Public Law Project

How to do judicial review

November 2020

SESSION 3: STEPS IN A JUDICIAL REVIEW CASE, FROM LETTER BEFORE CLAIM TO FINAL HEARING[1]

Part 1: INITIAL STEPS TO GRANT OF PERMISSION

1. This part of the course will cover the standard initial steps in judicial review, from first meeting the client to the grant or refusal of permission, (including how those steps differ in an urgent case) through to the final hearing.

2. Other preliminary considerations before and at the outset of judicial review proceedings have been or are being covered in different sessions: such as, for example, standing and relief; defending a judicial review; funding; and settlement (including pre-permission settlements) and securing *inter partes* costs. These topics are all very relevant to the early stages of judicial review.

3. Essential reading for anyone practising in this area includes the relevant Civil Procedure Rules[2] ('CPR'), supporting Practice Directions and the pre-action protocol for judicial review[3]. The CPR is divided into parts. Judicial review procedure is mainly (but not exclusively) governed by CPR Part 54[4] and the associated practice direction (mainly Practice Direction 54A[5]). These materials and relevant forms are at Appendix 1 of the course pack. The Administrative Court's own Judicial Review Guide[6] is also required reading as it provides a general explanation of the work and practice of the Administrative Court and parties are expected to act in accordance with it.

[1]With thanks to Dan Carey of Deighton Pierce Glynn, Martin Westgate QC , Caolfhionn Gallagher QC and Catherine Meredith of Doughty Street Chambers, Rory O'Ryan, Lucy Mair and Tom Royston of Garden Court North, and Steve Cragg QC of Monckton Chambers.

[2]http://www.justice.gov.uk/courts/procedure-rules/civil/rules

[3]https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

[4]http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54

[5]http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/pd_part54a

[6]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/540607/administrative-court-judicial-review-guide.pdf

4. **Covid-19 measures.** From the end of March 2020 all Courts and Tribunals have adopted special measures in light of the Covid-19 pandemic which has meant that the court offices have closed to the public and hearings are being conducted remotely. Accordingly both the Administrative Court and the Upper Tribunal have issued guidance to court users for the issuing and the hearing of claims. In this section we have retained the standard procedures that are to be followed by practitioners, however where these differ we have indicated this in the material. The key changes to bear in mind relate to issuing claims by email, payment of fees, the use of and specific requirements for electronic bundles and the court's use of remote hearings.

5. There are a number of key differences between judicial review ('JR') and mainstream civil litigation which mean that it is a uniquely 'front-loaded' process: the very short time limit for issue; the need for permission; and pre-issue preparation in JR incorporates much of the work that in other civil proceedings is usually postponed until much later. In order to get past the permission stage you need to present the Court with a well-argued claim, supported by a well-organised bundle, insofar as time constraints allow.

6. There are also cost risks if permission is refused. For any application for a legal aid certificate for a judicial review made on or after 27 March 2015, funding will be 'at risk' at the permission stage if permission is refused, unless a Defendant withdraws the decision under challenge, or the court orders an oral hearing, or a rolled up hearing of the claim[7]. However note that there is sometimes a possibility to frontload the work and have it paid for under an investigative representation certificate (to be considered in the session on legal aid).

7. This part of the session will cover six areas:
   (a) Identifying the target for challenge;
   (b) Time limits;
   (c) Client instructions and advice;
   (d) Pre-action protocol;
   (e) Preparing to issue;
   (f) Steps in proceedings.

   Steps (a) – (e) are necessarily Claimant-focused, but when we address step (f) below this includes the steps to be taken by the Defendant. Step (d) is also important for Defendants. The position for Defendants is also specifically considered in the session on "Defending a JR".

IDENTIFYING THE TARGET FOR CHALLENGE

5. The first step is identifying a challenge – either identifying the challenge for a client who has come to you, or looking for one. It is critical (though not always easy) to identify the:
   - enactment;
   - decision;
   - action; or

- failure to act

that will be the subject of the judicial review claim. Note that sometimes a challenge will have multiple targets.

Why is identifying the target so important?

6. There are a number of reasons:

[7]The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 S.I. 2015/898

- Without a reasonably clear view of what is being challenged, it is impossible to weigh up potential alternative remedies (such as appeal rights or ADR);
- Judicial review challenges can be refused permission, or a remedy, if a challenge is 'premature';
- Difficulties may also arise when a Claimant seeks to determine the lawfulness of a course of action which is, at present, hypothetical;
- A Claimant may have sufficient interest to bring a claim only in relation to certain stages of a decision making process;
- The enactment, decision, action or failure to act under challenge must be identified on the claim form;
- Most importantly, the claim must be brought both promptly and within three months of when grounds for judicial review first arose to avoid problems with delay (except in planning and procurement cases, where the time limits are 6 weeks and 30 days, respectively).

Practical questions for identifying the target (or targets) for challenge

7. Consideration should be given to the following:
   - What precisely is the duty or power the public body has used (or ought to use) to take the decision or action (or failure to act) the prospective Claimant is unhappy with?
   - Is there anything in any associated legislation, or guidance which requires that a decision be notified in a particular way?
   - Are there already consequences which adversely affect the prospective Claimant (such as deprivation of the opportunity to put his or her views forward in a consultation case) or will there only be consequences at a later stage of the process which has yet to be reached?
   - Has the public body given a firm indication of what it intends to do, or is the indication merely provisional?
   - Is there a single target or multiple targets? For example, is the challenge both to legislation which confers a power and its application to an individual, or merely the exercise of discretion in an individual case? Is the challenge to an unlawful policy used to determine the individual's case?

8. At this stage you should ask yourself:
   - Is there a material issue now (not academic, and not hypothetical)?
   - Is there a decision, act, omission or policy to be attacked? (From primary legislation all the way down to the simplest of acts – all are in theory challengeable.)
   - Was it in exercise of a public function?
   - Was it in exercise of a power or a duty? Even if a power, it has limits. Duties are likely to be more narrowly delineated (thus greater chance of breach).
   - Are there reasonable alternative remedies?
   - Consider where the power or duty arose from – it may give the clue as to further avenues for challenge (e.g. was it in a policy, promulgated under statute? Where was the failure? The statute, the policy or the act itself?)

- Does your client have standing to challenge (see Session 1)? Note the 'sufficient interest' test (Senior Courts Act 1981, s. 31(3)); not a busybody; a liberal test; standing under the HRA.
- Timing – see below.
- Importance to client and the public interest?
- The funding position (see Session 4).

TIMING

When do the grounds first arise?

9. CPR 54.5 provides:

> *"(1)* [save in planning and procurement cases] *The claim form must be filed-*
> *(a) promptly; and*
> *(b) in any event not later than 3 months after the grounds to make the claim first arose."*

This means you must act very quickly indeed. Do not assume that you have a full three months, or that the date your client thinks the decision was made is correct. You need to establish this from the documents or the other side.

10. You cannot agree an extension of time with the Defendants. You can only ask the court to exercise their discretion to allow your client's claim out of time. (The Defendant agreeing not to take the point is of limited help.) Your chances of success will depend on your client's behaviour and the reason for delay as well as any prejudice to the Defendant and other interested parties.

Continuing failures or unlawful actions

11. The CPR[8] helpfully mentions that a failure to act in relation to the exercise of a public function can form the subject of a challenge. Though grounds will first arise when the conduct in question became unlawful, challenges may be entertained by the court some time after that. In a continuing failure case, it will be necessary to explain in the claim form when the events came about that should have resulted in a decision or action.

CLIENT INSTRUCTIONS AND ADVICE

13. This is where a large amount of a solicitor's time is spent. Key matters to bear in mind are:
    - Managing expectations – often unrealistic (see earlier – lawfulness, not merits; remedies discretionary – but on other hand could have massive constitutional implications, and so on);
    - Record advice in correspondence;
    - Media if high profile;

[8]CPR 54.1(2)(a)(ii)

- Funding matters.

Advising once a decision has clearly been made

14. There are a number of practical steps to be taken when a decision to be challenged has clearly already been made:
    - Identify the decision, bearing in mind the points above: what is it; who made it; when was it made; when was it notified to the potential Claimant? Keep in mind the time limit.
    - Track down any document that records it, for example, minutes of the relevant committee, signed and dated decision letter or written record/notification of tribunal decision.

Advising when a decision has clearly yet to be made

15. A potential Claimant may seek advice before a final decision is actually made. The options in this scenario are:
    - Wait for the decision to be made and then apply for judicial review.
    - Write to the authority threatening judicial review and explaining why you believe the contemplated decision to be unlawful, ask to be notified in writing of the decision reached and the reasons for it.
    - Make written representations on behalf of your client, if necessary or helpful, giving further information or evidence to support his/her case.
    - Advise your client to attend the decision-making forum and, where possible, to put forward arguments or at least keep a good note of the proceedings. Consider the feasibility/ desirability of going yourself or arranging for a friend or lay advocate to accompany the client.

    Which is appropriate will depend very much on the facts of the case. However, the court is unlikely to be sympathetic when the basis for a challenge is that the relevant public body has failed to take into account of some relevant consideration the Claimant was aware of but did not bring to its attention before the decision under challenge was made.

Checklist for a Claimant's statement

16. When taking a full statement from your client cover as many relevant details as possible. These may include:
    - Full background of the Claimant bearing in mind the issues in the case.
    - History of the decision-making process, including dates and names and status of individuals or relevant committees, and so on.
    - Details of any consultation.
    - Correspondence – take (good) copies of all correspondence and documentation your client has in relation to the case. Some things which do not look relevant at first later prove vital.
    - A formal/ final decision.
    - Any appeals or tribunals.
    - History of the Claimant's dealings with the public body.

- How have they been included in the process/ kept informed?
- What information have they been given, and when?
- Have any reasons been given for the decision?
- If part of the Claimant's case relies on hearsay, is there someone else who might need to sign a witness statement about an aspect of it?

PRE-ACTION PROTOCOL

17. In the vast majority of JRs, the parties must comply with the pre-action protocol ('PAP') (however it does not apply in urgent cases). The current version of the PAP is included in the course pack at Appendix 1. It is essential to comply with the protocol wherever possible. The most crucial part for the Claimant is the **letter before claim** or letter before action, setting out their case and allowing the Defendant the opportunity to explain their actions or overturn their decision. Non-compliance with the protocol may be taken into account by the court when deciding case management and costs issues.

Steps by prospective Claimant

18. The PAP requires the Claimant, before making a claim, to write a letter before claim to the proposed Defendant. The protocol recommends a letter in a standard form (see Annex A of the Protocol), although provided that the letter addresses the core issues a failure to use the standard form is unlikely to be significant. The Home Office have also produced a standardised form that can be completed for non-urgent immigration judicial reviews. Again it is not compulsory to use this form. It can be found at https://www.gov.uk/government/publications/pre-action-protocol-for-judicial-review

19. The information which should be included in the pre action letter is as follows:
    - Details of the Claimant and Defendant;
    - Any reference details or details of the identity of those within the public body who has been handling the dispute;
    - Details of the Claimant's legal advisers;
    - The matter which is being challenged should be clearly set out;
    - Details of any Interested Parties
    - The issue in the claim should be spelt out – the date and details of the decision, act or omission, a brief summary of the facts and an explanation as to why it is contended to be wrong;
    - Details of the action which the Defendant is expected to take, including details of the remedy sought;
    - ADR proposals
    - Details of any information sought which is related to identifiable issues in dispute so as to enable the parties to resolve or reduce those issues. This may include a request for a fuller explanation of the reasons for the decision;
    - Details of any documents of which disclosure is sought, setting out why these are relevant and why disclosure is necessary. (Note that a pre-action disclosure application is possible under the CPR);

- Address for reply and service of court documents;
- Proposed reply date (usually 14 days, although a longer or shorter time may be appropriate in a particular case: we address this later in the session).

20. A well-drafted letter before claim can make or break a case. It impacts on costs recovery and your final remedy, as well as having the potential to avoid proceedings altogether. It can also focus your mind on the issues, and clarify the grounds for you and counsel prior to their instruction. Try to identify by name the correct person to send it to and enclose all relevant documentation to avoid delay. The protocol also provides that the letter should be sent to certain addresses for certain types of claim (e.g. claims about immigration, asylum or nationality). It the claim is against a local authority the letter should be sent to the legal department as well as the relevant department/ decision maker.

21. The claim should not normally be issued until the proposed reply date has passed. You must also carefully consider any response before applying for public funding or moving to issue proceedings. Sometimes it will be necessary to send further pre-action correspondence to protect your position (e.g. by correcting a misunderstanding, or including an additional ground of challenge) prior to issue.

Steps by prospective Defendant

22. Within (usually) 14 days the Defendant should send a letter of response. Again the PAP has a recommended standard form (see Annex B). This should provide where appropriate a fuller explanation of the decision, and indicate whether the claim is conceded in whole or in part, or will be contested. If the claim is being conceded in full, the letter should clearly and unambiguously say so. If it is being conceded in part or not at all, again the Defendant's position should be unambiguously stated.

23. Where the Defendant does not propose to disclose any information or documents that have been requested, the reasons for this should be explained.

24. The letter of response should be sent to the IPs named by the prospective Claimant and should identify any parties who the Defendant considers have an interest and who have not already been named by the Claimant.

Costs Implications of Non-Compliance with the PAP

25. A failure to comply with the PAP may well affect a party's prospects of recovering costs. It is an aspect of behaviour specifically identified as having potential costs implications in CPR r. 44.3(5) and in the PAP itself. See, for example:

    (i) In R (William Kemp) v Denbighshire Local Health Board [2006] EWHC 181 (Admin) the Claimant had effectively succeeded in obtaining funding of his nursing home costs; but because he had failed to comply with the PAP, there was no evidence that

the Defendant would not have offered a review had a protocol letter been written, so no order for costs was made;

(ii) In Aegis Group Plc v Inland Revenue Commissioners [2005] EWHC 1468 (Ch) the Claimant discontinued judicial review proceedings, and had achieved nothing sought in the claim, but because the Defendant took almost two months to reply to the Claimant's initial protocol letter, it was awarded only 85% of its costs rather than 100%;

(iii) The importance of compliance with the PAP and the costs implications of failure were emphasised by the Court of Appeal in R (Bahta) v. SSHD [2011] EWCA Civ 895: "*what is not acceptable is a state of mind in which the issues are not addressed by a Defendant once an adequately formulated letter of claim is received by the Defendant. In the absence of an adequate response, a Claimant is entitled to proceed to institute proceedings. If the Claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol...*" (we will be returning to Bahta in Session 5);

(iv) Although see R (KR) v. SSHD [2012] EWCA Civ 1555: no compliance whatsoever with the PAP, but this *"failure was causally insignificant,"* the Court of Appeal held (see Maurice Kay LJ at para. 12; this is also covered below in relation to urgent cases).

PREPARING TO ISSUE

26. Once you have identified that the case is likely to be pursued by way of judicial review, you must address the practical issues of preparing the claim.

27. Always keep in mind what the client wants to achieve, and whether this is the best way to go about it. At each stage review whether you are likely to meet the client's end goal.

28. In terms of preparation, the division of labour between solicitor and counsel is usually that the solicitor prepares the **claim form** and **witness statement**(s) in support and counsel drafts the **grounds**. These are the three key documents/ types of documents required for the claim.

29. You will also need to prepare the **permission bundle** (see below). Once you have received a reply from the Defendant to the letter before claim (or the 14 day reply time has run out), and you advise your client to proceed, you will need to instruct counsel to draft the grounds as soon as possible. In the meantime, you should start preparing the permission bundle. You can in fact double-up on some tasks by preparing the papers for counsel in the order they are likely to be in the permission bundle, and even using a draft statement as the basis of your instructions (or vice versa).

30. The likely order for the bundle is as follows:

- List of essential reading
- Index
- Urgent consideration application, N463, and draft interim order (if appropriate)
- Claim form, N461 (T480 in the Upper Tribunal – see more on this below)
- Grounds for judicial review
- Witness statement from you and/ or client
- Relevant correspondence and other documents, preferably in chronological order (oldest document first) or grouped appropriately
- Primary and secondary legislation
- Guidance/ policies
- Copy public funding certificate/notice of issue (if appropriate)

31. When you copy the documents for counsel, copy them for yourself as well in this order to form the basis of your permission bundle, and so that you can easily discuss with counsel anything that should be left out (or added in). You will also then be able to begin paginating as soon as counsel indicates roughly how long the grounds will be. Some solicitors like to arrange the bundle in sections so that they can begin paginating before the grounds have been settled. These logistical considerations are important as you are likely to be short on time.

32. Heed Sedley's law of documents:

(1) Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.
(2) Documents shall in no circumstances be paginated continuously.
(3) No 2 copies of any bundle shall have the same pagination.
(4) Every document shall carry at least 3 numbers in different places.
(5) Any important documents shall be omitted.
(6) At least 10 per cent of the documents shall appear more than once in the bundle.
(7) As many photocopies as practicable shall be illegible, truncated or cropped.
(8) At least 80 per cent of the documents shall be irrelevant. Counsel shall refer in Court to no more than 10 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.
(9) Only one side of any double-sided document shall be reproduced.
(10) Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.
(11) Documents shall be held together, in the absolute discretion of the solicitor assembling them, by: a steel pin sharp enough to injure the reader; a staple too short to penetrate the full thickness of the bundle; tape binding so stitched that the bundle cannot be fully opened; or a ring or arch-binder, so damaged that the 2 arches do not meet.

33. **Covid-19 measures.** The standard procedure requires the filing and service of a hard copy bundle as described in the preceding paragraphs. However, Covid-19 measures require the filing of an electronic bundle. The Administrative Court has very specific requirements for the filing of electronic bundles. This is set out in the Administrative Court's Note: "Information for Court Users" (included the appendix to this course material) which we also set out below:

In all cases where the application is filed by a legal representative the electronic bundle must be prepared as follows and be suitable for use with all of Adobe Acrobat Reader and PDF Expert and PDF Xchange Editor. The document:

(a) must be a single PDF not exceeding 20mb in size;
(b) must be numbered in ascending order regardless of whether multiple documents have been combined together (the original page numbers of the document will be ignored and just the bundle page number will be referred to)
(c) Index pages and authorities must be numbered as part of the single PDF document (they are not to be skipped; they are part of the single PDF and must be numbered).
(d) The default display view size of all pages must always be 100%.
(e) Texts on all pages must be selectable to facilitate comments and highlights to be imposed on the texts
(f) The bookmarks must be labelled indicating what document they are referring to (it is best to have the same name or title as the actual document) and also display the relevant page numbers.
(g) The resolution on the electronic bundle must be reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another.
(h) The index page must be hyperlinked to the pages or documents it refers to.

Any application filed by a legal representative that does not comply with the above rules on electronic bundles may not be considered by a Judge.

34. Note that these requirements have not been adopted in immigration judicial reviews in the Upper Tribunal. The requirements are set out at paragraphs 23 - 26 of the Amended Presidential Guidance Note No.1 2020. The only requirement is that the size of any single pdf should not exceed 15MB (if necessary you will need to submit any documents in more than one pdf if it would otherwise exceed 15MB). However it is suggested that it would be best practice to prepare the electronic bundle in a similar way to those filed in the Administrative Court - in particular by bookmarking each document and hyperlinking the index - as it is likely to assist the Upper Tribunal Judge considering the bundle.

35. The claim form gives you the opportunity to make additional applications requesting, for example:
    - An extension of time;
    - Disclosure of documents;
    - Anonymisation of the proceedings.

36. Certain applications may be appropriate in an urgent case, e.g.:

- Directions for a permission hearing if there is particular urgency or interim orders are sought;
- Directions reducing the amount of time allowed for the Defendant to file their acknowledgment of service;
- Expedition, or other alterations to the usual timetable

37. Deal with the need for any application clearly in your statement that accompanies the claim form.

38. Since the implementation of regionalisation of the Administrative Court in 2009, you also need to consider venue for issue: see CPR Practice Direction 54D.

STEPS IN PROCEEDINGS

Issuing Proceedings

39. The claim may be issued in the Administrative Court Offices of the High Court which are at the Royal Courts of Justice in London, Birmingham Civil and Family Justice Hearing Centre, Cardiff Civil Justice Centre, Leeds Combined Court Centre, or Manchester Civil and Family Justice Centre unless the claim is one of the excepted types of claim (e.g. claims about control orders, terrorism and the disciplining of solicitors) in which case it must be issued in London. See PD 54.D. The general expectation is that a claim should be issued and determined in the region with which the claimant has the closest connection. Alternatively the claimant should outline why the claim has been lodged in a different region (which might include that it is the region in which the claimant's legal representatives are based). Most immigration claims have been transferred to the Upper Tribunal (Immigration and Asylum Chamber) and must be issued in the Upper Tribunal. See the Lord Chief Justice's direction (amended on 17 October 2014) for the types of claims which have been transferred: https://www.judiciary.gov.uk/publications/lord-chief-justices-direction-regarding-the-transfer-of-immigration-and-asylum-judicial-review-cases-to-the-upper-tribunal-immigration-and-asylum-chamber/
The forms to be used are also different; please refer to: https://www.justice.gov.uk/tribunals/immigration-asylum-upper/application-for-judicial-review

An application to the Upper Tribunal for judicial review and all related forms and correspondence should be sent to:

Upper Tribunal Immigration and Asylum Chamber

Field House
15-25 Breams Buildings
London
EC4A 1DZ 020
7073 4278

Or to one of the Administrative Court Offices in the region where the claimant has the closest connection in Birmingham, Cardiff, Leeds or Manchester.

40. You need to lodge the original claim form and witness statement, along with one copy of your permission bundle, indexed and paginated. The court will also need to seal (and return to you) a claim form for yourself, plus one for each of the Defendant(s) and any interested parties that you need to serve. The claim can be posted to the Administrative Court Offices or taken to the counter to be issued or left at the drop box in the ACO in London. Please note the following important practical considerations concerning opening hours:

(i) The ACOs outside London are open from 10am to 4pm for all applications including non-urgent applications. However in the ACOs in Birmingham, Leeds and Cardiff you must arrive at 3.45pm at the latest in order to be seen at the counter. In the ACO in Manchester you must arrive by 3.30pm at the latest in order to be seen at the counter on that day. If you arrive after that time then the claim will not be processed until the next day.

(ii) The ACO at the Royal Courts of Justice, London, is open between 10am – 4.30pm. However between the hours of 3pm – 4.30pm the ACO in London will only take receipt of urgent matters on form N463 (application for urgent consideration). If the matter is non-urgent then the claim (or any other application) may be left in the drop box at the ACO. The ACO will then process the claim the following working day but treat it as filed on the day that it was left in the drop box. However from the time that the claim is received (if left in the drop box or posted to the ACO) it may take a further week or two for it to be issued. It is important to bear in mind that even if you arrive at the ACO before 3pm, if you are not seen by the ACO counter staff by 3pm (e.g. because there is a queue for the ACO counter) then your claim or application will not be issued on that day. You will then have to decide whether to leave the claim or application in the drop box so that it can be processed the next day (but possibly not issued for a week or two) or return to the ACO early the next day so it can be processed and issued then. Your decision will depend on the particular circumstances of the case and the degree of urgency required.

(iii) Covid-19 measures. Until further notice all claims for judicial review (and other applications) must be filed electronically with the Administrative Court Office. This applies to both immediate/urgent claims and non-urgent cclaims for judicial review. mmediate/urgent applications must be filed by email to administrativecourtoffice.immediates@hmcts.x.gsi.gov.uk accompanied with either a PBA number, receipt of payment by debit/credit card or a fee remission certificate. Non-urgent claims must be filed electronically with the ACO using the Document Upload Centre. You must first send in by email a request to upload documents should be sent to AdministrativeCourtOffice.GeneralOffice@hmcts.x.gsi.gov.uk You will receive

an invitation from an ejudiciary.net email address to upload your documents. You should then upload the permission bundle (prepared in accordance with the court's guidance), including a PBA number or receipt of payment by debit/credit card. If you are commencing a claim you must also upload a further PDF document comprising an additional copy of the Claim Form and the decision document challenged.

(iv) The UTIAC judicial review counter at Field House operates a similar system to the ACO in London and is closed to non-urgent cases after 2.30pm. However it has a ticketing system so that when you arrive at the judicial review counter you take a numbered ticket and await your turn to be called. Provided you take a ticket before 2.30pm then you will be seen at the UTIAC counter after 2.30pm. If you arrive after 2.30pm then you may leave the claim with the fee in the UTIAC's drop box and it will be processed the next working day.

(v)

Covid-19 measures. The procedure is slightly different in the UTIAC from the Administrative Court as the requirement for electronic bundles is not as prescriptive as it is in the Administrative Court. Nevertheless, at present, all applications for judicial review (both urgent and non-urgent) are to be filed electronically by email with the Upper Tribunal. Immediate urgent applications are filed by email at utiac.londonjr@justice.gov.uk . Non-urgent applications are filed at UTIACJudicialReviewApplications@justice.gov.uk . When Fees can be paid using a PBA number if you have a fees account with HMCTS, otherwise upon receipt of the application contact will be made by a member of HMCTS staff who will make arrangements for an online payment to be made. Details of these procedures are set out in the Presidential Guidance Note and the HMCTS Coronavirus update for Judicial Review applications to the Upper Tribunal (both in the appendix to the course material).

41. You need to pay an issue fee or apply for a fee waiver if appropriate. If issuing a claim or any other application in the Royal Courts of Justice in London and if your firm does not have a fee account with the Administrative Court then remember that you must first attend the fees office to pay the fee before attending the Administrative Court Office (ACO) otherwise the ACO will refuse to issue the claim. The fees office is in a different part of the RCJ building. If you need to issue a claim or application on that day then remember to factor in enough time to attend the fees office first.

42. **Covid-19 measures.** See above and also the note from the Fees Office in the appendix to the course material.

Serving Proceedings

43. You must serve the issued claim form on the Defendant within seven days of issuing. Although it is not necessarily required, it is appropriate to serve a copy of the permission bundle on the Defendant at the same time. You must then lodge a certificate of service within seven days of serving. You should also serve any Interested Parties.

Acknowledgment of Service

44. The Defendant (and any Interested Parties) then have 21 days to lodge their **Acknowledgment of Service** ('AoS') if they chose to do so. Under the CPR they then have seven days to serve it on the Claimant, but as a Judge may in theory consider the question of permission on the papers once the AoS has been filed it is best practice, and appropriate, to serve it on the Claimant immediately. This is particularly so given the increasing importance of a reply to the AoS.

45. **Covid-19 measures.** Any response to a claim must be filed electronically with the ACO. Defendants who are represented should file all documents, including all Acknowledgements of Service and Respondent's Notices, and any interlocutory applications using the Document Upload Centre. Any request to upload documents must be made by the professional representative by email to:Administrativecourtoffice.generaloffice@hmcts.x.gsi.gov.uk . Parties must file an electronic bundle so that the case can be allocated to the judiciary to consider the application. The rules for electronic bundles, (set out above for Claimants) apply.

43. If you act for the Defendant, ensure that you comply with the 21 day (or any shorter) deadline. Form N462, the AoS, sets out the matters to be addressed. It is quite common for the 'Summary Grounds of Resistance' to be set out in a separate document, attached to the N462, although you can insert the Grounds on the form itself.

44. Highlight any procedural flaws, including any delay by the Claimant, which means that permission should be refused. On substantive issues, set out in summary form why the claim is not arguable. Depending on the case, this may focus upon the facts or the legal position. You are trying to persuade the Judge considering permission that you have a "knock-out blow" and that the claim

47 should not proceed any further. You may also wish to highlight any alternative remedies available to the Claimant which s/he has not used. Also it is important for both Defendants and Claimants to note that, where the Defendant asks it to do so (in which case, a summary of the grounds for this application must be included in the Acknowledgement of Service[9]), the court when considering whether to grant permission must consider whether it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred[10], unless it

[9]CPR 54.8(4)(a)(ia)
[10]Section 31(3C) & (3D) Senior Courts Act 1981 – as amended by s84(1) of Criminal Justice and Courts Act 2015.

considers there are reasons of exceptional public interest. The court may also consider that question of its own volition.

45. If you act for the Claimant, diarise these dates to keep track of a number of issues:
    - Has the Defendant actually filed anything?
    - Have they filed it, but not served it on you?
    - When will it go to the judge for a permission decision?
    - Do you want to reply?

46. Although the CPR does not specifically allow claimants to respond to the acknowledgment of service, there is no bar on this and it is an important tactical decision, particularly when you have not had a response to the letter before claim. This might be the first opportunity for you to see the Defendant's case, or they may have added in extra reasons or evidence since you served proceedings on them. As the permission decision (see below) is initially made on the papers (in most cases), it can be essential to respond to any 'killer blow' in the AoS. You must do so promptly and ensure the court receives your response and it is put before the judge considering the papers for the permission decision.

47. Time limits for the AoS are sometimes extended between the parties, but the new emphasis on complying with the CPR means that an application to court should be required of the defaulting party (in advance of the breach).

URGENT CASES

48. So far we have considered the standard steps and timetable in preparation for a judicial review challenge, and commencing the challenge: 14 days for a response to the pre-action protocol letter; 21 days for the AoS; permission considered on the papers thereafter; and if permission is granted, a substantive hearing months later. However there are many situations in which this standard approach will not be possible or appropriate – for example:
    - Because your client urgently requires assistance/ a service, e.g. she is street homeless and requires a roof over her head immediately; or an already removed service or assistance should be reinstated to prevent immediate harm, such as reinstating the provision of methadone to a methadone-dependent prisoner;
    - Because the public body may be about to take a step which is impossible or difficult to reverse if it goes ahead, e.g. to introduce a new policy or practice; or a prison or local authority social services department is about to separate a mother and newborn baby; or the UKBA is about to remove a person from the country to a place where he would risk serious harm; or a prisoner has been refused permission to attend his parent's funeral and it takes place tomorrow;
    - Because the three-month time limit for judicial review may be about to expire;
    - After proceedings have been issued there is a change of circumstances which means that the case has become very urgent, or a service is urgently required.

Note that some urgent cases (most immigration and asylum judicial review) must be brought in the Upper Tribunal (IAC) not the Administrative Court. The forms and procedures[11] are superficially different (and are not described below) but the principles are the same.

49. In urgent cases the standard steps and timetable can be altered. For example:
    - It may not be necessary to follow the pre-action protocol and wait 14 days for a response to the letter before claim ('LBC'). The timetable can be 'abridged,' or in exceptional emergency cases it may not be necessary to send an LBC at all (but in all cases, no matter how urgent, you must give reasonable notice to the public body – see below);
    - In certain emergency cases, judicial review proceedings can be issued within days of a solicitor being instructed. In exceptional cases this can even happen on the same day;
    - An immediate, temporary court order can be obtained to deal with pressing issues – for example requiring the public body to immediately take a particular step (such as provide accommodation), or to stop doing something (such as introduce a new policy or remove your client from the country). 'Injunctions' or 'interim relief' can protect your client or ensure that the status quo is maintained until a final decision can be made about the claim for judicial review;
    - The Court can be asked to speed up the usual timetable. For example, a 'rolled-up hearing' can be ordered, which combines the permission stage and the final hearing; the Court can abridge time for the AoS, requiring the public body to provide it within 7 or 14 days rather than 21; or the Court can require the final hearing to be expedited and heard by a particular date ('no later than…').

50. Below we summarise some of these urgent, emergency options which are available in judicial review. Bear in mind that what is appropriate will depend very much upon the circumstances of the case. For example:
    - If your client comes to you on the last day of the 3-month time limit, having taken no earlier action, and this delay is the only reason why the case is now 'urgent,' the vast majority of the urgent mechanisms will simply not be appropriate. You may, for example, decide you need to issue proceedings protectively, but still send a pre-action LBC, delay service of the claim form for as long as you can under CPR 54.7, and make clear to the other side that you will consider any response and withdraw the claim before their AoS is due if they give you a satisfactory answer;
    - In most housing/ social welfare/ community care cases interim relief can hold the position until the final hearing takes place, so once an urgent Order is obtained the timetable going forward can still allow for many if not all of the usual steps to take place (AoS, exchange of skeleton arguments, and so on);

[11]The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)
https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber

- However in some cases it is essential that the final hearing take place very quickly, and interim relief cannot assist.

51. Key questions for the Claimant's representatives to consider are:

    (i) How urgent is the case? And why?

    (ii) Does it require an urgent final hearing, i.e. a speedy resolution of the claim itself? Or would urgent interim relief hold the position until the substantive hearing?

52. Sometimes, in cases where interim relief is granted, the Claimant may not require a speedy final hearing, but this will be a concern to the Defendant. For example, where the interim relief is the provision of expensive accommodation pending the hearing, and the Defendant considers that there is no duty to provide it, s/he will be anxious to minimise the expenditure by ensuring the hearing takes place promptly.

Pre-Action Correspondence

53. As we have discussed above, the standard timetable under the PAP is for an LBC to be sent by the Claimant to the Defendant, allowing 14 days for a response. However, the PAP recognises that urgent situations may arise. It states at paras. 6 and 7:

> ***6.*** *This protocol will not be appropriate in very urgent cases. In this sort of case, a claim should be made immediately. Examples are where directions have been set for the claimant's removal from the UK or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so, such as where a local housing authority fails to secure interim accommodation for a homeless claimant. A letter before claim, and a claim itself, will not stop the implementation of a disputed decision, though a proposed defendant may agree to take no action until its response letter has been provided. In other cases, the claimant may need to apply to the court for an urgent interim order. Even in very urgent cases, it is good practice to alert the defendant by telephone and to send by email (or fax) to the defendant the draft Claim Form which the claimant intends to issue. A claimant is also normally required to notify a defendant when an interim order is being sought.*
>
> ***7.*** *All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of the case. Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it in good time before proceedings are issued and will take into account compliance*

54. If you are seeking to 'abridge' the usual timetable, and you are asking the public body to respond quickly, your LBC should explain why this shorter timetable is required. In some very urgent cases it

will not be possible to send a full LBC but you should always take all reasonable steps to ensure that the public body is on notice and informed. Even where the case is exceptionally urgent, it is very likely that you will have sufficient time to send a LBC or at least a letter which addresses the main issues, explains the urgency, and sets out what you intend to do. Such a 'paper trail' is critical to protect you and your client, and to maximise the opportunity for the Defendant to settle or negotiate.

55. We have noted above that a failure to comply with the PAP may have costs implications. This is another reason why a paper trail is helpful to the Claimant: it allows you to set out, at the time, why it is not possible to give 14 days for a reply, or why you cannot provide all of the detail required by the PAP. Such a letter may later be very relevant when it comes to either negotiating costs or applying to the Court for a costs order.

56. Failure to comply with the PAP need not necessarily be fatal to a costs application: see e.g. R (KR) v. SSHD [2012] EWCA Civ 1555, where Maurice Kay LJ said at paras. 11 and 12:

> *"11... It is a case in which there was plainly a degree of urgency, but on the chronology as I have set it out, it seems to me that it would have been possible for the solicitors to communicate by letter, or certainly electronically, with the Secretary of State or the Treasury Solicitor before issuing the application. The solicitors had commenced to act on 18 January. Even if it can be said that the urgency was less before the setting of removal directions on 25 January, there still remained 13 days before the actual date set for removal on 7 February.*
>
> *12. However, that is by no means the end of the matter. What is abundantly clear to me is that with more time, with prior warning, indeed with all the time in the world, the Secretary of State would have responded by robustly defending the application, as she did when her acknowledgment was served. It was not a hurried document in any way. It was a substantial document going to many pages, disputing the claim in every respect. From this I conclude that, even if there had been meticulous compliance with the pre-action protocol, it would still have been necessary for the appellant to make her application for judicial review and to pursue it to the point of the grant of permission before any likely positive response would have been forthcoming from the Secretary of State. To that extent, it seems to me that, by placing reliance on the failure to comply with the pre-action protocol in this case, Mitting J did fall into error because that failure was causally insignificant."*

57. However, KR is an unusual case, and given that the CPR expressly refers to pre-action conduct, and given that it will be unclear to a Claimant prior to issue precisely how the Defendant will respond, in our view notice should always be given prior to issue (even if very short) and a LBC should be sent if at all possible.

Interim Relief

58. CPR Rule 25 deals with 'Orders for Interim Remedies'. CPR r. 25(1) provides that the Court may grant an 'interim injunction' or an 'interim declaration,' but the former is far more common and is the usual remedy you will be seeking. It is not usually appropriate for the Court to grant permission on an urgent application: R (Karkut) v. SSHD [2005] EWHC 354 (Admin).

59. CPR r. 25.2 makes clear that interim relief can be obtained before proceedings have been issued:

> ***"Time when an order for an interim remedy may be made***
> ***25.2***
> *(1) An order for an interim remedy may be made at any time, including–*
> *(a) before proceedings are started; and*
> *(b) after judgment has been given.*
> *(Rule 7.2 provides that proceedings are started when the court issues a claim form)*
>
> *(2) However –*
> *…..*
> *(b) the court may grant an interim remedy before a claim has been made only if –*
> *(i)) the matter is urgent; or*
> *(ii) it is otherwise desirable to do so in the interests of justice;*
> *…..*
>
> *(3) Where it grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced."*

60. The formal test applied when interim relief is sought in judicial review is the same as in private law claims: 'the balance of convenience' (see BACONGO v. Dept of Environment of Belize [2003] 1 WLR 2839). The balance of convenience test involves considering whether the Claimant has a *prima facie* / arguable case, and considering where the greatest risk of injustice lies depending upon which party is ultimately successful.

61. There are some contradictory dicta regarding whether the first question is only whether or not the Claimant has a *prima facie* case. For example, in Francis v. RB of Kensington and Chelsea [2003] 1 WLR 2248 it is suggested that a strong *prima facie* case is required, which is a higher threshold, and some Judges do in practice apply a higher test when considering whether or not to grant a positive injunction (i.e. requiring a Defendant to do something) rather than a negative injunction.

62. When considering where the greatest risk of injustice lies, the Judge considering and determining the urgent application is of course under a duty to act consistently with the State's human rights obligations. By virtue of s. 6(1) of the Human Rights Act 1998 ('HRA'), it is unlawful for a public

authority to act in a way which is incompatible with a Convention right. 'Public authority' includes a court or tribunal (s. 6(3)(a)) and 'an act' includes a failure to act (s. 6(6)). Where the Claimant claims that his or her human rights are being infringed on a continuing basis and granting interim relief will not be determinative of the final outcome or infringe any other party's rights, interim relief will ordinarily be appropriate (unless clearly unfounded, or unless the Court needs to hear from the other side first and the issue can wait for a short time until that happens). This reflects the usual practice of the Administrative Court, which protects the position of defendants by including 'liberty to apply to discharge or vary the Order' in its interim Order.

63. There is a specific form for making an application for urgent consideration when the application for interim relief is being made at the same time as the claim for judicial review, the N463. This must be prepared along with a draft Order which sets out what you are seeking. Urgent applications can be made 'on the papers' during Court hours, or out of hours when the Court is closed, by telephone to the out of hours Judge. You must state the on the N463 form how quickly the N463 application must be considered abd whether should be considered immediately (within 3 days) or urgently (over 3 days). You must also state on the N463 form the nature and timeframe of consideration sought – e.g. how quickly should one or more of the following be considered: interim relief; abridgment of time for the AoS; consideration of permission; or, if permission is granted, the substantive hearing. If however the application for interim relief is either made at the pre-action stage i.e. before the claim is issued or after the claim for judicial review has already been issued and proceedings are ongoing, then it is not appropriate to use the N463 form and instead the application should be made on the N244 application notice form.

64. Please note that the N463 which includes questions regarding, the reasons for urgency, when you first learned of the need for an urgent application and what steps were then taken, and the reasons for any delay in making the application, so it is essential that you both act as speedily as possible, and retain a strong 'paper trail' of your actions – see below.

65. The strength of an urgent application for interim relief is often determined by how well the ground has been prepared in correspondence, so ensure you have a good paper trail. In almost all cases it will be possible to send a LBC, even if you are only giving a very short time for a response. Ensure you confirm that the letter has been received. Ensure that you 'chase' a response by telephone but also record these efforts in writing, e.g. with follow-up emails. If you can show that the Defendant has ignored repeated efforts by you to engage in a serious discussion of the case, or even respond to your correspondence, that will be a key point in your application. It is also essential that you provide the Defendant with an opportunity to agree to provide the interim relief you seek, or to explain its position for refusing to do so.

Assessing Urgency

66. When you lodge urgent judicial review proceedings together with the N463 and draft Order, you will need to tell the Court how quickly it needs to be determined and the reasons for urgency. Note that the Administrative Court's Judicial Review Guide warns that if the matter is put before a judge who concludes that the application was not urgent then he or she may refuse to deal with the matter on an urgent basis and may make an adverse costs order against the applicant or his legal representatives.

67. To complete the N463 form the claimant must indicate how quickly the Court must act. If the application itself, and/or interim relief, and/or the claim form must be considered by a judge within 48 hours then the claimant must set out the reason for the urgency as well as when it was first appreciated that the matter was urgent. See also the warning given by the President of the QBD in Hamid (below at paragraph 81).

Out of Hours Applications

68. Sometimes you will need to make an urgent application out of hours. This may be when proceedings have already been issued: for example, if: (a) proceedings have been issued, (b) the interim relief sought is required overnight so that the matter cannot wait until the morning, and (c) by 4.30pm (or 4pm in the ACO registries outside London) no Judge has yet looked at your papers, then you will need to call the out of hours Judge. A High Court Judge is on call at all times to deal with very urgent applications which cannot wait until 10am the next working day. In these circumstances you will have already worked up the issues and will be already armed with a draft interim Order, an N463 setting out the urgency and why you are requesting the relief in the draft Order, and a Statement of Facts and Grounds/ Statement of Facts along with a Witness Statement – which makes your task, and the out of hours Judge's task, far easier! However often you will only be instructed late in the afternoon and will be preparing for the telephone application with very limited time, and sometimes with very limited paperwork.

69. Note that when you have already lodged an N463 and it reaches 4.30pm the papers do not automatically get transferred to the out of hours Judge. Even if your solicitor has specifically spoken to the Administrative Court Office ('ACO') and requested that papers be passed in this way, and even if the ACO has informed your solicitor that this will be done, papers do not usually get passed in this way. You will need to contact the out of hours duty clerk to the Judge at 4.30pm via the RCJ switchboard, the process described below.

70. The key question to have in mind before making an out of hours application is, 'why can't this wait until 10am tomorrow?' Whilst your case may be sufficiently urgent to justify lodging an N463, it may not justify calling the Judge out of hours. This will often be the first question the out of hours duty clerk asks you when s/he calls.

71. The first step is to call the Royal Courts of Justice switchboard, at 020 7947 6000. You will speak to a Security Guard in the first instance. Say you have an urgent application for the Queen's Bench

Division out of hours Judge. You will be asked to give basic details: your name and Chambers/ firm; your telephone number; the name of the case; and sometimes the nature of the issue arising. S/he will then pass your details to the Queen's Bench Division out of hours duty clerk (the Judge's clerk).

72. You must ensure that your telephone line is free. It is often useful to give a landline number and keep your mobile number free in case your solicitor or client needs to contact you with any updates, or in case the other side wishes to negotiate: see further below.

73. The next stage is that the out of hours duty clerk will contact you. The out of hours duty clerk will ask you to complete the out of hours form[12] and return it by email to QBDutyClerk@hmcts.gsi.gov.uk. The out of hours form requires you to summarise the reason for your urgent application. Treat this as the first stage of your advocacy. Please note that you are not to fill in this form unless requested to do so, and the email address is not to be used unless you have been asked to take this step. A copy of the out of hours form can also be found at appendix 1 of the course pack.

74. The out of hours Judge may deal with the application on paper or may telephone you and you will need to make oral submissions to the Judge before a decision is made. The out of hours Judge may also telephone any other party to the application if he or she considers that to be appropriate (for example in immigration cases where the application seeks a stay on removal).

Proceed with Caution

75. There is a heavy onus on the solicitor and / or counsel making an urgent application, particularly when it is ex parte (see Buxton LJ in R (Madan) v. SSHD [2007] EWCA Civ 770). It is essential that you are scrupulously careful to give the Defendant every opportunity to settle or explain its position; that you keep a record of this; that you act as promptly as possible, making your application at the earliest possible time after it becomes apparent that an urgent application is needed; that you continuously review the merits of the interim relief application which you propose to make; and that you make "*full and frank disclosure"* of any adverse facts, law, previous applications, and the Defendant's position. In general, a party to proceedings who seeks relief without notice is obliged to make full and frank disclosure to the court of all relevant facts and law: Memory Corp Plc v Sidhu (No.1) [2000] 1 WLR 1443, CA . In Re M and N (Minors) [1990] Fam. 211, CA , Lord Donaldson of Lymington M.R. said at 229F:

> *"… [I]t cannot be too strongly emphasised that those who seek [ex parte injunctions] are under an obligation to make the fullest and most candid disclosure of all relevant circumstances known to them."*

76. Failure to comply with these obligations may amount to professional misconduct.

[12] The out of hours form can be found at: http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3007

77. For the solicitor with conduct, we recommend always providing out-of-hours contact details (including a mobile number) to the other side, and ensuring that you are available to speak at any time. For counsel, we recommend that you give one number (e.g. your landline) to the Court and keep another number (e.g. your mobile) free for any urgent updates from your solicitor or the other side.

78. Two cases are essential reading for anyone working in this area, as they make very clear what not to do:

(i) R (Lawer) v Restormel BC [2008] HLR 20; and

(ii) R (Hamid) v SSHD [2012] EWHC 3070 (Admin), [2013] CP Rep. 6.

79. In Lawer (a housing case) the Court was sharply critical of counsel's failure to make full and frank disclosure to the out of hours Judge. Interim relief had been secured on a false basis, and was later discharged.

80. In R (Hamid) v SSHD [2012] EWHC 3070 (Admin), [2013] CP Rep. 6, Sir John Thomas (QBD President) issued a dire warning to legal representatives applying for last-minute JRs and interim relief in immigration cases, but his comments have wider application. In this case he referred to the revised N463 and the new form for out of hours applications which has since been introduced (see above). He stated:

> *"The form was revised because the Administrative Court faces an ever increasing large volume of applications in respect of pending removals said to require immediate consideration. Many are filed towards the end of the working day, often on the day of the flight or the evening before a morning flight. In many of these applications the person concerned has known for some time, at least a matter of days, of his removal. Many of these cases are totally without merit. The court infers that in many cases applications are left to the last moment in the hope that it will result in a deferral of the removal."*

81. In that particular case the application was considered to be totally without merit ('TWM'), made late, and was essentially a re-run of an earlier, failed application. The solicitor behind the offending application is not named in the judgment. The Court had ordered personal attendance by the solicitor with conduct of the case and the solicitor apologised to the court, thus apparently avoiding naming and shaming. Sir John at paras. 7 – 10 spelt out the consequences of such conduct in future:

> *"7. However, we will for the future do the following. If any firm fails to provide the information required on the form and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated and the efforts made to notify the defendant, the court will require the attendance in open court*

of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case but the firm concerned. Non-compliance cannot be allowed to continue.

8. That will not be the only consequence of failing to complete the requirements set out in this form. First, one consequence may be that, if the form is not completed, the judge may simply refuse to consider the application. Second, if reasons are not properly set out or do not explain why there has been delay or the reasons are otherwise inadequate, the court may simply refuse to consider the application for that reason and that reason alone.

9. These remarks apply equally to the form soon to be introduced for out of hours applications and the form for renewals when an application has been refused on the papers.

10. These late, meritless applications by people who face removal or deportation are an intolerable waste of public money, a great strain on the resources of this court and an abuse of a service this court offers. The court therefore intends to take the most vigorous action against any legal representatives who fail to comply with its rules. If people persist in failing to follow the procedural requirements, they must realise that this court will not hesitate to refer those concerned to the Solicitors Regulation Authority."

See also R (Butt) v. SSHD [2014] EWHC 264 (Admin) and R (Kozlowski) v. SOCA & CPS [2013] EWHC 1741 (Admin), and R(Sathivel and ors) v SSHD [2018] EWHC 913 (Admin). In *Sathivel* the Divisional Court referred solicitors to the SRA for full investigation due to misconduct when making urgent applications for injunctions and warned of a stricter line being taken in the future (at §97):

"the duty owed by legal practitioners in this area to the Court is paramount. This duty includes an obligation on practitioners to ensure that they are fully equipped with all relevant documentation before commencing proceedings or making applications and this means that practitioners must make real efforts to obtain documents from previously instructed solicitors. It means that practitioners must act candidly and bring to the attention of the Court or tribunal gaps and lacuna in their evidence. It means that practitioners must avoid delaying the brining of urgent applciations. It means that there must be a halt to Grounds which (objectively) the draftsperson must know are wholly bereft of merit and are being advanced simply as part of an effort to cause delay."

82. We strongly advise that you include in the draft Order an undertaking to file an attendance note of your application, and that you prepare a contemporaneous note which includes all issues and documents which you put before the Judge.

83. If acting for a Defendant, when you are put on notice of a possible out of hours application consider your position as quickly as possible. If you can agree a compromise to prevent the need for an out of hours application (such as, for example, offering accommodation overnight in a homelessness case, pending you considering the matter more fully and taking instructions) do so. If you consider the application to be ill-founded, set your position out clearly in writing, and expressly ask for your comments to be put before the Judge if an application is made.

84. For the Claimant, if the out of hours Judge makes a determination, whether or not your out of hours application is successful, in accordance with CPR 25A PD 4.5 you must file a copy of your out of hours application with the court the next working day, together with the application fee. You should send the form and fee to the Royal Courts of Justice Fees Office. You must pay this fee in addition to any fee required for any other application/claim the judge directs you to issue.

Return Dates

85. Sometimes the Court may grant interim relief temporarily, on an ex parte basis, but order that a hearing take place on notice to the other side. Tactically, if you are acting for a Claimant in a case of real urgency but where there are strong arguments against you, requesting interim relief for a short (24 or 48 hour) period followed by a return date can be sensible.

Applying to Set Aside an Interim Order

86. If acting for a Defendant, you may wish to object to an Order which has been made, and apply to have it set aside or varied. In those circumstances, you should write to the Claimant setting out your concerns. It may be possible for there to be a variation by agreement. If no agreement is reached, you may need to apply to the Court for the Order to be set aside or varied.

87. Concerns have been raised with the Administrative Court Users' Group regarding the absence of a simple process for such applications. They are made by using the standard Application Notice, the N244 or PF244. However there is no 'urgent' equivalent for a Defendant – no mirror document to the N463 for Claimants. Defendant practitioners complain that they have difficulty having such applications dealt with promptly. The advice from the Administrative Court is to clearly mark such applications as urgent and to raise any concerns regarding delay with senior ACO staff.

Abridgment of Time and Rolled-Up Hearings

88. Sometimes interim relief will protect the Claimant's position, and the usual timetable to permission can then be followed. However, in some circumstances it is essential that the final hearing take place swiftly. The Claimant may need to seek an Order at permission stage that the hearing be expedited.

In rare cases, a 'rolled-up hearing' will be required, i.e. a hearing combining the permission and substantive stages. In others, the permission stage will remain but needs to progress faster than usual. In these cases, the Claimant should apply for abridgment of time for the AoS, e.g. 14 days rather than the usual 21. This will also require an N463 and draft Order.

THE PERMISSION DECISION

89. Ordinarily this decision is first considered by a judge considering the papers alone (ie without an oral hearing).

90. The permission stage is intended to be a filter for unsustainable claims, to shield public bodies from *"weak and vexatious claims":* per Lord Bingham in R v. SSTI, ex parte Eastway [2000] 1 WLR 2222. The test is, in theory, 'arguability': whether the Claimant has a 'realistic prospect of success', or whether the Defendant has scored a 'knock-out blow' (see R (Ewing) v Deputy Prime Minister [2005] EWCA Civ 1583). Lord Diplock in National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617 at 644A suggested that permission should be granted where, *"on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case".*

91. However in practice the test applied at permission stage is far more stringent. For example, oral permission hearings (when they are needed) often last for an hour or more, and the court adopts a searching, probing approach, exploring the strength of the substantive issues. This is why the reply to the Acknowledgement of Service is particularly important for paper decisions.

92. In considering the paper permission application, a judge can make the following types of orders (in each case with appropriate case management directions):

    (1) Permission is refused – in this situation, the claimant can renew the application to an oral hearing by filing a notice with the court within 7 days. Care must be taken in cases where the claimant is legally aided, to seek urgent authority to proceed from the Legal Aid Agency. Absent such authority, the work done in seeking to have the permission application reconsidered at an oral hearing will not be covered by legal aid (and so the claimant will not have the de facto costs protection afforded by legal aid). Legal aid is considered further in session 4.

    (2) Permission is refused and the claim certified as totally without merit – in this situation, the claimant cannot renew the permission application orally, although there is a right of appeal on the papers to the Court of Appeal.

    (3) The permission application is adjourned to an oral hearing – in this situation, the court will invite the defendant and any interested parties to make submissions on the question of permission at an oral hearing. Where the claimant is legally aided, it will generally be easier to persuade the

Legal Aid Agency to extend legal aid to cover the oral permission hearing where an oral hearing is directed by the court, than where permission is refused on the papers.

(4) The case is adjourned to a rolled up permission/substantive hearing (so that the substantive hearing is heard - if permission is granted - at the same hearing as the permission application). The court may make an order of this sort where it recognises that the case is urgent but does not consider itself able to grant permission on the papers.

(5) Permission is granted (on one or more grounds). In this situation the claim will proceed to a substantive hearing on payment by the claimant of a further court fee.

93. At an oral permission hearing, the court can grant or refuse permission. If permission is granted, the case will proceed to a substantive hearing, as if permission had been granted on the papers. If permission is refused, the claimant can appeal against the refusal of permission to the Court of Appeal.

94. **Covid-19 measures.** The default position at present in both the Administrative Court and the Upper Tribunal for immigration judicial reviews is that hearings will be conducted remotely using a video conference or telephone conference call facility. See the protocol regarding remote hearings (included in the appendix to the course materials).

Information about financial resources

95. When sections 85 and 86 of the CJCA come into force, section 31(3) of the Senior Courts Act 1981 will be amended as follows (see underlined section):

> *No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court' and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates, <u>and the applicant has provided the court with any information about the financing of the application that is specified in rules of court for the purposes of this paragraph</u>.*

<u>Part 2: PERMISSION TO THE FINAL HEARING</u>

96. There are certain routine steps which should take place following the grant of permission in all judicial reviews: the filing of Detailed Grounds of Resistance and any supporting evidence by the Defendant; a listing date being secured; exchange of Skeleton Arguments; the hearing itself.

97. There are, however, many variations on that theme, depending upon matters such as the directions made at permission stage, the urgency of the case, the issues, whether the Claimant wishes to file further evidence or amend his or her Grounds, whether interim relief is sought, and whether there are any third party interveners.

NEXT STEPS FOLLOWING THE GRANT OF PERMISSION

Listing – Securing a Date for the Hearing

102. Listing is dealt with in more detail below. However, if the claim is urgent, and the permission order recognises this, then steps should be taken very promptly after the grant of permission to ensure that a speedy listing is secured. In such cases, it is sensible for the Claimant's solicitor to contact the Administrative Court list office (if in London – 020 7947 6655 – select option 3) or the nominated court lawyer. The solicitor can emphasise the need for an urgent hearing, as per the Permission Judge's order, and press to secure a speedy listing. It will usually be the Claimant's solicitor who is anxious to ensure that the case gets listed promptly, although in some cases the Defendant may wish to take these steps (for example where there is costly interim relief in place).

103. In other cases, the list office will usually contact counsels' clerks to discuss listing dates a number of weeks or months after permission has been granted.

Defendant's Detailed Grounds and Evidence

98. CPR 54.10(1) provides that where permission to proceed is given the court may also give directions. The content of these would vary depending on the nature of the case, but typical directions made (which the Judge may expect you to have as a template, and to send to him/her for approval) would be as follows:

1. Permission to apply for Judicial Review is granted.
2. The Defendant do file with the Court and serve on the Claimant detailed grounds for contesting the application and any written evidence within 35 days from the date of service of this Order.
3. Any reply and any application by the Claimant to adduce further evidence must be filed within 14 days of service of detailed grounds for contesting the application.
4. The application shall be listed on the first available date thereafter with a time estimate of 3 hours.
5. The Claimant must file with the Court and serve on the Defendant a skeleton argument and trial bundle no later than 21 days before the hearing of the judicial review.
6. The Defendant must file with the Court and serve on the Claimant a skeleton argument not later than 14 days before the hearing of the judicial review.

59

7. The Applicant must file an agreed bundle of authorities, not less than 3 days before the date of the hearing of the judicial review.

99. The reference to the Defendant filing its Detailed Grounds for contesting the claim arises from CPR r.54.14:

> *(1) A defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve –*
>
> *(a) detailed grounds for contesting the claim or supporting it on additional grounds; and*
>
> *(b) any written evidence,*
>
> *within 35 days after service of the order giving permission.*

100. This standard 35-day timetable will not apply if the Judge when granting permission has made bespoke directions setting a different timetable.

101. CPR Part 54 does not explicitly envisage Claimants responding to the Detailed Grounds and evidence. However, as discussed in Session 2, it is now increasingly common for the Permission Judge to build into the timetable an opportunity for the Claimant to respond to the Detailed Grounds and file any further evidence, and, if acting for a Claimant, it is sensible to request that this be provided for in the order granting permission. See further below at para. 11 onwards.

INTERIM APPLICATIONS

Procedure for making interim applications

104. The procedure in CPR Part 23 applies and an application should be made in an application notice. Note that under CPR part 54.1A a Court officer who is a barrister or solicitor may decide matters that are incidental to proceedings in the High Court or where there is no substantial dispute. This is subject to review by a judge (54.1A(5)).

105. A different procedure applies to applications for interim relief (e.g. an injunction) made after the start of proceedings. In that case CPR part 25 applies.

Further evidence and amendment of the Claimant's case

106. Part 54 contemplates that the evidence and issues will crystallise at the time of the Defendant's Detailed Grounds and evidence. The rules do not explicitly provide for the Claimant to serve evidence in response and this may not be necessary. Permission may be given for further evidence under Part 54.16.

107. Permission is specifically required for any party to rely on expert evidence (even expert evidence relied on in the original grounds). This will not normally be heard live but CPR Part 35.4 still applies: "no party may call an expert or put in evidence an expert's report without the court's permission" - R (Kemp) v Denbighshire Local Health Board [2006] EWHC 181 (Admin). BY Development Ltd v Covent Garden Market Authority [2012] EWHC 2546 (TCC) explains that expert evidence is rarely needed or relevant in judicial review claims where the court is not the primary decision-maker. Note the criticism of late and inappropriate expert evidence in JG v Lancashire CC [2011] EWHC 2295 (Admin) at para 59. The proper procedure to follow when seeking to admit expert evidence, and the circumstances in which permission may be granted to rely on it, were considered in some detail in R (The Law Society) v The Lord Chancellor [2018] EWHC 2094 (Admin) at paras 35 to 61.

108. However, oral evidence including oral expert evidence is usually heard in age assessment judicial reviews ('AAJR') in the Upper Tribunal (IAC) sitting in its judicial review capacity. In R (A) v London Borough of Croydon [2009] UKSC 8 the Supreme Court held that in cases involving the exercise of a local authority's statutory obligations in respect of children, a child's age was a matter subject to determination by the court as a precedent fact. Neither the applicant nor the respondent bear a burden of proof but it is for the Tribunal to enquire and on the basis of the evidence produced to make a decision on a balance of probabilities.

109. In practice most applications to admit further evidence are dealt with by consent. The parties will often provide the court with evidence bringing the facts up to date at the time of the hearing. They may be under a duty to do so to comply with the duty of candour.

110. It may be necessary to change the focus of the Claimant's case following receipt of the Defendant's evidence or subsequently as the case develops (for example where a decision or further decision is made in an immigration case).

111. If the Claimant wishes to rely on grounds other than those for which permission was granted then they require permission and must (Part 54.15 and PD para 11) give not less than 7 clear days' notice before the hearing date (or warned date).

112. If the change goes further than adding to the grounds for the challenge to the original decision (for example if there has been a fresh decision or failure to deal with new material) then an amendment to the grounds may be necessary (Munby J in R (P, W, F and G) v Essex County Council [2004] EWHC 2027 (Admin), R (MB) v Lambeth BC [2006] EWHC 639, R (F) v Wirral BC) [2009] EWHC 1626. At para 35 of the Essex case Munby J said:

> *"Where a Claimant seeks to make a case sufficiently different from that set out in his Form N461 as to require an amendment to the Form N461 then it seems to me that it is incumbent on him (a) to seek permission to amend his N461, (b) to give notice of his wish to amend at*

61

the earliest possible moment and in any event no later than 7 clear days before the hearing and (c) to formulate the new or additional case he wishes to make in a properly drafted document setting out, in the manner and with the detail required by CPR Part 54.6 and by Form N461, the precise amendments for which he is seeking permission."

113. In R (Messaoud) v SSHD, 17 Jul 2013, Phillip Mott QC suggests that the critical question may be whether the additional grounds were so different that the original grant of permission does not apply to them.

114. But see R (Bhatti) v Bury MBC [2013] EWHC 3093 (Admin) for a discussion of the circumstances in which a challenge to a fresh decision can be included in the original claim form at all. This is permitted if the new decision is in response to evidence filed by the Claimant and to the same effect (applying R v SSHD, ex p Turgut [2001] 1 All ER 719) but not where the Defendant has withdrawn the original decision and embarked on entirely different decision making (Bhatti at para 17).

Disclosure

115. CPR Part 31 (disclosure) applies to all proceedings except for those on the small claims track but CPR PD 54A 12.1 states that disclosure is *"not required unless the court orders otherwise"*.

116. Formerly very restrictive criteria applied derived from R v SSFCA, ex p World Development Movement [1995] 1 WLR 386. Disclosure would generally be ordered only where the Defendant's evidence could be shown to be materially inaccurate or misleading.

117. This is no longer the case. The rules were substantially relaxed by the House of Lords in Tweed v Parades Commission of Northern Ireland [2007] 1 AC 650.

> *"it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.* – Para 32 per Lord Carswell; see also Lord Brown at para 56.

118. However, this does not mean that disclosure will be ordered as a matter of routine. *"The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly*."[13] Normally judicial review applications raise an issue of law and disclosure is unnecessary; disclosure should be limited to the minority of cases where the *"precise facts are significant"* – Lord Bingham in Tweed at para 2-3. Lord Brown thought the impact would be simply that *"the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions"* and that orders for disclosure would remain exceptional (para 56).

119. The courts will guard against *"fishing expeditions,"* i.e. disclosure applications with *"no solid evidential basis*" – R (Hoppr Entertainment Ltd) v Office of Communications [2011] EWHC 3693 (Admin), para 19 and 21. In Ford v FSA [2012] EWHC 997 Burnett J refused disclosure of correspondence between the FSA and third parties about the use of confidential information because there was *"no reason to suppose that anything is amiss".* Yet, *"there is – of course – a very high duty on public respondents ... to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide*" – R (Quark Fishing) v SSFCA [2002] EWCA Civ 1409, para 50. There is an *"obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged"* – Tweed, para 31.

120. If an application for disclosure is made then it must be *"properly focussed on auditing the legality of public decision making"* – Bredenkamp, para 11.

121. Disclosure may be ordered despite the fact that documents are confidential – R (Mohammed) v SSD [2012] EWHC 3946 (Admin), para 16-18. In appropriate cases the court may require documents to be produced to it so that it can assess whether disclosure is necessary – Re Finucane's application [2013] NIQB 45.

122. Disclosure may also be ordered to make the decision under challenge intelligible. For example, in R (Firstgroup Plc) v Strategic Rail Authority [2003] EWHC 1611 Admin anonymised disclosure was ordered of scores in a rail franchise exercise, in part so that the court could evaluate an irrationality challenge.

123. It may also be necessary to make disclosure so that cross examination can be effective – Al Sweady (below):

> *"For there to have been effective cross-examination, it was vital for full disclosure to occur as otherwise the evidence of those witnesses could not be effectively challenged and appraised with the consequence that the truth would not have been discovered. Put in another way,*

[13] See R (Bredenkamp) v FCO [2013] EWHC Admin 2480 for a recent example.

63 *where the court is involved in fact-finding on issues as crucial to the outcome of this case as they were in the present case, the approach to disclosure should be similar to that in an ordinary Queen's Bench action"* – para 27.

124. The Court can order disclosure of the gist of sensitive information. In A (a Child) v CC Dorset [2010] EWHC 1748 (Admin) the Claimant had been taken to a safe centre because he had allegedly been seen with an *"inappropriate adult".* The police did not give any further information and Claimant started a claim for a declaration and damages. The interested party applied to prevent the police serving sensitive information on C to justify their actions. Blake J directed that a gist should be given of the nature of the harm that the police considered C might be subject to but not the grounds for that belief. He invited the parties to agree that C's legal team should have access to the material without disclosing it.

125. Note, however, that in relation to summarised documents, the House of Lords in Tweed held at para. 4 that "*where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says.*"

126. In appropriate cases, a confidentiality ring may be another option to allow sensitive material being disclosed – R (Mohammed) v SSD [2012] EWHC 3454 (Admin). (Although the decision was doubted in AHK v SSHD [2013] EWHC 1426 (Admin), para 22).

127. Claimants should also consider the possibility of applications for information under the Freedom of Information Act 2000 and the Data Protection Act 1998.

Cross examination

128. The traditional approach has always been that Judicial review applications are ordinarily heard on paper and factual disputes will generally be resolved at trial in the Respondent's favour – R. v Board of Visitors of Hull Prison Ex p. St Germain (No.2) [1979] 1 W.L.R. 1401. This does not apply where the evidence is manifestly wrong such as the where it is inconsistent with undisputed objective evidence (S v Airedale NHS Trust [2002] All ER (D) 79 , Stanley Burnton J) or the documents show that the Defendant's evidence *"cannot be correct"* (Silber J in R (Mc Vey) v Secretary of State for Health [2010] CP Rep 38 at para 35 and R (Westech College) v SSHD [2011] EWHC 1484 (Admin) at 22-7).

129. Parties and the court should always consider carefully if there is any critical factual issue which requires orders for cross-examination or disclosure. Courts should not be reluctant to make such

64 orders in suitable cases – R (Al Sweady) v Secretary of State [2010] HRLR 2 at 27-8. They must consider at an early stage whether cross examination may be necessary and seek appropriate directions – *ibid* para 64.

130. Examples of cases where applications to cross examine may be allowed are:

a. The court has to reach a conclusion on disputed issues of fact, for example:

(i) a question of collateral fact or where there is a dispute as to the procedure that was actually followed (see e.g. R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2012] EWHC 2115 (Admin). Even in this case the Court retains a discretion and may resolve the issues on the papers (R v CC Thames Valley ex p Cotton [1989] COD 318).

(ii) Where there is disputed allegation of a human rights breach raising a hard edged question of fact. In Al Sweady (above) at para 19 the court said:

> *"In our view, it was necessary to allow cross-examination of makers of witness statements on those "hard-edged" questions of fact. We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its articles".*

Issues of fact in that case were:

- Where had Al Sweady been killed. The applicability of Art 2 depended on this.
- Had the Claimants been subjected to ill treatment in a way that infringed their Art 3 rights.
- Was detention of some of the Claimants justified for the purposes of Article 5? Were they held for imperative reasons of security?
- Would the Claimants be subjected to ill treatment if handed over to the Iraqi authorities.

b. Where fundamental human rights are at stake and the court has to review the merits of the decision – for example questions as to the compulsory treatment of a detained patient - R (Wilkinson) v RMO Broadmoor Hospital [2002] 1 WLR 419.

131. Recent cases have suggested that a more relaxed approach to ordering cross examination is not confined to cases concerning fundamental human rights:

c. R (MH) v SSHD [2009] EWHC 2506 (Admin) Sales J:

65

"The fact that a claim (such as a claim in tort) happens to be brought using the procedure in Part 54 does not mean that ordinary procedures employed by the courts for resolving substantial disputes of fact (including cross-examination) are not to be applied"[14].

d. R (Mc Vey) v Secretary of State for Health [2010] CP Rep 38 – a case involving whether the Defendant had acted to amend a VCJD scheme when so advised by trustees. No application for cross examination was made but Silber J stated as a general rule:

"The proper course for a Claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies".

e. R (Shoesmith) v OFSTED and others [2010] EWHC 852 (Admin). The question whether the Claimant had had an adequate opportunity to address concerns may be an issue for cross examination.

Further information

132. Under Part 18 a court may require a party to *"(a) clarify any matter which is in dispute in the proceedings or (b) give additional information in relation to any such matter whether or not the matter is contained or referred to in any case".* Where such an order is made, the party must file and serve a response within a specified timeframe." (r18.1(2)). The Court may direct that the information provided (voluntarily or following an order under r.18.1) must not use it for any purpose outside those proceedings (r.18.2). However, before applying for an order under part 18, the party seeking clarification or information (the first party) should first serve on the party from whom it is sought (the second party) a written request stating a date by which the response to the request should be served and allowing a reasonable time for that response (PD 18.1.1). Practice Direction 18 sets out the detail needed to be included in the first party's request, (PD 18.1.6) and in the second party's response (PD 18.2.3). The second party must verify his response with a statement of truth (PD 18.3). In Bredenkamp, Dingemans J allowed (in part) an application for further information but said that such requests should be exceptional. It was common ground that the principles for disclosure set out in Tweed should apply (para 19-20).

133. Even in the absence of a formal Part 18 request parties should liaise to clarify the issues in dispute, however Part 18 may be more effective at promptly eliciting information than informal requests and FOIA or DPA requests. A recent example is in the systemic challenge to the legal aid 'Exceptional Case Funding' regime in the case of Gudanaviciene & Ors v Director of Legal Aid Casework & Anor

[14]This was a claim for false imprisonment but the remarks were general. In the event there was no live evidence and the Claimant's statements were treated with a *"measure of generosity"* because they had not been challenged.

66 [2014] EWHC 1840 (Admin) (PLP were instructed to act for the Official Solicitor on behalf of the Claimant). Following evidence filed by the Defendant, the Claimant made a Part 18 request for further specific information. The Defendant robustly resisted the request and relied on Bredenkamp. An application was made to the Court, which ordered disclosure of the further information sought on the basis that it was relevant as it related to matters raised in the Defendant's evidence and was required to resolve the case justly and fairly.

CASE MANAGEMENT PROBLEMS

155. In the event that directions are not or cannot be complied with, it may be necessary to make an application for relief from sanction. In *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537, the Court of Appeal gave tough new guidance on the Court's approach to granting relief from sanctions for breach of a court rule or order under the amended CPR 3.9 brought in by the Jackson reforms. The decision led to a flood of satellite litigation in which parties sought to take their opponents to task for procedural failings and, in many cases, harsh sanctions were imposed for relatively minor breaches.

156. In Denton & Ors v TH White Ltd & Ors [2014] EWCA Civ 906, The Court of Appeal held it would be useful for courts, in determining relief applications, to apply a 'three-stage' test, namely:

- identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1)
- this is instead of the 'triviality' criteria introduced by *Mitchell*
- in considering this factor the court could look at whether the breach imperils future hearing dates or otherwise disrupts the conduct of litigation. *Note*: the disruption factor is not to be considered by reference to the instant proceedings alone but by reference to litigation generally
- If the breach is determined to be neither serious nor significant, relief is likely to be granted and the court is unlikely to need to spend much time on the second and third stages. However, if the breach is determined as being serious or significant then the second and third tests below 'assume greater importance' [para 28]
- consider why the failure or default occurred (and, by implication, whether these are 'good' or 'bad' reasons). Note: the Court of Appeal was keen to stress the examples given in para 41 of *Mitchell* were no more than examples
- evaluate all the circumstances of the case, so as to enable it to deal justly with the application including CPR 3.9(1)(a) and (b)
- issues that could be taken into account at this third stage could include the promptness of the application; other past or current breaches; etc [para 36]

157. There appears to be some difference of opinion between the Lords Justices as to the weight to be given to factors (a) and (b) i.e. is it a case that those factors should be given particular weight

(majority view) or is it a case that they are simply factors to be taken into account every time as part of 'all the circumstances of the case' ie although 'factors (a) and (b) should "have a seat at the table, not the top seats at the table". Ultimately what rule 3.9 requires is that the court should "deal justly with the application"' (Jackson LJ's view at para 85)

SETTLEMENT AND DISCONTINUANCE

137. Settlement is being considered in more detail in Session 5. However, some of the brief key aspects are summarised here.

138. Parties are encouraged to use Alternative Dispute Resolution ('ADR') – R (Cowl) v Plymouth City Council (Practice Note) [2001] EWCA Civ 1935; see also Practice Statement 1st February 2002. See Varda Bondy's September 2005 paper *Mediation and Judicial Review: Mind the Research Gap* for a more sceptical approach.

139. If the parties do settle then they must inform the court promptly so as to avoid the Court wasting time reading and preparing the case – R (Craddock) v PCA [2005] EWHC 95 Admin. Failure to do so may result in a wasted costs order - R (Gassama v SSHD [2012] EWHC 3049 (Admin); R (Grimshaw) v LBC Southwark, unreported, 17 Jul 2013, Leggatt J. (Wasted costs orders are also being considered in Session 5.)

140. PD 54 para. 17 appears to require the consent of the Court for all settlements except those that relate to costs only. The intention behind this is to ensure that where the agreement involves the doing of a judicial act (for example a quashing or mandatory order) the court should be satisfied that it has power to make the order concerned. Many agreements do not involve this type of act on the part of the court, for example where the parties simply agree that the Defendant should take a fresh decision.

141. It often happens that the parties agree all issues with the exception of costs. The court's approach in relation to costs in such circumstances will be addressed in Session 5.

142. A Claimant may discontinue their claim at any time by notice under CPR Part 38 (subject to the restrictions in that rule which include 38.2(2) – permission is required if there has been an injunction or undertaking). If they do so, they must pay the Defendant's costs unless the Court orders otherwise.

PREPARATION FOR THE HEARING

Listing for the full hearing

134. Listing policy is set out at http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/listing-policy. Where counsel are on the record then the court usually attempts to fix a date convenient to counsel. Some cases are placed in the short warned list where they are liable to be called on at less than a day's notice from the warned date.

135. Note that if you act for a third party intervener there are sometimes difficulties with ensuring that the court takes account of your counsel's availability, despite you having been granted permission to intervene. It is essential to ensure that the court records have been updated to include your legal team's details as this does not always happen automatically once permission to intervene is granted.

136. The parties must keep the Court informed of any matters likely to affect the length of the hearing. They must also notify the court if there is a good reason for it not to be listed (e.g. settlement negotiations).

Determination without a hearing

143. Under CPR Part 54.18 the *"court may decide the claim for judicial review without a hearing where all the parties agree".* This will normally be suitable for simple cases[15] only but might also be used to *"tie-break"* where the parties have agreed on everything apart from a discrete issue but do not want to incur the costs of a hearing. The rules and practice direction do not set out any procedures for dealing with a case in this way[16]. Once permission has been granted then the Court does not have any other general power to dispose of it without a hearing unless the parties agree – BP v SSHD [2011] EWCA Civ 276.

144. Insisting on an oral hearing when it is not needed (e.g. on costs) can be unreasonable conduct meriting an adverse costs order – R (J) v Hackney LBC [2010] EWHC 3021 (Admin).

Timetable and skeleton arguments

145. Skeleton arguments are dealt with in para. 15 of the Practice Direction to Part 54. The Claimant must file a skeleton 21 working days before the hearing or the short warned list date. The Defendant must file their skeleton 14 working days before those dates. Failure to observe these time limits may result in *"disagreeable"* costs orders – Haggis v DPP [2003] EWHC 2481, para 30.

146. Skeleton arguments may now be filed by email. Each region has its own email address. These are listed at: http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court. This also contains a template prompting advocates to include the date of the hearing and time estimate for the hearing and pre-reading.

147. PD 54A para 15.3 requires that skeleton arguments must contain:
    a) a time estimate for the complete hearing, including delivery of judgment.
    b) a list of issues;

[15]In McVey [2010] EWHC 1225 (Admin) an issue about the entitlement of a person to be an interested party was dealt with on paper only.
[16]Note that a decision given on the papers in this way is a final decision so that any challenge is by appeal and not to restore the matter for an oral hearing - R (Jones) v Nottingham CC [2009] EWHC 271 (Admin).

c) a list of the legal points to be taken (together with any relevant authorities with page references to the passages relied on);

d) a chronology of events (with page references to the bundle of documents);

e) a list of essential documents for the advance reading of the court (with page references to the passages relied on) (if different from that filed with the claim form) **and a time estimate for that reading**;

f) a list of persons referred to.

148. Citation of authorities should follow the Practice Direction of 9 April 2001 ([2001] 1 WLR 1001). In particular: *"The skeleton should…clearly identify what authorities, and what parts of what authorities, are relied on, and carry the certification of counsel as required by the Lord Chief Justice's Practice Direction [2001] 1 WLR 1001*[17]*"* – R (Prokopp) v London Underground [2003] EWCA Civ 961, para 90; see also Munby LJ's *"afterword"* in R (B) v CC Derbyshire Constabulary [2011] EWHC 2362 (Admin) at paras. 96-101.

149. At the time of drafting the skeleton argument Claimants should also take stock and reconsider:

a) What the object is of the proceedings and what relief the Claimant seeks. It is helpful to have a draft of the Orders that the Court might be invited to make and to identify the relief sought in the skeleton.

b) Whether it is necessary to pursue all of the arguments initially advanced or whether the case can be more usefully focused:

> *"One of the merits of great advocates, as Lord Pearce pointed out in Rondel v Worsley [1969] 1 AC 191 at p 255G, has been the ability ruthlessly to sacrifice nine points and win on the tenth and best…The leave no stone unturned approach is no longer to be encouraged…"*
>
> Munby J in R (Bateman) v LSC [2001] EWHC Admin 797.

[17]The relevant passage of the Practice Direction is para 8, which reads:

"Methods of citation

8.1 *Advocates will in future be required to state, in respect of each authority that they wish to cite, the proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition. If it is sought to cite more than one authority in support of a given proposition, advocates must state the reason for taking that course.*

8.2 *The demonstration referred to in paragraph 8.1 will be required to be contained in any skeleton argument and in any appellant's or respondent's notice in respect of each authority referred to in that skeleton or notice.*

8.3 *Any bundle or list of authorities prepared for the use of any court must in future bear a certification by the advocate responsible for arguing the case that the requirements of this paragraph have been complied with in respect of each authority included.*

8.4 *The statements referred to in paragraph 8.1 should not materially add to the length of submissions or of skeleton arguments, but should be sufficient to demonstrate, in the context of the advocate's argument, the relevance of the authority or authorities to that argument and that the citation is necessary for a proper presentation of that argument."*

70

c) What documents (and authorities) are really necessary for the Court. In Prokopp, Schiemann LJ said:

> *"Even if one were prepared to accept – which I am not - that they were all relevant to those actions they were certainly not relevant to the appeals before us. Their production before us not only involved a grotesque waste of environmental assets such as trees but an equally grotesque waste of public money and judicial time and energy in laying one's hand on the few documents and authorities which are relevant. It is the duty of Counsel and solicitors to go through material in order to decide what is relevant. Counsel apparently did this and referred to what they thought was arguably relevant. Yet far more was placed before us".*

150. A receipt for the skeleton should be obtained when lodging it (if done by email there should be an automated confirmation). Spare copies should be taken to the hearing and check that the court has received it.

Hearing bundles

151. The Claimant must file a paginated and indexed bundle of documents with the court at the same time as the Claimant's skeleton argument - PD54A.16. The contents of the bundle must be agreed between the parties.

152. There is no requirement to provide bundles of authorities, but it is good practice to agree one and lodge it before the hearing. Directions will often require this in any event.

Running Order and Timetable

153. The usual running order in a judicial review is that the Claimant goes first to set out his or her case; the Defendant responds; and the Claimant then has the last word, in the form of a reply at the end of the hearing. In the vast majority of cases there will be no need to discuss timetabling in advance. The time estimate for the hearing will have been agreed, on the basis that these steps can take place within the allocated time.

154. However, in more complex cases, particularly where there are a number of parties or interveners, it may be necessary for counsel to negotiate in advance in order to produce an agreed running order and timetable for submissions.

THE HEARING

Composition of the Court

155. Criminal cases may be heard by a single judge or by a Divisional Court of two judges (one from the Court of Appeal and one from the High Court). Simpler cases will ordinarily be suitable for decision by

a single judge but note that only a Divisional Court has power to make a Defendant's costs order in a criminal case – s 16(5) Prosecution of Offences Act 1985.

156. Civil cases are ordinarily heard by a single judge. The order granting permission may state that the case is suitable for decision by a deputy judge or specify more than one judge. In particularly important cases a Divisional Court will be ordered – for example, Divisional Courts have recently considered the challenges to the Secretary of State for Work and Pensions' policies concerning the so-called 'bedroom tax' (R (MA) v SSWP [2013] EWHC 2213) and the 'benefit cap' (R (JS) v SSWP [2013] EWHC 3350).

157. **Covid-19 measures.** In view of the Covid-19 pandemic, judicial review hearings in the Administrative Court are being listed in accordance with the Protocol for Remote Hearings. The default position at present is that hearings will be conducted remotely. It should be noted at paragraph 16 and 17 of the protocol that:

(16) Judges, clerks, and/or officials will, in each case, wherever possible, propose to the parties one of three solutions:-

(i) a stated appropriate remote communication method…for the hearing;

(ii) that the case will proceed in court with appropriate precautions to prevent the transmission of Covid-19;

(iii) *that the case will need to be adjourned, because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.*

(17) If the parties disagree with the court's proposal, they may make submissions in writing by email or CE-file (if available), copied to the other parties, as to what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination as to the way in which the hearing will take place, and give all other necessary directions.

158. Therefore if you consider that the claim cannot be heard remotely (for example due to the complexity of the case, the volume of documents) and will require a face-to-face hearing in the Administrative Court, then representations should be sent to the court, preferably having first taken the views of the other parties and tried to reach agreement, explaining why it would be in the interests of justice for hearing to be conducted in person.

In the hearing

159. Standing can be considered again but overlaps with remedy – R v Secretary of State for Health ex p Presvac Engineering Ltd (1991) 4 Admin LR 121.

160. Delay – A decision at the permission stage that a claim was brought promptly or to extend time where

it was not is final and cannot be re-opened at the final hearing. However the Defendant may still argue that relief should be refused because of undue delay (R v CICB ex p A [1999] 2 AC 330). In R (Lichfield Securities Ltd) v Lichfield DC [2001] EWCA Civ 304 the Court of Appeal held that where the effect of undue delay had been fully argued at the permission hearing then it should be re-opened only where (a) the judge at the initial hearing had expressly so indicated; (b) new and relevant material was introduced at the substantive hearing; (c) in an exceptional case, the issues as they developed at the full hearing put a different aspect on the question of promptness; or (d) the first judge had plainly overlooked some relevant matter or had otherwise reached a decision *per incuriam*.

161. Where limited permission was given: CPR Part 54.15 also permits a Claimant to give notice that they intend to rely on grounds in their original N.461 for which they were not granted or refused permission. However, this may be an abuse of process in the absence of significant justification– R (Opoku) v Principal of Southwark College [2002] EWHC (Admin) 272, and R (Smith) v Parole Board [2003] EWCA Civ 1014.

162. Where there has been a material non-disclosure by the Claimant, relief may be refused at the full hearing (or before) without consideration of the merits.

Orders

163. Time estimates assume that judgment will be given at the hearing. If so then it will be transcribed but counsel must still make a note in case of an urgent appeal. In the vast majority of judicial reviews, judgment is not given at the conclusion of the hearing, but is reserved.

164. Usually a confidential draft judgment will be prepared in advance of handing down, with a direction for the parties to submit typing corrections and notes of other obvious errors. The court is not bound by

72 the draft decision so circulated and in exceptional cases the court can be invited to alter it – R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2011] QB 218.

165. Counsel will usually be asked to agree a draft minute of Order to be lodged with the Court.

166. The parties need not attend for handing down of judgment if all consequential orders have been agreed and may not be able to recover costs if they attend when this is unnecessary.

167. Once sealed the Order of the Court is final, subject to correction under the slip rule (CPR 40.12).

APPEALS

Civil cases

168. In a civil case an appeal lies to the Court of Appeal[18], with permission of either the Administrative Court or Court of Appeal. It is not necessary to seek permission from the lower court but it is usual to do so. Under CPR 52.6(1), permission will only be granted by either court if:
    a. There is a real prospect of success; or
    b. There is some other compelling reason why the appeal should be heard. This can lead to an appeal on a point of public importance even if the prospects of success are poor – R (Benabdelaziz) v Haringey LBC [2001] EWCA Civ.

169. An application to the Administrative Court for permission to appeal is usually made when judgment is handed down. If time permits then it should be accompanied by draft grounds of appeal. An application for permission to the Court of Appeal is contained in the Notice of Appeal (N161) itself and must be accompanied by grounds and a skeleton argument in support.

170. The Appellant has 21 days to appeal but this time limit can be extended by the Administrative Court whether or not it actually grants permission provided the application is made within the 21 day period. Any application for an extension outside that period must be made to the Court of Appeal. Time for appealing runs from the date on which the decision is given and not the date on which the order is sealed – CPR Part 52.12.

171. An application for permission to appeal will be determined by the Court of Appeal on the papers, unless the judge considering the application directs that an oral hearing. They must direct an oral hearing if they are of the opinion that the application cannot be fairly determined on paper – CPR 52.5.

172. The Court of Appeal or the lower court may order a stay but the appeal does not operate as such in the absence of an express order – CPR 52.16.

[18]Subject to the possibility of a leapfrog appeal to the Supreme Court.

Criminal cases

173. In the case of any decision in a criminal cause or matter an appeal lies to the Supreme Court – s. 1, Administration of Justice Act 1960. It is a precondition of such an appeal that:

c. The High Court grants a certificate that the case raises a point of law of general public importance. Only the High Court can grant this.

d. The High Court or the Supreme Court grants leave to appeal. An application must be made first to the High Court though in practice it is very rare for that court to grant leave. An application for leave to appeal must be made to the Administrative Court within 28 days of the decision and must be accompanied by a draft of the question that the Court is being asked to certify. If that Court refuses permission then the Appellant must present a petition to the Supreme Court within 28 days.