This paper is submitted by **Michael Thomas** CMG QC [redacted] I practised at the Bar between 1958 until 2013, latterly as a member of Essex Court Chambers in London and of Temple Chambers in Hong Kong. I served as Attorney-General of Hong Kong between 1983 and 1988. I have appeared in several judicial reviews, both for and against applicants. Most were in the Hong Kong courts where the principles and procedure are virtually identical to those in UK. I retired from practice in 2013.

Judicial Review - an elephant in the room

1. One objection to modern judicial review (JR) is the lack of adequate consideration of the adverse effects upon the public as a whole from delay. In principle, government should be free to carry on the business for which it has been elected. The public as a whole has that interest, though it is the Ministers and officials upon whom the legal spotlight falls. It proposed that the wider public considerations are not ordinarily considered [1], but should always be fully taken into account.

2. The wider public interest is neglected as the case proceeds because of undue concern for the particular complaint that once leave is granted becomes the intense focus of forensic attention. There may be many reasons for this.

3. Modern judges are less Tory than before, appropriately Whiggish, wary of the Royal prerogative and sympathetic to victims of overbearing or inefficient public officials. This may reflect widespread diminishing respect for the Parliamentary institution, the quality of MPs, the ossifying nature of party politics, and excessive use of legislation.

4. In Court, Judges will always tend to focus upon the issues and materials presented to them by the adversaries appearing in their Court and lose sight of the wider implications for the public at large. They may be egged on by pressure groups as interested parties who see the courts as a more promising platform for their cause than Parliament itself.

5. Lack of attention to the wider public interest is not just seen in public law cases. The general point is well made by Lord Hoffman who has written:

> "On the whole the attitude of the common law is that cost does not matter. If principle requires that there should be a remedy, then it does not matter that the cost of providing that remedy will greatly exceed any compensation which the victims are likely to receive. There are very few areas in which the common law has felt itself able to say that, as a matter of public policy, the financial and social costs do not justify providing a remedy." [2]

   This failing is exemplified in cases about swimming activities. [3] Deciding that a stair well in a particular block of flats could reasonably have been better lit to provide a remedy to an injured occupant fails to take into account the cost of upgrading lighting

[1] Save when the Court has reached a decision and before granting relief; see para. 11 below.
[2] The Common Law Lecture Series 2005 (University of Hong Kong) at pages 80-81.
[3] Tomlinson c. Congleton BC [2004]1 AC 46; R (Hampstead Health Winter Swimming Club v. Corpn. of London [2005] EWHC 713. Cf Bolton v. Stone [1949] 1 All ER 237.

in every publicly owned block in the country. A schoolchild with disappointed parents recovers damages because a judge holds that their dyslexia could reasonably have been detected and addressed earlier, regardless of the cost of ensuring that every child at school will similarly benefit.

6. When leave is granted to apply for JR, whatever proceeding is challenged will come to a halt as a matter of caution. Though impugned decision remains legally valid until set aside, in practice it ceases to be relied upon. A public consultation in progress will cease but its costs will still have to be met. Expensive construction projects will be put on hold. In Hong Kong, a challenge to an air quality assessment required by statute held up the construction of a transport bridge linking Hong Kong with the PRC across the Pearl River for more than a year at an estimated cost of $6.5 billion (nearly £1 bn.).

7. In civil proceedings, justice dictates that an interim injunction is granted on condition that the applicant should agree to indemnify [4] the injuncted party against any loss or damage should it be later set aside. In JR, the public must suffer those costs come what may. Once leave is granted, an overriding interest emerges. The applicant must be able to test the legality of the decision as well as to protect a personal interest. The rule of law becomes the paramount consideration for the duration of the case.

8. Even so, the judiciary should strain to minimise the period of uncertainty pending a final determination to protect the wider public interest. In a high profile case (as in the Brexit and prorogation matters) this can be achieved by a 'fast track' procedure. But in general, every JR takes its place in the lists, with the same prospect as any other case of reaching the Supreme Court in two or three years' time. The popularity of JR among practitioners because the procedure is simple and streamlined, the increasing complexity of the issues, and the shortage of judicial resources all add to the delay.

9. Take immigration and asylum cases. Once the administrative review processes (since 2011) are complete [5], there is the likely prospect of resolving points of law or judicial review of decisions for deportation. This may take years after the immigrant's arrival to complete. During that time personal and family circumstances will have changed. The politics of the country of origin may have changed. Fresh grounds citing human rights will have arisen for resisting deportation. The known result is that a very small percentage of illegal economic migrants are deported. Worse still, every government that seeks to control immigration is discredited. Sound and popular policies die a death by a thousand cuts in their execution.

10. The relevant Rules of Court stipulated a prompt application for leave within 3 months of a decision, extendable only for good reason. That is the only statutory concession to meet the public interest in public authorities being allowed to get on with their business [6]. Once the 'legal locomotive' is set in motion, Courts give generous

[4] Often to be fortified by banking guarantee, even where this may stifle the claim.
[5] Waiting times in the tribunals doubled between 2011 and 2018, as reported in 2019.
[6] In practice 'good reason' is easily shown. One reason for the many criticisms of the 2019 Supreme Court decision in R. v. (Gerry) Adams is that the ground for questioning a 1973 decision was known to the applicant in 2009 but leave to apply was given in 2017.

consideration to the requests of the parties' legal advisers for time to have all relevant documentation prepared and to be ready for the hearing. Appeals may follow to the Court of Appeal and Supreme Court in the usual way. This is not acceptable when each week that passes can lead to heavy expense, inconvenience to the public as important projects are held up, and frustration for those responsible for implementing public policy.

11. The exception to my general point is that after reaching a decision of illegality on a matter of public policy, a Court may then be persuaded that this would create such difficulties adverse to the public interest that before granting relief, a period should be allowed for the administration to address those difficulties. Whether a Court has power to grant a temporary validity order to fill a hiatus is in doubt, but there is good authority for granting a temporary suspension order to postpone for a finite period the date on which a declaration of invalidity will take effect; see Koo Sze Yiu c. Chief Executive (2006) 9 HKCFAR 441 in which the Court of Final Appeal reviewed cases since the Manitoba Language Rights case [1985] 1 SCR 721 [7] .

A proposal

12. The judges will not welcome structural reform for they take understandable pride in the efficacy of judicial review. They enjoy the intellectual legal analysis it presents on assumed [8] facts (as against trying drug or rape cases on circuit). Some might be thought to relish holding government to account, especially those with unfulfilled political ambitions. But change is, I suggest, needed to speed up the process of questioning the legality of political and administrative decisions and to meet a major cause of complaint in Whitehall.

13. It is proposed that a special Public Administration Court be set up with its own President and panel of assigned specialist judges (three in number) to handle and determine all judicial review cases.

    - before leave is granted, the Court should be mandated to ascertain the cost and any adverse effect that will bear upon the public or the administration if the decision were to be reviewed
    - those factors should be considered and given due weight in the Court's reasons before leave is granted, and especially where 'good reason' is relied upon for extending the 3 month time bar
    - the greater the public interest in an early determination, the more weight should be given to it in setting the time table for each case to progress to a hearing
    - the adverse public consequences of quashing a decision should be referred to in the judgments and treated as a relevant consideration

[7] See too Hong Kong Court of Final Appeal's decision in Kwok Wing Hang v. Chief Executive [2020] 1 HKLRD 80.
[8] The power to order viva voce evidence and cross examination to resolve disputed facts is rarely or never permitted. It is usual to assume that the Respondent's version is accurate.

- the scope of damage to the public interest may justify (i) denying discretionary relief to a successful applicant (just as a contract-breaker has the option of paying compensation where specific performance is inappropriate) or (ii) delaying the grant of relief to give the Administration the opportunity to protect the public interest (see para. 11 above)
- because of the tension between judicial review and public administration, there should be a discrete provision for an appellate review to speed up finality
- an appeal should only be permitted by leave of the first instance judge or another judge given after a written application
- there should be only one appellate tier before the final outcome
- an appeal should lie to a bench of two, three or five judges, constituted by the President according to the perceived importance or complexity of the issues
- judges to be 'lent' from the Supreme Court or Court of Appeal as required

ENDS 19 October 2020