



**CHAMBERS**  
**of IAN MACDONALD QC**

## **Interim Relief in JR**

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## INTERIM RELIEF IN JR

### 1 General background

- (1) CPR Pt 25 is applicable to judicial review proceedings. A claimant may apply to the court for one or more of the interim remedies set out in r.25.1 and also for a stay of proceedings (see r.54.10(2)).
- (2) Pursuant to r.25.2 an order for an interim remedy may be made at any time, including before proceedings are started and after judgment is given. However, an interim remedy may only be granted before proceedings begin if the matter is urgent or it is otherwise desirable in the interests of justice (r.25.2(b)). Where an interim remedy is granted before the commencement of a claim the court should give directions requiring the claim to be commenced (r.25(3)).

### 2 What remedies are available?

- (1) Interim injunctions
  - i. The most important form of interim relief in JR proceedings
  - ii. May be *mandatory* or *prohibitory*
  - iii. The ordinary *Cyanamid* principles are not readily applicable since the courts will tend to ask (as with the test for permission) whether the claimant can show a *prima facie* case for relief rather than merely an arguable one. Ordinarily there will be no adequate remedy in damages, so the application will be decided by reference to the balance of convenience.
  - iv. Where a public authority seeking to enforce the law is involved, consideration of the balance of convenience will take into account the interests of the public to whom the authority owes a duty: *R v Secretary of State for Transport ex p Factortame Ltd (No.2)* [1991] 1 AC 603.
  - v. Since there are unlikely to be significant factual disputes in a claim for judicial review the court will necessarily consider the merits of the legal arguments advanced by the claimant on an application for an interim injunction.
  - vi. The discretion to refuse relief in JR proceedings may be more readily exercised on an application for an interim injunction: see *R (Debt Free Direct Ltd) v Advertising Standards Authority* [2007] EWHC 1337 (Admin) in which an application to continue an interim injunction was refused in part due to non-disclosure.
- (2) Interim declaration
  - i. Unknown to law prior to the introduction of the CPR; see *St George's Healthcare NHS Trust v S* [1998] 2 FLR 728.
  - ii. The authors of De Smith's Judicial Review comment that "*so far the courts have not made a great deal of use of interim declarations in judicial review proceedings*" (6<sup>th</sup> Edition at §18-021).
  - iii. Two cases in which interim declarations have been refused are *R v Secretary of State for Trade and Industry ex p Trades Union Congress* [2000] EWHC

*Admin 345 and R (Mayer Parry Recycling Ltd) v Environment Agency [2000] EWHC Admin 388.*

- iv. In *R (Ashworth Special Hospital Authority) v Mental Health Review Tribunal for West Midlands and North West Region [2001] EWHC Admin 901* Stanley Burnton J assumed that an interim declaration would be inappropriate to curtail liberty or force medical treatment.

### (3) Stay of proceedings

- i. Available where the claimant is granted permission (r.54.10(2)).
- ii. There has been some debate as to whether this provision applies only to proceedings before a court or tribunal. However in *R v Secretary of State for Education and Science ex p Avon CC [1991] 1 QB 558* the Court of Appeal held that it also embraces executive decisions and the process by which the decision was reached.
- iii. In most cases other than those involving judicial proceedings injunctive relief will be available in any event.
- iv. The court has jurisdiction to stay the decision of a tribunal (or court) even where the decision has been fully implemented: *R(H) v Ashworth Special Hospital Authority [2003] WLR 127*.

### (4) Bail

- i. The court has inherent jurisdiction to grant bail in judicial review proceedings: *R v Secretary of State for the Home Department ex p Turkoglu [1988] 1 QB 398*; *R v Secretary of State for the Home Department ex p Sezek [2001] EWCA Civ 795*

### Have a plan

- (3) Work out in advance - am I aware of the kind of disputes which might result in an urgent JR? What documents/books/resources do I need to identify a runner, and do I have them close to hand? Have I generally got the information and the knowledge to identify an underlying claim?

### A checklist for an urgent JR

- (1) The substantive claim. Full instructions from the client and any other witnesses and relevant parties if possible. Focus on any factual issues which might be disputed by the decision maker. Imagine what they might say in response to a challenge and ask questions accordingly.
- (2) Urgency. Is it *really* urgent, or just *quite* urgent? And what do *really* and *quite* mean<sup>1</sup>?
- (3) Funding. Eligibility for LSC funding? Devolved powers available?
- (4) Your opponent. Contact the other side. Can you speak to the decision maker? Or a senior manager in the relevant section? Or the legal section? Try to ring one or more of these and keep a detailed note of everything they say. Have you got a fax

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<sup>1</sup> See below for a suggested answer.

number of the relevant office of the Defendant so you can fax over any order you get from court?

- (5) Advance warnings. Letter before action - Protocol Annex A if you want a template. Fax to decision maker's section, their manager or similar and their legal section. The time you give for a response will depend on the urgency of the case, but always best to have something sent in writing before commencing proceedings. Try to give them a reasonable time to respond, but consider the benefits of asking for a response by (say) 12pm on the final day you have to spare. That gives time to then get the court before it shuts.
- (6) Counsel. Instructing counsel - ideally they'll want a copy of all correspondence and statements ready but if the case is particularly urgent consider speaking first. Send papers over prior to expiry of your LBA deadline if possible.
- (7) The court. Speak to the court (or get counsel/chambers to do so) - is there a judge available? Will you be in time to use your local Admin Court office or will any injunction application have to be made on the phone to the duty judge in London?
- (8) Paperwork for the hearing. What will the judge want to see? Will you or counsel bring it along? Case law? Statutory material?
- (9) Settlement. Final attempt to get the Defendant to change its mind? Do they want to be heard on your injunction application?

#### **When its really urgent - an oral injunction application**

- (4) 'Really urgent' here means so urgent you can't wait until tomorrow.
- (5) If your deadline passes without adequate response from the other side then you need to make an application for an injunction. That application will be made within JR proceedings (which you will later have to formally prepare and issue within a short period of time of applying for the injunction).
- (6) If you have instructed counsel and sent documents over already then he/she will normally take copies of anything relevant to the injunction application. He/she will also normally prepare a draft order of the interim remedy being sought.
- (7) Interim injunctions can be either prohibitory or mandatory. In JR cases the courts tend to ask whether the claimant can show a *prima facie* case, which tends to be equated with the question of whether permission should be granted. The availability of damages will rarely be relevant, but the balance of convenience will. The court will necessarily have to take a view of the merits of the legal arguments, as there are unlikely to be substantial disputes on the facts.
- (8) If the court is persuaded to grant an order, then, bearing in mind this will have normally been done without the presence of the Defendant, the court will want to give them a reasonable opportunity to respond and apply to discharge the order if necessary. Brief directions are often made leading to a further hearing on the interim injunction, on notice to the Defendant, perhaps 7 days later. Many urgent JRs (in particular those brought against local authorities) can be resolved prior to this point.

- (9) The orders granted by the court in these cases do not usually bear a penal notice. They are, as a result, difficult to enforce against a recalcitrant Defendant. Service is informally effected by faxing and posting of the order to the Defendant (to the number/address you already have for the decision maker's office). In most cases this leads to compliance without any trouble at all.
- (10) If for any reason it does not, then there are a range of options available:
- (1) Fax the order direct to the Director of Housing and if still no response then have him/her personally served, attaching a letter setting out the history of the case etc and emphasising the fact that the authority is presently in breach of a High Court order. Copy in the Head of Legal.
  - (2) Go back to court (by making an urgent application) and ask that the order be indorsed with a penal notice; then serve the DofH personally with that and threaten committal proceedings if compliance is not then forthcoming.
  - (3) Ask the judge's clerk to speak to the other side's solicitors and get them to comply. Not as bad an idea as it sounds.
  - (4) Make a note of which authority it was who failed to comply with an order and try to have penal notices attached to all future injunctions obtained against them.

What to file at court - post injunction

- (11) Once you have successfully persuaded the council to comply with the injunction you need to file a bundle of documents at court. The court will normally give you until 12pm on the second day after the injunction was obtained (discounting weekends and bank holidays).
- (12) You need to file a claim form (the prescribed form N461), statements of facts and grounds, an application for urgent consideration (N463) and a suitable indexed and paginated bundle.
- (13) CPR PD 54 states:

*5.6 The claim form must include or be accompanied by–*

- (1) a detailed statement of the claimant's grounds for bringing the claim for judicial review;*
- (2) a statement of the facts relied on;*
- (3) any application to extend the time limit for filing the claim form;*
- (4) any application for directions.*

*5.7 In addition, the claim form must be accompanied by*

- (1) any written evidence in support of the claim or application to extend time;*
- (2) a copy of any order that the claimant seeks to have quashed;*
- (3) where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision;*

- (4) copies of any documents on which the claimant proposes to rely;*
- (5) copies of any relevant statutory material;*
- (6) a list of essential documents for advance reading by the court (with page references to the passages relied on).*

*5.8 Where it is not possible to file all the above documents, the claimant must indicate which documents have not been filed and the reasons why they are not currently available.*

*5.9 The claimant must file two copies of a paginated and indexed bundle containing all the documents referred to in paragraphs 5.6 and 5.7.*

- (14) It is common (though not essential) for counsel to draft the statement of facts and grounds, and often too the N461 and N463.
- (15) File everything at the Administrative Court Office in your local area (Manchester, Leeds, Birmingham, Cardiff or London).
- (16) Court fee on application for permission is £50.
- (17) Keep the permission bundle down in size to what is absolutely necessary - less than 100 pages if at all possible. A high court judge will spend on average 30 minutes looking at each paper permission application. Only include case law or statutory extracts if essential. A selective use of helpful extracts might therefore assist. If the case gets to trial the advocate preparing the claim for final hearing will tend to prepare a full bundle of authorities..
- (18) Once you get the sealed claim form back from the court you then have to arrange for formal service of it on the other side. You normally have 7 days to serve and you will need to file a certificate of service at court confirming you did so.

#### **When its quite urgent - a paper application**

- (19) 'Quite urgent' covers those cases where you can't afford to wait until permission has been considered - but can't suggest the case is one requiring the court to drop everything and consider the application that very day.
- (20) If you need to apply for interim relief in these circumstances you can lodge an application for urgent consideration with your permission application.
- (21) Form N463, '*Judicial Review: Application for urgent consideration*' can be downloaded from the HMCS website and requires you to set out the reasons for urgency and a proposed timetable for dealing with the claim. There is a separate section in which to make your application for interim relief and you should attach a draft order.

- (22) The alternative way of dealing with such cases is to invite the court to list your interim relief application on notice to your opponent, but in time to enable the remedy you are seeking to be a meaningful one. The regional courts are very keen on this.

### Duty of candour

- (23) There is no formal stage of disclosure in JR claims as in other civil litigation - CPR PD 54.12 states that disclosure is “not required unless the court orders otherwise”.
- (24) The existence of a general ‘duty of candour’ in JR claims one of the main reasons for the lack of more specific rules on disclosure. In short this duty requires the lawyers for a claimant (and indeed any party to JR proceedings) to approach the litigation in an even handed manner.
- (25) Where a without notice interim injunction is sought the duty is fairly extensive, and requires the claimant to
- (1) Act with utmost good faith
  - (2) Set out any possible defences in detail
  - (3) Disclose any material facts in detail.
- (26) This can be a fairly onerous obligation - see *R (Lawer) v Restormel Borough Council [2007] EWHC 2299 (Admin)*. There (on a telephone application to the court to compel the provision of accommodation to a homeless person pending a statutory review) the Claimant’s counsel failed to draw the judge’s attention to various discussions that council officers had had with the claimant’s solicitor - which were relevant to the crucial issue before the court<sup>2</sup>. This is a very good example of how the courts are likely to deal with cases in which it appears the whole truth might not have been told. See also *R (Debt Free Direct Ltd) v Advertising Standards Authority [2007] EWHC 1337 (Admin)*.

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<sup>2</sup> Whether or not what are known as the *Mohammed* criteria were properly considered by the council.