RESPONSE OF THE CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION TO THE PRESIDENT OF THE QUEEN'S BENCH DIVISON'S INVITATION TO ADMINISTRATIVE COURT USERS FOR COMMENT

INTRODUCTION

1. The President of the Queen's Bench Division has established two working groups to consider improvements to the Administrative Court. The President has invited comments from court users prior to an approach being made to the Civil Procedure Rules Committee to consider possible changes to CPR Part 54 and has provided a draft document setting out a summary of proposals for change

2. The Constitutional and Administrative Law Bar Association ("ALBA") welcomes the invitation to make comments. In broad terms, ALBA welcomes the summary of proposals for change. ALBA's comments are set out below, dealing with the proposals in the document. ALBA's principal comments are that (1) claimants' and defendants' skeletons should be exchanged sequentially and (2) the process for consideration of immediate, urgent and expedited courses should be clarified.

Section A: Guidelines as to what constitutes immediate, urgent and standard

3. ALBA agrees with the definition of what constitutes an immediate, an urgent and an expedited case.
4. ALBA does consider, however, that guidance should be provided as to how (1) applications for permission and (2) applications for permission in each of those

category of cases should be dealt with. At present, the draft does this only in the third category of cases, i.e. expedited cases.

5. In considering the appropriate procedure, ALBA has had regard to the following considerations. First, in relation to permission, there are rarely cases where the question of whether permission should be granted needs to be resolved in the absence of an acknowledgement of service (or representations at a rolled-up hearing if appropriate). CPR 54, by introducing a procedure for acknowledgements of service prior to consideration of an application of permission, recognises the value that providing summary grounds. The purpose of the acknowledgement is to assist the judge in considering if there is an arguable claim and if judicial review is appropriate (see *R (Ewing) v Office of the Deputy Prime Minister*[2006] 1 W.L.R. 1260 at para. 43). Consequently the Administrative Court has indicated that permission should not be granted in the absence of an acknowledgement of service and, if cases of urgency arise, appropriate directions should given: see, e.g. *R (BG) v Medway Borough Council* [2006] 1 F.L.R. 663 at para. 40.

6. Secondly, in relation to interim relief, basic principles of procedural fairness requires that a party should have a proper opportunity to make representations before an interim order is made which binds that party and, where necessary, have the opportunity to adduce evidence. Furthermore, in many instances, the grant of interim relief may be determinative of the whole case; for example, in many cases

the failure of the claimant to obtain an interim injunction will make it pointless to pursue proceedings. It is therefore appropriate before interim relief is granted that there in these cases that there be careful scrutiny of the case for and against the grant of interim relief.

7. ALBA takes the view that, in principle, applications for interim injunctions should be listed and heard orally. There is no reason why the practice in the Administrative Court should be different from that used in the general Queen's Bench Division. Indeed many planning injunctions involving public law issues are already routinely issued and heard before the QBD applications judge. These include, for example, applications for interim injunctions made by local planning authorities under section 187B of the Town and Country Planning Act 1990. Many of these involve a party's rights to respect for home and family life under article 8 of the ECHR and involve quite sophisticated balancing of competing public rights, see *South Bucks DC v Porter* (No.1) [2003] 2 AC 558.

8. ALBA therefore believe that the usual procedure would be for applications for interim injunctions to be dealt with at an oral hearing.

9. ALBA also recognises that there may be a need for an urgent interim order and it may not be possible for there to be a hearing. The most urgent cases, generally, are immigration removals and evictions or refusal of social support. In these cases urgency may often be measured in hours and the grant of interim relief may

be necessary to prevent harm. These will be “immediate” cases in the new proposed terminology. A requirement that a Defendant be given time to respond before ordering relief may, in such cases, defeat the purpose of granting the relief because time would have rendered the application otiose.

10. ALBA also recognises that there will also be cases where the defendant may not seek an oral hearing to address an application of an interim injunction. This may be for a variety of reasons. Defendants may not wish to want to make a response within a very truncated timetable and may be unable to instruct counsel in order to do so. In some kinds of cases, the only issue will be whether there is a prima facie case: if there is, questions as to the balance of convenience generally do not arise because they are all one way (consider, e.g. removal where the claim relates to a breach of Article 3). The Defendant may be content for the interim order to continue and what is appropriate is directions for an early consideration of permission.

11. In general, therefore, where there is a need for urgent interim relief and an oral hearing is not possible, ALBA considers that such an order should normally be made only for a limited time with an oral hearing thereafter to determine if the interim order should continue. If the parties agree that the interim order should continue without the need for an oral hearing, then they should inform the court which can, accordingly, continue the interim order without the need for an oral hearing.

12. Thirdly,, ALBA considers that questions of how to deal with immediate, urgent and expedited cases, and the making of orders abridging time or ordering a rolled-up hearing, ought to be dealt with by a High Court judge or a deputy High Court Judge.

13. Fourthly, ALBA believes that the broad nature of the suggested categories should not prevent a claimant from being more precise about the necessary timescale. For example, a person facing removal in 24 hours, or less, should not be put in a category where they are to be considered within 48 hours – the court must be astute to ensure that it is considered within the 24 hours requested. Similarly, a planning injunction required within 3 days must not be considered only after 2 weeks just because it falls short of the timescale for "immediate" consideration. Provided this is clear, and the court is astute to see that cases are dealt with within the necessary timescale, the broad categories may be of general assistance.

14. Finally, there are different ways in which cases may be urgent, and they may be urgent at different stages of proceedings and to different parties. Urgency may be removed by the grant of interim relief. Thus, for example, if a person facing eviction or removal is granted interim relief, the case may, and probably will, cease to be urgent from his point of view. The Defendant may or may not want the case brought on urgently after that – to give an obvious example of when he may not, the Secretary of State may not want every immigration judicial review

to be expedited. The current N463 reflects this – for example, it is possible to ask for interim relief to be considered urgently but nothing more – or it is possible to ask for abridgement of time for an Acknowledgement of Service if an urgent final hearing is needed even though no interim relief is sought,

15. ALBA therefore believes that the flexibility achieved under the present procedures should be preserved.

16 Consequently, ALBA proposes the following guidance.

Immediate cases and Urgent cases

(1) It should be a condition of making an application on the basis that it is an immediate case that the Claimant have served the proposed Defendant and interested parties by fax or e-mail before making the application;

(2) In relation to permission:

a) the presumption would be that questions permission would not normally need to be resolved on the basis of the application alone;

(b) instead, the matter would be placed before a judge within 48 hours (immediate cases) or between 48 hours and 2 weeks (for urgent cases) for directions to be given for dealing with the application for permission,

including abridgement of time for service of the acknowledgement of service and summary grounds or ordering a “rolled-up” oral hearing to consider permission and the substantive claim if permission is granted;

(c) in case where the judge considers that the question of granting permission must be dealt with immediately or urgently and on the papers provided by the applicant alone, permission would either be refused or granted conditionally, i.e. granted unless submissions were made within a specified number of days that permission should not be granted, with the judge reviewing the grant of permission in the light of those observations.

(3) In relation to application for interim relief,

(a) wherever possible, there should be an oral hearing with the opportunity for representations from both parties and any interested parties and evidence;

(b) where there is a need for urgent interim relief and this is not possible, an order granting interim relief would only be made for a limited time with a hearing thereafter to determine if the interim order should continue and directions should be given for the service of evidence and skeletons. If the parties do not want an oral hearing and are content for the interim order to continue, they should inform the court accordingly and the court may continue the interim order without a hearing.

Expedited Cases

(1) in relation to permission, where a case requires judicial consideration within two to four weeks, the matter be placed before a High Court judge or a deputy High Court Judge as soon as possible for directions for an abridgement of time for an acknowledgement of service and summary grounds or directions for a rolled-up hearing if appropriate.

(2) In relation to applications for interim relief,

(a) wherever possible, there should be an oral hearing with the opportunity for representations from both parties and any interested parties and evidence;

(3) where there is a need for urgent interim relief and this is not possible, an order granting interim relief would only be made for a limited time with a hearing thereafter to determine if the interim order should continue and directions should be given for the service of evidence and skeletons. If the parties do not want an oral hearing and are content for the interim order to continue, they should inform the court accordingly and the court may continue the interim order without a hearing.

B Claimant's Reply to Acknowledgement of Service

9. ALBA agrees that CPR 54 should provide for a reply to an acknowledgement of service to deal with any issue of fact or law that arises for the first time in the acknowledgement of service. The proposal appears to be limited to a reply dealing with new issues of fact – but in principle a Reply ought to be able to deal with any issues arising for the first time, whether they be questions of law or fact. It would also afford the claimant an opportunity to address any costs application made by the defendant or the interested party in respect of the acknowledgement of service. ALBA therefore believe that it would be wrong in principle for the rules to prescribe the circumstances in which a claimant is entitled to file a reply.

16. ALBA agrees with the proposed timetable of a reply being filed and served 7 days after receipt of the acknowledgement of service.

17. ALBA does draw attention to the extended timescale this would mean before permission can be considered. At present, claimants have seven days after issue before they must serve it on the defendant and interested party. The defendant and interested party have 21 days to reply. However under CPR 54.8(2) the defendant and the interested party have up to another 7 days before they have to serve the claimant with copies of the acknowledgement of service. The Court cannot know whether the Defendant and Interested party has served the claimant at the same time as it filed the acknowledgement of service with the court but has done so at any time thereafter but not later than 7 days. One possibility is that the rules be

changed so that the defendant and the interested party must serve the claimant with the acknowledgement of service at the same time it lodges it with the court. Another is that the court should wait another 14 days upon receipt of the acknowledgement of service before proceeding to consider the papers (since it is only then that the court can be sure that the claimant has had 7 days following receipt of the acknowledgement of service in which to reply). Thus the claimant would then have seven days to reply. The Court would often not to able to begin considering the application for permission for a period of 35 days (5 weeks) after the claim was first filed as it would only be at that stage that the time for all the various steps had passed.

C: Standardised Trial Bundle for Substantive Hearings

18. ALBA agrees with the proposal for a trial bundle.

D Revised timescales for submission of trial bundle and skeleton arguments.

19. ALBA considers that skeletons ought to be served sequentially with the claimant serving his or her skeleton 14 calendar days before the date of the hearing and the defendant and interested parties serving their skeletons in reply within 7 calendar days of the hearing.

20. Sequential exchange of skeletons is favoured for these reasons. Often, a case will have narrowed or refocused following the service of the acknowledgement and evidence from the defendant or others. It is sensible for the claimant to set out the

case as it will be presented at the substantive hearing and for the defendant to respond to that case. Mutual exchange of skeletons may involve the defendant dealing with issues raised in the claim form but that are no longer pursued. It may mean that the defendant does not address the issues and the evidential matters that the claimant will be relying or focusing upon at the substantive hearing. Mutual exchange of skeletons is likely to be wasteful of time, increase costs and, importantly, will be less helpful to the Court in identifying what the issues are and what the response is. For those reasons, sequential exchange of skeletons is considered appropriate. That, too, is consistent with the proposals for renewal applications. ALBA also believes that mutual exchange of skeleton is likely to encourage the service of supplementary skeleton arguments.

21. ALBA is content with the proposal that default hearings be listed before the Master or deputy Master for explanations as to failure to comply with time limits for submission of bundles and skeleton arguments.

E: Skeleton Arguments for Renewal Applications

22. ALBA agrees that CPR 54 should include a requirement to lodge skeletons in permission hearing – that is, in cases where an oral permission hearing is directed or where there is an application for reconsideration of a refusal of permission. ALBA agrees that skeletons should be exchanged sequentially with the claimants filing and serving their skeleton 7 calendar days before the hearing and the defendant and interested parties 4 calendar days before the hearing.

OTHER MATTERS IN THE ADMINISTRATIVE COURT

23. ALBA invites consideration as to whether the provisions for statutory appeals against decisions of administrative bodies under CPR 52 ought to include early provision for the respondent to set out the grounds for resisting the appeal. At present, if respondents are not filing a respondent's notice, they need only provide a skeleton within 14 days before the hearing. ALBA invites consideration as to whether there should be provision for a respondent in statutory appeals against decisions of administrative bodies to lodge a written response setting out which parts of the appeal they resist and their grounds for doing so. That may assist in early identification of the issues and assist in reducing costs.

24. In relation to CPR 8, ALBA invites consideration as to whether defendants to statutory applications to quash administrative decisions should be required in their acknowledgement of service to state the grounds upon which they contest the claim. CPR 8(3) at present requires only that they must state if they contest the claim and are seeking a different remedy. Again, that may assist in early identification of the issues and assist in reducing costs. It would reflect the provisions governing judicial review and statutory applications are, in essence, a form of statutory judicial review. In principle, similar procedural rules ought to apply to both unless there is good reason for having different rules.

25. ALBA agrees that there should be provision for lodging trial bundles and skeletons in statutory applications governed by CPR 8. ALBA considers that similar provisions to those governing claims for judicial review should be adopted.

26. In relation to costs, it is expected that there will be full consultation on any proposed amendments to the rules relating to costs. Current issues include rules governing claims for the costs incurred in preparing an acknowledgement of service and applications for protective costs orders. Furthermore, the Jackson report also deals with the question of costs in public law proceedings. It is assumed that costs issues fall outside the scope of the invitation for suggestions and that there will be full consultation on any proposed amendments to the rules in due course in relation to these matters.

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