Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction

This is a consultation exercise by the Civil Procedure Rule Committee

This consultation begins on Thursday, 19 May 2016

This consultation ends on Friday, 24 June 2016

Contact details/How to respond

The Civil Procedure Rule Committee (CPRC) invites written responses on the detail of the proposed amendments to the Civil Procedure Rules, in respect of appeals to the Court of Appeal, from users and potential users of the civil justice system in England and Wales. In particular responses from legal professionals, businesses, individuals and advice agencies in England and Wales are welcome.

The Civil Procedure Rule Committee would welcome responses to the questions set out in this consultation paper. Responses must be received no later than 5pm on 24 June 2016. Responses can be made online, by email or by post. The details are as follows:

Online at: https://consult.justice.gov.uk/digital-communications/appeals-to-the-court-of-appeal;

Email to: CPRCconsultation@justice.gsi.gov.uk (please see separate response questionnaire);

Post to: Jane Wright, Secretary to the Civil Procedure Rule Committee, Post Point 3.32, Ministry of Justice, 102 Petty France, London SW1H 9AJ (please see separate response questionnaire).

Please note:

Complaints or comments: If you have any complaints or comments about the consultation process you should contact the secretary to the CPRC at the Ministry of Justice, Post Point 3.32, 102 Petty France, London SW1H 9AJ.

Extra copies: Further copies of this consultation document can be obtained from this address and it is also available at: https://www.gov.uk/government/organisations/civil-procedure-rules-committee/

Consultation: Copies of the consultation document are being sent to various stakeholders and a list of the broad categories of stakeholder invited to respond is included at the end of this document. Responses are welcome from anyone with an interest in or views on the subject.

Representative groups: Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality: Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the CPRC. The CPRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The principles that public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf

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Foreword

The proposals in this consultation paper have been drawn up in response to the major pressures facing the Court of Appeal's Civil Division. The pressures are such that last year I took the reluctant decision to increase significantly the hear-by dates for the court, to reflect the realities of longer waiting times for hearings and for appeals to be determined.

The problems are getting worse. The volume of appeals is continuing to rise. The court's workload has increased by 59% in the past five years. There has been no increase in judicial resources. There is already a serious backlog of cases waiting to be heard and in addition there is a significant shortfall in the amount of judicial time required to deal with the amount of work coming into the Court of Appeal each year and the amount of judicial time in fact available to deal with it. This means that the backlog is growing year by year and delays in the Court of Appeal are becoming longer and longer.

This is a matter of serious concern within the Court. Justice delayed can be justice denied. Parties to litigation seek prompt resolution of their disputes.

The judges of the Court do not regard the present position as acceptable or sustainable. We have been giving active and detailed consideration to a package of proposals to address the problems we face. This included an exercise from May to July 2015 to gather full information for the first time about how judges' time is divided up and how long different items of work take. This research was independently reviewed and is being made available to support this consultation exercise. Using this data a working party prepared a package of reforms designed to bring the annual shortfall in disposing of cases under control and then to begin to reduce the backlog and the delays associated with it.

The package of reforms was presented to all the judges of the Court and debated extensively at a judges' conference in March. The principles agreed by the judges, the evidence base for the proposals and an explanation of the relevant part of the working party's recommendations as endorsed by the judges of

the Court are set out in the Annex to this consultation paper and its appendices. Some minor adjustments were made to the original proposals and the present set of reform proposals has secured the unanimous support of the Court. The judges of the Court consider that adoption of the package of reforms is critical in order to tackle the problems of overload of cases and increasing delays.

The package of reforms has a number of elements. Legislative measures to re-route certain appeals from lower courts to the High Court are already in hand. We will also be looking to the Ministry of Justice to promote some further minor changes to primary legislation which are necessary to allow the Court to function as a true second appeals court wherever that is appropriate. We will be looking to the Ministry of Justice to promote certain modest changes to relevant Tribunal rules. In addition, there are some measures the Court has been able to implement for itself by internal administrative means, to promote more extensive use of two-judge courts and improved listing arrangements.

However, central to the package of reforms are proposals to change the Civil Procedure Rules in limited but significant ways. It is these proposals with which this consultation by the Civil Procedure Rule Committee is concerned. The proposals are directed to amending the Civil Procedure Rules so as (i) to increase the threshold for grant of permission to appeal to the Court of Appeal from "a real prospect of success" to "a substantial prospect of success" on appeal; and (ii) to remove the right for a litigant to require a refusal of permission to appeal (or other application to the court) based on consideration of the documents to be re-considered at a court hearing, and replace this with a discretion for the judge who considers whether permission to appeal (or other application) should be granted to decide to call the case in for an oral hearing if they think it appropriate to do so as a matter of case management.

In addition, there is a proposal to re-cast the principal Practice Direction governing the conduct of civil appeals in the Court of Appeal to make it more user-friendly and to prevent the Court from "drowning in paper", and the Court of Appeal and the Civil Procedure Rule Committee would welcome any comments about this as well.

In the light of my discussions with the Ministry and in view of the current fiscal constraints, I have no doubt that there is no possibility at the present time of increasing the number of judges in the court.

Unless urgent and concerted action is taken to ease the pressures on the Court of Appeal we risk damaging not just the international reputation of the court, but its integral role in the proper and efficient administration of justice in this country.

Lord Dyson MR

Chair of the Civil Procedure Rule Committee

Introduction

This consultation document sets out proposals to raise the threshold for permission to appeal to the Court of Appeal and to remove the automatic right of oral renewal for permission to appeal to the Court of Appeal in civil cases (and for other forms of application) where it has been refused on the basis of the documents in the case. It is important that the appellate work of the Court of Appeal is handled with a minimum of delay to provide prompt guidance for lower courts as well as resolution of cases for the parties. The consultation document also sets out proposals to amend Practice Direction 52C, the principal Practice Direction governing litigation in the Court of Appeal, to make it more user-friendly and to limit the volume of documents which the Court has to grapple with when deciding cases.

This is part of a package of reforms being considered to maximise the effective use of judicial and administrative resources in the Court of Appeal. The consultation is aimed at all users and potential users of the civil justice system in England and Wales, and in particular at legal professionals, businesses, individuals and advice agencies in England and Wales.

A list of the main professional bodies and representative groups that are being consulted is set out at the end of the document.

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

This consultation seeks views on

(1) proposals to amend the Civil Procedure Rules (which govern court procedure in England and Wales) as set out below,

(i) to raise the threshold for permission to appeal to the Court of Appeal;

(ii) to remove the automatic right of oral renewal for applications for permission to appeal in the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application for permission to appeal on the documents;

(iii) to remove the automatic right to an oral hearing for reconsideration of decisions on other applications made in the course of proceedings in the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application on the documents.

(2) proposals to amend Practice Direction 52C to make it more user-friendly and to limit the volume of documentation presented to the Court of Appeal in connection with cases it has to decide: see the proposed text set out below.

The proposed text of the rules and Practice Direction 52C is set out on pages 12-32.

Supplementary information on the background to the proposals is provided in the Annex (page 35).

(1)(i) Amendment of CPR Part 52.3(6)(a) to create a test of "a substantial prospect of success" for permission to appeal to the Court of Appeal in a first appeal, in place of the current test of "a real prospect of success"

1. This proposal is made so as to reduce the number of full appeals accepted for hearing in the Court of Appeal (CA), thus assisting the CA to reduce the annual shortfall between work coming into the court and the number of cases the court is able to deal with and the existing substantial backlog of cases waiting to be heard (which continues to grow each year by the amount of the annual shortfall). Reducing the backlog will reduce delays in the CA overall. It is the hearing of full appeals which takes up, by far, the main amount of Lord Justice and Lady Justice (LJ) time spent on judicial work in the court. The proposed test is designed to focus the limited judicial resources of the CA on the cases which most merit review at an appellate level.

2. The proposal is that this somewhat more stringent test should be applicable in relation to first appeals to the Court of Appeal only (as distinct from in relation to first appeals heard by courts and tribunals lower down in the civil justice system), as these will mainly take place from senior courts of the status of the High Court and the Upper Tribunal (when the Upper Tribunal functions as a superior first instance tribunal, in relation to judicial review business which has been transferred to it). It is not proposed that the "real prospect of success" test for first appeals be replaced more generally. Since other amendments to CPR Part 52.3 are proposed to make it clear that the right of oral renewal for permission to appeal (PTA) applications is being removed, it is proposed that CPR Part 52.3 should be recast as a whole to make its structure clear and to make it easier to read and understand.

3. After the reforms of appeal routes already in the pipeline (to divert first appeals to the High Court in County Court and certain family appeals) and certain other changes proposed by the CA's working party take effect, first appeals will lie to the CA mainly in cases heard by senior courts in the legal system: the High Court and the Upper Tribunal. (In addition there will continue to be appeals from the County Court in family public law cases, but this is simply because there are not the judicial resources in the High Court to be able to cope with the diversion of this work to the High Court as well.) The draft Destination of Appeals Order in respect of civil and family appeals can be seen at:
http://www.legislation.gov.uk/ukdsi/2016/9780111146286/contents
http://www.legislation.gov.uk/ukdsi/2016/9780111146620/contents.

4. In case law and the leading commentary, "a real prospect of success" has been said to cover any appeal where the prospects of success are not merely fanciful. However, in circumstances where there has been a fully considered and reasoned decision by the court below, it is proposed that the gateway into the CA should involve a threshold for PTA of "a substantial prospect of success" on appeal, such that it is seriously arguable that an error has been made (and not merely arguable so that it cannot be said to be fanciful). Given the constraints on LJ-time in the CA, the CA believes that this change will better ensure that an appropriate share of the court's resources is allocated to hearing full appeals in the cases where it really matters, while taking into account the need to allot resources to other cases. In line with this proposal, in cases where permission to appeal is sought for a second appeal to the CA the appellant would have to show that there was both a substantial prospect of success on appeal and that, under the test for a second appeal as currently set out in the CPR 52.13, the appeal would give rise to an important point of principle or practice or there is some other compelling reason for the CA to hear it.

Questions:

A. Do you agree that the threshold for permission to appeal to the Court of Appeal should be raised to "a substantial prospect of success"? If not, why not?

B. Do you think that amendment of CPR Part 52.3(6)(a) will assist in reducing delays in determination of appeals in the Court of Appeal?

C. Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

D. Do you have any other suggestions for assisting the Court of Appeal to reduce delays in the hearing of appeals?

(1)(ii) Amendment of CPR Part 52.3 to remove a right of oral renewal for an application for permission to appeal to the Court of Appeal, but with a power in the single LJ reviewing the application on the documents to call the application in for an oral hearing

5. It is proposed that the process of consideration of applications for PTA should be reformed so as to remove an automatic right to an oral hearing of such an application. Instead:

- there should be consideration of each application by one LJ on the documents;
- that LJ may decide the application on the documents alone if it is appropriate and fair to do so, and this would be the normal course in most cases;
- however, the LJ would have a discretion to call the application in for oral hearing before him or her (or, in exceptional cases, before him/her and another LJ). This would allow the LJ to ensure they fully understood the application, if they were not confident they did so from the documents alone, and would accommodate cases where special circumstances meant this was necessary to ensure fair consideration of the application. If the LJ thought it appropriate, in advance of such an oral hearing an indication could be given to the appellant of areas of difficulty he might face in pursuing an appeal, so as to provide a focus for argument at the oral PTA hearing and save time.
- PTAs called in for oral hearing should be listed within days of the decision to call in, so that the LJ does not have to re-read the case again.

6. Thus, as in the Supreme Court, there would be no right to an oral hearing of an application for PTA.

7. This change would save a substantial amount of judicial time which could be deployed in hearing full appeals, so as to reduce the current backlog of cases and improve waiting times in the Court of Appeal for hearings and judgments.

8. It has emerged that there is a glitch in the CPR in relation to the CA's ability to control its own procedure in relation to determining PTAs, where a case has been certified as Totally Without

Merit ("TWM") by the court below. The general position is that the applicant for permission may not request an oral hearing in the CA, but the single LJ could direct that there be one: see CPR Part 52.3(4A) and Part 3.1(2). However, in a case where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court or where permission to apply for judicial review has been refused and recorded as TWM, the CPR are mandatory that there cannot be an oral hearing: CPR Part 52.15(1A); and see RG (Albania) v Secretary of State for the Home Department [2013] EWCA Civ 1286. This is also the position where the Upper Tribunal has refused permission to apply for judicial review as being TWM: CPR Part 52.15A(2). In conjunction with the proposed amendment of the CPR in relation to the procedure governing an application for PTA it is desirable that the single LJ should have the power to call in these cases for an oral PTA hearing, as they can other cases, if they consider this would assist the court. Therefore it is proposed that Part 52.15(1A) and Part 52.15A(2) should be amended to bring them into line with the proposed new rule governing oral hearings on PTA applications.

Questions:

E. Do you agree that the right of oral renewal for an application for permission to appeal should be removed and replaced by a system allowing for determination of such an application by a single LJ on the documents coupled with a case-management power to call the application in for an oral hearing if it assessed to be appropriate to do so? If not, why not?

F. Do you think that amendment of CPR Part 52.3(4) and (4A) will assist in reducing delays in determination of appeals in the Court of Appeal?

G. Do you agree that CPR Part 52.15(1A) and Part 52.15A(2) should be amended as proposed? If not, why not?

H. Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

I. Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be made more efficient or effective?

J. Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be changed so as to help reduce delays in the Court of Appeal?

(1)(iii) Proposal to amend CPR Part 52 rule 15.16 to remove the automatic right to an oral hearing for reconsideration of decisions on other applications made in the course of proceedings in the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application on the documents

9. A similar issue regarding a right to an oral hearing for reconsideration of a decision taken by a single LJ on the documents arises in relation to decisions taken pursuant to CPR Part 52.16 on other forms of application made to the CA (for example, for a stay of enforcement, for permission to file documents late and for other matters ancillary to an appeal such as seeking a protective costs order). Again, in the Supreme Court such applications would ordinarily be dealt with on the documents without an oral hearing. As currently drafted, CPR Part 52.16 allows for

decisions to be made by a court officer or a single LJ on the documents, but Part 52.16(6) provides that at the request of a party a hearing will be held to reconsider a decision of a court officer or a single LJ made without a hearing. In order to exclude the possibility of an appeal to the Supreme Court in relation to such ancillary matters it is necessary that there be some form of reconsideration (by which a decision is "called into question"), by reason of the terms of section 58 of the Senior Courts Act 1981; however, the form of such reconsideration is to be prescribed by the Civil Procedure Rules, and it is not required to be by way of a right of oral reconsideration. In line with the proposal at (1)(ii) above, it is proposed that CPR Part 52.16 be amended as set out below to allow for reconsideration to be by the same court officer or LJ on the documents, but with a case-management power for the court officer or LJ to call the reconsideration in for an oral hearing if fairness so requires.

Questions:

K. Do you agree that CPR Part 52.16 should be amended as proposed? If not, why not?

L. Do you think that amendment of CPR Part 52.16 will assist in reducing delays in determination of appeals in the Court of Appeal?

M. Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

N. Do you have any other proposals for amending CPR Part 52.16 to make the procedure for consideration of ancillary applications more efficient and effective?

O. Do you have any other proposals how the procedure for considering ancillary applications in the Court of Appeal could be changed so as to help reduce delays in the Court of Appeal?

(2) Amendment of Practice Direction 52C

10. Practice Direction 52C is the main Practice Direction which governs procedure for appeals to the Civil Division of the Court of Appeal. The proposed amended version of Practice Direction 52C is set out below. The object of the changes is (i) to make the Practice Direction more user friendly by explaining more clearly in the body of the Practice Direction (rather than in table 5, setting out the timetable for serving and filing documents) what is expected of litigants in the Court of Appeal and (ii) to limit the volume of documentation placed before the CA to help the CA to deal with cases more efficiently and speedily.

Questions:

P. Do you agree that Practice Direction 52C should be amended as proposed? If not, why not?

Q. Do you think that amendment of Practice Direction 52C as proposed will make it more user-friendly for litigants and assist in limiting the volume of documentation placed before the Court of Appeal in determining appeals?

R. Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

S. Do you have any other proposals for amending Practice Direction 52C to make it more user-friendly for litigants?

T. Do you have any other proposals for amending Practice Direction 52C to limit the documentation presented to the Court of Appeal for determination of appeals?

Draft amendments to CPR 52 Appeal and PD52C Appeals to the Court of Appeal

Draft showing rule 52.3 and the proposed amendments to it (which separate the rule out into four separate rules):

Permission to appeal

52.3 (1) An appellant or respondent requires permission to appeal–

(a) where the appeal is from a decision of a judge in the County Court or the High Court, except where the appeal is against–

(i) a committal order;

(ii) a refusal to grant habeas corpus; or

(iii) a secure accommodation order made under section 25 of the Children Act 1989[1]; or

(b) as provided by Practice Direction 52.

(Other enactments may provide that permission is required for particular appeals)

(2) An application for permission to appeal may be made –

(a) to the lower court at the hearing at which the decision to be appealed was made; or

(b) to the appeal court in an appeal notice.

(Rule 52.4 sets out the time limits for filing an appellant's notice at the appeal court. Rule 52.5 sets out the time limits for filing a respondent's notice at the appeal court. Any application for permission to appeal to the appeal court must be made in the appeal notice (see rules 52.4(1) and 52.5(3).)

~~(Rule 52.13(1) provides that permission is required from the Court of Appeal for all appeals to that court from a decision of the County Court or the High Court which was itself made on appeal)~~

(3) Where the lower court refuses an application for permission to appeal—

(a) a further application for permission may be made to the appeal court; and

(b) the order refusing permission will specify—

(i) the court to which any further application for permission should be made; and

(ii) the level of the judge who should hear the application.

~~(4) Subject to paragraph (4A) and except where a rule or practice direction provides otherwise, where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.~~

~~(4A)~~

~~(a) Where a judge of the Court of Appeal or of the High Court, a Designated Civil Judge or a Specialist Circuit Judge refuses permission to appeal without a hearing and considers that the application is totally without merit, the judge may make an order that the person seeking permission may not request the decision to be reconsidered at a hearing.~~

~~(b) For the purposes of subparagraph (a) "Specialist Circuit Judge" means any Circuit Judge in the County Court nominated to hear cases in the Mercantile, Chancery or Technology and Construction Court lists.~~

~~(4B) Rule 3.3(5) will not apply to an order that the person seeking permission may not request the decision to be reconsidered at a hearing made under paragraph (4A).~~

~~(5) A request under paragraph (4) must be filed within 7 days after service of the notice that permission has been refused.~~

~~(6) Permission to appeal may be given only where –~~

~~(a) the court considers that the appeal would have a real prospect of success; or~~

~~(b) there is some other compelling reason why the appeal should be heard.~~

~~(7) An order giving permission may –~~

~~(a) limit the issues to be heard; and~~

~~(b) be made subject to conditions.~~

~~(Rule 3.1(3) also provides that the court may make an order subject to conditions)~~

~~(Rule 25.15 provides for the court to order security for costs of an appeal)~~

Determination of application for permission to appeal to the County Court and High Court

52.3A (1) Where an application for permission to appeal is made to an appeal court other than the Court of Appeal, the appeal court will determine the application on paper without an oral hearing, except as provided for under paragraph (2).

(2) Subject to paragraph (3) and except where a rule or practice direction provides otherwise, where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.

(3)

(a) Where a judge of the High Court, a Designated Civil Judge or a Specialist Circuit Judge refuses permission to appeal without an oral hearing and considers that the application is totally without merit, the judge may make an order that the person seeking permission may not request the decision to be reconsidered at an oral hearing.

(b) For the purposes of subparagraph (a) "Specialist Circuit Judge" means any Circuit Judge in the County Court nominated to hear cases in the Mercantile, Chancery or Technology and Construction Court lists.

(4) Rule 3.3(5) (party able to apply to set aside, etc., a decision made of court's own initiative) does not apply to an order made under paragraph (3) that the person seeking permission may not request the decision to be reconsidered at an oral hearing.

(5) A request under paragraph (2) must be filed within 7 days after service of the notice that permission has been refused.

Determination of application for permission to appeal to the Court of Appeal

52.3B (1) Where an application for permission to appeal is made to the Court of Appeal, the Court of Appeal will determine the application on paper without an oral hearing, except as provided for under paragraph (2).

(2) Where the judge considering the application on paper is of the opinion that the application cannot be fairly determined on paper without an oral hearing, the Court of Appeal must direct that the application be determined at an oral hearing.

(3) An oral hearing directed under paragraph (2) must be listed—

(a) no later than 14 days from the date of the direction under that paragraph; and

(b) before the judge who made that direction,

unless in an exceptional case the direction provides otherwise.

(4) The Court of Appeal may, in any direction under paragraph (2)—

(a) identify any issue or issues on which the party seeking permission should specifically focus its submissions at the oral hearing in order to assist the court to determine the application; and

(b) direct the respondent to serve and file written submissions and to attend the oral hearing.

Permission to appeal test – first appeals

52.3C (1) Subject to paragraph (2), permission to appeal may be given only where –

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason why the appeal should be heard.

(2) Except where rule 52.13 applies, permission to appeal from a decision to the Court of Appeal may be given only where—

(a) the court considers that the appeal would have a substantial prospect of success; or

(b) there is some other compelling reason why the appeal should be heard.

(3) An order giving permission may—

(a) limit the issues to be heard; and

(b) be made subject to conditions.

(Rule 3.1(3) also provides that the court may make an order subject to conditions)

(Rule 25.15 provides for the court to order security for costs of an appeal)

Permission to appeal test – second appeals

52.3D (1) Permission is required from the Court of Appeal for any appeal to that court from a decision of the County Court, the family court or the High Court which was itself made on appeal, or a decision of the Upper Tribunal which was made on appeal from a decision of the First-tier Tribunal on a point of law.

(2) The Court of Appeal will not give permission unless it considers that—

(a) the appeal would—

(i) have a substantial prospect of success; and

(ii) raise an important point of principle or practice; or

(b) there is some other compelling reason for the Court of Appeal to hear it.

Draft showing amendments to rules 52.15 to 52.16 (including a new rule 52.15C)

Judicial review appeals from the High Court

52.15 (1) Where permission to apply for judicial review has been refused at a hearing in the High Court, an application for permission to appeal may be made ~~the person seeking that permission may apply~~ to the Court of Appeal ~~for permission to appeal~~.

(1A) Where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court on the papers or where permission to apply for judicial review has been refused on the papers and recorded as being totally without merit in accordance with rule 23.12, an application for permission to appeal may be made to the Court of Appeal.

~~(a) the applicant may apply to the Court of Appeal for permission to appeal;~~

~~(b) the application will be determined on paper without an oral hearing.~~

(2) An application ~~in accordance with~~ under paragraph~~s~~ (1) ~~or (1A)~~ must be made within 7 days of the decision of the High Court to refuse to give permission to apply for judicial review ~~or, in the case of an application under paragraph (1A), within 7 days of service of the order of the High Court refusing permission to apply for judicial review~~.

(2A) An application under paragraph (1A) must be made within 7 days of service of the order of the High Court refusing permission to apply for judicial review.

(3) On an application under paragraph (1) or (1A), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review.

(4) Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (3), the case will proceed in the High Court unless the Court of Appeal orders otherwise.

Judicial review appeals from the Upper Tribunal

52.15A (1) Where permission to bring judicial review proceedings has been refused by the Upper Tribunal at a hearing and permission to appeal has been refused by the Upper Tribunal at that hearing, an application for permission to appeal may be made to the Court of Appeal.

(2) Where an application for permission to bring judicial review proceedings has been ~~recorded~~ determined by the Upper Tribunal on the papers and recorded as being completely without merit, ~~and~~ an application for permission to appeal ~~is~~ may be made to the Court of Appeal ~~in accordance with paragraph (1) above, the application will be determined on paper without an oral hearing~~.

(3) An application under paragraph (1) must be made within 7 days of the decision of the Upper Tribunal to refuse to give permission to apply for judicial review.

(4) An application under paragraph (2) must be made within 7 days of service of the order of the Upper Tribunal refusing permission to apply for judicial review.

~~(The time limits for filing an appellant's notice under rule 52.15A(1) are set out in Practice Direction 52D.)~~

Planning statutory review appeals

52.15B (1) Where permission to apply for a planning statutory review has been refused at a hearing in the High Court, an application for permission to appeal maye be made to the Court of Appeal ~~the person seeking that permission may apply to the Court of Appeal for permission to appeal~~ (see Part 8 and Practice Direction 8C).

(2) Where permission to apply for a planning statutory review has been refused by the High Court on the papers and recorded as being totally without merit in accordance with rule 23.12, an application for permission to appeal may be made to the Court of Appeal.

~~(a) the claimant may apply to the Court of Appeal for permission to appeal;~~

~~(b) the application will be determined on paper without an oral hearing.~~

(3) An application ~~in accordance with~~ under paragraph (1) ~~or (2)~~ must be made within 7 days of the decision of the High Court to refuse to give permission to apply for a planning statutory review ~~or, in the case of an application under paragraph (2), within 7 days of service of the order of the High Court refusing permission to apply for a planning statutory review~~.

(3A) An application under paragraph (2) must be made within 7 days of service of the order of the High Court refusing permission to apply for a planning statutory review.

(4) On an application under paragraph (1) or (2) the Court of Appeal may, instead of giving permission to appeal, give permission to apply for a planning statutory review.

(5) Where the Court of Appeal gives permission to apply for a planning statutory review in accordance with paragraph (4), the case will proceed in the High Court unless the Court of Appeal orders otherwise.

Appeals from the Employment Appeal Tribunal

52.15C (1) Where on an appeal to the Employment Appeal Tribunal either—

(a) the appellant or special advocate has been given notice under rule 3(7) of the Employment Appeal Tribunal Rules 1993 ("the 1993 Rules") and an order has been made under rule 3(7ZA) of those Rules; or

(b) a direction has been made under rule 3(10) of the 1993 Rules that no further action shall be taken on the notice of appeal,

the appellant may apply to the Court of Appeal for permission to appeal.

(2) An application under paragraph (1) must be made within 7 days of the date of—

(a) service of the notice under rule 3(7) of the 1993 Rules; or

(b) the decision under rule 3(10) of those Rules,

as the case may be.

(3) The Court of Appeal may, instead of giving permission to appeal, direct that the notice under rule 3(7) of the 1993 Rules or (as the case may be) the direction under rule 3(10) of those Rules shall be of no effect so that the appeal shall proceed in the Employment Appeal Tribunal as if the notice or direction had not been given or made; but such a direction shall not be given unless the test for the grant of permission to appeal under rule 52.6(2) is met.

Who may exercise the powers of the Court of Appeal

52.16

(1) A court officer assigned to the Civil Appeals Office who is–

(a) a barrister; or

(b) a solicitor

may exercise the jurisdiction of the Court of Appeal with regard to the matters set out in paragraph (2) with the consent of the Master of the Rolls.

(2) The matters referred to in paragraph (1) are–

(a) any matter incidental to any proceedings in the Court of Appeal;

(b) any other matter where there is no substantial dispute between the parties; and

(c) the dismissal of an appeal or application where a party has failed to comply with any order, rule or practice direction.

(3) A court officer may not decide an application for–

(a) permission to appeal;

(b) bail pending an appeal;

(c) an injunction(GL);

(d) a stay(GL) of ~~any proceedings, other than a temporary stay~~ proceedings in the lower court other than a stay of execution of any order or decision of the lower court over a period when the Court of Appeal is not sitting or cannot conveniently be convened.

(4) Decisions of a court officer ~~may~~ will be made without ~~a~~ an oral hearing, unless a court officer directs otherwise.

~~(5) A party may request any decision of a court officer to be reviewed by the Court of Appeal.~~

(5) A party may request any decision of a court officer to be reviewed by a single judge, and—

(a) the review will be determined on paper without an oral hearing; except that

(b) where the judge determining the review on paper is of the opinion that the review cannot be fairly determined on paper without a hearing, the judge must direct that the review be determined at an oral hearing.

(6) ~~At the request of a party, a hearing will be held to reconsider a decision of–~~

~~(a) a single judge; or~~

~~(b) a court officer,~~

~~made without a hearing~~

(6) A party may request a decision of a single judge made without a hearing (other than a decision made on a review under paragraph (5)) to be reconsidered, and—

(a) the reconsideration will be determined by the same or another judge on paper without a hearing; except that

(b) where the judge determining the reconsideration on paper is of the opinion that the reconsideration cannot fairly be determined on paper without a hearing, the judge must direct that the reconsideration be determined at an oral hearing.

(6A) A request under paragraph (5) or (6) must be filed within 7 days after the party is served with notice of the decision.

(7) A single judge may refer any matter for a decision by a court consisting of two or more judges.
(Section 54(4) of the Access to Justice Act 1999 provides that there is no appeal from the decision of a single judge on an application for permission to appeal)

(Section 58(2) of the Supreme Court Act 1981 provides that there is no appeal to the Supreme Court from decisions of the Court of Appeal that–
(a) are taken by a single judge or any officer or member of staff of that court in proceedings incidental to any cause or matter pending before the civil division of that court; and
(b) do not involve the determination of an appeal or of an application for permission to appeal,
and which may be called into question by rules of court. Rule 52.16(5) and (6) provide the procedure for the calling into question of such decisions)

Amendments to Practice Direction 52C (Section IV and Section VII)

SECTION IV – PROCEDURE WHERE PERMISSION TO APPEAL IS SOUGHT FROM THE COURT OF APPEAL

Documents for use on an application for permission

14.

~~(1)~~ Within 14 days of filing the appeal notice the appellant must lodge a core bundle ~~containing only those documents which are necessary for the court to determine that application~~ (and, if necessary, a supplementary bundle) for the application for permission to appeal, prepared in accordance with paragraph 27.

~~(2) The bundle of documents must –~~

~~(a) be paginated and in chronological order;~~

~~(b) contain an index at the front.~~

.....

SECTION VII – BUNDLES, AMENDMENT AND SKELETON ARGUMENTS

Bundle of documents

~~**27.**~~

~~(1) The appellant must lodge an appeal bundle which must contain only those documents relevant to the appeal. The bundle must –~~

~~(a) be paginated and in chronological order;~~

~~(b) contain an index at the front.~~

~~(2) **Documents relevant to the appeal:** Subject to any order made by the court, the following documents must be included in the core appeal bundle in the following order –~~

~~(a) a copy of the appellant's notice;~~

~~(b) a copy of any respondent's notice;~~

~~(c) a copy of any appellant's or respondent's skeleton argument;~~

~~(d) a copy of the order under appeal;~~

~~(e) a copy of the order of the lower court granting or refusing permission to appeal together with a copy of the judge's reasons, if any, for granting or refusing permission;~~

~~(f) a copy of any order allocating the case to a track;~~

~~(g) the approved transcript of the judgment of the lower court (except in appeals in cases which were allocated to the small claims track but subject to any order of the court).~~

~~(3) **Documents which may be included:** The following documents should also be considered for inclusion in the appeal bundle but should be included only where relevant to the appeal—~~

~~(a) statements of case;~~

~~(b) application notices;~~

~~(c) other orders made in the case;~~

~~(d) a chronology of relevant events;~~

~~(e) witness statements made in support of any application made in the appellant's notice;~~

~~(f) other witness statements;~~

~~(g) other documents which the appellant or respondent consider relevant to the appeal.~~

~~(4) **Bundles not to include originals:** Unless otherwise directed, the appeal bundle should not include original material such as original documents, photographs and recorded media. Such material should be provided to the court, if necessary, at the hearing.~~

~~(5) **Destruction of bundles:** Bundles lodged with the court will not be returned to the parties but will be destroyed in the confidential waste system at the conclusion of the proceedings and without further notification.~~

27.

This paragraph of the Practice Direction should be read in conjunction with the Timetable in paragraph 21 above

(1) **Core bundle for permission to appeal:** Subject to any direction made by the court, the applicant must lodge a core bundle containing only those documents listed in the relevant core bundle index accessible on the Court of Appeal (Civil Division) section of the Justice website or available from the Civil Appeals Office.

(2) **Supplementary bundle for permission to appeal:** For an application for permission to appeal any additional documents may be included in a supplementary bundle, but only where they are relevant to the grounds of appeal and where it will be necessary for the court to read the document for the purposes of determining whether to grant permission to appeal and any related application. The following documents may be considered for inclusion in a supplementary bundle:

(a) statements of case

(b) application notices;

(c) other orders made in the case;

(d) witness statements made in support of any application made in the appellant's notice;

(e) other witness statements relevant to the issues raised in the grounds of appeal;

(f) key contemporaneous documents.

(3) Service of indexes for the permission to appeal bundles: The applicant for permission to appeal must serve on every respondent a copy of the index for the core bundle for permission to appeal and a copy of the index for any supplementary bundle for permission to appeal at the same time as the bundles are lodged with the court (i.e. within 14 days of the appeal notice: paragraph 14 above).

(4) **Respondent's statement for permission to appeal**: In accordance with paragraph 19, a respondent is encouraged to file and serve a respondent's statement in response to an application for permission to appeal. Any respondent's statement will be copied to the core bundle by the Civil Appeals Office.

(5) **Respondent's Notice**: A respondent who wishes to file a respondent's notice must do so in accordance with the time limits in CPR Part 52.5. If the respondent seeks permission to appeal in their respondent's notice they must on the date when the respondent's skeleton argument is due to be filed lodge a respondent's supplementary permission to appeal bundle. That bundle must contain any documents not included in the appellant's bundle(s) for permission to appeal which are necessary for the court to read for the purpose of determining whether to grant the respondent permission to appeal, including the respondent's notice and the respondent's skeleton argument. On the same date the respondent must serve on every other party a copy of the index for that bundle.

(6) **Reviewing the case after the grant of permission to appeal**: Promptly after permission to appeal is granted to any party and before the appeal skeleton arguments are due to be filed under the Timetable, the parties must review the case with a view to resolution or refinement of the issues to be determined at the appeal hearing.

(7) **Bundles for the appeal hearing**: Subject to any direction made by the court, the appellant must not less than 42 days before the date for the appeal hearing file and serve a core bundle for the appeal hearing and (if required) a supplementary bundle for the appeal hearing. The appellant

must seek to agree the contents of the core bundle and the supplementary bundle for the appeal hearing with all other parties in accordance with sub-paragraphs (8) and (9) below.

(8) **Core bundle for the appeal hearing**

(a) In accordance with the Timetable the appellant must serve on every respondent a proposed bundle index for the core bundle for the appeal hearing.

(b) The respondent must either agree the proposed bundle index for the core bundle or notify the appellant of the documents that the respondent considers should be included in, or removed from, the core bundle by sending a revised index. The appellant and respondent must seek to agree the contents of the core bundle.

(c) The core bundle must be lodged by the appellant in accordance with the Timetable and must contain the final form of the skeleton arguments to be relied upon at the hearing, cross-referenced to the pagination in the bundles for the appeal hearing (i.e. the replacement skeleton arguments).

(d) The core bundle for the appeal hearing must contain only those documents required in the core bundle for permission to appeal, together with copies of the following documents:

(i) any respondent's notice;

(ii) the appellant's replacement skeleton argument;

(iii) the respondent's replacement skeleton argument;

(iv) a copy of any orders made in the Court of Appeal;

(v) if permission to appeal was granted at an oral hearing, a transcript of the judgment giving permission to appeal.

(9) **Supplementary bundle for the appeal hearing:**

(a) In accordance with the Timetable the appellant must serve on every respondent a proposed bundle index for the supplementary bundle for the appeal hearing.

(b) The respondent must either agree the proposed bundle index for the supplementary bundle or notify the appellant of the documents that the respondent considers should be included in, or removed from, the supplementary bundle by sending a revised index. The appellant and respondent must seek to agree the contents of the supplementary bundle.

(c) The supplementary bundle may only contain documents relevant to the grounds of appeal which it will be necessary for the court to read in preparation for or during the appeal hearing. The following documents may be considered for inclusion in the supplementary bundle:

(i) statements of case;

(ii) application notices;

(iii) other orders made in the case;

(iv) witness statements relevant to the issues raised in the grounds of appeal;

(v) key contemporaneous documents.

(10) **Reviewing the case before the appeal hearing:** After the appeal skeleton arguments are filed and served, and in accordance with the Timetable, the parties must review the case with a view to resolution or refinement of the issues to be determined at the appeal hearing.

(11) **Size of supplementary bundle**: No supplementary bundle (whether for permission to appeal or for an appeal hearing) may exceed one lever arch file of 350 pages in size, unless the court gives permission. An application for permission to file a supplementary bundle of more than 350

pages must be made by application notice in accordance with CPR Part 23 and specify exactly what additional documents the party wishes to include; why it is necessary to put the additional documents before the court; and whether there is agreement between the parties as to their inclusion.

(12)**Unagreed documents bundles for the appeal hearing**: If there is no agreement in relation to inclusion of a particular document in the bundles for the appeal hearing, it must be placed in a separate unagreed documents bundle prepared by the party who has proposed its inclusion, and the bundle clearly labelled as such. The permission of the court is required to rely on an unagreed documents bundle. An application for permission must be made by application notice in accordance with CPR Part 23 and include a short statement of not more than three A4 pages explaining why the unagreed documents are relevant and why it is necessary to put them before the court. Any unagreed documents bundle, including at the front the application notice and supporting statement, must be filed and served not less than 42 days before the date for the appeal hearing. Unless the court directs otherwise, the application will be determined by the court at the appeal hearing.

(13)**Bundle format: Core, supplementary and unagreed documents bundles must—**

(a) be bound and any ring binder folder must be in fully working order;

(b) be paginated. Page numbering must not reduce the font size of any document below 12 points.

(c) contain an index at the front referring to relevant page numbers; and

(d) except for core bundles, be in chronological order.

(14)**Bundles not to include originals:** Unless otherwise directed by the court, no bundle should contain original material such as original documents, photographs or recorded media. Such material should be provided to the court, if necessary, at the hearing. Any copies of photographs included in the bundles must be of good quality and in colour.

(15)**Destruction of bundles:** Bundles lodged with the court will not be returned to the parties but will be destroyed in the confidential waste system at the conclusion of the proceedings and without further notification.

(16)**Timetable:** The Timetable, Parts 1 and 2, at paragraph 21 above sets out the time limits for filing and serving documents referred to in this section.

Appeals from the Upper Tribunal Immigration and Asylum Chamber

28.

(1) In an appeal from the Immigration and Asylum Chamber of the Upper Tribunal (other than an appeal relating to a claim for judicial review) –

(a) the Immigration and Asylum Chamber of the Upper Tribunal, upon request, shall send to the Civil Appeals Office copies of the documents which were before the relevant Tribunal when it considered the appeal;

(b) the appellant is not required to file an appeal bundle;

(c) the appellant must file with the appellant's notice the documents specified in paragraph 3(3)(a) to (e) and (g) of this Practice Direction.

Bundle of authorities

29.

(1) After consultation with any opposing advocate, the appellant's advocate must file a bundle containing photocopies of the authorities upon which each party will rely at the hearing.

(2) The most authoritative report of each authority must be used in accordance with mandatory requirements set out in paragraphs 5–13 of the Practice Direction on Citation of Authorities ~~(2012)~~ [2012] 1 WLR 780 and must have the relevant passages marked by a vertical line in the margin.

(3) Photocopies of authorities should not be in landscape format and the type should not be reduced in size.

(4) The bundle should not–

(a) include authorities for propositions not in dispute; or

(b) contain more than 10 authorities unless the issues in the appeal justify more extensive citation.

(5) A bundle of authorities must bear a certificate by the advocates responsible for arguing the case that the requirements of sub-paragraphs (2) to (4) of this paragraph have been complied with in respect of each authority included.

Amendment of appeal notice: rule 52.8

30.

(1) An appeal notice may not be amended without the permission of the court.

(2) An application for permission to amend made before permission to appeal has been considered will normally be determined without a hearing.

(3) An application for permission to amend (after permission to appeal has been granted) and any submissions in opposition will normally be dealt with at the hearing unless that would cause unnecessary expense or delay, in which case a request should be made for the application to amend to be heard in advance.

(4) Legal representatives must–

(a) inform the court at the time they make the application if the existing time estimate is affected by the proposed amendment; and

(b) attempt to agree any revised time estimate no later than 7 days after service of the application.

Skeleton argument

31.

(1) Any skeleton argument must comply with the provisions of Section 5 of Practice Direction 52A (and in particular must be concise) and must in any event–

(a) not normally exceed 25 pages (excluding front sheets and back sheets);

(b) be printed on A4 paper in not less than 12 point font and 1.5 line spacing;

(c) be labelled as applicable (e.g. appellant's PTA skeleton, appellant's replacement skeleton, respondent's supplementary skeleton), and be dated on its front sheet.

(2) (a) Any skeleton argument that does not comply with the requirements of paragraph 31.1(a), (b) and (c)—

(i) will be returned to its author by the Civil Appeals Office; and

(ii) may not be re-filed unless and until it complies with those requirements; and

(b) if the skeleton argument is re-filed out of time—

(i) it must be served on all other parties to the appeal; but

(ii) the party re-filing it must obtain the permission of the court in advance of the hearing in order to rely on it.

~~(2)~~ (3) Where an appellant has filed a skeleton argument in support of an application for permission to appeal, the same skeleton argument may be relied upon in the appeal or the appellant may file an appeal skeleton argument (Timetable Section 5, Part 1).

~~(3)~~ (4) At the hearing the court may refuse to hear argument on a point not included in a skeleton argument filed within the prescribed time.

~~(4)~~ (5) The court may disallow the cost of preparing an appeal skeleton argument which does not comply with these requirements or was not filed within the prescribed time.

Supplementary skeleton arguments

32.

(1) A party may file a supplementary skeleton argument only where strictly necessary and only with the permission of the court.

(2) If a party wishes to rely on a supplementary skeleton argument, it must be lodged and served as soon as practicable. It must be accompanied by a request for permission setting out the reasons why a supplementary skeleton argument is necessary and why it could not reasonably have been lodged earlier.

(3) Only exceptionally will the court allow the use of a supplementary skeleton argument if lodged later than 7 days before the hearing.

Documents to be provided to court reporters at the hearing of an appeal

33.

(1) Where a party is legally represented at the hearing of an appeal, the legal representative must bring

to the hearing two additional copies of the party's skeleton argument (including any supplementary skeleton argument) for provision to accredited law reporters and accredited media reporters in accordance with the following provisions of this paragraph.

(2) In appeals in family proceedings involving a child, the copies of the skeleton argument must be in anonymised form and must omit any detail that might, if reported, lead to the identification of the child.

(3) The additional copies must be supplied before the commencement of the hearing to the usher or other court official present in court.

(4) The usher or other court official to whom the copies are supplied must provide one copy to an accredited law reporter (upon production of their Royal Courts of Justice security pass) and one copy to an accredited media reporter (upon production of their press pass), if so requested by them. Those copies are to be provided only for the purpose of reporting the court proceedings and on the basis that the recipients may remove them from the court and make further copies of them for distribution to other accredited reporters in court, again only for the purpose of reporting the court proceedings.

(5) Any party may apply orally to the court at the commencement of the hearing for a direction lifting or varying the obligations imposed by sub-paragraphs (3) and (4). Where a party intends to make such an application or is notified by another party of the intention to make one, the operation of those sub-paragraphs is suspended pending the ruling of the court.

(6) In deciding whether to make a direction under sub-paragraph (5), the court must take into account all the circumstances of the case and have regard in particular to—

(a) the interests of justice;

(b) the public interest;

(c) the protection of the interests of any child, vulnerable adult or protected party;

(d) the protection of the identity of any person intended to be protected by an order or direction relating to anonymity; and

(e) the nature of any private or confidential information (including information relating to personal financial matters) in the document.

A direction may permit a skeleton argument to be supplied in redacted or anonymised form.

(7) For the purposes of this paragraph, "the hearing of an appeal" includes a hearing listed as an application for permission to appeal with the appeal to follow immediately if permission is granted.

SECTION V – TIMETABLE

21. Subject to any specific directions that may be given by the court, the timetable for the conduct of an appeal after the date of the listing window notification is set out below:

Timetable Part 1 – Listing window notification to lodging bundle

Period within which step is to be taken	**Action**	**Cross reference to relevant provisions in this Practice Direction**
Within 14 days of service of: the appellant's notice if permission has been given by the lower court or is not needed; notification that permission has been granted by the Court of Appeal; or notification that the permission application will be listed with the appeal to follow	**Respondent's notice** (if any) must be filed and served	Paragraph 8 (respondent's notice)
14 days after date of listing window notification	The appellant must file and serve on every respondent the **Appeal Questionnaire**	Paragraph 1 (listing window notification defined) Paragraph 23 (Appeal Questionnaire)
14 days after date of listing window notification	The appellant must serve on every respondent (1) the **appellant's appeal skeleton argument** or confirmation that the appellant intends to rely on the permission to appeal skeleton argument; and (2) **the proposed bundle index for the core appeal bundle and any supplementary bundle**	Paragraph 31 (skeleton argument) Paragraph 27 (bundle of documents)

Within 14 days of filing a respondent's notice	**If respondent has filed a respondent's notice**, respondent must lodge and serve a skeleton argument on every other party	Paragraph 9 (skeleton argument to be lodged with the respondent's notice or within 14 days of filing respondent's notice)
7 days after service of appellant's Appeal Questionnaire	**If a respondent disagrees with appellant's time estimate**, that respondent must file and serve on every other party its own time estimate	Paragraph 24 (time estimate)
28 days after date of listing window notification	**Where Respondent has <u>not</u> filed a respondent's notice**, respondent must lodge skeleton argument and serve on every other party	Paragraph 13 (respondent's skeleton argument where no Respondent's Notice filed) Paragraph 31 (skeleton argument)
42 days after date of listing window notification	**Review case**: parties to have reviewed case with a view to resolution or refinement of the issues to be determined at the appeal	Paragraph 27(6) (bundle of documents)
42 days after date of listing window notification	**Agree bundle**: the parties must agree the content of the core appeal bundle and any supplementary bundle for the appeal hearing	Paragraph 27(8) (bundle of documents) Paragraph 28 (bundle: Appeals from Upper Tribunal Immigration and Asylum Chamber)
56 days after listing window notification	Appellant must serve a **final bundle index** on all the respondents, including page numbers	Paragraph 27 (bundle of documents)
63 days after listing window notification	All respondents must serve on the appellant their **replacement skeleton arguments**	Paragraph 1 (replacement skeleton argument defined) Paragraph 31 (skeleton argument)

Timetable Part 2 – Steps to be taken once hearing date fixed: lodging bundles, supplemental skeletons and bundles of authorities

Time before hearing date when step is to be taken	Action	Cross reference to relevant provisions in this Practice Direction
No later than 42 days before the appeal hearing	Subject to any direction of the court, the appellant must lodge the appropriate number of **appeal bundles** and serve a copy on all other parties to the appeal. Any unagreed documents bundle must be lodged and served by the party seeking to rely on the unagreed documents.	Paragraph 27 (bundle of documents)
		Paragraph 28 (bundle: Appeals from Upper Tribunal Immigration and Asylum Chamber)
No later than 7 days before date of appeal hearing	Bundles of authorities must be lodged	Paragraph 29 (bundle of authorities)

Summary of Questions

The Civil Procedure Rule Committee would welcome responses to the questions set out in this consultation paper. Responses should be received no later than 5pm on 24 June 2016. Responses can be made online, by email or by post. The details are as follows:

Online at: https://consult.justice.gov.uk/digital-communications/appeals-to-the-court-of-appeal

Email to: CPRCconsultation@justice.gsi.gov.uk (please see separate questionnaire response form)

Post to: Jane Wright, Secretary to the Civil Procedure Rule Committee, Post Point 3.32, Ministry of Justice, 102 Petty France, London SW1H 9AJ (please see separate questionnaire response form).

Amendment of CPR Part 52.3(6)(a) to create a test of "a substantial prospect of success" for permission to appeal to the Court of Appeal in a first appeal, in place of the current test of "a real prospect of success"

Question A: Do you agree that the threshold for permission to appeal to the Court of Appeal should be raised to "a substantial prospect of success"?

Question B: Do you think that amendment of CPR Part 52.3(6)(a) will assist in reducing delays in determination of appeals in the Court of Appeal?

Question C: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

Question D: Do you have any other suggestions for assisting the Court of Appeal to reduce delays in the hearing of appeals?

Amendment of CPR Part 52.3 to remove a right of oral renewal for an application for permission to appeal to the Court of Appeal, but with a power in the single LJ reviewing the application on the documents to call the application in for an oral hearing

Question E: Do you agree that the right of oral renewal for an application for permission to appeal should be removed and replaced by a system allowing for determination of such an application by a single LJ on the documents coupled with a case-management power to call the application in for an oral hearing if it is assessed to be appropriate to do so? If not, why not?

Question F: Do you think that amendment of CPR Part 52.3(4) and (4A) will assist in reducing delays in determination of appeals in the Court of Appeal?

Question G: Do you agree that CPR Part 52.15(1A) and Part 52.15A(2) should be amended as proposed? If not, why not?

Question H: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

Question I: Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be made more efficient or effective?

Question J: Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be changed so as to help reduce delays in the Court of Appeal?

Proposal to amend CPR Part 52 rule 15.16 to remove the automatic right to an oral hearing for reconsideration of decisions on other applications made in the course of proceedings in the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application on the documents

Question K: Do you agree that CPR Part 52.16 should be amended as proposed? If not, why not?

Question L: Do you think that amendment of CPR Part 52.16 will assist in reducing delays in determination of appeals in the Court of Appeal?

Question M: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

Question N: Do you have any other proposals for amending CPR Part 52.16 to make the procedure for consideration of ancillary applications more efficient and effective?

Question O: Do you have any other proposals as to how the procedure for considering ancillary applications in the Court of Appeal could be changed so as to help reduce delays in the Court of Appeal?

Amendment of Practice Direction 52C

Question P: Do you agree that Practice Direction 52C should be amended as proposed? If not, why not?

Question Q: Do you think that amendment of Practice Direction 52C as proposed will make it more user-friendly for litigants and assist in limiting the volume of documentation placed before the Court of Appeal in determining appeals?

Question R: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

Question S: Do you have any other proposals for amending Practice Direction 52C to make it more user-friendly for litigants?

Question T: Do you have any other proposals for amending Practice Direction 52C to limit the documentation presented to the Court of Appeal for determination of appeals?

Thank you for participating in this consultation exercise.

Annex: Background Information

Introduction

1. The Court of Appeal (CA) is probably the part of the civil justice system which is most under pressure currently. Quite simply, the Court is overwhelmed by the current level of incoming work. It has been steadily rising for over 5 years and the increase shows no sign of ending: see the 10 year trend chart at Appendix 1.

2. The CA conducted a detailed data gathering exercise over May-July 2015 (the Time & Motion, or T&M, study) to provide an evidence base for analysing the problem. Each Lord and Lady Justice (LJ) filled in detailed time sheets to capture the time spent on each aspect of our work. With the assistance of Professor Dame Hazel Genn of UCL's Judicial Institute and a statistician colleague, work streams were analysed in terms of 8 subject categories (e.g. commercial law, immigration law, family law) and by reference to different stages of work, from permission to appeal (PTA) to the hearing of full appeals. The data allowed the Court of Appeal's reform working party to establish robust time-coefficients for each type of work within the subject categories set out in Appendix 2. Time spent on administrative and leadership work was also recorded to give an overall picture of how the time of LJs working to deal with civil work in the CA is broken down. The independently verified report which collates the information from the T&M Study is at Appendix 3.

3. The 3 month T&M study during May-July 2015 provided reliable information for the very first time about how judicial time is divided up and how long it takes to deal with specific items of work. It enabled the working party to quantify the shortfall, in terms of available LJ-hours, represented by the difference between incoming work and the rate at which it can be dealt with (the Annual Shortfall). The same time coefficients have been applied to the outstanding workload in the pipeline to give an estimate of the size in LJ-hours of the backlog of work the CA already has (the Backlog). Finally, the same time coefficients have been used to measure the likely impact in terms of savings in LJ-hours to be achieved by substantial reforms already in the pipeline (diversion of County Court appeals and certain appeals in family private law cases to the High Court) and further proposals which the working party has recommended and which have been endorsed by the judges of the CA: see Appendix 4.

4. Until about 18 months ago the CA managed to absorb the increase in its workload largely by the judges working longer hours. But the CA is now falling significantly behind in dealing with these. It is currently running at a deficit of 179 full appeals per year (after allowing for full appeal disposals at a rate of 1,042 a year), which of course get added to the Backlog.

5. The main element of the increasing burden in terms of pure numbers is PTA. The CA is currently running at a deficit of 47 paper PTA applications and 183 oral PTA hearings a year (after allowing for disposals at a rate of 3830 and 1254 a year, respectively). Again, these get added to the Backlog.

6. There has also been a large increase (not capable of measurement due to the absence of any historic time costing) in the administrative and leadership burdens of the members of the court. Across the CA, these take up 17% of LJs' time (including Heads of Division, who have a particularly heavy administrative burden) (see lower pie chart on p. 37 of Appendix 3). This means that the productivity of the court, in terms of the rate at which it can dispose of its workload of appeals, has actually been falling while the workload itself has been rising. There is no sign of the demands on LJs in respect of administrative and leadership work being reduced; if anything, at a time of major change in the civil justice system, the trend is likely to be in the opposite direction.

7. However the T&M study has shown that, regardless of increases in the number of PTAs and in the demands for leadership work, the overwhelming demand upon the time of the members of the court remains the work required for preparing, hearing and judgment writing in connection with full appeals: see pie charts at pp.36 and 37 of Appendix 3. Although the number of full appeals requiring to be heard has only increased modestly over the last 5 years, it is probable that the time taken per full appeal has also been rising (albeit there are no statistics from which this can be measured, because there has never before been an attempt to measure the CA's workload by anything more sophisticated than bare numbers of appeals). The probable reason for this, apart from the ever increasing complexity of the law, is that the court is hearing a smaller proportion of a greatly increased incoming workload as full appeals, and therefore concentrating its attention on the most difficult cases.

8. The three main symptoms of the overload are:

   (1) A dramatic increase in waiting time for hearings. The reality was recognised by the publication in July 2015 of new hear-by targets, in which the longest waiting time was increased from 9 months to 19 months. There is every reason to think that, without radical reform, this waiting time will get steadily longer, unless and until incoming work matches rather than exceeds the CA's capacity to deal with it. The delay for the determination of appeals risks seriously damaging the attractiveness of the UK as a venue for litigation in large commercial cases.

   (2) An unacceptable increase in the amount of work being done by judges out of hours. A stark example of this is that 48% of the time spent on writing lead judgments is being done out of hours.

   (3) Greater delay in the preparation and delivery of reserved judgments, as LJs cope with other demands on their time. Again, this has not previously been measured, so the delays experienced now cannot be compared other than anecdotally with delays in the past.

9. The first and third of these symptoms gravely impact upon the service provided by the CA and materially reduce the quality of civil justice, viewed overall. The second threatens the morale of the judges, risking reduced performance, early retirement and recruitment difficulties.

10. As at 31 January 2016, the total Backlog expressed as a time value using the figures derived from the T&M study was 46,812 LJ-hours: see Appendix 4. To put it in context, this is broadly equivalent to the total of LJ-hours worked during the year ended January 2016 on civil appeals and PTAs (written and oral) and may also be compared with a total of 19,872 LJ-hours worked annually on administration/leadership. This Backlog figure equates to the current waiting time of up to 19 months for full appeals, up to about 6 months for PTA decisions on the documents and up to an additional 6 months for oral renewal of PTA applications.

11. The current deficit of 179 full appeals a year is equivalent to 8,815 LJ-hours, using the figures derived from the T&M study. The deficit of 47 PTAs a year is equivalent to 53 LJ-hours. A deficit of 183 oral PTAs a year is equivalent to 614 hours. (The deficits in relation to PTAs have only been kept so low by focusing resources on those types of work to meet the increasing volume of PTA applications; but this has meant that the deficit in hearing full appeals has grown). Thus the Annual Shortfall in time terms amounts to 9,482 hours: see Appendix 4. By the end of 2016, after just a further year without changes to appeal routes or to the CA's working practices, the CA could therefore expect the total Backlog to have grown by a further 20% to 56,294 LJ-hours, equating to about a 2 year delay to the hearing date for an appeal, and further increases in the waiting times for paper PTAs and oral PTAs.

12. The benefits of changes to appeal routes in respect of appeals from the County Court and for certain family cases which are already in the pipeline will not significantly impact on the CA's workload by the end of 2016. They are not due to take effect until 1 October 2016 and they will only apply to appeals launched thereafter. The current periods of delay mean that paper PTAs from new appeals thereafter would not have reached the top of the waiting list until about January 2017, oral PTAs in about July 2017 and full appeals only in 2018. Meanwhile appeal work of all three types will remain part of the CA's Backlog, unaffected by those changes. In any event, the figures collated in Appendix 4 show that even once these changes in appeal routes have taken effect, they will not remove the Annual Shortfall, let alone begin to reduce the Backlog.

13. This projection forward assumes a steady state in the burden of the CA's incoming workload. It is not intended to be a prediction, as it cannot be ruled out that the upward trend shown in Appendix 1 continues to some degree.

14. The modelling based on the T&M study gives a sobering picture of the scale of the challenges the CA faces, first to eliminate the Annual Shortfall and then to bring the Backlog down to acceptable levels.

15. On 11 March 2016 the CA held a half-day conference to discuss the findings of the T&M study and a series of recommendations made by CA's reform working party of four LJs, chaired by Briggs LJ. In view of the scale of the problem facing the CA there was unanimous acceptance of the main proposals made by the working party: that there should be reform of the PTA process and increased use of 2 LJ courts. In summary, the reform of the PTA process which is proposed is to remove any right for a party applying for PTA whose application is refused by a LJ on consideration of the documents to demand an oral hearing of the same application, and instead to leave it to the discretion of the LJ who considers the documents whether the application should be called in for an oral hearing or whether it can properly be disposed of on the documents without the need for a hearing. This approach is that which currently applies in the Supreme Court. In parallel with this proposed change, the CA also proposes and recommends a similar change in CPR Part 52.16 to remove any right for a party making other forms of application in the CA to require an oral re-consideration at a hearing if the application is dismissed on the documents, again leaving it to the case-management discretion of the LJ considering the application whether it should be called in for an oral hearing. In addition, there was unanimous agreement at the CA judges' conference on a series of other reforms to improve efficient working in the CA and a focus of the CA's limited resources on its core business of hearing full appeals which have been identified through the PTA process as properly arguable and to do so with reduced delays. These include better triage of paper PTA applications, better case management of full appeals at the PTA stage, better use of judicial specialisation, better listing (including by video conference) of hearings involving litigants in person, and tightening up the Practice Direction about bundles of documents and skeleton arguments.

16. Further, arising out of the discussion the CA considers that the test for grant of PTA in cases of first appeals should be tightened from "a real prospect of success" on the appeal to "a substantial prospect of success", in order to limit the number of full appeals which the CA has to deal with (so as to reduce delays overall) and to focus its resources upon those cases which most merit review on appeal.

17. Where the CA has the means itself to take the steps recommended by the working party it is doing so. However, the main reform proposals require certain limited (and relatively minor) changes in primary legislation and other (more substantive) changes in the Civil Procedure Rules (CPR). In particular, the proposal to increase the hurdle for grant of PTA to "a substantial prospect of success" will require a Rule change in the CPR as will certain aspects of the proposals for changes to the PTA process and the process for consideration of other applications in the CA. Although it would be possible as a matter of legal form for the right of oral renewal of an application for PTA to be removed by a change in practice direction, it is desirable that this significant proposed change to the PTA process should be encapsulated in a Rule change as well.

18. These proposed changes are part of an integrated package of reforms designed to tackle the Annual Shortfall and the Backlog, and hence the delays in the CA. The CA has already decided to adopt new criteria for allocation of business to 2 LJ courts (as distinct from the 3 LJ courts which are the norm at present), as follows:

> *An appeal should generally be listed before a 2 judge constitution unless the case is of wide public interest, raises an important point of principle or practice or is of real difficulty or complexity. This does not prevent a case being listed before a 3 judge constitution where the LJ making the decision considers that there is some other good reason for doing so. An appeal in relation to a procedural decision should be listed before a 2 judge constitution in all but exceptional cases*.

19. It deserves emphasis that this focus on using 2 LJ courts more often depends for its full effectiveness on releasing additional LJ-hours through the other reforms which are proposed, so that those saved LJ-hours can be 'spent' to increase the throughput of full appeals using 2 LJ courts where possible and appropriate.

The Principles Governing the CA's Recommendations

20. The last major review of the Court of Appeal was the Bowman Report (September 1997). The Report included a review of the principles underlying a civil appeals system: chapter 2. No-one making representations in response to the Briggs consultation on reform of the civil justice system called these principles in question.

21. Paragraphs 4, 5 and 7 of the Bowman Report set out some fundamental ground-rules:

> "4. An effective system for appeals is an essential part of a well-functioning system of justice. However, that does not mean that an appeal should be seen as an automatic further stage in a civil case. In some jurisdictions the trial is often seen as a mere incident in the life of a case, because the parties are focused from the beginning on the possibility or even the inevitability of an appeal. In our system the purpose of the trial or hearing is to dispose of the action and an appeal is not therefore an automatic further stage. It is intended that the assumption should be that the court or tribunal has made the correct decision. …

5. We take the view that the law should not confer an automatic right of appeal in all cases. However, an individual who has grounds for dissatisfaction with the outcome should always be able to have his or her case looked at by a higher court so that it can consider whether there appears to have been an injustice and, if so, allow an appeal to proceed. If, however, there are no justifiable grounds for the complaint, there should be no further proceedings.

…

7. Appeals can create uncertainty and can delay a litigant receiving the benefit of a judgment to which he or she is entitled. An appeal process should therefore ensure that, so far as is practical, uncertainty and delay are reduced to a minimum."

22. The primary function of the CA is to produce judgments which determine appeals. That is the end product which litigants require. The CA is falling behind in the time it takes to secure appellate justice as compared with the UK's principal rival jurisdictions: see Appendix 5, in particular the information provided in answer to Question 9.

23. The CA has faced previous periods of intense pressure of business in which the delays in it fulfilling its primary function of determining full appeals have become unacceptably great, to an extent where justice delayed really is justice denied. There have been two major rounds of reform in modern times. Reforms were introduced in 1981/82 to address the pressures at that time, following a review by the Scarman Committee in 1978. Pressures and delays built up again leading to the Bowman Report and the introduction of further reforms in 2000. There have only been piece-meal adjustments to Rules and Practice Directions since then.

Options for Change

24. The Bowman Report noted that there are three main ways in which delays may be reduced and workload kept within reasonable bounds: (1) increase the number of LJs to deal with the increased workload; (2) alter the jurisdiction of the CA so that fewer cases come to it; (3) change the way the CA works so that it can deal with its caseload more quickly and at less cost in terms of time.

25. As to option (1), the Government has confirmed that an increase in the number of LJs is simply not feasible at the present time given the financial constraints on the justice system and public expenditure generally. Far from option (1) representing a solution to the current problems in the CA, there is in fact a constant haemorrhaging of judicial time of the existing complement of LJs (a term used to denote the full judicial complement of the CA, including the Master of the Rolls, the Lord Chief Justice and the Heads of Division) to administrative and policy work, public inquiries etc. At the same time the assistance derived from retired LJs has reduced in recent years, and the CA can see no evident solution to that problem either.

26. Option (2) is being implemented in relation to transfer of first appeals in County Court cases and certain private family matters to the High Court. But because of pressures on the Family Division it is not viable to transfer another major category of first appeals (in public family cases) to the High Court under present circumstances, although that will remain an option under consideration for implementation some years in the future. The statistics indicate that the time saved from diversion of appeals, where this is possible, will come nowhere near meeting the CA's current difficulties: see Appendix 4.

27. All this increases the need to explore option (3). The judges of the CA emphasise the importance of simplifying procedures within the CA and shortening the time taken on various stages for an appeal.

28. There is no single reform which is capable of relieving by itself the pressure on the CA and reducing delays below current levels. In order to achieve that result, it is necessary to look for cumulative effects from a series of reform measures.

29. Appendix 4 sets out the main highlights derived from the T&M study and court statistics. The three sets of reforms which are capable of making a substantial contribution to meeting the projected stream of cases entering the CA and addressing the Annual Shortfall and the Backlog are the diversion of first appeals in County Court and certain private family matters (time saving approx. 5,403 LJ hours p.a.), abrogation of a right of oral renewal for PTA applications (time saving approx. 2,929 LJ hours p.a.) and greater use of 2 LJ constitutions (time saving between approx. 2,310 LJ hours p.a. and 4,619 LJ hours p.a.). These are the main items capable of having a significant effect. Other reforms offer the prospect of far more modest time savings, most of which cannot be statistically measured. Taken together the proposals which the CA recommends should eventually eliminate the Annual Shortfall and begin to reduce the Backlog, albeit at a slow rate.

30. Subject to any representations made in response to this consultation, the principles the CA considers should inform the review of its procedures and working practices are those in the Bowman Report set out above and the following:

    (1) The quality of the CA's deliberations on full appeals, the quality of the guidance it can provide to lower courts and the quality of the assistance it can provide in cases which go to the Supreme Court are all greatly enhanced by the CA being able to explore legal issues on full appeals in detail at oral hearings. Therefore, the proposals should seek to preserve this aspect of the system as a fundamental priority.

    (2) If, as appears from the statistics now available, dealing with the Annual Shortfall and with the Backlog cannot be achieved without some reductions in aspects of the quality of the CA's service, then these must be faced up to and those reforms adopted which are least damaging to the fundamentals of what the CA is supposed to achieve.

    (3) The CA is a superior appellate court and the emphasis in its work should be upon providing guidance for lower courts and the public on issues of law, rather than simply determination of run-of-the-mill cases where there has already been a close look at the case by a first instance court and on an appeal to a more senior level of court. Lower courts such as the High Court and Upper Tribunal are more suitable for hearing first appeals at a proportionate cost in time and resources. Where there has already been a first appeal, parties will already have had a fair allocation of the judicial resources of the state, including a right of appeal, at the lower levels in the court system: cf the aspect of the overriding objective at CPR Part 1.1(2)(e) ("allotting to [a case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases"). The CA does not have the luxury of resources available to it to dedicate to fulfilling a wider routine second appeal role in run-of-the-mill cases.

    (4) Leaving aside appeals from the High Court, as a general rule, therefore, the CA should become a court exercising a guidance function at a second appeal level, and access to it in second appeals should be governed by the existing second appeals test. There should only be a departure from this general rule where there is a clear and compelling need for the CA to fulfil

a first tier appellate role because of pressures elsewhere in the court system or for some other reason.

(5) The focus of reforms should be upon keeping the time to final judgment in full appeals to a minimum. That should be the CA's primary objective.

(6) Procedures must be fair for litigants. Fairness does not require that litigants should have any entitlement to a "second bite at the cherry" in relation to any matter determined at an appropriate level within the court.

(7) Burdens on LJs must be kept within reasonable bounds, both as to pressure of workload and as regards equity between LJs in terms of distribution of work.

(8) It is important for the CA to maintain a suitable spread of expertise within the court. To maintain coverage of expertise, LJs coming into the court should be expected to develop and expand their existing set of areas of expertise and should be assisted to do so.

Background information for proposal (1)(ii) (removal of automatic right of oral renewal for applications for permission to appeal to the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application for permission to appeal on the documents)

31. Rule 16 of the Supreme Court Rules 2009 provides that applications for PTA shall be considered on the documents, but with a discretion to call in an application for an oral hearing; and paragraph 3.1.1 of Practice Direction 3 states that applications for PTA will generally be determined without a hearing.

32. There would be savings of judicial time in moving to this system in the CA. Only one LJ would need to prepare the case (rather than two, as happens now where there is an oral renewal). The time taken up by a hearing would be avoided in most applications. The average time taken by one LJ for an oral renewal application is 3.36 hours. This compares with an average of 1.14 hours for a paper PTA.

33. In addition, there are a number of applications which are refused on paper but then allowed on oral renewal which lead to full appeals. This usually arises under the current system because the appellant gets "two bites at the cherry" and the later LJ simply forms a different impression on arguability of an appeal. In most cases the first LJ turns out to be right: the full appeal is dismissed (in other words the grant of PTA by the second LJ turns out to have been something of a false positive). Sometimes the second LJ turns out to be right, and the appeal is allowed. See below for discussion whether this shows that there is any injustice involved in restricting an appellant to a single opportunity to persuade one LJ that they have an arguable appeal; it is suggested that it does not. For modelling purposes, the CA working party has made the assumption that this reform proposal would not lead to any reduction in the number of full appeals coming through.

34. In child family cases involving Litigants in Person (LIPs) the paper consideration stage is by-passed and there is only consideration of the PTA application at an oral hearing. If these were instead dealt with on the documents, the hearing time for the LJ concerned would be saved.

35. The time savings in moving to a system in line with the CA's recommendation have been modelled as set out in Appendix 4. Modelling on the basis of an assumption regarding the rate at which LJs might choose to call in PTAs for an oral hearing at 10% of all PTAs, the time saving in a year is 2,929 LJ-hours. These figures are arrived at after first taking account of the diversion of appellate work under the existing changes in the pipeline in relation to County Court and certain private family appeals.

36. Also, there would be a benefit for parties generally in getting to a final definitive outcome in many cases (i.e. those where PTA is ultimately refused) far more speedily than under the current system involving routine oral renewals. Currently, the average time from filing a notice of appeal to a decision on PTA on the documents is about 6 months and an oral renewal adds about another 6 months. There would be a further benefit for users of the court by avoiding or minimising the times when an oral PTA hearing overruns and reduces the time available for a full appeal listed the same day. The *average* hearing time for an oral hearing of a PTA application is 50 minutes, so this is a significant issue. Sometimes the hearing time for such a hearing can be a lot more than this.

37. At the moment, if a claim or application has been certified as Totally Without Merit (TWM) in the lower court, and in certain other cases, there is no right of oral renewal: CPR Part 52.3(4A), Part 52.15(1A) and Part 52.15A(2). Again, if an application for PTA considered in the CA on the documents is certified as TWM, and in certain other cases, there is no right of oral renewal: CPR Part 52.3(4A). Outside these cases, where an application for PTA is considered and refused on the documents in the CA there is a right to request an oral hearing before a single judge, subject to any practice direction to the contrary: CPR Part 52.3(4). The current practice directions do not make contrary provision.

38. The background to this position is a progression through time from much wider rights of appeal to the CA without any permission requirement, then as backlogs in the CA built up to unacceptable degrees there were successive reforms to extend such a requirement to ever wider classes of case. This development already involved an acceptance that the appeal system could not function to give results in a timeous way without restricting the degree of access to judicial resources which could be dedicated to resolution of parties' disputes and that early judicial scrutiny of the arguability of a case on appeal could be an appropriate mechanism by which to prioritise allocation of judicial resources to be dedicated to cases.

39. Moreover, there has over time been a reduction in the judicial resources judged to be appropriate to dedicate to this task. For example, in view of growing delays in the CA there was a major review of CA procedure by the Scarman Committee, appointed in 1978, leading to the passage of section 56 of the Supreme Court Act 1981 (now re-named as the Senior Courts Act 1981) and amendments to the old RSC Order 59 (appeals) in 1981 which were followed by a Practice Note [1982] 1 WLR 1312.

40. Section 54(6) of the 1981 Act, as enacted, conferred jurisdiction for a single LJ to decide PTA applications. RSC Order 59 made provision to similar effect. The Practice Note included this statement:

> **"The single judge of the Court of Appeal**
>
> In the past a court consisting of at least two judges has had to consider incidental applications, such as those for leave to appeal, for the imposition or removal of orders

staying execution or for the grant, variation or discharge of injunctions pending appeal. This represented an extravagant use of judicial time and rule 10(9) [i.e. in RSC Order 59] will now enable all these matters to be considered and disposed of by a single judge sitting in chambers. …"

41. See also the 1985 Supreme Court Practice (the White Book), at p. 846, which stated that applications for PTA were normally heard by a single LJ. Subsection 54(6) of the 1981 Act was repealed by the Access to Justice Act 1999: it appears that this was because, following the Bowman Report of 1997, the question of jurisdiction was dealt with by provision of a general discretion to list cases before a single member of the CA (previously the general position was that 2 LJs would exercise the CA's jurisdiction) – see recommendation 35 at p. 144 of the Report and section 54(2) of the 1981 Act as substituted by the 1999 Act - and the practice regarding the procedure and number of LJs who would determine such applications could be left to be dealt with by directions within the CA under the new section 54(3), as substituted by the 1999 Act.

42. Practice developed after 1982 to allow for consideration of applications for PTA on the documents as a first stage. In light of (again) increasing numbers of applications and appeals and the consequent delays in the hearing of appeals, Sir Jeffrey Bowman chaired a Review of the Court of Appeal (Civil Division), reporting in September 1997. The Bowman Report reviewed the then current position at paras. 21-27. The Report recommended that applications for PTA should be considered initially on the documents by a single LJ, who would also have the option to decide to hear the application on their own in open court (or, according to their choice, along with a second LJ in open court); and if minded to refuse on the documents the LJ should write giving reasons but offering to hold an oral hearing. If the offer were not taken up, the application would fall to be dismissed. This recommendation was the background to the introduction of CPR Part 52.3(4) in its original form in 2000.

43. The Bowman Report also recommended that one level of appeal should be the norm, whilst allowing for second appeals in exceptional cases: chapters 2 and 4. "This principle reflects the need for certainty, reasonable expense and proportionality" (para. 15) and the general requirement that "Appeals should be dealt with in ways that are proportionate to the grounds of complaint and the subject matter of the dispute" (para. 14). This recommendation was the background to the introduction of CPR Part 52.13 as part of the reforms in 2000, which provides that the CA will not give permission for a second appeal unless the appeal would raise an important point of principle or practice or there is some other compelling reason for the CA to hear it. This restrictive test for PTA in second appeals contemplates that PTA may be refused even though it can be seen that there is an arguable point on appeal with a real prospect of success (which is the usual test for PTA).

44. Part 52.3(4A) has been added since 2000 to take away the right to request an oral renewal if the application is certified as TWM. Two other developments also occurred: (a) despite the Bowman recommendation that (as was implicit) an oral renewal hearing should take place before the LJ who had refused PTA on the documents, the practice of listing the hearing before a different LJ developed (thus duplicating the preparation involved); and (b) in family cases involving LIPs it was found that the rates of requests for renewal were very high so that it saved more time to eliminate the paper consideration stage and in all cases proceed to an oral hearing.

45. Development (a) might arguably be attractive in a system which is well-resourced in terms of judicial availability relative to incoming business and where pressure of workload is not leading to inordinate delays (though it involves greater delay, since 2 judges acting sequentially have to

prepare the case). However, that is not the position in which the CA finds itself now. There has been a substantial rise in the workload of the court over the last 10 years and the trend is upwards: see Appendix 1. The delay to obtaining a hearing date for an appeal, let alone a final judgment, has risen steeply.

46. Development (b) makes sense in a system which gives the litigant the right to "two bites of the cherry" in the CA if a decision on the documents occurs first, and where the paper consideration is not having the practical effect of screening out a fairly high level of cases where there would otherwise have to be an oral hearing. But this begs the questions whether this system should exist and whether the use of additional judicial time taken up by an oral hearing is justified and efficient.

47. There are two aspects to the issue of procedure: (i) to what extent is it necessary to have an oral hearing? and (ii) to what extent is it necessary for a second LJ to be involved to review a decision regarding PTA taken by another LJ?

48. Against the background set out above it might be asked, what is the nature of the "right" to an oral hearing of an application for PTA? Under the current form of CPR Part 52.3(4) that "right" is very attenuated. It can be removed by a practice direction: no subordinate, let alone primary, legislation is required. Even where there is a right to oral renewal, it does not include any right to have a second LJ look at the application. There is only a right to consideration by one LJ, which may be at an original oral hearing (as in (b) above) or at a follow-on oral hearing after PTA has been refused on the documents. Section 54(6) of the 1981 Act in its original form, RSC Ord. 59 and CPR Part 52.3(4) all allowed or allow this and the 1982 Practice Direction and the Bowman Report both contemplated that there would only be an entitlement to consideration by one LJ.

49. There is no obligation under Article 6 ECHR for the state to provide anything more than this, so far as concerns how many LJs look at the application. Nor is there any obligation under Article 6 for the consideration of an application for PTA to take place at an oral hearing so long as it is possible for the court to understand from the documents the issues which arise and deal with the matter fairly: see Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (3rd ed. 2007), pp. 184-185. Hence the practice of the Supreme Court does not give rise to problems under Article 6. Fairness does not normally require that there should be an oral hearing of this type of application.

50. The fact that CA practice has developed to be more hospitable to using the oral renewal process to provide for additional review by a second LJ in some cases (though not all: see (b) above) does not show that there is anything in the nature of a "right" to review by two LJs rather than one. In fact, the practice in the Chancery Division in cases where the High Court acts as an appeal court and is governed by CPR Part 52.3(4) is that any oral renewal usually takes place before the same judge as refused PTA on the documents: the oral hearing simply provides an appellant with another opportunity to draw facts and arguments to the attention of the judge in an effort to persuade them that there is an arguable appeal. There has been no adverse reaction to this on the part of court users.

51. The principal question, therefore, is what procedure should be adopted where the only relevant entitlement (properly so-called) is to consideration of an application for PTA by a single LJ, rather than to have "a second bite at the cherry" by asking a second LJ to look at the application afresh and possibly take a different view from the first. In that context, it is proposed that the norm should be for a decision to be made after consideration on the documents without any right of a

litigant to demand an oral hearing, but leaving it to the judgment of the single LJ to decide whether they think that a hearing is necessary to enable them to understand the issues, to achieve fairness or for some other compelling reason. As in the Supreme Court, applications for PTA should normally be determined on the documents alone. This approach provides the most time-efficient way to determine PTA applications fairly and with due regard to the demands of other users of the appeal system. This is in accordance with the general principle reflected in the overriding objective, of "allotting to [a case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases" (CPR Part 1.1(2)(e)).

52. It is suggested that there is no principle of a party having their "day in court" which requires adoption of a different approach. The parties will have had their "day in court" at first instance, and the question on an application for PTA is whether they should be granted access to an appeal. As stated in the Bowman Report, at para. 4, "In our system the purpose of the trial or hearing [at first instance] is to dispose of the action and an appeal is not there as an automatic further stage. It is intended that the assumption should be that the court or tribunal has made the correct decision."

53. Oral procedures increase expense and delay, which is why courts under stress from increased workload generally move to increased paper consideration as a way to match workload and judicial resources. The European Court of Human Rights now only very rarely grants an oral hearing even for full argument on the merits of an application, as well as generally screening applications at the admissibility stage on the documents. Truncated oral hearings with very tight limits on oral argument are standard in many jurisdictions, such as for hearings before the Court of Justice of the European Union, any oral hearings in the European Court of Human Rights and for hearings before the US Supreme Court.

54. The view of the judges of the CA is that there is considerable value in having reasonably full oral hearings for appeals where PTA has been granted. However, the benefit within the stressed appeal system in England and Wales of having 2 or 3 experienced LJs participate in extended oral hearings of each appeal has to be secured, in part, through streamlining procedure and minimising the time taken on all interlocutory matters, including consideration of applications for PTA, in conjunction with other measures such as reducing appeals to the CA where reasonable protection on appeal can be secured lower down in the court system and tightening up the test for PTA in first appeals to a "substantial prospect of success".

55. In the consultation by Briggs LJ on his proposals for reform of the civil justice system, consultees were asked for their views in relation to a proposal to remove an automatic right of oral renewal for PTA applications. Despite that, it is desirable to consult further on this question, particularly since it is now presented in conjunction with the proposal to tighten the threshold for PTA in the CA. The responses given to the previous consultation will be taken into account in relation to the present proposals.

56. One could ask whether, despite constraints on resources and the pressures and delays to which the CA is subject the "right" of renewal should in fact be extended or strengthened so that it becomes a right to an additional review by a second LJ. However, this would contravene the principles identified in the Bowman Report, which have not been brought into question in any of the consultation responses to Briggs LJ. To require there to be a second bite of the cherry before a second LJ would involve disproportionate use of resources in the CA, particularly since in most cases the question will also have been considered by the judge at first instance as well. At a time of even greater pressure on the CA than at the time of the Bowman Report, it is suggested that this cannot be justified. The party seeking to appeal has a fair opportunity to seek to persuade

the CA, acting by a single LJ, that he should have access to a full appeal and is granted a fair allocation of the resources of the CA to address that question. The position in respect of a PTA application in the CA contrasts with that in respect of an application in the Administrative Court for permission to apply for judicial review, where consideration first on the documents and then at an oral hearing ensures there is a fair gateway into the justice system for a claim in the first place. For an application in the CA for PTA, it is a question of a party having a fair opportunity to show that they should be allowed to move up within the system to try to displace a considered, independent and impartial judgment already rendered in the case.

57. Statistics show that there is a group of cases in each year in which PTA has been refused on the documents, is then granted upon oral renewal and then the appeal is successful: see Appendix 6. This is unsurprising. It is suggested that the extent of this group of cases is not such as to undermine the validity of the proposals. If anything, if a single LJ considers a PTA application under the present proposal and appreciates that their decision is final, without there being further recourse to the view of another LJ, it may be expected that even greater diligence would be applied than at the first stage consideration under the current system (though it is in the nature of things that this cannot readily be tested). There has been no pattern of complaints regarding unfairness when final PTA decisions are made by single LJs under (b) above. The CA working party has made assumptions in the statistical modelling to reflect an increased element of time which may be spent in dealing with PTAs on the documents alone.

58. Judicial views are bound to vary regarding the merits of cases, including applying a low arguability threshold on an application for PTA, and the statistics in Appendix 6 are compatible with this ineradicable aspect of legal decision-making. The total number of full appeals where PTA was granted at oral renewal, having been refused on the documents, ran at 124 for the year to 7 March 2016; and of those only 19 of the full appeals were successful (these figures compare with disposal of full appeals at the rate of 1,042 a year). The object of the appeals system cannot be wholly to eliminate the risk that some cases do not proceed to a full appeal at which it might transpire that the appellant would be successful: that would divert far too much of the very limited resources of the appellate system for insufficient benefit and would be inconsistent with the very idea of having a PTA requirement in the first place (since of course it can never be implemented to a notional standard of absolute perfection). Justice in relation to the appellate system is taken to be achieved if a party has had a fair opportunity to have access to judicial resources within the system to present their case, rather than by reference to any notional idea that there is a single "right" answer to a case, and that an injustice occurs if that right answer is not given by the system as a whole. This is the underlying justification for a wide range of rules and principles applicable in relation to appeals: having a PTA requirement in the first place; having a very stringent PTA test in relation to second appeals, even though it might be apparent that the appellant has a real prospect of success if their case did proceed to a full appeal; the TWM system; limiting the exercise of the appeal jurisdiction in ordinary cases to a review rather than a re-hearing and allowing appeals only where the court below is "wrong", not simply where the CA might be inclined to disagree with the result (CPR Part 52.11); allowing appeals in cases involving interlocutory relief and procedural decisions only in cases where the judge has misdirected him- or herself or reached a perverse result, while dismissing appeals in other cases even though the CA might itself have made a different decision; and having a restrictive PTA test for appeals to the Supreme Court, as a result of which PTA will be refused even in cases where the Supreme Court might consider that the CA has erred in law in its decision.

59. There is a very wide range of cases in which PTA is sought and a very wide range of merits and wide differences in the ease with which merits can be discerned in the PTA applications which are made to the CA. To move to oral PTA hearings in every case would be needlessly wasteful of resources. It is suggested that a LJ reviewing the documents will be well placed to make and well

capable of making the relevant assessment in light of the particular circumstances of the application whether it is one which ought to be called in for oral hearing or not.

60. The CA considers that this proposed reform is especially important because (i) of the contribution in saved hours it represents as modelled in Appendix 4; (ii) it will save LJs from being diverted into separate PTA hearings in the middle of or shortly after hearing full substantive appeals, as happens currently, and so will free up judicial time for judgment writing in the period during or immediately after the hearing of a substantive appeal, when the submissions are fresh in the judge's mind, which is when a LJ is able to be most productive in producing a written judgment (and so will generate additional savings of time as a result); and (iii) it is a critical underpinning to realise the full benefit of working with 2 LJ courts (since unless and until this reform begins to take effect judges will need to be given more judgment writing time when sitting in 2 LJ courts to cater for the increased number of lead judgments they will have to write as compared with sitting in 3 LJ courts).

Appendices

Appendix 1 – 10 year work trend in the Court of Appeal

Appendix 2 – Subject categories for data analysis report

Appendix 3 – Data analysis report

Appendix 4 – Summary of impact of proposed reforms on the work of the Court of Appeal

Appendix 5 – Survey of appellate justice in other jurisdictions compiled by Allen & Overy

Appendix 6a – Oral permission to appeal renewal applications 1

Appendix 6b – Oral permission to appeal renewal applications 2

Consultees

(a full list is available on request, see contact details on page 2)

ACAS
Access to Justice Action Group
Action against Medical Accidents
Administrative Law Bar Association
Advice Now
Advice Services Alliance
Advice UK
Age UK
Amnesty
Association of British Insurers
Association of Costs Lawyers
Association of HM District Judges
Association of Litigation Funders
Association of Litigation Professional Support Lawyers
Association of Medical Reporting Organisations
Association of Personal Injury Lawyers (APIL)
Association of Regulated Claims Management Companies (ARC)
Bar Council
Bar Standards Board
Barristers Chambers
British Association For Counselling & Psychotherapy
British Bankers Association
British Chambers of Commerce
British Medical Association (BMA)
British Safety Council
Centre for Effective Dispute Resolution
Child Support Agency
Christians against Poverty
Citizens Advice Bureau (CAB)
City of London Law Society
Civil Court Users Association
Civil Justice Council
Civil Mediation Council
Claims Standards Council
Confederation of British Industry
Consumer Credit Counselling Service
Consumer Focus
Council of Mortgage Lenders
Court of Appeal Mediation Scheme
Court of Appeal User Group
Employment Law Bar Association
Engineering Construction Industry Association
Expert Witness Institute
Faculty of Law, University of Cambridge
Federation of Small Businesses
Finance and Leasing Association
Financial Ombudsman Service
Financial Services Authority
FOIL
Forum of Complex Injury Solicitors
Forum of Insurance Lawyers
High Court Judges Association
HMCTS
HMRC
Housing Law Practitioners Association
Institute of Chartered Accountants
Institute of Legal Executives
Institute of Money Advisers
Institute of Paralegals
Insurance bodies
Intellectual Property Bar Association
Intellectual Property Court Users Committee
Justice
Justice Committee
Law Centres
Law Centres Federation
Law Centres Network
Law for Life
Liverpool Law Society
London Solicitors Litigation Association
Magistrates Association
Manchester Law Society
Mediation providers
Medical Defence Union
Medical Protection Society
Ministry of Justice
Ministry of Justice
Money Advice Trust
Motor Insurers Bureau
Motoring Accident Solicitors
National Accident Helpline
National Association of Local Councils
National Association of Paralegals
National Landlords Association
National Mediation Helpline Providers' Forum
National Planning Forum
National Youth Advocacy Service

Newspaper Publishers Association
NHS Litigation Authority (NHSLA)
NMH Providers' Forum
Nuffield Foundation
Office of Fair Trading
Oyez
Parliamentary & Health Service Ombudsman
Personal Injuries Bar Association
Personal Support Units
Planning & Environmental Bar Association
Police Action Lawyers Group
Practical Law
Professional Negligence Bar Association
Refuge
Registry Trust
Residential Landlords Association
Royal Institution of Chartered Surveyors
Shelter
Society of Asian Lawyers
Society of Editors
Solicitors firms
Solicitors For The Elderly
Solicitors Litigation Association
The Academy of Experts
The Asset Based Finance Association
The Association of Women Solicitors
The Consumer Justice Alliance
The Law Society
Trade Union Congress
Trading Standards Institute
UK Environmental Law Association
UNISON
Welsh Government
Young Barristers' Committee