Garden Court Immigration Team Response to the Ministry of Justice's Judicial Review: proposals for reform

Introductory comments regarding the purpose and validity of these proposals

1. This is a response to the Consultation Paper on behalf of the Immigration Team at Garden Court Chambers. The Immigration Team has had the benefit of the sight of submissions made by our colleagues in our Housing Team and our Civil Team and the Immigration Team endorses the responses made by both teams.

2. The Immigration Team at Garden Court Chambers is probably the largest team of barristers practising in immigration and asylum law in England and Wales and between us we have wealth of experience in representing claimants in judicial review proceedings.

3. We are concerned as to the purpose and point of these proposals. From the very statistics produced by the Ministry at paras 28-32 of the proposal paper, it seems that oral renewal hearings are an important part of the judicial review process with some full quarter of all cases in which permission to proceed was granted in 2011 being at a renewed oral hearing.

4. Partial statistics, notoriously, can be misleading. We are told that 300 cases in which permission was granted were at renewed oral hearings. Firstly, the statistics do not show how many of the grants of permission were at first instance oral hearings. As the Ministry knows, judges faced with paper applications do sometimes 'adjourn' the matter of permission to an oral hearing.

5. Secondly, the paper asserts that there were 2,000 renewed applications in 2011 and *only* 300 were successful in that permission was then granted at an oral hearing. But what the statistics presented in the consultation paper do not show is how many of the remaining 1,700 cases were withdrawn before hearing of a permission application; how many settled, perhaps favourably to the claimant, perhaps in light of further information or otherwise and how many of the 1,700 cases actually resulted in hearings before a High Court judge. Furthermore it is relevant, but not disclosed by your statistics, in how many of the cases that actually went to a renewed oral permission hearing before a judge the claimant was legally represented and in how many cases was permission refused at a renewed oral hearing where the claimant was legally represented. This latter figure would be a useful comparison as against the stated 300 cases in which permission was granted at a renewed oral hearing.

6. The statistics that have been presented in the consultation paper do not make good the case for removing would-be claimants' entitlement to an oral hearing of a renewed application for permission. On the contrary, they show a significant number of cases where permission to claim judicial review was granted only because of that entitlement.

7. The legal system in England and Wales has traditionally placed great emphasis on the importance of oral advocacy in the courts and we consider that especially where fundamental rights are in issue as in asylum cases and many other

immigration cases there is no basis or good reason for seeking to limit the right to an oral renewed permission hearing.

8. A recent case in which the Garden Court Immigration Team was involved clearly illustrates the potentially disastrous consequences of removing the entitlement to a renewed permission application in immigration cases. In *R (Akhalu) v SSHD* CO 3005/2012 the Upper Tribunal refused permission to apply for judicial review in a fresh claim case on the papers and indicated that renewal was not to operate as a bar to removal. The claimant applied for an oral hearing of the permission application. That enabled her also to apply to the Upper Tribunal for an interim injunction to stop the directions that had been given for her removal to Nigeria. The Upper Tribunal granted the injunction, but only had jurisdiction to do so because of the pending oral permission application. Had she been removed she would, as the Secretary of State later accepted and the tribunal found, have died within 4 weeks in an extremely painful and distressing way as a result of kidney failure. The claim for judicial review was compromised before the permission application was heard; it was withdrawn by the claimant after the Secretary of State accepted that she had made a fresh claim, enabling her to bring an appeal to the tribunal. The appeal was allowed on the ground that her removal would breach article 8 of the ECHR because of its consequences for her health (IA / 20559/2012). In this case, it is no exaggeration to say that the claimant's ability to renew her permission application made the difference between life and death.

9. We consider that the alleged problem of an excess of meritless renewed applications is much better dealt with by requiring a fee to be paid on renewal than by preventing a right to oral renewal.

<u>The specific Questions</u>

10. Q1-Q4: We have no particular view on these proposals that do not affect our area of work

<u>Questions 5 and 6 – re continuing breaches and the 'starting line' for time limit</u>

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.

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?

11. We have particular concerns regarding the situation of 'continuing breaches' in cases where an individual is unrepresented – and indeed may have no notion of needing to be represented – at the commencement of the 'breach' and it only once they become represented that the 'continuing breach' becomes apparent – e.g. in

cases of students (or 'Tier 4 (Students)') whose applications are wrongly rejected for non-payment of a fee, bouncing of credit card, not ticking a box etc. Members of our team have been involved in several cases where once the student approached a representative it became clear that the original decision to reject the application was wrong and therefore the breach continued.

12. We are concerned that the effect of the proposal would mean that where the UKBA acted wrongly in respect to a person who was unrepresented and therefore unaware of this illegality but tried instead to remedy the situation themselves, eg by writing a further letter, they would not be able to seek redress once the response was received. The UKBA Points Based Immigration system is partly designed to take out lawyers. However if you do this, you both take out lawyers and take out the ability to go to a lawyer when it has all gone horribly wrong for the genuine and qualified immigrant.

Questions 7 to 9 – re no oral renewal where judge refuses on paper and states that the same matter has been dealt with at a previous judicial hearing

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?

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?

13. Q7: We do not agree with the proposal. However, *if* there is to be a definition in this context of a prior judicial hearing it should be limited to hearings before a court of record and so not include, for example, hearings before the First-tier Tribunal. We consider that this distinction is principled and in-line with the reasoning of the higher courts in *Cart*.

14. Q8: It is particularly important in the immigration and asylum context that this test of whether the issue raised in the judicial review application be 'substantially the same matter as in a prior judicial hearing' should not be a basis for denying a renewed oral permission hearing in cases where the challenge on judicial review is to the rejection of a fresh asylum or human rights claim. This is because to allow otherwise would be to risk begging the very issue raised on the judicial review application – i.e. whether the Secretary of State's conclusion, that matters raised in the further representations are not new and or do not create a realistic prospect of success on a further appeal before the FTT, is *Wednesbury* unreasonable - and would thus risk both denial of justice and the UK being in breach of its international obligations and commitments.

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?

15. Q9: We do not agree with this proposal. However, *if* these proposals are to be implemented then we agree that the burden of persuading the judge, considering the application for permission on the papers, that the case has already had a prior judicial oral hearing of substantially the same matter, should lie on the defendant. It is vital in the interests of justice however that the claimant have a specified right, laid out in the CPR, to respond to the defendant's assertions as made in the Acknowledgment of Service in a form that would then be put before the judge, considering the matter on the papers, prior to the judge making his or her decision on the application for permission and on the issue regarding the prior judicial hearing etc.

16. Furthermore in order that such a system can work properly and not be a cause for further delay in judicial decision making it should be provided in the CPR that in order for the defendant to satisfy this burden and in order for the judge to deny an oral renewal hearing on this basis, the defendant *must* file and serve his or her Acknowledgment of Service within the time limit laid down by the CPR. There must then be a further time limit specifically provided for in which the claimant must file and serve his or her response.

Questions 10 to 12 - re no oral renewal where judge refuses on paper and states that the claim is totally without merit

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?

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?

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?

17. Q10: We strongly disagree with this proposal and do so from direct and plentiful experience of many cases in which a judge on refusing permission on the papers also asserts the claim to be totally without merit – such that under the current CPR provisions renewal does not by itself act as bar to removal in the immigration context – yet which on renewal permission is granted at oral hearing.

18. Q11 and Q12: Further and or alternatively we consider that this 'totally without merit' block on renewing for oral hearing should definitely not be applied in cases involving issues pertaining to refugee asylum and fundamental human rights in respect to which the courts in this country have long acknowledged the need for most anxious scrutiny.

Question 13 – re implementation

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?

19. Given our views on questions 7 to 12 above, we do not consider that either of these two proposals should be implemented with respect to judicial reviews in cases involving asylum and immigration issues.

Questions 14 & 15 – re fees

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

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?

20. Q14: We do see some force in principle in the proposal that a fee be paid for renewing a judicial review permission application for an oral hearing. Indeed we consider that this is a much better way, than that contained in the previous proposals, of seeking to limit the number of renewed oral applications.

21. Q15: We consider that in principle it is not fair to charge the same fee as currently charged for a full substantive judicial review hearing – a hearing that is likely to be listed for half a day or a whole day – for a 30 minute renewal hearing. We of course accept and realise that the fees charged are not in any way reflective of the true costs of a judicial hearing but rather represent a contribution to those costs for reasons of public policy, but on this very basis if it be considered that a full hearing be charged at a fee of £215 then we suggest that an oral renewal hearing be charged at a fee of a £75.

22. We also consider that if permission to proceed with the claim for judicial review is granted at the oral hearing then the £75 fee should be refunded in the sense that it be deducted from the £215 fee for the substantive hearing. This is because the claimant has been put to an additional expense by needing to renew for oral hearing owing to the paper refusal; and besides this is in line with the Ministry's proposal.

Question 16 – equalities impact

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.

23. By their very nature judicial review claims in the asylum and immigration field relate to persons from abroad who are often of a minority race and or religion in UK terms and we are naturally concerned that if the proposals relating to denial of oral renewal hearings (see above) are implemented so as to include asylum and immigration cases, then they will obviously particularly affect in negative manner 'individuals with protected characteristics'.

Immigration Team
Garden Court Chambers
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