considered by another judge, of the same or superior jurisdiction. To take two examples from the immigration and asylum field, that would include any decision of the First-tier Tribunal (Asylum Support) (in respect of which there is no right of appeal to the Upper Tribunal), or non-appealable decisions of the First-tier Tribunal (Immigration and Asylum Chamber) (such as decisions about the validity of an appeal).

38. The proposal to restrict the right to oral renewal because the case is one where "substantially the same matter" has already been considered by another court or tribunal also gives rise to the risk of injustice and to unnecessary and time-consuming arguments about whether a matter is "substantially the same" when time would be better spent considering the point at the heart of the challenge.

39. There is a lack of clarity over the meaning of "substantially the same matter", as set out in the consultation. This could particularly disadvantage those affected by the removal of certain areas of law from the scope of legal aid after April 2013. A number of the case examples in Annex A to this response include cases where the application had already been considered by the Tribunal but in which the applicants were ultimately successful in claiming judicial review, having been granted permission at an oral hearing.

40. 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. The Act will remove legal aid for judicial review claims in immigration cases:

(1) where a claim is brought in relation to an appeal or judicial review of the same or substantially the same issue if the court found against the applicant or appellant less than one year previously, or

[26] In which there was a right to apply to a High Court judge for review of the refusal of permission to appeal by the Immigration Appeals Tribunal which was considered on paper and the Court of Appeal had held in R *(G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445 that this was a proportionate response to the need for some check on the lawfulness of decisions of the Immigration Appeals Tribunal.

(2) where 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.[27] In introducing these provisions, the Government recognised 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).*" [28]

41. The lack of clarity over what is meant by 'substantially the same' and the breadth of the proposed definition of 'prior judicial hearing' also give rise to serious concerns in respect of immigration detainees, who the Government recognised required particular safeguards. Is it, for example, intended that an immigration detainee should be restricted from taking his/her case to an oral hearing where s/he has previously been refused bail by the First-tier Tribunal? Given that the Tribunal when considering an application for bail has no jurisdiction to consider the legality of detention, that would create a manifest risk of injustice (as the case of *R (M) v SSHD* cited in Annex A shows) and would moreover create a risk of breaches of the right to have the lawfulness of detention reviewed by a court under Article 5(4) of the European Convention on Human Rights. That right includes a right to an oral hearing in certain circumstances.

42. Any restriction on the right to an oral hearing in judicial review challenges to the lawfulness of detention may also see an increase in the use of *habeas corpus* proceedings to seek release from detention; *habeas* applicants do not require permission from the court either to bring proceedings or to appeal to the Court of Appeal.

43. The proposals in the current consultation run contrary to the Government's own acknowledgment of the importance of a restrictive approach to measures that curtail the right to judicial review. We disagree with any restriction on the right to an oral hearing but consider that this measure is particularly disproportionate given the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Further, the new proposals are silent as to when a prior judicial hearing could have taken place, therefore disregarding the changes to law and fact that could have taken place in the interim.

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?

44. For the reasons set out above, ILPA is opposed to these proposals in principle. If however they are implemented then ILPA agrees that the Judge considering the application for permission would be the only person able to make any kind of assessment of this issue. However, as set out below, it would be unfair for this to occur without the Claimant having any opportunity to respond to the Acknowledgment of Service.

45. It is likely moreover that implementing these proposals would lead to an increase in the number of applications for permission to appeal to the Court of Appeal. In particular, in immigration cases it is very frequently the case that the claim develops and changes significantly between issue and the

[27] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, paragraph 19 http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted

[28] Reform of Legal Aid in England and Wales: the Government Response, June 2011, p13 http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf

initial decision on permission. ILPA has previously argued that claimants should be allowed a right of reply to the Defendant's Acknowledgement of Service prior to a decision being made on permission on the papers. In our response to the Tribunal Procedures Committee's consultation on the changes to the Upper Tribunal Procedure Rules arising out of the transfer of fresh claim judicial reviews, ILPA said that:

> *Fresh claim judicial reviews are very often brought by applicants facing imminent removal. The cases can develop very quickly and very often the Acknowledgement of Service is accompanied by further or new reasons for refusing to treat the claim as an asylum claim and often by a new decision letter. This will often lead to permission being refused because the grounds for the original claim have fallen away as a result of the new decision. It would be fairer and more efficient to allow the applicant an opportunity to raise any new grounds or matters in light of the respondent's summary grounds before permission is considered on the papers, rather than leaving these matters to be raised on a renewed application for permission. While this is a particular problem in fresh claim judicial reviews, due to the Secretary of State for the Home Department's more common practice of issuing a new decision with the acknowledgement of service, ILPA considers that a general provision in all judicial reviews would be appropriate.*

46. If the right to an oral renewal is removed, and there is no provision made for a right of reply, there will inevitably be an increase in the number of applications for permission to appeal to the Court of Appeal. For the reasons set out in *MD Afghanistan* [2012] EWCA Civ 194, it would be inappropriate for the Court of Appeal to assume this role:

> *19. There are two interrelated reasons why, in our judgment, it is in general inappropriate for the Court of Appeal, in a case such as the present, to hear both an appeal against the refusal by the Administrative Court of interim relief and an appeal against its refusal on the papers of permission to apply for judicial review. The first is that to do so converts the Court of Appeal, which is an appellate court, into a court of first instance. The Court of Appeal would have to determine the appeal without the benefit of any judgment at first instance. CPR r 52.15(4) makes express provision for the Court of Appeal to act as a court of first instance, but even in such a case there will be a judgment of the Administrative Court on the hearing of the renewed application for permission to apply for judicial review, giving its reasons for its decision.*
>
> *20 The second, and perhaps more important, reason is that for the Court of Appeal to act as a court of first instance effectively deprives the parties of any appeal against the first judicial decision on the substance of the case.*

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?

47. If, contrary to the arguments set out above, the change were introduced, then the burden would have to be on the Defendant to demonstrate that the "substantially the same" test is met. This would, however, give rise to unfairness if Claimant is not given the opportunity to respond to any such allegation. The current judicial review procedure does not allow the Claimant a formal opportunity to respond to the Acknowledgement of Service before a permission decision. While, as discussed above, ILPA considers this to be generally problematic, if these proposals are implemented and increase the number of appeals to the Court of Appeal, it would be acutely unfair for the Defendant to be able to make submissions to the Judge that the Claimant should be deprived of a right to an oral hearing without the Claimant having any opportunity to respond. There would therefore have to be formal provision in the rules for the claimant to make written submissions if so advised in response to the Defendant's submissions as to whether he should be deprived of a hearing. The added time and complexity required would render any perceived benefit from the proposal illusory.

48. If provision were not made for a reply to the Defendant's submissions, it will not only give rise to injustice but it is also likely lead to an increase in applications for permission to appeal to Court of Appeal.

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?

49. No. ILPA opposes the removal of the right to an oral renewal in any cases for the reasons set out above. As set out above, there are also particular problems in immigration and asylum cases where the Home Office frequently serves fresh decision letters with its Acknowledgement of Service to which the Claimant has no meaningful opportunity to respond before permission is determined on the papers. The Judge may refuse permission and certify it as totally without merit in light of the new decision letter (which may have addressed some or all of the original grounds of claim) but the Claimant may have good grounds for challenging the further decision letter or further reasons of which the Judge will be unaware. Removing the right to oral renewal in such cases will simply result in fresh applications for judicial review of the new decision and/or an increase in appeals to the Court of Appeal.

50. As well as being opposed in principle to the removal of the right to an oral hearing, ILPA also considers that the concept of 'totally without merit' is insufficiently precise to form the basis for such a measure, particularly in immigration and asylum cases given the gravity of the matters at stake. 54APD 18.4 empowers a High Court judge to certify an application in immigration as clearly without merit. This does not bar an oral renewal but in such cases it is the Secretary of State's policy not to stay removal. The procedure prioritises administrative convenience over the protection of the law, including for persons who may face torture or death on return. It is not a model to emulate.

51. Members report that judges refusing permission on the papers appear to describe cases as 'totally without merit' with increasing frequency and often without giving adequate reasons for that conclusion. One experienced solicitor reports:

> *It seems that orders that cases are totally without merit are being made more often ... and they often make orders that renewal is no barrier to removal. Oral renewal is an extremely important part of the process in my experience. There are a large number of very vulnerable people who have been through the system, quite often with either no or inadequate representation, where negative findings have been made in the past and where it is very easy on the papers to dismiss the case. Getting in front of a judge to argue the issues is often crucial in these cases, especially where the case changes somewhat throughout the course of the proceedings.*

52. Appended to this response at Annex A is a list of case examples where permission has been refused on the papers, including many cases where the case was certified as being 'totally without merit', but permission was subsequently granted at an oral hearing and the claim was either conceded by UK Border Agency or allowed by the Court. These are only a few examples of cases provided by members to illustrate the point, and several members have commented that it is their frequent experience that cases certified as totally without merit are later successful after an oral hearing.

53. These case examples and the experience of ILPA members show that a fundamental assumption of the consultation paper, stated repeatedly in the Impact Assessment document, that these proposals will not affect the number of successful cases "which would either affect very weak claims deemed to be "totally without merit", implying they would have been highly unlikely to have succeeded in the oral renewal..." (e.g. paragraph 1.25), is flawed. That may be a result of the lack of an evidence base for the proposals: the Impact Assessment reveals that the Government has not been able to assess the impact of these proposals properly because of a lack of information about the number of cases likely to be affected by them. ILPA is concerned that such potentially far- reaching proposals

restricting the fundamental right to an oral hearing have not been adequately researched or thought through.

54. The question of whether there should be an oral renewal at the Court of Appeal stage should be for the Court of Appeal to determine in the individual case.

3. 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?

55. No. ILPA is opposed to its introduction in all cases.

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. It would be appropriate where the decision that the claim is totally without merit is clearly erroneous, such as where it has been based on a clear misunderstanding of the facts, or where it has been reached in a procedurally unfair manner such as where the Defendant has introduced new matters in the Acknowledgement of Service to which the Claimant has had no opportunity to respond.

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?

57. ILPA opposes both proposals. Nor is the test whether an option would "filter out weak or frivolous cases early" but rather whether it would do so while ensuring adequate protection for those with strong cases, whatever their means. ILPA considers that both proposals fail this test.

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

58. ILPA does not agree with the proposal to introduce a fee for an oral hearing. ILPA is concerned that the overall effect of the proposals made in the consultation paper will be to restrict access to justice. The introduction of new fees is likely to act as a barrier to access to the courts. The right of access to the court is a fundamental right recognised by the common law, by the European Convention on Human Rights as an aspect both of Article 6 (right to a fair hearing) and of Article 13 (right to an effective remedy) and by European Union law, where it is an aspect of the general principle of effective judicial protection, expressly recognised in Article 47 of the Charter of Fundamental Rights of the European Union. ILPA's concerns have been detailed in our response to the consultation on "Fees in the High Court and Court of Appeal" of February 2012 where we said of the proposed increased fees for judicial review proceedings:

> *"…a number of the comments made in the consultation paper about the justification for this increase appear to be based on a flawed understanding of the judicial review procedure.*
>
> *First, it is inaccurate to say that "At the permission stage the merits of the case must be fully considered" (para 44). The permission stage is intended to filter out the most unmeritorious claims and requires consideration only of whether the claim is arguable on the basis of the arguments presented by the Claimant in a detailed statement of facts and grounds (in respect of which the Claimant is under a duty of full and frank disclosure), and a summary statement of grounds for opposing the application from the Defendant. The Court is not required to look in detail at the evidence or at the authorities cited. If permission is refused and the Claimant requests an oral hearing, this will ordinarily be limited to 30*

minutes unless there are particular reasons in a given case to think it will take longer. Thus to charge the same fee for consideration of permission as for the full hearing does not appear to be justified.

Secondly, the level of fee proposed is stated to be justified on the basis that it is a "type of appeal" and so should be equivalent to the fee charged for appeals. ILPA disagrees: judicial review is not a "type of appeal" but is a review on limited grounds of the decision-making of a public body where there is no alternative effective remedy.

…inadequate account has been taken of the important role which judicial review plays in holding public bodies to account for their decision-making. This is referred to at paragraph 48 of the consultation paper in the context of the proposed increase in the continuation fee, but no account seems to have been taken of this principle in proposing to make this very significant increase to the issue fee.

ILPA also wishes to comment on the proposal, made by way of an addendum to the consultation paper, to increase the fees for fresh claim judicial reviews in the Upper Tribunal (Immigration and Asylum Chamber) to the same level. ILPA is strongly opposed to this proposal.

…the majority of applicants in fresh claim judicial reviews are destitute or on low incomes. The increase in fees is likely to increase the number of applications for fee remissions. In the consultation paper, the Government recognises that now is not the time to introduce 100% cost recovery across the board in the Courts because of the "wide-ranging changes underway in civil justice and the wider justice system", including changes proposed to the legal aid system (paragraph 15 of the consultation paper) and the implementation of fees in the Asylum and Immigration Chamber of the First-tier Tribunals (paragraph 17 of the consultation paper), both of which are likely to have a significant impact on the costs base of the Upper Tribunal Immigration and Asylum Chamber and its workload.

…Given the concerns raised below in respect of the equality impact of these proposals, ILPA considers that extending these proposed significantly increased fees in the Upper Tribunal to fresh claim judicial reviews alone (in which 100% of applicants will not be British citizens) would require particularly cogent justification.

The only justification advanced in the addendum to the consultation paper for applying these fees to fresh claim judicial reviews is the desire "that Claimants should not be worse or better off in respect of fees by the transfer". ILPA does not consider this to be an adequate justification. For all the reasons set out above, there is every reason for not increasing the fees in the Upper Tribunal at this stage and none of the justifications for increasing the fees in the High Court appear to apply to the Upper Tribunal. Individuals seeking to bring fresh claim judicial reviews do not have a choice of jurisdiction and will not therefore be evading the higher fees in the High Court by issuing their claims in the Upper Tribunal. There is a similar parity of fees between the High Court and the County Court but the consultation paper expressly does not propose raising fees in the County Court.

The Equality Impact Assessment frankly acknowledges that these proposals are likely to impact more severely on ethnic minority groups because of the high percentage of the workload of both the High Court and the Court of Appeal which involves immigration and asylum matters. Many of these cases will also involve people who are at risk for other reasons, such as mental and physical health problems.

… As the Equality Impact Assessment expressly acknowledges, the Government simply does not have the information available to it to enable it properly to analyse the impact of these proposals on protected groups. It is not appropriate to make such far-reaching changes, with the very real potential to impact on access to justice for persons at risk without access to reliable information about that impact.

…ILPA is particularly concerned about the impact on ethnic minority groups. Given the high proportion of the work of the Administrative Court and Court of Appeal which involves immigration and asylum cases,

and that the only other part of Her Majesty's Courts and Tribunals Service which will be affected by these proposals is the Immigration and Asylum Chamber of the Upper Tribunal, it is difficult to avoid the conclusion that these proposals will have the effect of excluding migrants from access to justice. [29]

See also the response to question 16 below.

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?

59. No. The suggestion appears to be that it costs as much to hear an oral permission application as a substantive judicial review hearing. Permission applications are normally listed with a 30-minute time slot. To suggest they take as much in terms of court resources as a full judicial review is very odd and does not accord with members' experience.

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

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

60. It is particularly concerning that the Government is bringing forward these proposals which, for the reasons set out above, have the potential drastically to restrict access to justice and undermine the rule of law, without having a proper evidence base on which to assess the impact of the proposals as they affect issues of equality.

61. Given the statistics which show that a large proportion of applications for judicial review concern immigration and asylum, the proposals are likely to impact particularly on grounds of race (nationality and/or ethnic or national origins). People whose first language is not English or Welsh are also likely to be particularly adversely affected by the proposals, which reduce time limits (given the need to present arguments and documents to court in English or Welsh) or restrict the right to an oral hearing (at which an interpreter may be made available if necessary to assist a claimant).

62. The proposals to reduce time limits and restrict the right to an oral hearing may also have a disproportionate impact on people with disabilities and on those who are particularly young or old, who may find it more difficult to present their case in a shorter time limit or without the possibility of an oral hearing.

63. In ILPA's response to the consultation on "Fees in the High Court and Court of Appeal" of February 2012,[30] we stated.

    The Equality Impact Assessment frankly acknowledges that these proposals are likely to impact more severely on ethnic minority groups because of the high percentage of the workload of both the High Court and the Court of Appeal which involves immigration and asylum matters. Many of these cases will also involve people who are at risk for other reasons, such as mental and physical health problems.

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[29] ILPA response to *Consultation on fees in the High Court and Court of Appeal, February 2012, available at* http://www.ilpa.org.uk/data/resources/14163/12.02.07-ILPA-response-appeal-high-court-fees-consultation-questionnaire.pdf The answers to this consultation should be read in light of those comments.

[30] *Op.cit.*

… As the Equality Impact Assessment expressly acknowledges, the Government simply does not have the information available to it to enable it properly to analyse the impact of these proposals on protected groups. It is not appropriate to make such far-reaching changes, with the very real potential to impact on access to justice for persons at risk without access to reliable information about that impact.

…ILPA is particularly concerned about the impact on ethnic minority groups. Given the high proportion of the work of the Administrative Court and Court of Appeal which involves immigration and asylum cases, and that the only other part of Her Majesty's Courts and Tribunals Service which will be affected by these proposals is the Immigration and Asylum Chamber of the Upper Tribunal, it is difficult to avoid the conclusion that these proposals will have the effect of excluding migrants from access to justice. [31]

64. The case studies in Annex A include relevant examples illustrating how the proposals might impact on individuals with protected characteristics.

Adrian Berry
Chair
ILPA
24 January 2013

[31] ILPA response to *Consultation on fees in the High Court and Court of Appeal, February 2012, available at* *http://www.ilpa.org.uk/data/resources/14163/12.02.07-ILPA-response-appeal-high-court-fees-consultation-questionnaire.pdf* The answers to this consultation should be read in light of those comments.

Annexe A: Case examples where permission granted at an oral hearing

R (MK and AH) v SSHD [2012] EWHC 1896 (Admin)

These two leading cases found that a Home Office policy of delaying consideration of applications for 'hard cases' section 4 support for at least fifteen working days was unlawful because of the significant risk that applicants would be exposed to inhuman and degrading treatment during the period of delay. The individual claims were allowed and a declaration made that the policy was unlawful. The UK Border Agency had defended the policy robustly at "stakeholder" meetings and in previous judicial review claims, since its implementation in October 2009.

Both claimants were refused permission on the papers on the grounds that their claims for judicial review had become academic (MK had been granted refugee status and AH had been granted support). MK was subsequently granted permission to claim judicial review at an oral hearing and the Secretary of State conceded that AH should be granted permission when he renewed his application.

R (M) v SSHD [2012] EWHC 1424 (Admin)

This claim concerned the unlawful detention of a Somali national pending his proposed deportation to Somalia. M was detained under the Immigration Act 1971 from January 2011 until May 2012. His application for permission to apply for judicial review was refused on the papers by a Deputy High Court Judge on 29 November 2011, on the basis of the factual and legal situation as presented in the Defendant's Acknowledgement of Service, dated 1 November 2011, with the Judge holding that it was 'not reasonably arguable' that M's detention was or had become unlawful at that stage. However, unknown to the Judge there had been legal developments on 25 and 28 November 2011. Permission was subsequently granted at an oral hearing in February 2012. The Claimant was released from detention on 18 May 2012 and in a judgment given on 25 May 2012, HHJ Waksman QC held that he had been unlawfully detained since mid-July 2011 (it had thus already become unlawful at the time that permission was refused on the papers).

R (Luthra) v SSHD [2011] EWHC 3629 (Admin)

Mr Luthra was an Afghan Sikh who made a fresh claim for asylum on the basis of evidence showing deterioration in conditions for Sikhs in Afghanistan. He was refused permission on the papers by Irwin J who also directed that renewal should be no bar to removal. Nicol J and Stadlen J also considered the matter on the papers, following submission of further documents and amended grounds, and refused to stay removal or grant permission. Permission was subsequently granted at an oral hearing by a Deputy High Court Judge and the claim was eventually allowed by Collins J, who quashed the Secretary of State's decision and accepted an undertaking to facilitate Mr Luthra's return to the UK from India where he was then living in 'miserable' conditions.

R (D) v SSHD [2010] EWHC 2110 (Admin)

D was a Jamaican national who had been refused asylum. He made further representations in the light of new material which had come to light in another case, of which the Secretary of State ought to have been aware, in support of his case that his removal to Jamaica would breach Article 3 of the European Convention on Human Rights, because of the risk to his life and safety in that country.

His representations were refused. A claim for judicial review was issued on 14 May 2010. Permission to apply for judicial review and interim relief was refused on the papers by Mr Justice Ouseley on 17 May 2010 and the claimant was on that same day later deported to Jamaica. He went into hiding. On 22 June 2010, Mr Justice Hickinbottom granted permission and ordered that the hearing of the substantive application should be expedited. On 9 July 2010, Mr Justice Nicol allowed the claim, quashed the decision and ordered that the Secretary of State take reasonable steps to return D to the United Kingdom.

*R (BN) v SSHD [*2011] EWHC 2367 (Admin)

BN was a Malawian national whose further representations regarding her right to a family life with her teenage children were refused by the Secretary of State in a series of decisions taken between 22 September and 8 November 2010. BN challenged by way of judicial review the failure of the Secretary of State to take account of her duty to have regard to the need to safeguard and promote the welfare of children and/or to consult the Office of the Children's Champion.

On 19 October 2010, a Deputy High Court Judge refused BN permission to claim judicial review on the papers and found that the application was totally without merit, directing that renewal of the application would be no bar to removal. On 29 October 2010, Mr Justice Kenneth Parker J refused an application for an injunction preventing the Claimant's removal. Removal directions were deferred due to BN's ill-health. Further representations were made and on 9 November 2010, a further application for an injunction was refused by Mr Justice Treacy, and on 10 November 2010, Carnwath LJ refused permission to appeal against that decision, and that evening BN was removed to Malawi.

On 11 February 2011, at the first oral hearing in the case, Mr Justice Supperstone granted BN permission to claim judicial review and on 16 September 2011, following a hearing over two days on 30 June – 1 July 2011 at which both the Secretary of State and BN were represented by leading counsel, Mr Justice Stadlen allowed BN's claim. The Secretary of State subsequently facilitated BN's return to the UK and granted her discretionary leave to remain.

Case CO/7124/2012

This is an example of a case in which an Upper Tribunal judge refused permission in a fresh claim judicial review on the papers on 16 August 2012, holding that the claim was 'completely without merit.' On 1 November 2012, Mr Timothy Brennan QC granted permission to claim judicial review following an oral hearing.

Case CO/8207/2011

This claim involved a Pakistani convert to Christianity who sought judicial review of further representations for asylum made on the grounds of his marriage to a Christian woman. Permission was refused on the papers by Lord Carlile of Berriew QC who ordered that the claim be certified as completely without merit and that renewal of the claim be no bar to removal.

However, Blake J subsequently granted an injunction staying his removal pending consideration of the oral application for permission. At the permission hearing, Hickinbottom J granted permission and the Secretary of State subsequently conceded that the further representations should have been accepted as a fresh asylum claim.

Case of A

A was detained pending removal. He was a failed asylum seeker from Cameroon whose appeal against the refusal of his asylum claim had been dismissed. It became very clear to his solicitor (who was instructed after he was detained) that he was suffering from serious mental health problems (he was complaining of auditory hallucinations, described being commanded to jump out of the window, refusing to eat or drink). She issued proceedings challenging removal directions and later amended the grounds to challenge his unlawful detention. An initial report prepared by the Helen Bamber Foundation following a telephone assessment concluded that it was likely the client was suffering from a psychotic disorder of some sort, but it was difficult to assess over the phone. Permission was refused by Blake J on the papers. He also refused interim relief and said that renewal was no barrier to removal. The solicitor renewed the application for judicial review.

In the meantime, she lodged a bail application in the First-tier Tribunal and the Tribunal granted bail for a period of one week while removal directions were still in force following a video-link hearing where the tribunal judge could see the client's distress and that he was clearly responding to the voices he was hearing.

Three days after A was released he was detained under section 2 of the Mental Health Act 1983 after his solicitor called an ambulance when he visited her offices for advice. He remained detained under section 2 for a month and was then subsequently detained under section 3 of the Mental Health Act for a further four months. Before the oral permission hearing the Secretary of State agreed that she would reconsider the case and so the challenge to his removal directions became academic.

Case of B

This case involved a challenge to the unlawful detention of B. He was refused permission on the papers and at an oral hearing in the Administrative Court. His application for permission to appeal was refused on the papers by the Court of Appeal, but following an oral hearing it was allowed and remitted to the Administrative Court for the substantive judicial review hearing.

Case of C

C was a young Afghan male (over 18), who had initially arrived in the UK as an unaccompanied minor. He had been granted discretionary leave until he was 17 ½ in accordance with UK Border Agency policy but an application for further leave to remain was refused as he was by then an adult. His appeal against that decision was dismissed and he was detained pending removal. A fresh claim was submitted with evidence that C suffers from learning difficulties and is particularly vulnerable alongside, having no contact with family in Afghanistan. This was refused. Judicial review permission was refused on the papers. Permission was granted at oral hearing and the matter then settled by consent with Secretary of State agreeing to record fresh claim. C was very vulnerable, and could not give instructions so the Official Solicitor was involved.