ILPA Response to the Civil Procedure Rule Committee's Consultation on a pre action protocol for judicial review and to the Home Office consultation on the introduction of a pro forma in pre-action judicial review cases

The Immigration Law Practitioners' Association (ILPA) is a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations. ILPA apologises for the lateness of this response to your consultations. ILPA gives permission for the publication of this response.

On 21 July 2014 ILPA responded to The Treasury Solicitors' consultation on the introduction of a pro forma in pre action judicial review cases. A copy of that response is appended hereto.

Given that it would have been our intention to copy the Home Office to our response to the Civil Procedure Rules Committee consultation and *vice versa*, we deal in one document with both consultations.

Civil Procedure Rules Committee consultation

As we understand it from internal evidence in the protocol, it is anticipated that it will be used by litigants in person as well as persons with legal representation. For the most part it is clear and in plain language, although this will not be sufficient to make it accessible to a person without knowledge of English or indeed without rudimentary knowledge of the UK legal system.

As to matters that might cause particular confusion to non-lawyers, we highlight:

> Paragraph 5: "full representation" is a technical term and a cross reference to Annex C would be helpful.
>
> Paragraph 8 assumes understanding of words such as "stay."
>
> Paragraph 16 on interested parties, unless it is accepted that a litigant in person is unlikely to be in a position to identify interested parties in any event. At the very least the definition in rule 54.1(2) should be imported into the text.
>
> Paragraph 18 on protective costs: the phrase "explanation of the financial resources available to the claimant in making the claim" is a little obscure.

Annex C appears lifted from Legal Aid Agency literature and we think that terms such as "litigation services" are jargon and difficult to understand. These passages are in marked contrast to the rest of the document. As we understand it, they are primarily intended for litigants in person to alert them to the possibility of obtaining legal aid, not for legal aid lawyers. That should be made clear. Lawyers should be referred to the relevant Legal Aid Agency material and a plain language version provided here that individuals will be able to understand.

Section 2

We emphasise the importance of being able to send a claim either by email or by post. A significant number of immigration detainees are held in prison service establishments and may have no access to the internet while access to the internet in immigration removal centres is patchy, particularly within tight timescales. As to those at liberty, a significant number of persons are in situations of isolation and destitution without access to the internet. It is extremely unlikely that such persons will be in a position to apply for judicial review at all, but further barriers should not be placed in their way.

Specific reference numbers required

An applicant will not always have all of the information requested to hand, and nor will all legal representatives, particularly when engaged only at this stage. By contrast, given one of these pieces of information the Home Office should be able to retrieve them all. Therefore for the words "dependent upon the nature of the case" should be substituted "if known" or "if known and applicable" using the wording ("if known") on the Home Office form. There should be no question of a claim's being rejected where the information is not supplied.

Nationality and date of birth may be problematic if disputed by the Home Office and may not match the information it holds.

Similarly, the Legal Aid Agency should ask for the certificate reference number "if available"

In our 21 July 2014 letter we set out our view that the proposed pro forma should be available in a range of languages. The response of Treasury Solicitors in Ms Andrea McMahon's letter of 23 July 2014 was that this was not going to be done and to state that "…it would not be the responsibility of the Home Office to provide translations as the pro-forma would be an appendix to the Pre-action Protocol which is published by the Courts Service." We urge the courts service to give it consideration as without it some persons who are not eligible for legal aid but cannot afford to fund legal representation for judicial review will be unable to vindicate their rights

Home Office consultation a pro forma in pre-action judicial review cases

We refer you to our response of 21 July 2014 to Treasury Solicitors' consultation and Treasury Solicitors' response of 23 July 2014, both appended hereto.

We are pleased that it is stated that the form is not mandatory. If emailing is made part of the mandatory procedure, nonetheless it should be possible for person who wishes to do so to print off the form and use it as a basis for their postal claim, even if this does not, in the Home Office's view, constitute use of the pro forma.

The Home Office pre action protocol must not impose any additional requirements incompatible with the main Pre-Action Protocol without express sanction for this from the Civil Procedure Rules Committee and all versions of any pro forma should have the express approval of the Committee.

We consider that material supplied by the Home Office should be additional to and not replace or duplicate that emanating from the Civil Procedure Rules Committee. Having two documents covering the same ground in slightly different terms is a recipe for confusion. Overall we consider that the pre-action protocol being consulted upon by the Civil Procedure Rules Committee is a clear document and should be used. The Home Office should therefore supply additional information only.

Q.1. Is there any additional information which should be requested on the pro forma?

Wherever the pro forma is available the Civil Procedure Rules Committee pre action protocol document, the subject of the linked consultation, should also be available. There should be a clear cross reference in the pro forma.

We suggest a free text box at the end for any other comments. Otherwise, persons who wish to explain why they selected a particular answer or none will write this in such boxes as are available.

Although the Home Office consultation and the Civil Procedure Rules Committee's consultation are running in parallel we suggest that they have not been properly sequenced. We are concerned that the Home Office pro forma is based on the existing pre action protocol, not on that on which the Civil Procedure Rules Committee is consulting. The pro forma requires amendment to reflect the new pre action protocol. Thus, for example, the protocol requires mention of Alternative Dispute Resolution. We do not pretend that this is likely to offer a solution in the overwhelming majority of immigration cases, where the imbalance of power is so stark, and we are aware that it is not commonly Home Office practice to come involved in Alternative Dispute Resolution at this stage or indeed at all, but the protocol requires it to be considered in every case and that means immigration cases along with the others.

Q.2 Does the pro forma explain clearly what is required from the person? If there are areas of ambiguity please suggest revised wording.

It is unclear what the "from" drop down menu will say – the notes say "includes" "authorised legal representative" or "claimant in person." Is anything else on the list? "Authorised legal

representative" is not a term defined in the Immigration and Asylum Act 1999 Part V and therefore the reference thereto is unhelpful. The closest thing is s 84(2) (b). The term should be replaced with options identifying legal professionals by profession.

It is not helpful to say "[i]f applicable" full name of spouse/partner and children. When it is applicable? When the individual has a spouse/partner and/or children? When s/he has a spouse/partner and/or children in the UK? When these persons would be parties to the proposed action?

"Solicitor's number" is ambiguous. If the roll number of the individual solicitor, please say so. If the practice number of the firm, please say so.

We consider that a number of persons will struggle to distinguish their many and various Home Office reference numbers. It would be helpful to indicate that if a person has a number, but does not know which one of the list it is, s/he should just write it down.

In the "type of claim" section "PBS Sponsorship" is confusing given that a number of persons in the Points Based system, such as investors and entrepreneurs, do not have sponsors. It would be clearer just to say "Points-Based System". If what is meant is sponsors only then we suggest "Sponsorship (for sponsors in the Points-Based System)" would be clearer.

It will not always be obvious to an individual (or indeed a legal representative) which box is most relevant: e.g. entry clearance or temporary migration and in event the Home Office may disagree with their election. We therefore suggest a free text box under this part.

In the box beginning "date of action/decision being challenged", the final sentence should be rephrased as "Is this Pre action protocol pro forma being submitted within three months of date of action/decision complained of, if any." The addition of the words "in any" would make clear that the three month time limit will be no bar in a case of an ongoing breach such as failure to make a decision.

In the box "The details of the action that you want the Home Office to take" what is meant by "a review"?

In the part headed "The details of any documents that are considered relevant and necessary" there is reference to "the disclosure" but no disclosure has been mentioned previously. In addition disclosure is a technical term with which non lawyers may be unfamiliar (ditto the reference to the statutory duty to disclose).

The notice in italics at the very end about the Pre-Action Protocol and the form's not being mandatory should appear at the beginning of the form, not at the end. As stated, the Pre Action Protocol should be attached/hyperlinked.

Q.3 Do you think the pro forma should be a mandatory requirement?

We agree, for all the reasons set out in our letter of 21 July 2014, that the pro forma should not be mandatory and it is important that nothing gives the impression that it is.

Q4 How could we encourage people to use this form rather than write a letter?

Use carrots not sticks. If the form is easy to use and accessible and allows people to say what they need to say without confusion and without fighting the technical confines of a form they will use it. Saying it is not mandatory and encouraging people to feel free to adapt it if it does not allow them to say what they need to say will also encourage them to put as much as possible on the form.

Q.5 Will the pro forma be sufficiently available and accessible? and **Q.6 Should the pro forma be available to claimants in any other way?**

Not everyone has access to the internet and while we do not object to this means of dissemination we suggest that before adopting it the Home Office discuss with prison governors and those in charge of immigration detention centres how it will be ensured that those detained whether in prisons or immigration detention centres can access the document.

We strongly urge, for reasons set out in our 21 July 2014 letter, that the document be available in word form and that any boxes expand so that all that is written in them can be read when the document is printed. These letters will often be worked on sequentially by a number of persons who may be geographically far apart. It is also essential that the form does not have an inbuilt process preventing an individual from skipping a question to which they do not know the answer or where nothing on the drop down mention appears accurately to reflect their situation.

See comments on translation in response to the Civil Procedure Rules Committee consultation above.

Q.7 Should it be possible to submit the pro forma in any other way? If so, why?

It will be possible to submit the pro forma in ways other than by electronic submission in that, given that its use is not mandatory, it is open to a person to make a written submission that uses the form rather than a letter. This would appear to be what the Home Office wants (see question 4). For the reasons set out in our letter of 21 July 2014 (lack of access to the internet and inability to cope with the form) it is essential to be able to submit a pre action protocol letter by post. Given this, why not say so on the form?

Q.8 Do you have any other comments in relation to the proposal to use a Pre Action Protocol Pro Forma?

As set out in our letter of 21 July 2014, Home Office compliance with pre-action protocol has been poor as has its record in lodging summary grounds of defence once proceedings have been issued. We acknowledge that there is some evidence of improvement; we are watching to see whether this is sustained.

As set out in our letter of 21 July, assuming that the principal concern remains the unrepresented litigant, how is it intended that the individual will be made aware of the form?

As set out in our letter of 21 October, we have experienced problems with the size of emails and enclosures with upper limits preventing enclosures from being received in the current pre-action protocol inbox. Are there likely to be capacity limits or has this problem been addressed?

As described in our letter of 21 July 2014, much of the information on the form reflects that normally found on the immigration factual summary but some relates to information more commonly found on the claim form which a litigant in person is likely to find more difficult to address.

Adrian Berry

Chair

ILPA

9 November 2014