THE IMMIGRATION LAW PRACTITIONER'S ASSOCIATION RESPONSE TO THE DRAFT "CHAMBER GUIDANCE NOTE: 2013 No 1", MARCH 2013

1. ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law and is represented on numerous Government consultative and advisory groups.

2. ILPA is grateful for being given the opportunity to comment on the draft "Chamber Guidance Note: 2013 No 1" ("the Guidance"), and is also particularly grateful for being given an additional period in which to respond.

3. ILPA welcomes the issuing of guidance. ILPA does however consider that there are particular features of the Guidance which present problems, for the reasons explored below, and that there are areas where the Guidance could be augmented.

Extension of time

4. ILPA has concerns about the statement at §2.4(i) that:

> *In deciding what is 'prompt' regard may be had to any relevant time limits for statutory appeals.*

5. For the reasons which follow, ILPA suggests that this sentence be deleted.

6. Presumably, the "relevant" time limits here will be those which apply to statutory immigration appeals, either to the First-tier Tribunal or onward appeals to the Upper Tribunal. Those time limits are very short, generally of the order of between one and two weeks, and stand in stark contrast to the three- month time limit provided for in judicial review claims (whether under the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) or the Civil Procedure Rules).

7. In *R (Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23, [2002] 1 WLR 1593, the House of Lords was concerned with the so-called "six weeks rule" for planning judicial review cases. This was a practice which had been adopted by Administrative Court judges of, in effect, contracting the three-month time limit to a six-week time limit, on the basis that that was the time limit for statutory challenges to decisions of planning Inspectors[1]. Lord Steyn commented on this as follows:

> *First, from observations of Laws J in R v Ceredigion County Council, Ex p McKeown [1998] 2 PLR 1 the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a "six weeks rule". This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision. Secondly, there is at the very least doubt whether the obligation to apply "promptly" is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty. Moreover, Craig, Administrative Law, has pointed out, at p 794:*
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> > *"The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted ultra vires now has the*

[1] Under section 288 of the Town and Country Planning Act 1990.

strongest incentive to seek a judicial resolution of the matter immediately, as opposed to attempting a negotiated solution, quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit"

8. It is very difficult to reconcile these remarks with the publication of Presidential Guidance which invites or mandates Upper Tribunal judges to have regard to the time limits in statutory immigration appeals.

9. In immigration, analogy with statutory appeal time limits is still more objectionable than in planning, for a number of reasons including that

    a. the contrast between the 3 months fresh claim judicial review limit, and the very short time limits for appeals, is much greater than that between three months and six weeks, and the effect of any judicial policy change is therefore much more stark;

    b. by definition fresh claim judicial review claims concern human rights, refugee or EU law claims, where discretionary refusal of relief is particularly objectionable; and

    c. there are particular reasons why "promptness" has generally been thought desirable in planning, namely the protection of third party interests, which do not apply to immigration cases.

10. It is unclear whether, in indicating that "regard" may be had to time limits in statutory appeals, the Guidance is envisaging that, in effect, the statutory appeal time limits will become determinative, or merely that some loose analogy may be made with those limits as a reason to require a claim to be brought somewhat more quickly than might otherwise be necessary, but to an extent that is left to the discretion of the individual tribunal judge.

11. The first of these approaches would be clearly contrary to Lord Steyn's remarks in *Burkett*. The latter is equally objectionable, first, because it is again contrary to *Burkett,* in substituting a judicial policy decision for the language of the rule, and secondly, because such an approach is very vague in its effect, and will only increase what is already a problematic level of uncertainty inherent in the "promptness" requirement.

12. Paragraph 2.4 would appear to provide, surprisingly, that applications which are not obviously out of time, or indeed not out of time at all, and which therefore do not on the face of it require an application to extend time, could be refused permission on the basis that no written reasons have been provided for seeking an extension of time.

13. Lord Steyn's observations, above, that the promptness requirement is arguably objectionable in terms of EU and European human rights law, have proven prophetic. It is now generally accepted[2], following the decision of the Court of Appeal in *R (Berky) v Newport City Council* [2012] EWCA Civ 378, [2012] 2 CMLR 44, that the imposition of a promptness requirement, as distinct from a fixed time limit, in judicial review claims involving the assertion of a breach of EU law, is unlawful. This ruling has potential application in the immigration sphere and the fresh claim judicial review jurisdiction, where the substantive arguments underlying the fresh claim may not infrequently depend on EU law. More controversially, the Court of Appeal has recently entertained, albeit not decided, an argument that, even as a matter of domestic law and under the Human Rights Act

[2] There was some disagreement amongst the members of the court about the precise scope of this, in particular as to whether (a) it applied only to grounds of challenge based explicitly on EU law, or meant that promptness could not be relied on in any case where (any) EU ground was put forward, and (b) whether it governs only the grant of permission, or also discretionary refusal of relief. There was also some indication that, had the case depended upon this issue, it might have been appropriate to refer to the matter to the Court of Justice of the European Union. Nevertheless, notwithstanding those complications, *Berky* leaves little doubt that, at least for some cases involving EU law, a promptness criterion is unlawful.

1998, the promptness requirement is unlawful: *R (Mcrae) v Hertfordshire CC* [2012] EWCA Civ 457, §§10-11.

14. ILPA does not suggest that the current Guidance is the appropriate forum for the discussion of, let alone imposition of a solution to, the issues raised by these cases. But the cases are a relevant part of the backdrop to consideration of whether it is appropriate for the Guidance to indicate, in unqualified terms, that Upper Tribunal judges should or may have regard to time limits in statutory appeals. In light of the above, especially *Burkett*, that approach is at best controversial, and at worst clearly wrong.

15. Further, at least unless it is treated as, in effect, giving rise to a presumption that the statutory appeal time limits should trump the three- month time limit altogether, the approach suggested in the Guidance can only increase the uncertainty already inherent in the promptness requirement. It may be that some tribunal judges will not have regard to those time limits at all, or give them little weight, whilst others may treat them as close to determinative, giving rise to a particularly wide range of possible approaches. A litigant who brings a fresh claim judicial review after, for example, two months, may be refused permission for lack of promptness by one tribunal judge, though nothing in the particular case called for promptness, and granted by another. That is unacceptable.

16. Secondly, and in any case, the proposed analogy with statutory appeals is, with respect, false. The statutory appeal time limits apply in the context of on-going litigation. In the case, for example, of an appeal from the First-tier Tribunal to the Upper Tribunal, the appellant will very often already have instructed lawyers who will be up to speed on the case. Legal Services Commission funding (from 1 April 2013, Legal Advice Agency funding), under the Controlled Legal Representation scheme, will generally already be in place if available at all. By contrast, a fresh claim judicial review arises out of what has, up until then, been an administrative process. Lawyers are less likely to be already instructed, and there is often a delay of many years between the making of fresh claim representations and the decision of the Home Office refusing them (something which in itself makes a harsh approach to promptness inappropriate), so the material facts may have changed considerably.

17. Legal Services Commission funding for judicial review is different. Pre-1 April 2013 only some lawyers have devolved powers which allow them to grant funding without a decision from the Legal Services Commission, which may take considerable time to obtain before proceedings can be issued. As the time of writing no devolved powers have been granted post 1 April 2013 and there is no certainty that such powers will be granted. The UK Border Agency often does not reply in that timeframe, and has been heard to argue in many subsequent costs disputes that the period for reply is inadequate, and that it should not be made to pay costs where it did make a reply even many weeks later.

18. An approach of having regard to statutory time limits to inform the promptness requirement is, at best, highly controversial, and at worst unlawful. It is inappropriate for it to be laid down in Presidential Guidance of this nature, thereby pre-empting or influencing any judicial consideration of the issues it raises after hearing full argument. The President is invited to delete the relevant sentence of the Guidance.

<u>Permission decisions</u>

19. <u>Time for renewal</u> At paragraph 2.7(ii), the Guidance indicates:

> *In order to reflect the practice of the Administrative Court CPR 54.12 the Upper Tribunal judge will normally curtail time for renewal to five working days and may curtail time to two working days where there is a compelling case for expedition.*

20. Paragraph 54.12 of the Civil Procedure Rules provides, as a rule, that time for renewal is seven days, which corresponds in practice to five working days. So the Administrative Court practice referred to is a matter of a rule, not a discretionary practice. By contrast, the clear rule in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) themselves is that there are nine days for renewal. That rule is specific to fresh claim judicial review claims, in contrast to the 14 days permitted for all other Upper Tribunal judicial review claims, and must be taken to represent the considered view of the relevant rules committee on what time period is appropriate for fresh claim judicial reviews.

21. What is proposed here is, by way of blanket judicial policy, the contraction of the nine-day period provided for in rule 30(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), to a five working day period. That offends very clearly indeed against the principles outlined by Lord Steyn in *Burkett*. Indeed, this is a much clearer case. The context of Lord Steyn's remarks was a rule which required promptness in addition to three months, and the six-week rule had been adopted as a way of informing the promptness requirement. *A fortiori*, the adoption of a judicial policy which in effect overrides the fixed rule in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) themselves is inappropriate and indeed unlawful.

22. ILPA accepts that there is a discretion, in the individual case, to curtail time if there is a compelling case for expedition. But here caution is desirable. In practice, there is unlikely to be a compelling case for curtailment. With the possible and doubtful exception of cases where removal has been set for a specific date after refusal of permission, and before ordinary time for renewal, and the court has said that renewal should not bar removal, it is difficult to see how any real advantage to the UK Border Agency will be given by a curtailment of four days. It is very hard to see how the removal exception will arise. The UK Border Agency cannot, with any expectation or certainty, set removal before the paper permission decision is received, both because it cannot assume the outcome, and because in the vast majority of cases it will not know when the decision on paper will be made. Thus, at the time the permission decision is made, it is most unlikely that there will be a fixed removal date (and in the experience of ILPA members, that is very unusual in a case where a paper decision on permission is awaited). Thus, unless the UK Border Agency has explicitly sought expedition of permission on the basis that removal is set for a particular date, it is difficult to see why it would be beneficial to shorten the time period by only a few days. Even in an expedited case, a fresh claim judicial review may take a few weeks or months to resolve, and in many cases it will take longer, and come against a backdrop of several years delay in decision-making by UK Border Agency. In that context a curtailment of a few days is, from the perspective of any benefit to good administration, trivial.

23. By contrast, curtailment may have real consequences for claimants and their representatives. A five-, or even nine-, day period in which to reconsider the merits, perhaps obtain counsel's advice, if necessary get a funding decision from the Legal Services Commission/Legal Aid Agency, and draft and lodge the renewal, is already short. The reality of curtailment to five, let alone two, days, is that it simply makes it harder for a claimant to pursue his/her claim, or for his/her lawyers to do so responsibly and competently, and so restricts access to the court for no good reason. The whole purpose of oral renewal is to enable reconsideration of the merits by a different judge, and that will be undermined if the tribunal judge refusing permission on paper takes steps (perhaps influenced by his or her own view of the merits, the very matter to be reconsidered) which make it harder for the claim to be renewed. Routine curtailment is also objectionable because any contrast between the practice of the Upper Tribunal, and the approach in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), may lead to confusion (especially for litigants in person).

24. For these reasons, the adoption of a blanket judicial policy of curtailment to reflect the Civil Procedure Rules is unlawful, contrary to *Burkett*, and in any case is not justified or desirable. The wording set out above should be deleted.

25. "Wholly without merit" The power to certify a claim as wholly without merit is, in the context of fresh claim judicial review claims, draconian. The power had its genesis in paragraph 3.3 of the Civil Procedure Rules, where its purpose and effect were quite different, and considerably less harsh, being merely that they opened up the *possibility* of a judge also making a civil restraint order (though not requiring him to do so). Its use in immigration judicial review cases is made much more draconian, not by the grant of any further powers to the judge himself, but because of the way it interacts with UKBA removals policy, namely that its general policy of staying removal will be departed from where the judge refusing permission gives such an indication. Its effect is, in any claim in which removal is imminent; effectively to render further pursuit of the claim solely of academic concern if an injunction is not obtained. In a case involving an issue of a breach of human rights or the 1951 UN Convention Relating to the Status of Refugees (as most or all fresh claim judicial reviews do), it may expose the claimant to treatment contrary to Article 3 of the European Convention on Human Rights, or equivalent, without the opportunity to have his/her case tested at an oral hearing.

26. The experience of ILPA's members is that the practice of judges of the Administrative Court and now immigration judges of the Upper Tribunal varies greatly. Whilst some have an appropriate appreciation of the sweeping nature of the power, others may equate a decision that a case is not arguable in the sense required to justify permission, with its being "wholly without merit". They may certify a claim as wholly without merit in reliance on assertions in the UK Border Agency Acknowledgement of Service which can be later shown to be untrue or, in some cases, misleading in the sense that they are made when the UK Border Agency should have known, or did know, to the contrary.

27. It is not uncommon for orders made on the papers that a claim is totally without merit, to be followed by a successful application to the court for an injunction restraining removal pending permission, or a grant of permission at an oral hearing. In not every case in which such orders are made is removal enforced for reasons of UK Border Agency resources, or precisely to avoid satellite litigation over injunctions. ILPA members have experience of many cases in which such an order on the papers is followed by an oral grant of permission, a concession of the claim by the UK Border Agency, or substantive success at trial. In many such cases, the applicants go on to win their resultant statutory appeals before the First-tier Tribunal. This suggests both that such orders are made overly frequently, but also that the practical benefits to UK Border Agency are limited. The result of such an order will not infrequently be an increase in the work of the court or tribunal itself as it is required to consider an application for an injunction.

28. The facts of one of the few fresh claim judicial reviews to have reached a substantive hearing in the Upper Tribunal, *R (Mamour) v SSHD* [2013] UKUT 00086 (IAC), should give pause for thought. The judgment of Upper Tribunal judge Storey reveals that after the claim was lodged permission was initially refused by the High Court with renewal no bar to removal, and on two occasions the Upper Tribunal refused a stay of removal. The claimant was then removed, only for permission to be granted by a different Upper Tribunal judge, and for the Secretary of State to concede not only that the application was not 'wholly without merit' but that it should succeed, i.e. that her own original decision was unlawful.

29. In the circumstances, ILPA invites the President to consider adding to paragraph 2.7(iii) of the Guidance, either (a) by drawing attention to the consequences of a "totally without merit" finding, and the distinction between such a finding, and a simple finding that a claim does not merit permission, and / or (b) or by drawing attention to the observations to that effect made by Collins J in *R (Santur) v SSHD* [2007] EWHC 741 (Admin). A statement of this kind in the Presidential Guidance would enhance consistency of judicial decision making and help to avoid inappropriate use of this power.

Renewal hearings

30. ILPA is startled by the suggestion at paragraph 2.11 that renewed permission applications will be listed at just two days' notice. ILPA does not understand the purpose for, or justification of, such an arrangement, especially bearing in mind the points made above about delay at the UK Border Agency and the overall timetable in fresh claim judicial review cases. For instance, it is unclear why the Secretary of State should be given 21 days to provide grounds for opposing the grant of permission, or 35 days to provide her detailed grounds, if and when permission is granted, if the oral permission application itself has to be listed in such haste. If the purpose of paragraph 2.11 is to avoid delay overall in dealing with fresh claim judicial reviews, we do not understand why it is not those time limits, or others affecting the Secretary of State, which are trimmed, rather than the period of notice for the hearing. The Upper Tribunal practices will not mirror those of the Administrative Court if the notice given for the oral renewal hearing is so greatly reduced. Applicants would struggle to instruct any counsel, let alone counsel of their choice, at such notice. If different counsel has to be instructed for the permission hearing (as is likely to be the case at such notice, if any counsel at all can be found), that has implications for public funding, as a new advocate will have to take time reading into the case.

31. ILPA therefore invites the President to delete the second sentence of paragraph 2.11. Promptness, as provided for in the first sentence of paragraph 2.11, is of course desirable; extreme haste, whose practical effect is certain to be far more detrimental to the applicant than to the defendant, is not.

Appeals to the Court of Appeal

32. Paragraph 2.14 provides that at the permission hearing the tribunal judge *shall* curtail time for applying for permission to appeal to the Court of Appeal – apparently without having any discretion to do otherwise. Once again, this would appear to subvert the law by way of judicial policy in the way deprecated in *Burkett*.

Urgent applications

33. At paragraph 3.2, the Guidance indicates that any application for a stay on removal or injunctive relief must be accompanied by certain matters, including a statement:

> *(iii) certifying that there is merit in the application...*

34. ILPA assumes that the intention is that the applicant or practitioner making that statement should certify that *in their opinion* there is merit in the application – the actual merits being of course a matter for the Upper Tribunal itself to determine on consideration of the application.

35. Either way, ILPA does not understand the reason for this requirement, and suggests that it may be unlawful, or at least put practitioners in situations where they may be required to act contrary to their professional obligations. ILPA understands other parts of paragraph 3.2 to derive from the comments of Sir John Thomas PQBD in *R (Hamid) v SSHD* [2012] EWHC 3070 (Admin) at paragraphs 2 and paragraph 7, but does not consider that this requirement can be so derived.

36. Sir John Thomas did comment that many urgent applications were 'totally without merit', but that is not the same as introducing a requirement to certify to the contrary. The purpose of the requirement is unclear. In particular, it is unclear whether:

    a. it is intended that the purpose of the certification is to require the lawyer in question to provide something akin to an undertaking, which could give grounds for censure of that lawyer in the event that the court takes a different view; or

    b. whether it is intended simply to focus the mind of the lawyer in question of the need to properly consider the merits of a claim.

The former is objectionable, and the *vires* for it is unclear, and the latter is, or should be, unnecessary.

37. It is unclear what is meant, also, by "merit." At least on one view, it would mean that the legal representative in question believes that the claim is well-founded (i.e. should succeed). Alternatively, it may mean that the claim is thought to have a better than 50% prospect of success, or some lesser prospect.

38. Legal representatives have a role in advising their clients. In cases funded by the Legal Services Commission/Legal Aid Agency, they may be required to assess merits for funding purposes, and in some cases funding will not be granted unless a relatively high merits threshold is satisfied, in their view or that of the Legal Services Commission/Legal Aid Agency.

39. Nevertheless, the basic obligation of a lawyer is to put their client's case, provided that doing so does not involve misleading the court or advancing arguments which the lawyer believes to be improper or misconceived. For barristers, the Bar Code of Conduct provides:

> *704. A barrister must not devise facts which will assist in advancing the lay client's case and must not draft any statement of case, witness statement, affidavit, notice of appeal or other document containing:*
> *...*
> *(b) any contention which he does not consider to be properly arguable;*

40. See also paragraph 708(f), for the equivalent limitation in oral argument.

41. Provided that these standards are met, a lawyer is under a professional duty to advance his/her client's case. A duty to do so by certifying to the court a view of its merits which may be at odds with his/her assessment of the merits may cause a conflict, since s/he is either prevented from advancing that arguable, but not strong, case, or prevented from pursuing interim relief.

42. The requirement to certify a claim as meritorious is still more problematic where a litigant is not represented at all. Does the lack of a lawyer's certification prevent pursuit of interim relief at all, or is the requirement in effect waived? The former is unconstitutional, because it would amount to a restriction on access to the court[3], and the latter would put litigants in person in a better position than those who are represented, and might discourage the use of lawyers to the disadvantage of the litigants themselves and indeed the tribunal, which would face an increase in claims by litigants in person. It might also give rise to the situation where a litigant decides to go it alone at a very late stage. There is a risk that Upper Tribunal judges would draw this inference when a person lost representation at a late stage, whereas this could arise for a host of reasons, including their decision as to how they wished to spend their money.

43. Both the legality and the justification for imposing this requirement are in doubt. It is previously unheralded. ILPA recommends that it be deleted.

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March 2013

[3] *R v Lord Chancellor, ex parte Witham* [1998] QB 575.