Morning Breakout Session 1

An Introduction to Public Law and Judicial Review

1. This paper provides a whistle-stop tour through the principal grounds that can be relied upon in seeking judicial review of decisions made by public bodies, courts or tribunals, and of the procedures involved. Thee contents will be elaborated through the workshop.

2. Before progressing to a claim for judicial review a claimant must have exhausted all remedies available to him or her, including internal complaints, complaints to the Ombudsman (where relevant), and all other appeal mechanisms. Failure to do so is likely to result in permission to proceed being refused by the court.

Judicial review in substance

3. Judicial review, in summary form, is generally the only means by which the Administrative Court (a sub-division of he Queen's Bench Division of the High Court) considers public law functions, i.e. statutory or government functions. The "Admin" court acts as a superior court of review under an historic function with its origins in the supervisory jurisdiction of the King's Bench over lesser courts.

4. The remedy of judicial review is entirely discretionary. A court will only consider intervening where the claimant has sufficient interest or - in the case of a pure human rights challenge -where he is the alleged victim of a human rights violation. The remedy is only available where the claimant lacks any suitable alternative remedy and has commenced proceedings promptly.

5. Judicial review is there to correct a recognisable public law wrong, which includes those occasioned by unreasonableness / irrationality, unfairness, unlawfulness or a breach of human rights. It is emphatically not available simply where the claimant disagrees with the merits of the decision/act or failure to act.

6. The available relief includes an order quashing the decision (a "quashing order"), an order requiring the defendant to do something (a "mandatory order"), preventing the defendant from doing something (an "injunctive order"), declaring a decision act or omission to be unlawful ("declaratory relief") or compensating the claimant for his or her loss ("damages.")

7. The extent of the jurisdiction of the court to review decisions of inferior courts or tribunals is judge-led and always evolving. It provides a brake on the executive and on public bodies: ensuring that their decisions are made according to law; it also restrains excesses and abuses of power.

8. In summary, a court exercising powers of judicial review can/must consider

   ~ whether the decision-maker had jurisdiction to make the decision,
   ~ whether the decision was in accordance with law,
   ~ whether the decision was taken by a fair procedure, and
   ~ whether the decision was rational and proportionate.

9. <u>**Wednesbury Unreasonableness**</u> (or irrationality) is the most commonly known ground of judicial review but far from the most successful. To establish this ground the claimant must show 'that the decision is so unreasonable that no properly directed decision maker could have reached it. The courts do not decide whether the decision is fair or unfair, but whether it was unreasonable or not.

10. Decisions which engage human rights as defined under the European Convention must be proportionate as well as reasonable. A restriction of a fundamental right has to be necessary, involve the minimum interference possible to achieve the legitimate aim, and proportionate to the goal it seeks to achieve. In summary the relevant questions for the court are likely to be:

    i. Has there been a failure to take into account relevant matters or have irrelevant matters been taken into account?
    ii. Is the decision or failure to act patently unreasonable?
    iii. Is the decision disproportionate if impacting upon a fundamental right?

11. The standard of <u>**procedural fairness**</u> that must be adhered to by public bodies and tribunals depends very much on the circumstances of the case and is defined by common law and – in human rights cases - the European Convention. Under this heading can also be considered questions such as whether the reasons provided by the decision-maker are adequate, whether there has been a material error of fact, or whether the decision violates a legitimate expectation on the part of the claimant.

12. A leading case on the requirements of fairness *is R v SSHD ex p Doody* **[1994] 1 AC 541**, which set down a number of principles, including that:

- It is presumed that administrative powers will be exercised fairly;
- Where a person has been adversely affected by a decision, fairness dictates that they should have the opportunity to make representations, either before the decision is made or after it has been taken;
- Fairness requires that the person is normally given at least a gist of the case to answer as otherwise it is not possible to make effective representations;
- The standards of fairness vary according to the nature of the rights at stake.

13. Finally, the category of decisions pleaded on the grounds of **Unlawfulness** includes a straightforward error of law, e.g. a failure to comply with statutory provisions. It also can included consideration of whether the defendant improperly abdicated his duty or fettered his discretion. This essentially means closing his ears to those with something new to say, i.e. applying blanket policies that fetter his discretion to consider cases of their merits.

Procedure

14. JR proceedings are subject to CPR Part 54. A claim must generally be pre-empted by a 'letter before claim'('"the pre-action protocol") unless urgency means that proceedings must be launched immediately or the decision is a judicial one.

15. The letter before claim should briefly set out the facts of the complaint and why the material decision is said to be wrong, asking (where possible) for the matter to be rectified, and setting a short but realistic timeframe before which the claim will be commenced (ordinarily 14 days).

16. If satisfaction is not gained within a reasonable timeframe then proceedings should be commenced expeditiously. Remedies at JR are discretionary and the court will not entertain delayed applications. A claim must be brought "promptly and in any event within three months." This outside time limit and is keenly observed and the court can refuse a remedy if it deems that the case has not been brought promptly, and conversely may extend the limit if there is very good reason (and in practice, if the merits are strong). Some decisions can properly be described as 'continuing', which can avoid the limitation problem.

17. The Claim is pleaded on the form N461, and usually counsel will settle the accompanying detailed statements of facts of grounds, which are supported by statements of truth setting out the evidence (or confirming what the grounds assert),

and exhibiting documentary evidence. The Claim is lodged with a bundle of documents and a bundle of authorities (statutes, regulations and cases). In an urgent case a form N463 must also be completed asking for consideration to be expedited as necessary.

18. The claim form is largely self-explanatory. The statement of grounds should set out what decision is being attacked, what remedies are sought, the salient facts, the law, and the Claimant's submissions. Careful attention should be paid to the preparation of the bundles which should be clearly indexed and paginated, and accompanied by other documents designed to assist the court 'cut to the chase', and a list of essential reading for the judge.

19. Practitioners who have not taken a case to JR are often daunted by the process, but in fact it is relatively straightforward, and less encumbered by rules than many other areas of civil law.

20. The papers should generally be served on the defendant(s) and any other interested parties, as well as two copies lodged at the court. Once the claim is lodged a single judge considers on the papers whether to give permission, unless exceptionally, an oral permission hearing is requested. This is unusual as a permission application can be renewed orally, if refused on the papers, and the Claimant thereby gets two bites at the cherry. An oral application may be appropriate if the case is urgent, and sometimes the single judge will order an oral hearing, or a 'rolled-up' hearing where permission and full hearing are listed together. In many cases the defendant will attend an oral hearing and oppose permission being granted. If permission is granted the claim goes to a full hearing on its merits. Skeleton arguments must be prepared, and bundles re-served and added-to if necessary.

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Regionalisation

On 21 April 2009, the Practice Direction 54 – Administrative Court (Venue) came into effect. This allows proceedings in the Administrative Court to be issued and administered either in the Royal Courts of Justice in London or in one of the District Registries in Birmingham, Cardiff, Leeds or Manchester, unless the claim falls within the excepted class set out in paragraph 3.

Usually the case will be heard where it is issued, namely in the Royal Courts of Justice if issued in London, or in one of the courts within the region of the relevant District Registry if issued elsewhere. The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection. However, the Court will take in to account other considerations which are listed in the practice direction as follows:

(1)any reason expressed by any party for preferring a particular venue;

(2)the region in which the defendant, or any relevant office or department of the defendant, is based;

(3)the region in which the claimant's legal representatives are based;

(4)the ease and cost of travel to a hearing;

(5)the availability and suitability of alternative means of attending a hearing (for example, by videolink);

(6)the extent and nature of media interest in the proceedings in any particular locality;

(7)the time within which it is appropriate for the proceedings to be determined;

(8)whether it is desirable to administer or determine the claim in another region in the light of the volume of claims issued at, and the capacity, resources and workload of, the court at which it is issued;

(9)whether the claim raises issues sufficiently similar to those in another outstanding claim to make it desirable that it should be determined together with, or immediately following, that other claim; and

(10)whether the claim raises devolution issues and for that reason whether it should more appropriately be determined in London or Cardiff.

It is open to either party to apply for the proceedings to be transferred to a different venue. The Claim Form now asks whether the claim has been issued in the region with which the claimant has the closest connection, but also allows the claimant to specify other reasons justifying a request for a particular venue. Similarly, the Acknowledgment of Service has been amended to prompt defendants and interested parties to consider whether or not they wish to seek a direction for transfer and, if so, they are reminded that they will need to complete Form N464. This is a new form entitled "Application for Directions as to Venue for Administration and Determination", which must be served on all other parties to allow them the opportunity to respond to a request for a change of venue.

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Appendices

Pre-action Protocol for Judicial Review Annex A

N461

N463