Public
Law
Project

How To Do Judicial Review

One day, in person course
Monday 20 March 2023

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How to do Judicial Review

20 March 2023

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Public Law Project

How to do judicial review

March 2023

SESSION 1: INTRODUCTION TO JUDICIAL REVIEW[1]

1. What is judicial review? Here are three ways of describing it:
    - It is one (of a number of) means of enforcing public law.
    - It is a procedure set out in Part 54 of the Civil Procedure Rules.
    - It is the name of a type of application referred to in section 31 of the Senior Courts Act 1981.

Judicial review is one (of several) means of enforcing public law

2. This begs the question: what is "Public Law"? This is what Wikipedia says:

    > Public law… is that part of law which governs relationships between individuals and the government, and those relationships between individuals which are of direct concern to the society. Public law comprises constitutional law, administrative law, tax law and criminal law, as well as all procedural law… Laws concerning relationships between individuals belong to private law.
    >
    > The relationships public law govern are asymmetric and unequal – government bodies (central or local) can make decisions about the rights of individuals. However, as a consequence of the rule of law doctrine, authorities may only act within the law. The government must obey the law. For example, a citizen unhappy with a decision of administrative authority can ask a court for judicial review.

3. There are four main ways of seeking to enforce public law, each of which the judicial review practitioner will have to be keenly aware of. They are:
    - Complaints procedure;
    - Ombudsmen schemes;
    - Appeal and review processes;
    - Judicial review.

[1] With thanks for their input to Azeem Suterwalla and Martha Spurrier of Doughty Street Chambers, and Jared Ficklin of Garden Court North.

4. The reason that a judicial review practitioner must be aware of the potential availability of each of these remedies in every case is that judicial review is a remedy of last resort. That means that the court will require every judicial review claimant to show that there is no suitable alternative (i.e., non-judicial review) remedy that might give the claimant what he or she wants. Sometimes this will be an easy task: for example a complaint to the UK Border Agency under the Agency's complaints procedure would be unlikely to prevent a migrant without leave to enter the UK from being removed, and so a claimant challenging removal would generally have little difficulty in persuading the court that it was reasonable to bring a claim for judicial review without first making a complaint under the complaints procedure[2]. But in every case, detailed consideration should be given by a judicial review claimant to the suitability of any alternative remedy (i.e., the degree to which it may provide the claimant with an acceptable outcome) on the facts of the case.

Complaints procedures

5. Complaints procedures exist in some areas and can provide a non-litigious, cheap and accessible way of resolving disputes, particularly where the issue is historic and so there are no concerns about timing or interim relief. However, complaints tend to be investigated by the body about which the complaint is made, and the result of a complaint is not binding on the public body being complained about.
6. Ombudsmen schemes are designed to provide redress for injustice that arises of maladministration. This often overlaps with the kinds of public law wrongs that judicial review claims might be challenging. For example, if a prisoner considers that he has been waiting for an unreasonably long time to access a rehabilitation course, he could challenge the delay using judicial review on the grounds that it was unfair or contrary to his human rights, and/or he could make representations to the Prison and Probation Ombudsman so as to get them to investigate the delay, on the grounds that the prison's poor administration has caused him the injustice of not being able to get parole because he has not completed a particular course.
7. However, it must be remembered that the ombudsman is only able to investigate maladministration that causes injustice. Maladministration includes:
    - bias;
    - neglect;
    - inattention;
    - delay;
    - incompetence;
    - ineptitude;
    - perversity;
    - turpitude; and
    - arbitrariness.

[2]Although note the general requirement under the Judicial Review Pre-Action Protocol for prospective judicial review claimants to send a letter before claim before commencing judicial review proceedings.

8. There are a number of different ombudsmen for different areas, including the Local Government Ombudsman, the Prison and Probation Ombudsman and the Parliamentary and Health Service Ombudsman.
9. The following principles govern ombudsman schemes in general:
    - The complaint must be about (a) administrative actions (or failures to act); (b) by a body over which that particular ombudsman has jurisdiction; (c) which led to injustice; and (d) which remains unremedied;
    - Internal complaints procedures must be exhausted first, unless it is unreasonable to expect this, and there must be no other available remedy (for example, an appeal to a tribunal or court action), or if there is such a remedy it must be unreasonable to expect the individual to use it.
    - The claim must be brought within the time limit (usually 12 months) unless there is good cause to extend time;
    - The merits of discretionary decisions are not questionable, except where there is maladministration;
    - An investigation will not normally be carried out if it is not possible to identify a potential appropriate remedy.
10. The following are some common advantages of ombudsmen schemes:
    - The process is simple and cheap, with no potential exposure to costs liability;
    - Ombudsmen's reports may encourage better practice and can be useful political ammunition for changing practice;
    - Ombudsmen can recommend compensation which, although not legally enforceable, is almost always paid.
11. The following are some common disadvantages of using ombudsmen schemes:
    - The process is sometimes slow and no interim remedies are available;
    - There is no duty to investigate;
    - Ombudsman reports are unlikely to be as effective in dealing with points of law, at least where there is lack of clarity (for example, the Ombudsman had been questioning the power of local authorities to charge for services provided under section 117 of the Mental Health Act 1983 for some years, but local authority practice did not change until *R v Richmond Borough Council ex parte Watson and others* [2002] UKHL 34, [2002] 3 WLR 584;
    - The Ombudsman's recommendations are not binding upon the public body concerned (although recommendations are usually given effect).

Appeal and review procedures

12. Appeal and review procedures also provide an effective public law remedy in many cases. For example, a decision by the Department of Work and Pensions (DWP) not to award benefit often comes with a right of appeal to an independent tribunal. Before the right can be exercised, applicants are frequently required to apply to the DWP to request that the decision is reviewed before it can be appealed to an independent tribunal.

13. Appeals to tribunals cover a wide range of decisions by the state that affect the individual, for example decisions relating to entitlement benefits, immigration, mental health and education. Some tribunals are administered through the local authorities (for example the School Exclusion Panels), some by government departments (for example the Valuation Tribunals) and others through Her Majesty's Courts and Tribunals Service (HMCTS), an agency of the Ministry of Justice.
14. In relation to the tribunals administered by HMCTS, the Tribunals, Courts and Enforcement Act 2007 unified what had hitherto been a diverse system of independent tribunals which had been established piecemeal to provide for individuals to appeal against a range of state decisions. The Act established two tribunals, the First-tier Tribunal and the Upper Tribunal, which is divided into 4 chambers (the Administrative Appeals Chamber, the Tax and Chancery Chamber, the Immigration and Asylum Chamber, and the Lands Chamber), all presided over by a senior President of Tribunals (currently Ryder LJ). A diagram of the HMCTS tribunal structure is available online here: https://www.judiciary.gov.uk/publications/tribunals-organisation-chart/.
15. In general, the First-tier Tribunal provides for appeals on law and fact with a right of appeal – subject to a requirement to obtain permission – on a point of law to the Upper Tribunal, with an onward right of appeal – subject to further requirement to obtain permission – on a point of law to the Court of Appeal.
16. The Tribunals, Courts and Enforcement Act 2007 also provides for classes of judicial review case, and for certain individual judicial review cases to be transferred for hearing by the Upper Tribunal instead of the Administrative Court, where most judicial review cases are heard.
17. Practitioners of judicial review need to understand the tribunal system and what satisfaction it can offer the appellant, in order to advise a client whether a case should be brought as an appeal or as a judicial review claim. If a claim is brought by judicial review where an appeal right is available, the judicial review claimant will be expected to show why an appeal was not the appropriate remedy. Judicial review is a (relatively) successful public law remedy.
18. Finally, public law can also be enforced by way of judicial review, the subject of this course. Research conducted by the Public Law Project clearly demonstrates the efficacy of judicial review in promoting better quality decision making and good governance (see Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing, Bondy and Sunkin 2009, available on the Public Law Project website):
    - Thousands of judicial review cases settle each year with a positive outcome for the Claimant;
    - Around one-third of judicial review claims are withdrawn following a settlement before they get to court. In around three-quarters of those cases, the settlement will have been in the Claimant's favour;
    - Of the cases that get to the permission stage, around one-third are granted permission to proceed to a full hearing;

- Of the judicial review cases that get permission to proceed to a final hearing, over half of them settle before the hearing, again with around three-quarters of the settlements being in the Claimant's favour;
- Of the small number of judicial reviews that get to a full hearing, Claimants succeed in approximately 40 per cent of cases.

Judicial review is a procedure set out in Part 54 of the Civil Procedure Rules

19. The procedure governing judicial review cases is set out in the Civil Procedures Rules (for cases brought in the Administrative Court) and in the Tribunal Procedure (Upper Tribunal) Rules 2008 (for cases transferred to the Upper Tribunal).
20. The Civil Procedure Rules are rules made by a committee called the Civil Procedure Rule Committee headed by the Master of the Rolls. The rules they make govern the procedure to be followed in civil cases by the County Court, the High Court and the Court of Appeal.
21. Judicial review cases are heard by the Administrative Court (except for those transferred to be heard by the Upper Tribunal which has its own procedure rules), so, as one would expect, the procedure governing judicial review cases is contained in the CPR. CPR 54 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54 and its associated Practice Direction, PD54A: https://www.justice.gov.uk./courts/procedurerules/civil/rules/part54/pd_part54a relate to judicial review.
22. CPR 54.1 has a definition of judicial review. It states:
    - This Section of this Part contains rules about judicial review.
    - In this section –

      (a) A 'claim for judicial review' means a claim to review the lawfulness of –

        (I.) an enactment; or

        (II.) a decision, action or failure to act in relation to the exercise of a public function.
23. This definition of judicial review raises an important point about the purpose of the procedure, which is considered further below (see paragraph 31).

Procedure in the Upper Tribunal

24. Procedure rules for judicial review claims that are transferred to the Upper Tribunal are contained in Part 4 of the Tribunal Procedure (Upper Tribunal Rules) 2008/2698. These, together with CPR54, PD54A are included in these notes at Tab 8.

Judicial Review is the name of a type of application referred to in section 31 of those Senior Courts Act 1981, and defined by reference to the remedies that the court can order

25. Section 31(1) of the Senior Courts Act 1981 states:

    31 Application for judicial review.

    - An application to the High Court for one or more of the following forms of relief, namely—

(a) a mandatory, prohibiting or quashing order;
(b) a declaration or injunction under subsection (2); or
(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies, shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

26. To understand Section 31(1), we will need to understand what powers the court has to grant relief on an application for judicial review. Judicial review remedies are considered in more detail at paragraphs 41-63 below.
27. Section 31 of the Senior Courts Act 1981 read together with CPR54 and PDR54A (and the equivalent provisions relating to judicial review cases in the Upper Tribunal) together with Part 4 of the Criminal Justice and Courts Act 2015 (considered further below) contain much of the information about procedure that judicial review practitioners need to know. All these provisions are contained in the course pack at Tab 8.

Some preliminary concepts

Sources of law

28. Over time, public law has developed into a large and varied body of jurisprudence that applies across a number of areas, including education, immigration, prison, housing, community care and welfare benefits. In every judicial review case, it will be necessary to consider and identify the source of the public body's authority to act in the way that it has acted. In English law there are a number of types of law that give public bodies the authority to act in a certain way. These are:
    - Primary legislation, i.e. an act of Parliament;
    - Secondary legislation, such as regulations or directions;
    - Common law, meaning the rules that the courts have developed over time;
    - European Union law;
    - Human rights law.

The distinction between law and guidance

29. When considering the source of the public body's authority to act, it is important to understand the difference between law and guidance. Put simply, guidance is produced to tell a body how it should act, unless there are good reasons for not acting that way. This can be contrasted with law, which dictate how a body must act. This means that there will be circumstances where a body can lawfully say that it has decided not to follow guidance for a good reason, but it can never say that it has decided not to follow the law, good reason or not.

Powers and duties

30. In analysing the nature of the authority that a public body purports to be acting under, it is important to distinguish between powers and duties. Sometimes the applicable law places a public body under a duty to act in a particular way. This means that they have to act in that way. On other occasions

the applicable law gives a public body a power to act in a particular way, often referred to as a "discretion". This means that the public body can act in that way but is not obliged to. This difference is vital – it is often easier for a judicial review claimant to show that a decision, act or omission is unlawful because the public body has not discharged its legal duty (e.g., where a local authority does not accommodate a child that it is duty bound to accommodate), than because the public body has exercised its discretion in an unlawful way (e.g., where a school has a power to expel a pupil for bullying and decides to exercise that power even though it does not have to).

Exercising public functions

31. We have already observed that judicial review is a means for remedying breaches of Public Law, which governs the relationship between the individual and the State. But it is not all decisions of the State that are governed by Public Law. For example, where the State acts in its capacity as an individual like any other legal individual (e.g., as a landowner, or an employer) its actions may be governed by Private rather than Public Law (for example, land law or employment law) which regards the dispute as a dispute between two individuals rather than a dispute between the State and the individual. In a case between two individuals governed by Private Law, judicial review will not be available. So the definition in CPR54.1(2)*** makes it clear that judicial review only applies to challenges to enactments and decisions, acts or omissions "in relation to the exercise of a public function".
32. Whether the decision, act or omission that a judicial review claimant wishes to challenge was made "in the exercise of a public function" is therefore a crucial precondition to the claim's success. If it was, then – subject (a) to there being no suitable alternative remedies (since, as we have seen, judicial review is a remedy of last resort), and (b) to other factors, which are considered below – judicial review will be a potential remedy. But if the decision, act or omission was not made in the exercise of public functions, then judicial review will not be the appropriate remedy.
33. Public functions include things like running prisons, hospitals and care homes policing, state education, border control, social security and taxation. Usually public functions will be carried out by state bodies; for example, the Department of Work and Pensions is in charge of welfare benefits. However, it is increasingly the case that these functions are 'contracted out' to private agencies which discharge them on the state's behalf. An example of this is the Work Capability Assessment, by which eligibility for Employment Support Allowance is assessed, and which is carried out by a private company (previously Atos Healthcare and now Maximus). However, because the administration of welfare benefits remains a public function, the private company is governed by Public Law when it is discharging this function[3].
34. In most cases that practitioners come across, it will be clear whether the body making the decision, act or omission that a claimant seeks to challenge did so in the exercise of a public function. For example, many immigration decisions are taken in the name of the Secretary of State for the Home

[3]Lead case on private bodies exercising public functions is *R v Panel on Takeovers and Mergers, ex parte Datafin [1987] QB 815*. The court decided, effectively, that the private body was functioning as a public body because it was fulfilling a function that the government would have been obliged to step in and fulfil had the private body not existed.

Office and many benefits decisions are taken in the name of the Secretary of State for Work and Pensions. However in some cases, it can be difficult to decide whether a decision, act or omission was made in the exercise of a public function (in which case a judicial review will in principle be available) or not.

35. Various tests have been developed by the courts in order to identify bodies which can be challenged by way of judicial review:
    - The 'source test'. If the source the power that a body has exercised is statutory or prerogative then the body will generally be a public body, and its decisions will be made in the exercise of a public function for the purposes of judicial review.
    - If not, the 'function test' will be applied. There is considerable uncertainty as to how this test operates in practice. The courts have been unwilling to box themselves in with strict criteria. Broadly, the test requires an examination of the nature of the power exercised by the body which is under challenge and consideration of a number of factors, such as:
        (a) the greater the degree of statutory or governmental underpinning for the function, the more likely it will be a public function;
        (b) the 'but for' test – would power be exercised directly by government, or by government agency if the body concerned did not do so? (This is often significant in relation to regulatory bodies, see *R v Advertising Standard Authority ex p The Insurance Services plc* [1990] 2 Admin LR 77)
        (c) if the individual consented to be bound by the decision of the decision maker, it is less likely to be a public law function; if the individual simply had no choice in the matter, the decision is more likely to involve the exercise of public law functions;
        (d) if the relationship is governed solely by contract, the body is unlikely to be exercising public functions.
36. Apart from 'obvious' state bodies, those such as the Law Society, the General Medical Council, the Advertising Standards Authority and the National Trust have all been held to be susceptible to judicial review relation to certain decisions. The Football Association has not.
37. The Human Rights Act 1998 ('HRA') provides a loose definition of a public authority in section 6. It states that a public authority (and therefore on that is bound by human rights law) is one "whose functions are functions of a public nature". It does not go on to define public functions and so arguably it does not take us much further than the analysis set out above.
38. Although, as we have noted, judicial review claims can be brought against private bodies such as corporations, to the extent that they discharge public functions, it is convenient to refer to the bodies against which judicial review may be brought as "public bodies".

<u>Identifying the decision, act or omission to be challenged</u>

39. One of the first considerations before bringing a claim for judicial review is to identify the decision, act or omission to be challenged. There are a number of reasons why this is fundamentally important:

- We have already noted that judicial review is only available in respect of decisions, acts and omissions that are made in the exercise of public functions. Identifying the object of challenge will enable the judicial review practitioner to give consideration to this crucial issue at the outset.
- We have already noted that only certain remedies are available to the court on an application for judicial review (see Section 31 of the Senior Courts Act 1981). These are considered below. Identifying the object of challenge, will enable the judicial review practitioner to assess which if any of these remedies would be appropriate, and therefore whether it is worth embarking on a claim for judicial review.
- Similarly, we have already observed that judicial review is a remedy of last resort. Identifying the object of challenge is necessary to assess whether there are any alternative remedies available to the perspective judicial review claimant, and if there are, why it might be appropriate to pursue a judicial review claim instead.
- There are short time limits for bringing a claim of judicial review. Isolating the object of challenge will help to ensure that the judicial review time limits is not missed.

40. We considered (1) at paragraphs 31-38 above. We will now consider issues (2)-(4) in turn.

Judicial Review Remedies

41. There are six remedies normally available in judicial review:
    - quashing orders;
    - mandatory orders;
    - prohibiting orders;
    - declarations;
    - injunctions;
    - damages.
42. The first three are unique to judicial review. Considering each in turn:

Quashing Orders

43. A Quashing Order (formerly known as ‘certiorari’) is an order that quashes a decision or act, setting it aside so that it has no legal effect. For example, the court might make a quashing order in respect of an unlawful decision that someone does not qualify for community care services. The defendant local authority would then be obliged to take the decision again applying the proper legal test or by a fair procedure.

Prohibiting Orders

44. A Prohibiting Order (formerly known as ‘prohibition’) is similar to a quashing order but acts at an earlier stage prohibiting a public body from acting unlawfully in the future.

Mandatory Orders

45. A Mandatory Order (formerly known as 'mandamus') enforces the performance of a public duty. For example, the court might make a mandatory order to oblige a local authority to carry out a community care assessment where the court considers that the local authority would otherwise not carry one out. It should be noted that although the court can require a power to be exercised, the court cannot determine the outcome of the exercise of the public body's discretion.

Injunctions

46. An Injunction is an order compelling the person to whom it is addressed to perform, or not to perform, a specified act.

Declarations

47. A Declaration is an authoritative ruling on the rights of the parties, or the state of the law. This is a non-coercive form of relief by which the court declares the law or the respective rights of the parties without making any order against the decision-maker to do a particular thing. A declaration might be made, for instance, concerning the proper way to interpret a piece of legislation in future. Declarations of incompatibility, which are now available under the Human Rights Act 1998, are discussed below.

Damages

48. The failure of a public authority to act in accordance with public law principles does not in itself give rise to a right to damages. Traditionally, damages were rarely awarded in applications for judicial review. They are not available to compensate people who merely have had unlawful decisions made against them but are available if and only if there is a separate and recognised private law claim for damages, for example, in negligence or breach of statutory duty, which is proven. For example, a claim for damages can be made at the same time as a judicial review to challenge a period of immigration detention at the hands of the state, on the basis that the damages for false imprisonment is dependent on the public law claim that the detention was unlawful. An exception to the general rule that a damages claim pleaded in a claim for judicial review must be parasitic on the main public law claim arises out of the Human Rights Act 1998, which creates a freestanding statutory tort (see paragraph 51 below).

Interim remedies

49. In addition to giving directions about the future conduct of the proceedings, at the same time as granting permission the court may also make interim orders under CPR26 and the corresponding practice direction. Such orders typically address a state of affairs which, without an order being made, would change to the detriment of one or more of the parties or render the proceedings academic.

The impact of the HRA upon judicial review remedies

50. Under the Human Rights Act of 1998, a court or tribunal may grant 'such remedy or relief' as it considers just and appropriate for breaches of a person's rights under the Act (section 8(1)). The only limitation on the type of remedy available is the requirement that the court or tribunal in question must already have the power to grant the particular remedy sought.
51. Remedies can therefore include:
    - The standard judicial review remedies discussed above;
    - Damages (if the court involved can award damages) and if, having regard to other relief possible, they are necessary to provide 'just satisfaction'. Section 8 creates a remedy in damages in respect of breaches of section 6 – this is a new statutory tort. The term 'just satisfaction' is taken from the terminology used in the Convention as to the assessment of damages, and it is likely that the English courts will follow the approach taken by the Strasbourg Court. Damages may comprise pecuniary and non-pecuniary losses, costs and expenses and interest.

Declarations of incompatibility

52. Where the higher courts find a piece of primary legislation (and in some circumstances secondary legislation) cannot be read compatibly with the Convention it can make a declaration of incompatibility under section 4 of the Human Rights Act 1998. This triggers a fast track procedure, enabling Parliament to make an order in Council addressing the incompatibility. The first declaration of incompatibility was made in December 2000, in relation to the planning appeals system.
53. Where a court or tribunal is called upon to interpret *primary legislation* in a case raising Convention rights issues, it must go through the following steps:
    - It must first strive to find meaning which is compatible with those rights if it is possible to do so.
    - If this is not possible, then only a court with the necessary jurisdiction *may* make a declaration of incompatibility. Either way, this gives no immediate remedy to the client because the legislation, (and the interference with Convention rights) remains unless or until the offending legislation is changed by Parliament.
54. Where the court or tribunal must interpret a piece of *secondary legislation*, the process is a little more complicated:
    - The court must again strive to find a meaning compatible with the rights if it is possible to do so.
    - If it is not possible, the court must then examine the primary legislation which conferred the power to make the secondary legislation. It must then strive to interpret that legislation to find a compatible meeting.
    - If the primary legislation is found to be compatible, then it is clear that the secondary legislation in issue is 'ultra vires' the 1998 Act.

55. If the court finds that the primary legislation is incompatible, (i.e., that it required the making of incompatible secondary legislation), then a court with the necessary jurisdiction *may* make a declaration of incompatibility in respect of both the primary and the secondary legislation. Both primary and secondary legislation remains in force unless or until changed by Parliament.
56. Such declarations may only be made by the House of Lords, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court, the Court of Appeal or the High Court or Administrative Court. All other courts and tribunals are obliged to interpret legislation in accordance with section 3 of the 1998 Act, but cannot make such declarations.
57. The consequences of granting such a declaration *will not, of itself*, provide the client with a remedy. This is because section 4(6) provides that a declaration does not affect the validity or continuing operation or enforcement of the provision and is not binding on the parties to the proceedings in which it is made. Such a declaration is also a recognition that the public body in question could not have acted in any other way – and therefore the client has no claim for damages either. The body had not acted unlawfully.
58. However, it does trigger section 10 of the HRA which gives ministers the power to take remedial action if the minister considers that there are 'compelling reasons' to do so. The section permits 'fast-track' amendment by order to the primary legislation. The order may have retrospective effect, but it is most likely to be given prospective effect only. This will not be of any assistance to the client. In the absence of retrospective amendment, damages or an ex-gratia remedy, the client would have to take their case to the European Court of Human Rights in Strasbourg to seek a remedy in that court.
59. It must be remembered that in the English legal system, Parliament is supreme. A declaration of incompatibility is, so far as Parliament is concerned, a statement of opinion. Parliament can take heed of it but is under no obligation to do so. Also Parliament is specifically excluded from the definition of 'public body' under the HRA.
60. Although in theory, judicial review proceedings might be taken against a minister who failed to bring a remedial order, ultimately, the failure may be a matter that can only be remedied through the ballot box.

<u>The discretionary nature of judicial review remedies</u>

61. Unlike other remedies in civil litigation, judicial review remedies are discretionary. This means that a judicial review claimant can succeed in showing that the defendant public body acted unlawfully, but can nevertheless fail to persuade the court to make an order in the claimant's favour. The court's discretion in deciding whether or not to grant a remedy is a wide one – it can take into account many considerations such as the needs of good administration, delay, the effect on third parties, and the utility of the relief sought.

<u>Cases where the outcome for the judicial review claimant would not have been substantially different if the conduct complained of had not occurred</u>

62. Traditionally, the judicial review courts have regarded themselves as unable to substitute their own decision for that of the defendant. Instead, the court's focus has traditionally been on the procedure leading to a decision, rather than on the substantive merit of the decision itself (on which a judge may be poorly qualified to comment). As a result, it is frequently the case that a decision is quashed by the court, only to be re-taken by the defendant, this time properly. This can sometimes mean a hollow victory for the successful judicial review claimant.
63. However, for claims issued on or after 13 April 2015, section 84 of the Criminal Justice and Courts Act 2015 amends section 31 of the Senior Courts Act 1981 to require the court if so requested by the defendant (and to enable the court, even if not so requested), to consider how likely it is that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. If the court considers it highly likely that the outcome would not have been substantially different, it must refuse to grant relief, subject to a power for the court to disregard this requirement if it is appropriate to do so for reasons of exceptional public interest.

Alternatives to judicial review

64. As stated at paragraph 4 above, judicial review is a remedy of last resort. The courts will generally refuse permission for judicial review cases to proceed, or withhold a remedy, where there are alternative, equally effective, remedies open to the person bringing the action, and these have not been used.
65. Where there is what may be considered a potentially alternative remedy available to the prospective judicial review claimant, the court will consider whether the alternative is equally convenient, effective and expeditious. This is a case-specific exercise.
66. The *jurisdiction* of the court to grant relief by way of judicial review is not ousted by the availability of an alternative remedy, such as an appeal or ADR. However, the court may well exercise its discretion to refuse relief, refuse to grant leave or adjourn the case until the alternative remedy has been used. Costs orders may be made against the party applying for judicial review.
67. In *R on the application of Cowl v City of Plymouth* [2001] EWCA Civ 1935, [2002] 1 WLR 803), the Court of Appeal sought to require parties to judicial review cases to give greater consideration to attempting alternative dispute resolution. Whilst there is no evidence to suggest the uptake of ADR has increased significantly since *Cowl*, the court's aspirations in that case are reflected in recent amendments to the Judicial Review Pre-Action Protocol (considered further in Session 3) which makes it clear that the parties should consider ADR. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate in ADR or refusal to participate in ADR might eb considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

Time limits for bringing claims for judicial review

68. CPR54.5 states:
    (1) 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.

(2) The time limits in this rule may not be extended by agreement between the parties.

(3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.

(4) Paragraph (1) does not apply in the cases specified in paragraphs (5) and (6).

(5) Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose.

(6) Where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015, the claim form must be filed within the time within which an economic operator would have been required by regulation 92 of those Regulations (and disregarding the rest of that regulation) to start any proceedings under those Regulations in respect of that decision [generally 30 days].

69. Section 31(6) of the Senior Courts Act 1981 states:

- Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
  - (a) leave for making of the application; or
  - (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

70. They key points to note are as follows:

- In non-planning and non-procurement judicial review cases, the deadline for issuing a claim is “promptly” – it is not “3 months”, which is no more than a long stop. So a claim can be brought within 3 months, but may fail because the court concludes that it was not brought “promptly” and so was issued out of time.
- The meaning of “promptly” is a matter for the court, and cannot be determined by agreement between the parties. So the fact that the parties may agree between themselves that a claim has been brought promptly, does not prevent the court from dismissing the claim on the basis that it was issued out of time.
- Where the relief sought by the judicial review claimant is considered likely to cause substantial hardship to 3rd parties or to good administration, there is a risk that a delay in filing will be considered undue, and will therefore result in leave or relief being refused. In such cases it is particularly important that delay in filing the claim is kept to an absolute minimum.

<u>Continuing failures or unlawful actions</u>

71. Though grounds will first arise when the conduct in question becomes unlawful, challenges may be entertained by the court some time after that. For example, a court may permit a challenge to an unlawful policy to be brought months or even years after the policy’s inception if it is brought by a claimant in a timely manner the policy is applied to him or her.

Who can bring a claim for judicial review?

72. Claimants seeking judicial review must demonstrate 'sufficient interest' or standing in the outcome of the proceedings in order to bring a case.
73. Section 31(3) of the Senior Courts Act 1981[4] provides that:

    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.

74. As well as the person directly affected by the actions of the defendant having a 'sufficient interest', it has been held that, in some circumstances, applications can be made by pressure and public interest groups. This accords with the court's role being one of exercising its supervisory jurisdiction over public bodies, rather than adjudicating over the rights of the individual.
75. Where the case is based on the Human Rights Act 1998, a claimant must generally demonstrate that he or she is a direct or indirect 'victim' of the allegedly unlawful act, which is a much narrower test.
76. Section 7 of the HRA provides:

    a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

77. This test is drawn from Article 34 of the Convention:

    The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation … of the rights set forth in the Convention or the protocols thereto.

78. The concept of 'victim' requires that the applicant must be a person affected by the act or omission. That is not to say that the requirement has not been applied in a flexible manner. See, for example:
    - Abdulaziz, Cabales & Balkandali v UK (1985) 7 EHRR 471 (relatives of a person who was refused a residence permit can pursue a case in their own right).
    - McCann, Farrel and Savage v UK (1996) 21 EHRR 97 (families of deceased victims can claim on their behalf as well as their own).

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[4] This is mirrored for the UT (IAC) by S. 16(3) Tribunals, Courts and Enforcement Act 2007. Note that when s.84 of the Criminal Justice and Courts Act 2015 comes into force it will amend s31(3) of the Senior Courts Act to add that leave should not be granted unless information about the financing of the application is provided. A consultation on proposals for the provision of financial information by judicial review claimants has taken place and the Government's response is awaited. See https://consult.justice.gov.uk/digitalcommunications/reform-of-judicial-review-proposals-for-the-provis

SESSION 2:
GROUNDS FOR JUDICIAL REVIEW[1]

Grounds for judicial review

1. Whether or not a claimant has sufficient interest, has brought a claim sufficiently promptly, is challenging a decision of a public body taken in the exercise of a public function, and has no alternative remedy, a claim for judicial review will only be viable if the claimant can identify and persuade a court that there are grounds for judicial review. As noted above, the judicial review court has traditionally been very reluctant to adjudicate on the merits of the substantive decisions that it has reviewed. But the court will intervene if (and only if) the errors it identifies fall into at least one of certain categories of legal error. These categories of legal error are called judicial review grounds. They are often summarised as follows:

   (1) Illegality;
   (2) Irrationality;
   (3) Procedural unfairness; and somewhat controversially
   (4) Disproportionality.

   We will consider each category of ground in turn.

Illegality

2. This is where bodies subject to judicial review:

[1] With thanks for their input into these materials to Azeem Suterwalla and Martha Spurrier of Doughty Street Chambers, and Jared Ficklin of Garden Court North

- go beyond the limits of their powers;
- misdirect themselves about the scope of their powers, or misapply the law (including EU law) that applies to their decisions;
- fetter or avoid exercising their discretion in relation to individual cases;
- delegate decisions for which they are exclusively responsible to other bodies, or allow other bodies to make such decisions for them;
- fail to ask the questions necessary to discharge their decision making functions;
- take into account irrelevant considerations or ignore relevant considerations.

Limit of powers

3. Decision makers must correctly understand the law that regulates their jurisdiction, functions and decision-making powers and must give effect to it. The failure to do so will render the decision, action or failure to act 'illegal', see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL.

4. The courts may rule an action or a decision illegal if the public body or officer performing it had no power to take it or exceeded their powers. This arises, for example, when the legislation does not contain the necessary power, or it contains precise limits on the circumstances in which a power could be used, and the action or decision in question exceeds those limits. This type of public law wrong is sometimes called 'classic *ultra vires*' (beyond the powers).

5. Examples include:

- *R v Secretary of State for Health ex parte Hammersmith and Fulham LBC* (1998) 1 CCLR 96, QBD; asylum seekers could not be provided with cash under the National Assistance Act 1948 since that Act states that local authorities must themselves make arrangements for services and handing out cash did not fall within that definition.
- *R (KB) (a child, by his litigation friend LW) v Secretary of State for Justice* [2010] EWHC 15 (Admin); the "disciplinary incident report" system operated at a Young Offender Institution was unlawful because the Prison Act 1952 and the Young Offender Institution Rules 2000 made exhaustive provision for a system of disciplinary rules involving a prescribed and identifiable

process of charge; a prescribed and identified offence; and a prescribed opportunity for a person charged to present his case.

Discretion and decision-making

6. Sometimes legislation allows for the exercise of a wide discretion by the public body, or provides that a duty should be discharged in certain circumstances, but does not prescribe a particular process for determining whether those circumstances arise in an individual case. Illegality can occur where the action, failure to act or decision in question violates the common law principles set down by the courts for processes of this kind. There is no such thing as 'untrammelled discretion'.

Fettering of discretion

7. This error occurs when the decision is made by reference to and application of a rigidly applied set of rules or criteria. In R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546 the Court summarised this principle, stating that *"[a] public authority may not adopt a policy which precludes it from considering individual cases on their merits."* Each case must therefore be considered individually – it is not lawful to apply a 'blanket policy'; for instance, if a local authority refused to disapply part of its charging policy for domiciliary care without considering the merits of the individual case.

8. For example, although health authorities are entitled to set general policies which may mean that certain forms of medical treatment are not funded, it is unlawful to refuse to consider exceptions: R v North West Lancashire Health Authority ex parte A, D and G [2000] 1 WLR 977, CA. An example in the immigration context would be R (Mayaya and others) v Secretary of State for the Home Department [2011] EWHC 3088 in which the Court held that the defendant had unlawfully fettered her discretion to grant indefinite leave to remain by rigidly applying the policy that those convicted of serious crimes needed to have completed 10 years of discretionary leave in order to be eligible for settlement.

Relevancy

9. A decision-maker may err by taking irrelevant factors into account or failing to take account of all relevant factors (sometimes the legislation will list the factors to be taken into account; on other occasions the court will determine what is or is not relevant).

10. For example, in R v Gloucestershire County Council ex p Barry (1997) 1 CCLR 36 the House of Lords considered whether a local authority was permitted to take into account its own resources when assessing need, and held that it could do so in a limited way.

Asking the right question and undertaking a sufficient enquiry

11. Two closely-related errors are failure by the decision maker to ask herself/ himself the correct question which enables a discretionary power to be properly exercised, and failure to take reasonable steps to ensure that s/he has the information on which a proper decision can be based. See *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

12. For example, in homelessness law a person should not be treated as acting deliberately, in relation to giving up or losing their home, if they acted in good faith in ignorance of a relevant fact. A local authority that asks whether the person acted reasonably is asking the wrong question; the question is whether the person acted in good faith.

Unlawful sub-delegation and ceding power to another body

13. Though public bodies are often empowered to discharge their duties or exercise their powers through others, sometimes it will be clear that a function cannot properly be delegated to another, or that the body must take responsibility for reaching a decision itself. See *R v Devon Country Council ex parte G* [1989] AC 573.

Undermining the legislative purpose

14. Public authorities owe a basic duty to promote the purposes and policy of the statute under which they are operating. They must not use their discretion to thwart the purpose of the legislation. See *Padfield v MAFF* [1968] AC 977, HL.

Impact of the Human Rights Act 1998 on illegality challenges

15. Most of the substantive provisions of the European Convention on Human Rights are scheduled to the HRA and therefore directly enforceable in domestic law.

16. Section 6 HRA requires certain individuals and bodies to act in a way which is compatible with those Convention rights unless some primary legislation, or secondary legislation designed to give effect to it, positively prevents that public body from doing so. Failure to honour the section 6 duty will be a form of illegality.

17. Section 3 provides that legislation must be interpreted ‘so far as possible’ in a way which complies with the Convention, so it will be a rare case where a public authority cannot act in conformity with the Convention. This rule applies to past legislation just as much as it does to future legislation and the doctrine of precedent becomes subordinated to it. It is clear from House of Lords’ decisions that a

declaration of incompatibility will be used only as a remedy of last resort and must be avoided unless it is plainly impossible to do so. Accordingly, section 3 has a strong interpretative effect and "*places a duty on the court to strive to find a possible interpretation compatible with convention rights*". Where a public body interprets legislation governing its powers in a non-Convention compatible way, in breach of the general duty under section 3 HRA, this can be conceptualised as a form of illegality, and can constitute a discrete head of judicial review.

Fairness

18. Decision makers subject to judicial review must not:

- breach a duty to reach a decision by way of an express procedure;
- take a decision themselves in which they have a direct interest, or when there is actual, or a real danger of, bias;
- breach natural justice requirements of fairness; or
- act in a manner so unfair that it amounts to an abuse of power

19. Sometimes (though much depends on context) fairness will also require decision makers to give reasons.

Procedural unfairness

20. If the procedures are laid down in legislation then failure to follow will give rise to grounds for judicial review.

Bias

21. The 'rule against bias' requires public bodies to be impartial and to be seen to be so. For example, a public body should not allow decisions to be made by people who have a financial interest in the decision, or a family or business connection with any of the parties, or who have strongly held views which may cause them to reach a decision based on prejudice.

The right to a fair hearing

22. Those affected by a decision from a public body are entitled to know what the case is against them, and must have the opportunity to put their case properly. They may not be entitled to an actual 'hearing', although in serious matters, where someone's livelihood or liberty is at stake, the public

body would normally be expected to have a detailed procedure, probably including an oral hearing and the calling of witnesses, and, in some circumstances, the right to representation.

23. In more minor matters, issues such as the cost involved in holding a hearing will be weighed against the individual's right to argue his or her case in person, but there should still be provision for written representations.

24. Note that actual injustice need not be proved: see *Boddington v British Transport Police* [1999] 2 AC 143. However, as stated above ***, under s84 of the Criminal Justice and Courts Act 2015 (amending s31 of the Senior Courts Act 1981), for judicial reviews issued on or after 13 April 2015, the court must refuse to grant relief if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred unless the court considers that it is appropriate to do so for reasons of exceptional public interest. Note that s84 has been partially commenced and is not yet in force for judicial review in the Upper Tribunal.

25. Factors that could lead to a finding that there has been a breach of natural justice and the duty to act fairly include situations where the decision-maker:

- failed to tell the individual what was the case against him or her or took account of evidence or factors of which he or she was not made aware;

- failed to allow the applicant to put his or her case forward at all or failed to give him/her adequate facilities for making the case;

- refused to hear some of the evidence available and that evidence might have led to a different decision;

- refused to allow legal representation, or to inform the individual of that option, in circumstances when such representation would make a difference;

- failed to notify the individual or his or her representative of the time and place of any hearing that would lead to the taking of a decision, or denied the individual access to relevant documents, or a hearing was held in their absence when they had a good reason for not being able to attend and the hearing could have been re-arranged;

- failed to consult those whom it was under a duty to consult, or those who had a legitimate expectation of being consulted before a decision is made. A person or a group may have a legitimate expectation that they will be consulted if they have a history of being consulted by the

decision-maker or if the decision-maker has made promises or given undertakings which the decision in question will alter.

Legitimate expectation

26. The obligation to consult before a policy or course of action is changed is generally known as '**procedural legitimate expectation**'. The principle of '**substantive legitimate expectation**', which prevents removal of a benefit which the individual enjoys, was firmly established in R v North and East Devon Health Authority ex p Coughlan (1999) 2 CCLR 21, CA. There the Court of Appeal discussed what would happen when a public body described how it intended to act in future in the form of a promise or policy, which it then abandoned to the detriment of the individual: Miss Coughlan, the applicant for judicial review, had been promised a 'home for life' when she moved into the Health Authority's long term care facility. The Court of Appeal held that the breach of this promise represented an unlawful **abuse of power**.

27. An example of an area of law where legitimate expectation may be relevant concerns the relationships between voluntary sector organisations and local authorities. Public bodies are encouraged to enter into loose agreements called 'Compacts' with the voluntary sector agencies that they fund. These set out minimum standards as to consultation, termination etc. Although having no contractual force, they might be enforceable through public law.

Reasons

28. Though certain statutory procedures oblige decision makers to explain their decisions (and failure to do so would amount to procedural ultra vires), there is no general duty to give reasons for decisions in English law (see Stefan v General Medical Council [1999] 1 WLR 1293). That said, a number of recent decisions of the courts have held that fairness will demand in many cases that adequate reasons for a decision are given (the more important the decision for the individual, the fuller the reasons required are likely to be).

29. Particular circumstances in which reasons may be required are:

- where the decision maker is a **professional judge** (though there are exceptions for certain courts, and in relation to summary exercises of judicial discretion);
- where the decision would otherwise appear **aberrant**; or
- where the **subject matter** is particularly highly regarded (such as a person's liberty, or opportunity to hold a public office).

30. Refusal to give reasons is a risky course for public bodies in any event because:

- reasons can be sought in a letter before claim to which the judicial review pre-action protocol applies (normally a letter of response will be expected);

- a body challenged through judicial review will normally be expected to explain itself to the court; and

- if no reasons can be offered for a decision, the court may conclude that there are no good reasons for it, and in turn, that the body has acted irrationally: see Padfield v MAFF [1968] AC 977.

The impact of the Human Rights Act 1998 on fairness challenges

31. The duty to act fairly has further developed under the influence of Article 6 – 'the right to a fair hearing' along with others scheduled to the Human Rights Act 1998 (in particular Articles 2, 5 and 8) into which the Strasbourg court has implied certain procedural guarantees.

Article 6

32. When it is engaged, Art 6 will import certain procedural guarantees. Subject to certain exceptions, the hearing is to be 'public', take place within a 'reasonable time' and be before an 'independent and impartial tribunal established by law.'

33. Applying these requirements since the HRA 1998 has led to the refinement of existing common law standards. For instance, where partiality is alleged, the court must first ascertain all the circumstances which have a bearing on the suggestion that the body holding the hearing was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased in accordance with the ECtHR approach (see *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, CA and *Porter and another v Magill* [2001] UKHL 67, [2002] 1 All ER 465, HL).

Other Convention Articles

34. As mentioned above, other Convention Articles have an implicit procedural element. Article 2 has been held to require an effective investigation into deaths at the hands of state officials, or where such officials are responsible for that person's care (see *R (on the application of Amin and another) v Secretary of State for the Home Department* [2002] EWCA Civ 390, CA) and *R v HM Coroner for the Western District of Somerset and another ex p Middleton* [2004] UKHL 10.

35. Where respect for family or private life may be imperilled as a result of a decision, Article 8 will import a procedural element into the decision making process, necessitating, for example, disclosure of documents (see *R (on the application of Stevens) v City of Plymouth* [2002] EWCA Civ 388, CA). Article 8 procedural obligations may also require legal aid to be provided to ensure there is effective access to the decision making process (see *R(Gudanaviciene) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622

Irrationality and proportionality

36. Where a decision maker is subject to judicial review s/he must not act in a way that no reasonable decision maker would consider justifiable. The degree of justification required will depend on the context generally or whether human rights, or EU rights, are at play.

Wednesbury unreasonableness

37. The courts may intervene to quash a decision if they consider it to be so demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker.

38. The benchmark decision on this principle of judicial review was made as long ago as 1948, in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL), where Lord Greene MR stated::

> If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming...

39. Lord Diplock expanded on the *Wednesbury* principle in the GCHQ case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL), which concerned the right of staff at GCHQ to join a trade union. He defined an unreasonable decision as being one:

> which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

40. This threshold is extremely difficult to meet, which is why the *Wednesbury* ground is usually pleaded alongside other grounds such as relevancy. Note, though, the threshold will be a lower one, that of proportionality, when EC or HRA 1998 rights are engaged.

Irrationality, justification and proportionality - impact of the Human Rights Act 1998

41. To justify an interference with a *qualified* Convention right (e.g. Article 8) a State is required to demonstrate that the interference is:

- authorised by domestic law;
- for the purpose of pursuing a legitimate aim; and
- is proportionate.

42. Note the onus *on the public authority* to make out their justification, in contrast to traditional *Wednesbury* where the onus is on the claimant to establish irrationality.

43. Assertions by public authorities that interferences are justified will need to be substantiated by evidence.

44. In general terms, the concept of proportionality requires a balancing exercise between, on the one hand, the general interests of the community and the legitimate aims of the state and, on the other, the protection of the individual’s rights and interests.

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March 2023

SESSION 3: STEPS IN A JUDICIAL REVIEWCASE, FROM LETTER BEFORE CLAIM TOFINAL 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 ('CPR'), supporting Practice Directions and the pre-action protocol for judicial review. The CPR is divided into parts. Judicial review procedure is mainly (but not exclusively) governed by CPR Part 54 and the associated practice directions (mainly Practice Directions 54A and 54B). The Administrative Court's own Judicial Review Guide is also essential 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. The Administrative Court's "Information for Court Users" guidance sets out the Court's requirements for the preparation of electronic bundles (including the bundle to be filed with the Judicial Review Claim Form on issuing a claim), application notices and the different procedures used when filing urgent and non-urgent claims and applications. It also contains information about hearings and how to pay court fees.[2] **These materials and relevant forms are at Appendix 1 of the course pack.**

4. There are a number of key differences between judicial review ('JR') and mainstream civil litigation which mean that it is a '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 (prepared in accordance with the court's guidance), insofar as time constraints allow.

5. There are also cost risks if permission is refused. For any application for a legal aid certificate for a judicial review, 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

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[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 Miranda Butler and Tom Royston of Garden Court North, and Steve Cragg QC of Monckton Chambers, and Gerard Rothschild of Brick Court Chambers.

[2]The Administrative Court's consolidated information for court users effective from 19 July 2021 is at https://www.judiciary.uk/wp- content/uploads/2021/07/Administrative-Court-Information-for-3c5ourt-users.pdf.

hearing of the claim[3]. 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).

6. 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 considered in greater depth in the session on "Defending a JR".

IDENTIFYING THE TARGET FOR CHALLENGE

7. The first step is identifying a challenge. It is critical (though not always easy) to identify the:
   (a) enactment;
   (b) decision;
   (c) action; or
   (d) 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?

8. There are a number of reasons:
- The decision under challenge needs to be identified in the claim form;
- 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;
- 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

9. 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) 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?

10. At this stage you should ask yourself:

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

- 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 – principles) 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 – funding).

TIMING

When do the grounds first arise?

11. CPR 54.5 provides:

> "(1) [save in planning and procurement cases] T*he 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.

12. 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

13. The CPR[4] 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

14. 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;
    - Funding matters.

Advising once a decision has clearly been made

[4]CPR54.1(2)(a)(ii).

15. 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

16. 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

17. 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 – obtain copies of all correspondence and documentation your client has in relation to the case. Some things which do not look relevant at first later may 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?
    - The impact of the decision under challenge
    - 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

18. 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

19. The PAP requires the Claimant, before making a claim, to write a letter before claim to the proposed Defendant. The protocol recommends a letter in38a 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.

20. 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).

21. 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.

22. 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

23. 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.

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

25. 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

26. 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. 44.2(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 on Day 3);

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).

PROCEDURAL RIGOUR

27. The Administrative Court has emphasised the need for procedural rigour in judicial review: in other words, parties and their legal representatives must observe the rules. Therefore it is imperative that practitioners comply with the court's procedures and rules at all stages of a claim, from the pre-action stage, to preparing to issue the claim and right the way through to the conclusion of the claim. If parties or their legal representatives fail to comply with these procedural requirements then the court has a range of sanctions at its disposal including the powers:
    - To decline to accept documents filed in the wrong format;
    - To impose adverse costs orders against a party or a wasted costs order against a legal representative;
    - To refer a legal representative to the relevant professional regulator.

PREPARING TO ISSUE

28. 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.

29. 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.

30. 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.

31. You will also need to prepare the permission bundle (see below), which must be filed in both electronic and hard copy. 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).

32. The likely order for the bundle is as follows:
    (a) List of essential reading
    (b) Index
    (c) Urgent consideration application, N463, and draft interim order (if appropriate)
    (d) Claim form, N461 (T480 in the Upper Tribunal – see more on this below)

(e) A clear and concise "Statement of Facts" and a clear and concise "Statement of Grounds" for judicial review (these can be combined into a single document).
(f) Witness statement from you and/ or client
(g) Relevant correspondence and other documents, preferably in chronological order (oldest document first) or grouped appropriately
(h) Primary and secondary legislation
(i) Guidance/ policies
(j) Copy public funding certificate/notice of issue (if appropriate).

33. The Claim Form must include or be accompanied by the following documents—

a clear and concise statement of the facts relied on set out in numbered paragraphs – "the Statement of Facts"; and

a clear and concise statement of the grounds for bringing the claim – "the Statement of Grounds". The Statement of Grounds should: identify in separate, numbered paragraphs each ground of challenge; identify the relevant provision or principle of law said to have been breached; and provide sufficient detail of the alleged breach to enable the parties and the court to identify the essential issues alleged to arise. The Statement of Grounds should succinctly explain the claimant's case by reference to the Statement of Facts and state precisely what relief is sought. The Statement of Facts and the Statement of Grounds may be contained in a single document.

34. The Statements of Facts and Grounds should be as concise as possible. The two documents together (or the single document if the two are combined) shall not exceed 40 pages. In many cases the court will expect the documents to be significantly shorter than 40 pages. The court may grant permission to exceed the 40-page limit.

35. The Claimant's solicitor's preparation of the documents for counsel's brief is likely to form the basis of the permission bundle, and will assist with easily discussing with counsel anything that should be left out (or added in). Front-loading of the preparation of the bundle is an important consideration as you are likely to be short on time.

36. The Administrative Court has very specific requirements for the filing of electronic bundles. This is set out in the Administrative Court's Information for Court Users Note on Electronic Bundles dated 19 July 2021:

    https://www.judiciary.uk/wp-content/uploads/2021/07/Administrative-Court-Information-for-court-users.pdf

This document is essential reading since the guidance states that a Judge may refuse to consider any bundle filed by a legal representative that does not comply with these requirements.[5]

37. The Upper Tribunal Immigration and Asylum Chamber has electronic bundle requirements that are similar which are set out in a Guidance Note from the President of UTIAC on CE-file and Electronic Bundles. At present, CE-file system in UTIAC is NOT to be used for urgent claims for judicial review e.g. where the Claimant is facing removal from the UK. Those applications must be filed by email to UTIACJudicialReviewApplications@justice.gov.uk

38. The claim form gives you the opportunity to make additional applications at the time of issuing the claim without the need to pay an additional fee. Examples of applications that might be made include:
    - An extension of time;
    - Disclosure of documents;
    - Anonymisation of the proceedings.

[5] Find the Document Upload Centre professional User Guide here: https://assets.publishing.service.gov.uk/government/uploads/sy4st2em/uploads/attachment_data/file/887109/Document_Upload_ Centre_Professional_User.pdf.

39. Applications in urgent cases are considered separately. It is important to note that if an application urgently requires consideration by the court within 7 days, then form N463 must be completed ("Application for urgent consideration").

40. If the application does not need to be considered within 7 days but needs to be considered before permission is decided then this should be drawn to the court's attention and explained in the body of the claim form and also in any covering letter or email.

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

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

STEPS IN PROCEEDINGS

Issuing Proceedings

43. 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 54C. The general expectation is that a claim should be issued and determined in the region with which the claim has the closest connection (PD 54C). 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). Where a claim seeks to challenge the lawfulness of a Welsh public body's decision, it must be issued in the Cardiff ACO and all hearings will take place in Wales (CPR 7.1A). 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

44. You need to lodge a hard copy and an electronic copy of the claim form and permission bundle, in accordance with the Administrative Court's "Information to Court Users" guidance. The court will seal (and return to you) a claim form for you to serve on the Defendant(s) and any interested parties. The hard copy claim form can be posted to the Administrative Court Offices or left at the drop box in the ACO in London. If the claim is urgent then it must be sent to by email to immediates@administrativecourtoffice.justice.gov.uk accompanied with either a PBA number (if your firm has a fees account with the court), receipt of payment by debit/credit card or a fee remission certificate. Non-urgent claims should be filed electronically, using the Document Upload Centre wherever possible. You must first send in by email a request to upload documents to (for London) generaloffice@administrativecourtoffice.justice.gov.uk or (outside London) birmingham/cardiff/leeds/manchester(as applicable)@administrative courtoffice.justice.gov.uk You will receive an invitation from by email 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.

45. The Upper Tribunal Immigration and Asylum Chamber has requirements for the electronic filing of claims that are similar to the Administrative Court which are set out in a Guidance Note from the President of UTIAC on CE-file and Electronic Bundles. UTIAC has adopted the CE-filing – the online system for filing documents electronically at Court (the Administrative Court currently does not but intends to do so in due course). Anyone who wishes to use CE-file must register as a user – instructions for registration can be found in the guidance note. It should be noted that, at present, CE-file system in UTIAC is NOT to be used for urgent claims for judicial review e.g. where the Claimant is

facing removal from the UK. Those applications must be filed by email to UTIACJudicialReviewApplications@justice.gov.uk.

46. 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.

Serving Proceedings

47. You must serve the sealed/issued claim form on the Defendant and any Interested Parties within seven days after the date of issue. 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 file a certificate of service with the court within seven days of serving. It may seem an obvious point, but it is of critical importance that the sealed claim form and permission bundle are served on the Defendant at the correct address. Service can only be effected by email and if the Defendant has confirmed that it will accept service by email and the sealed claim form must be sent to the email address that the Defendant has confirmed can be used for service. If this step is not followed then service will be defective and this may prove to be fatal: the court may set aside the claim form for want of jurisdiction by reason of invalid service.

Acknowledgment of Service

48. 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.

49. Any response to a claim must be filed electronically with the ACO. Defendants who are represented should file all documents, i4n5cluding all Acknowledgements of Service, and any interlocutory applications using the Document Upload Centre. Any request to upload documents must be made by the professional representative by email to the same email addresses as noted above – i.e. (in London) generaloffice@administrativecourtoffice.justice.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.

50. 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.

51. The Summary Grounds should identify succinctly any relevant facts. Material matters of factual dispute (if any) should be highlighted. The Grounds should provide a brief summary of the reasoning underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information.

52. The Summary Grounds should (again succinctly) explain the legal basis of defendant's response to the claimant's case, by reference to relevant facts.

53. The Summary Grounds should be as concise as possible. Summary Grounds shall not exceed 30 pages. In many cases the court will expect the Summary Grounds to be significantly shorter. The court may grant permission to exceed the 30-page limit.

54. 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 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 Service11), 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 occurred12, unless it considers there are reasons of exceptional public interest. The court may also consider that question of its own volition.

55. 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?

56. 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. The judicial review procedure does not make provision for the Claimant to respond to the Acknowledgment of Service during the paper application process. Replies are rarely if ever necessary and are not encouraged. The ACO will not delay consideration of permission on the basis that the Claimant may wish to reply. Any reply that is received before a case is sent to a judge to consider permission will be put before the judge, but it is a matter for the judge as to whether she is willing to consider the document.

57. Time limits for the AoS are sometimes extended between the parties, but the 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

58. 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 procedures13are superficially different (and are not described below) but the principles are the same.

59. 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…').

60. 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);
    - However in some cases it is essential that the final hearing take place very quickly, and interim relief cannot assist.

61. 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?

62. 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

63. 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 l4e8tter 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.

64. 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.

65. 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.

66. 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 per4m9 ission 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."

67. 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

67. 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).

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

"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."

69. 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.

70. 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.

71. 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.

72. There is a specific form for making an application for urgent consideration which is used both for when the application for interim relief is being made at the same time as the claim for judicial review, and also for any urgent interlocutory applications made after the claim is issued – form N463. This must be prepared along with a draft Order which sets out what you are seeking. The form is only to be used where the application needs to be considered within 7 days. If the application does not require consideration within 7 days then you should either make the application on the N461 claim form (if making an application at the time of issuing the claim) or on form N244 (after the claim is issued). 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 on the N463 form how quickly the N463 application must be considered and whether it should be considered immediately (within 3 days) or urgently (in 3 t o 6 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.

73. Please note that the N463 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.

74. 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

75. 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 i.e. the reasons why it must be considered within 7 days. 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.

76. 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).

Out-of-Hours Applications

77. 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.

78. 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, using the process described below.

79. 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.

80. The first step is to call the Royal Courts of Justice switchboard, at 020 7947 6000. There is a menu of options which, if followed, will put you through to a clerk in the Administrative Court. 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. It is advised to have your OOH form and/or grounds ready when you call the Court. 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.

81. 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 form14and return it by email to DutyClerkQB@justice.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.

82. 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

83. 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."*

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

85. 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.

86. 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.

87. 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.

88. 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."*

89. 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."*

90. The recent case of DVP v. SSHD [2021] EWHC 606 (Admin) emphasised the duties owed to the court by legal professionals when making urgent applications to the Administrative Court. It described the Administrative Court Judicial Review Guide as "essential reading", which (in the current version) sets out the practice for urgent cases and applications for interim relief at pages 84-94. The court reminded us at paragraph 78 that:

> *"It is essential at the court can have confidence in the thoroughness and objectivity of practitioners, solicitors and counsel, who make urgent applications in the Administrative Court. It follows that all who do so must understand their professional obligations, must prepare such applications with care, must comply with the requirements set out in the Guide and set out the information they are required to provide in the form N463."*

91. In DVP, the court held that in the underlying judicial review claims – which concerned asylum seekers accommodated at the Penally Camp in Pembrokeshire – the application "should never have been made" and there had been "a significant abuse of the 'urgents' procedures", including:
    - Lack of exceptional urgency or urgency;
    - Failure to properly complete the N463 form – in particular, it had been a fundamental mistake to complete the form by simply cross-referencing other documents in the court bundle, rather than explaining on the form what the application was about and why it was said to be urgent;
    - Purporting to act without any instructions – the six claimants had been transferred out of the Penally Camp before the claim was filed, but the claimants' representatives purported to bring the claim for the benefit of other people accommodated at the camp who had not instructed them;
    - Breach of duty of candour – the claimants' representatives failed to comply with the duty of candour in completing the N463 form, including by not identifying that the claimants had all left the Penally Camp, not explaining the delay in making the application, and not drawing the court's attention to the extensive pre-action correspondence which included the Defendant's response to the proposed claim.
92. The court gave *"very careful consideration"* to referring the claimants' representatives to their professional regulators, but decided not to do so as those representatives accepted responsibility and apologised to the court.

93. 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 applications. 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."*

94. 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.

95. 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.

96. 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

97. 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

98. 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.

99. 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

100. 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

101. Ordinarily this decision is first considered by a judge on the basis of the papers alone (i.e., without an oral hearing).

102. 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"*. As the White Book notes at §54.4.2,

> *"[t]he purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration".*

103. 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.

104. 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 on Day 3.
    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 takes place - if permission is granted – on the same occasion as the permission application). The court may make an ord57er 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. 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.

105. Until recently hearings in the Administrative Court and the Upper Tribunal were taking place either in person, or as hybrid hearings, or remotely. In the Administrative Court the default position is that hearings will be in-person, but if a party requires a remote or hybrid hearing, then an application will need to be made to the court.

Information about financial resources

106. If sections 85 and 86 of the CJCA 2015 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, 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.

Part 2: PERMISSION TO THE FINAL HEARING

107. 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 (unless the Defendant wishes to rely only on its Summary Grounds, which it may do pursuant to PD54A para 9.1) and any supporting evidence by the Defendant; a listing date being secured; exchange of Skeleton Arguments; the hearing itself.

108. 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 interveners.

NEXT STEPS FOLLOWING THE GRANT OF PERMISSION

Listing – Securing a Date for the Hearing

109. 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, althou5g8h in some cases the Defendant may wish to take these steps (for example where there is costly interim relief in place).

110. Planning cases are heard within tight target timescales laid down in CPR PD 54D, para. 3.4.

111. In other cases, the list office will usually contact counsels' clerks to discuss listing dates within a few weeks after permission has been granted.

Defendant's Detailed Grounds and Evidence

112. 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; conventional directions might 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.
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.

113. 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.

114. This standard 35-day timetable will not apply if the Judge when granting permission has made bespoke directions setting a different timetable. Detailed Grounds must be concise and shall not exceed 40 pages (PD54A para 9.1(2)). As per PD54A para 9.1, if the Defendant has already filed Summary Grounds and if those have addressed all relevant matters, it may inform the court and other parties that the Summary Grounds will stand as its Detailed Grounds.

115. CPR Part 54 does not explicitly envisage Claimants responding to the Detailed Grounds and evidence. However, as mentioned above, 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.

INTERIM APPLICATIONS

Procedure for making interim applications

116. The procedure in CPR Part 23 applies and an application should be made in an application notice. Note that under CPR 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 upon request (54.1A(5)).

117. 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

118. 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.

119. 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; 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.

120. 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 bears 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.

121. 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.

122. 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).

123. If the Claimant wishes to rely on grounds other than those for which permission was granted then they require permission and must (CPR 54.15 and PD 54A para 11) apply promptly.

124. If the change is significant (especially if there ha6s0 been a fresh decision or failure to deal with new material) then an amendment to the claim form is likely to be necessary and an application should be made promptly including a draft of the amendments (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 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."*

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

126. 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).

127. Also see R (Dalton) v. CPS [2020] EWHC 2013 (Admin): "If the defendant has agreed to and already made a new decision which the claimant seeks to challenge, it may be more convenient for the parties and the Court to amend the claim to allow for the new decision to be challenged. The claimant should note the following guidance (as observed at paragraph 22 of R (Hussain) v Secretary of State for Justice [2016] EWCA Civ 1111):

- 6.10.4.1. The Court can impose a condition requiring the re-formulation of the claim and the re-preparation of any bundles of material, so as to eliminate any irrelevant surplus material and to work from a single set of papers. Any draft order or draft consent order seeking amendment of the claim in these circumstances should typically include a provision allowing for a new, amended claim bundle to be filed or, ideally, be accompanied by a copy of the proposed amended claim bundle.
- 6.10.4.2. The Court retains discretion to permit amendments and may make an assessment that overall the proper conduct of proceedings will best be promoted by refusing permission to amend and requiring a fresh claim to be brought.
- 6.10.4.3. The Court will be astute to check that a claimant is not seeking to avoid complying with any time limits by seeking to amend rather than commence a fresh claim.
- 6.10.4.4. A claimant seeking permission to amend would also be expected to have given proper notice to all relevant persons, including interested parties."

128. It should also be noted that where a party no longer pursues a ground of claim, the court expects the party to make this clear to the court and the other parties, rather than remaining silent about it and expecting the court and parties to infer from that silence that the ground is no longer pursued e.g. by not referring to it in the skeleton argument.

Disclosure

129. CPR Part 31 (disclosure) applies to all proceedings except for those on the small claims track but CPR PD 54A para 10.2 states that in judicial review claims disclosure is "not required unless the court orders otherwise".

130. 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.

131. 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.

  i. *"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.*

132. 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."* Normally judicial review applications raise issues of law rather than fact and disclosure is unnecessary to resolve such issues; disclosure should be limited to the minority of cases where the "precise facts are significant" – Lord Bingham in Tweed at paras 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).

133. 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), paras 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.

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

135. Disclosure may be ordered despite the fact that documents are confidential – R (Mohammed) v. SSD [2012] EWHC 3946 (Admin), paras 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.

136. 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.

137. 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, 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.

138. 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 the 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.

139. 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."*

140. 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).

141. Claimants should also consider the possibility of applications for information under the Freedom of Information Act 2000 and the GDPR.

Cross-examination

142. The traditional approach has always been that j6u3dicial review applications are ordinarily heard on the basis of written evidence rather than live evidence; 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 WLR 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]-[27]).

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

144. 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 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

iii. where there is disputed allegation of a human rights breach raising a hard-edged question of fact as to whether human rights are engaged at all. 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?

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

- R (MH) v. SSHD [2009] EWHC 2506 (Admin) Sales J:
  "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"16.

- 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".

- 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

146. Under CPR 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." (CPR 18.1(2)). The Court may direct that the information provided (voluntarily or following an order under CPR 18.1) must not be used for any purpose outside those proceedings (CPR 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 (CPR PD18, para. 1.1). Practice Direction 18 sets out the detail needed to be included in the first party's request (para. 1.6) and in the second party's response (para. 2.3). The second party must verify his response with a statement of truth (para. 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 (paras 19-20).

147. 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 GDPR requests. An 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 [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

148. 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 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.

149. 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:

(a) 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):
   i. This is instead of the 'triviality' criteria introduced by Mitchell.
   ii. 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.
   iii. 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 to be serious or significant then the second and third tests below 'assume greater importance' [para. 28].

(b) Consider why the failure or default occurred (and, by implication, whether these are 'good' or 'bad' reasons)
   i. **Note**: the Court of Appeal was keen to stress the examples given in para. 41 of Mitchell were no more than examples.

(c) 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).
   i. 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].

150. There appears to be some difference of opinion between the Lord Justices as to the weight to be given to factors (1) and (2) – should those factors be given particular weight (majority view) or are they simply factors to be taken into account every time as part of 'all the circumstances of the case'? 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

151. Settlement is being considered in more detail in a separate session. However, some of the brief key aspects are summarised here.

152. 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.

153. 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 on Day 3.)

154. CPR PD 54A para. 16 appears to require the consent of the court for all settlements requiring a court order 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.

155. 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 on Day 3.

156. 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 the court has granted an interim injunction or a party has given an undertaking to the court). 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

157. The Administrative Court's listing policy is set out at https://www.judiciary.uk/wp-content/uploads/2021/07/Administrative-Court-listing-policy-updated-June- 2021.pdf

158. 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.

159. Note that if you act for an 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.

160. 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

161. Under CPR 54.18 the "court may decide the cla6im7 for judicial review without a hearing where all the parties agree". This will normally be suitable for simple cases17 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 way18. 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.

162. 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

163. Skeleton arguments are dealt with in para. 14 of CPR PD 54A. The Claimant must file a skeleton not less than 21 days before the hearing (or warned) date. The Defendant and any other party wishing to make representations must file their skeleton not less than 14 days before those dates. Failure to observe these time limits may result in "disagreeable" costs orders – Haggis v. DPP [2003] EWHC 2481, para. 30.

164. Skeleton arguments may be filed by email. Each region has its own email address. The address for imminent hearings in London is London.skeletonarguments@administrativecourtoffice.justice.gov.uk. There is a template skeleton argument at https://www.gov.uk/government/publications/form-ac014-

skeleton- argument-template which prompts advocates to include the date of the hearing, a time estimate for the hearing and a list of pre-reading.

165. CPR PD 54A para. 14.1 states that the purpose of a skeleton argument is "to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely." Para 14.2 sets out the requirements for a skeleton argument and para 14.3 states that skeleton arguments shall not exceed 25 pages (although the court may grant permission to exceed 25 pages).

166. PD 54A para 14.7 requires the parties to file, not less than 7 days before the date of the hearing:

1) an agreed list of issues;
2) an agreed chronology of events (with page references to the hearing bundle); and
3) an agreed list of essential documents for advance reading by the court (with page references to the passages relied on) and a time estimate for that reading.

167. 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 …"*; see also Munby LJ's "afterword" in R (B) v. CC Derbyshire Constabulary [2011] EWHC 2362 (Admin) at paras. 96-101. In most cases, an authorities bundle should not contain more than 10 authorities. Where a decided case is reported in a set of law reports, the report should be used, with preference given to the Official Law Reports: see Practice Direction – Citation of Authorities [2012] 1 WLR 780. Versions downloaded from websites should resemble the hard-copy law report if possible.

168. 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 order 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:
    i. *"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.
(c) What documents (and authorities) are really necessary for the Court. In *Prokopp* [2003] EWCA Civ 961, Schiemann LJ said:
    i. "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."

169. 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. Skeleton arguments should be kept as short as possible. In most cases skeleton arguments can be set out in 20 pages or less.

Hearing bundles

170. The Claimant must file a paginated and indexed bundle of documents with the court not less than 21 days before the hearing (or warned) date – which will usually also be the deadline for the Claimant's skeleton argument – CPR PD 54A, para. 15.3. The contents of the bundle must be agreed between the parties. Where the hearing bundle exceeds 400 pages, the parties shall agree the content of a core bundle containing the decision under challenge, the pleadings and such documents as the parties consider essential for the purposes of the hearing (CPR PD 54A para. 15.1).

171. The requirement to agree a bundle of authorities is in CPR PD 54A, para. 15.4. It should be lodged in both electronic form and hard copy not less than 7 days before the hearing (or warned) date: para. 15.5.

Running Order and Timetable

172. The usual running order in a judicial review is that the Claimant goes first; 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.

173. 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

174. 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.

175. 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 convened – 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).

176. Covid-19 measures. In view of the Covid-19 pandemic, hearings in the Administrative Court and the Upper Tribunal are taking place either in person, or as hybrid hearings, or remotely. The decision as to how a hearing will take place is made by the judge who will hear the case; when possible the judge will make this decision taking account of the views of the parties.

177. If you require a particular mode of hearing (for example an in-person hearing due to the complexity of the case or the volume of documents), then it would be advisable to seek the other parties' agreement before making any representations to the court. An important consideration is the interests of justice.

In the hearing

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

179. 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 the decision on that issue 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.

180. Where limited permission was given: CPR 54.15 permits a Claimant to give notice that they intend to rely on grounds in their original N461 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.

181. 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

182. 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 particular for use in the case of an urgent appeal). In the vast majority of judicial reviews, judgment is not given immediately at the conclusion of the hearing, but is reserved.

183. 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 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.

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

185. 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.

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

APPEALS

Civil cases

187. In a civil case an appeal lies to the Court of Appeal19, with permission of either the Administrative Court or the 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 803, para. 1.

188. 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.

189. 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 52.12.

190. An application for permission to appeal will be determined by the Court of Appeal on the papers, unless the judge considering the application directs 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.

191. 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.

Criminal cases

192. 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:
   (a) 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.
   (b) 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.

Public Law Project

How to do judicial review

March 2023

SESSION 4: FUNDING[1]

INTRODUCTION

1. One of the biggest issues currently facing public lawyers for Claimants is how to fund judicial review cases. The combination of severe cuts to the availability of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), practices[2] and provisions[3] that force legal aid practitioners to work at risk, the impact of the cost capping provisions under the Criminal Justice and Courts Act 2015, and the effective abolition of success fees for CFAs as a result of the implementation of the Lord Justice Jackson reforms has been described as a *"perfect storm"*[4] which undermines the ability of individuals and organisations to hold public bodies to account through the vital mechanism of judicial review.
2. The important role of Claimant solicitors undertaking public interest litigation for impecunious clients via judicial review has been recognised at the highest level – see, for example, the comments of Lord Hope in In re appeals by Governing Body of JFS [2009] UKSC 1, [2009] 1 WLR 2353, paras. 24 and 25 (referred to in Session 4).
3. There are two aspects to funding that need to be considered by anyone thinking of bringing a judicial review:
   (1) Paying for your own legal costs

   (2) Paying the other side's legal costs
4. To a significant degree these two facets are interlinked because, subject to what has just been said in the previous session, generally costs follow the event so if you win your case you are likely to have to pay nothing (or a small amount depending on the nature of your funding agreement with your lawyers) but if you lose you will not only have to pay your own legal costs but also those of the successful Defendant (or the best part of them).

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[1]With thanks for their input into this document to Daniel Rourke and Emma Vincent Miller of Public Law Project, Caoilfhionn Gallagher and Martha Spurrier of Doughty Street Chambers and Jamie Beagent of Leigh Day.
[2]Such as delayed processing of applications with often forces providers to rely on backdating in urgent cases.
[3]See Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013 (as amended) which provides that providers generally cannot receive payment from the Legal Aid Agency unless cases are granted permission.
[4]See editorial at http://www.jordanspubliclaw.co.uk/articles/funding-judicial-review-a-perfect-storm (19 April 2013).

5. There are three main ways of covering your own legal costs in judicial review:
    a) Paying privately;
    b) Legal aid; or
    c) Entering a Conditional Fee Agreement.
6. There are four main means of covering the potential liability to the other side:
    a) Paying from your own resources;
    b) Legal Aid costs protection[5];
    c) Obtaining an Insurance policy;
    d) Obtaining a Costs Capping Order (as Protective Costs Orders are now known following the implementation of ss88-90 of the Criminal Justice and Courts Act 2015– considered further in session 6).
7. Typically judicial review cases will be brought and funded either: (a) by wealthy individuals, groups or companies who can afford to pay their own lawyers and run the risk of paying the Defendant's costs if the claim fails; (b) the extremely impecunious who qualify for legal aid and thus have their legal costs paid (albeit at extremely low rates of pay) and are protected from adverse costs risk; or (c) other groups and individuals who must try to tailor an affordable package through a combination of using their own resources, raising fighting-funds (crowd-funding etc), negotiating CFAs with their lawyers, paying for After The Event insurance and, where appropriate, applying for Cost Capping Orders.
8. This session will deal briefly with private funding and crowdfunding and will then focus on Legal Aid and CFAs. Insurance is not covered in detail because it is so rare and unaffordable.
9. Before-the-event legal expenses insurance is often provided as an additional benefit on contents and other insurance policies, mortgage policies, credit card agreements and as a benefit to members of a trade union or association. The policies differ and each policy will list the types of court proceedings it covers. If the policy does provide cover, then the insurer will meet the Claimant's legal costs to a specified level (and at specified rates) and, if there is sufficient cover, also the other side's costs. The insurer must also allow the Claimant to instruct a solicitor of his or her choice. Unfortunately most such policies expressly exclude judicial review.
10. There is an after-the-event legal expenses insurance market which will cover the adverse costs risk and sometimes disbursements (but not usually legal fees). Even before the abolition of the recovery of insurance premiums from Defendants under the Jackson reforms, ATE insurance was only available in the strongest of judicial review cases and usually at a prohibitively high cost (usually in excess of 50% of the sum insured). With the loss of the ability to recover premiums from Defendants, and with no damages in play which insurers can use to recoup the premium from, it seems highly unlikely that any insurer would touch a judicial review without an up-front payment of a very high premium.

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[5]Individuals who are sufficiently impecunious to obtain legal aid benefit from a presumption that costs orders will not be enforced against them. There are caveats to this which are not covered in this session but which legal aid providers should be aware of in order to advise clients.

A. Paying Privately

11. This can be split into:

    (i) Traditional hourly rate payment;

    (ii) Fixed fees.

    These two options are summarised below.

(i) Traditional hourly rate payment

12. Note:

    - Hourly rates set by solicitors firms (and barristers) dependent upon location of firm and experience of fee earner;
    - Disbursements (expenses) paid in addition (Court fees, travel expenses, expert fees etc.);
    - Expensive – typically anything from £20-50,000 for a judicial review going all the way to final hearing, although this is dependent upon the case and the lawyers instructed;
    - Possible to ask to have costs independently assessed - Part III of the Solicitors Act 1974.

(ii) Fixed Fees

13. Note:

    - Becoming more common for lawyers to agree to act on a fixed fee (or fees fixed by stage of the proceedings);
    - Risky for lawyers given the unpredictable nature of litigation;
    - Therefore usually offered as part of a CFA, with full fees payable in the event that the claim succeeds.

B. Crowd funding

14. It may be possible to raise money to meet your own legal costs and/or any liability to pay your opponent's costs (most likely where these have been capped under a Costs Capping Order) through a fundraising campaign or appeal. The use of "crowd funding" to raise a fighting fund to litigate issues which have are of interest to a section of the public, or which may draw sympathy, has gained momentum in recent years.
15. Not all cases will be suitable for funding in this way. Such appeals are more likely to be successful where the issue is one which will grab the public's attention, and especially if there is a group of people who are already interested in the issue, for example a campaign to save the closure of a local amenity such as a library. Even then it may be that the prospects of raising enough funds will be limited where the community with an interest is generally impecunious.

C. CFAs

16. CFAs are commonly known as *"no win, no fee"* agreements. Lawyers act 'at risk' of not being paid. However, in recognition of this risk the client agrees to pay the lawyers their full fees plus a success fee (of up to 100%) if they win.

17. CFAs are relatively rare in judicial review because of the unpredictability of outcome. This unpredictability of outcome is for a number of reasons, including: the nature of the process of judicial review itself (as we have previously seen, judicial review is a discretionary remedy). Compare tort claims, for example, where prospects of success can often be put at a very high level.
18. Typically, under a CFA disbursements will still have to be met by the client. It has now been confirmed by the Court of Appeal that lawyers can fund disbursements (and this is not champerty), but this is likely to be offered rarely: Flatman v. Germany [2013] EWCA Civ 278.
19. There are complex regulations which govern CFAs where a success fee is claimed. The ability to recover a success fee from the Defendant was abolished in April 2013, and the client is now liable for any success fee out of own pocket.

'CFA Lite'

20. A 'CFA Lite' limits costs to those recovered from the other party. It is essentially an agreement that the lawyers will not seek any costs from the client whatever the result. However, the client must seek to recover costs from the other side and pay these costs to the lawyers.
21. It is now understood to be settled that such arrangements do not infringe the indemnity principle.
22. The great benefit of the CFA Lite for lawyers is that it cuts out the need to comply with all of the CFA regulations. However, the down-side for lawyers is it limits the costs that they are paid.

Discounted CFA

23. Under a Discounted CFA, costs are charged at discounted rates, or on a fixed fee basis with full fees payable (including a success fee under a traditional CFA arrangement) if the case is won. This can operate as a traditional CFA (with success fee) or as a CFA Lite agreement.
24. This has always been permissible but it is likely to become more common as lawyers seek ways of mitigating the risk now that success fees are no longer recoverable from the Defendant.

D. Legal Aid[6]

25. The 'scope' of the legal aid scheme is very limited. Legal aid is only available for certain issues set out in schedule 1 to LASPO. However, where a matter is not within scope, an application for Exceptional Case Funding can be made on the basis that there is a risk of a breach of Convention Rights if Legal Aid is not granted[7]. Judicial review matters remain within the scope of Legal Aid, subject to certain exclusions (for example, where the judicial review does not have the potential to benefit the individual, their family or the environment or certain immigration cases[8]).

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[6] PLP has published a "How to Apply for Legal Aid Funding for Judicial Review" guide (September 2016) which is available in our resource library: http://www.publiclawproject.org.uk/resources/234/how-to-apply-for-legal-aid-funding-for-judicial-review

[7] PLP has published detailed guides on Exceptional Case Funding and how to apply for it which can be found here: https://publiclawproject.org.uk/exceptional-case-funding/

[8] Paragraph 19, Schedule 1 to the Legal Aid, Snetencing and Punishment of Offenders Act 2012.

Financial Eligibility

26. There are strict means eligibility criteria which govern the availability of legal aid to an individual. In summary:

a) Income:

- Monthly *"disposable income"* of less than £315 (or less than £733 subject to an ongoing monthly contribution);
- *"Disposable income"* is very strictly construed by reference to certain listed allowances;
- Maximum gross monthly income of £2,657 in any event;

b) Receipt of certain income-based benefits bypass the income assessment, but no longer exempt individuals from capital assessment.

c) Capital: less than £3,000 (or less than £8,000 with a capital contribution). As of 28 January 2021 all of the mortgage on the client's home is disregarded[9]. £100,000 of the client's equity in their home is also disregarded. The remaining value is included in the capital assessment. Following the case of GR v. Director of Legal Aid Casework [2020] EWHC 3140 the Legal Aid Agency (LAA) has a discretion to value capital *other than money* on an equitable basis (i.e. by valuing at 'nil' so that it does not affect eligibility)[10]. The LAA should be invited to do so if valuing a property or asset at market value would be unfair e.g. because a client has 'trapped capital' which exists on paper but in practice cannot be accessed or used to fund legal representation[11]. Notwithstanding these positive recent developments, many home-owners are still unlikely to be eligible for legal aid. For a judicial review, it is likely that anyone falling in the contribution band for capital (£3,001-£8,000) will in practice have to make the full capital contribution of £4,999;

27. It is important to remember that means eligibility is also calculated by reference to joint income with a partner. If another person 'is, has been or is likely to be substantially maintaining' the individual or making resources available to them, the LAA can take that persons resources into account in the assessment (Reg 16(5) of the Means Regulations).

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[9] Regulation 2(4) of the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020 got rid of 'the mortgage cap' which used to mean that only £100,000 of mortgage debt could be deducted when calculating an applicant's interest in their property (even if the applicant's mortgage debt was much larger).

[10] PLP has published a Practice Note on the implications of *GR v DLAC* along with a precedent for practitioners seeking to make representations to the LAA in reliance on the judgment: https://publiclawproject.org.uk/uncategorized/new-resource-for-legal-aid-practitioners-eligibility-and-trapped-capital/

[11] In *GR v DLAC* the Claimant could not sell or borrow against her home because she was on Universal Credit; had no savings; and her abusive ex-partner, with whom she jointly owned the property, would not consent to her borrowing against it.

Legal Aid: Funding Types

28. There are three different types of legal aid funding of relevance:

(i) **Legal Help**: for initial advice and assistance;

(ii) **Investigative Representation**: to cover the cost of investigating a potential claim where additional work is required to assess the merits (e.g. where expert evidence or counsel's opinion is required);

(iii) **Full Representation:** level of funding required to issue JR proceedings.

(i) *Legal Help*

29. This is the level of service whereby solicitors can provide basic legal advice to a client on a public law issue where the solicitors giving the advice have a public law contract with the LAA. Note:

- Solicitors are able to offer legal help without reference to the LAA (subject to an annually allocated number of matters);
- "Public law" is defined for the purposes of solicitors' contracts with the LAA to exclude non-judicial review matters such as complaints to an ombudsman;
- In most cases advice should be provided face to face;
- Lawyers are paid a fixed fee (£259) or an hourly rate once the escape fee (£777) has been reached.
- Cannot generally instruct counsel or incur significant expenses;
- In most cases the LAA expect this work to include engaging in Pre-action Protocol correspondence with a public body, although this is a grey area.

(ii) *Legal Representation*

30. "Legal representation" is defined in Reg 18(2) of the Civil Legal Aid (Merits Criteria) Regulations 2013 as:

"the provision of civil legal services, other than acting as a mediator or arbitrator, to an individual or legal person in particular proceedings where that individual or legal person—

(a) is a party to those proceedings;

(b) wishes to be joined as a party to those proceedings; or

(c) is contemplating issuing those proceedings."

There are two types of Legal Representation, as stated above, namely Investigative Representation, and Full Representation. These are the types of legal aid that are required if a person is contemplating taking active steps towards litigation.

31. It is possible to apply for legal aid on an 'emergency basis' in which case the application will be decided on the basis of limited information (without full evidence of means), with a 48 hour target for consideration by the Legal Aid Agency. A substantive application must then be made within 7 days. An

emergency certificate can be withdrawn or revoked if the client is later found to be ineligible on consideration of the substantive application[12].

(ii)(a) Investigative Representation

32. This level of funding is limited to investigating the strength of contemplated proceedings, where, without the work for which legal aid is sought, the merits of the claim are unclear. In these circumstances, investigative representation can cover evidence gathering, the instruction of an expert or, obtaining counsel's advice on the merits where the case involves a difficult point of law or the application of the law to the facts is complicated.
33. Solicitors must apply to the LAA for a 'certificate' to provide this service to a particular client. The certificate will limit the work undertaken and set the maximum costs which can be incurred.
34. Once the merits of the potential claim are clear, and if it is a sufficiently strong case, you can apply to the LAA for Full Representation.

(ii)(b) Full Representation

35. This is the level of service required to issue (or to represent a client in extant) JR proceedings.
36. Solicitors must apply to the LAA for a 'certificate' to represent the client. Certificates issued by the LAA control the stages of work that can be carried out in a JR and the maximum costs that can be incurred.
37. In order to be awarded Legal Representation (i.e. either Investigative Representation or Full Representation), the client needs to satisfy the merits criteria set out in the *Civil Legal Aid (Merits Criteria) Regulations 2013.* This includes both Standard and Additional criteria (Regs 39 and 53) and Public Law Specific criteria (Reg. 56).

38. **Standard & Additional Criteria (Regs. 39, 53):** It is necessary to show that:
    - No other source of funding is available to bring the claim (e.g. union, charity, financial backer etc.), including other individuals who would benefit from the outcome of the proceedings (39);
    - The case is unsuitable for a CFA (NB: note difficulties with insurance for JRs) (39);
    - All 'effective' alternative remedies have been exhausted (39 and 53);
    - There is a need for legal representation in the circumstances of the case (39);
    - The act, omission or matter complained of is susceptible to JR (53).

39. **Public Law Specific Criteria for Full Representation (Reg 56)** It is necessary to show that:
    - A letter before claim has been sent to the Public Authority (except where impracticable) (56(2)(a));
    - The proportionality test is met (56(2)):

[12]Regulation 52 of the Civil Legal Aid (Procedure) Regulations 2012. 'Revocation' effectively means the certificate never existed, with severe consequences for the client who loses their costs protection and becomes liable for the providers fees at legal aid rates.

"the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case" (Reg. 8)

- The prospects of success test is met (56(3)), meaning that either:
  - The prospects of success are moderate or better (above 50%)
  - The prospects of success are marginal (45-49%) or borderline <u>and</u>:
    - the case is of significant wider public interest;
    - the case is one with overwhelming importance to the individual;
    - the substance of the case relates to a breach of Convention right.[13]

Refusal of Legal Representation

40. An application for a certificate may be refused at the outset, or the certificate may be withdrawn by the LAA if they consider that the criteria are no longer met.
41. A review may be requested of the decision within 14 days.
42. If the decision is upheld, an appeal may be made to an Independent Funding Adjudicator. The appeal is usually dealt with on the papers. The Adjudicator's decision is not always binding on the LAA but it would be very unusual for it not to be followed.
43. Note that there is no right of appeal to an IFA where an application has been submitted under the emergency procedure.
44. Note that the Adjudicator can only determine certain issues relating to the Merits criteria and not, for instance, whether someone is means eligible or whether the services fall within LASPO.
45. The only alternative avenue if an appeal is not successful (or available) would be another judicial review.

Payment on Permission

46. Not content with the sweeping restrictions on legal aid rates introduced by LASPO, the Government has also restricted the circumstances in which legal aid will be paid to lawyers in judicial review cases.
47. Regulation 5A inserted into the Civil Legal Aid (Remuneration) Regulations 2013 by the Civil Legal Aid (Remuneration) (Amendment) (No3) Regulations 2014 placed all pre-permission work at risk. This came into force on 22 April 2014.
48. However in <u>R(Ben Hoare Bell & ors.) v Lord Chancellor</u>, the Court found that there was no rational connection between the effect of the regulations and its stated purpose [43], and that the reach of the regulations "*extends well beyond those in which such a regulation could lawfully incentivise providers to a sharper focus on the merits test in the way described in the consultation papers"* [52]. Accordingly, the Court found that the Lord Chancellor did not have the power to make such regulations and they were quashed.

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[13]Note that these criteria were amended for applications made on or after 22 July 2016 by the Civli Legal Aid (Merits Criteria) (Amendment) Regulations 2016 2016/781.

49. In response the Lord Chancellor immediately (and without any further consultation) introduced new regulations. The position now is that 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 directs an oral permission hearing, or a 'rolled up' hearing of the claim[14].

50. In other situations where the Court has neither granted nor refused permission, payment is at the discretion of the Lord Chancellor and he may only make payment if he considers it is reasonable in the circumstances of the case, taking into account, in particular—
    (i) the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;
    (ii) the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings, and
    (iii) the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time.

Public Law Project
March 2023

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

Public Law Project

How to do judicial review

March 2023

SESSION 5: SETTLEMENT AND COSTS[1]

SETTLEMENT AND COSTS

1. The paper covers settlement and securing inter parte costs and other costs orders (wasted costs, non-party costs and pro bono costs orders).

SETTLEMENT AND INTER PARTES COSTS

2. The need to consider settlement regularly arises in judicial review claims. In paragraph 3.21 of his final report in July 2009, Jackson LJ noted, "*PLP states that research shows that approximately 60 per cent of judicial review cases are now settled following the letter of claim…".* That is because as a result of a claim or threatened claim defendants often change their decision, agree to reconsider it, or produce evidence that shows the decision was lawful.

3. Particular difficulties in a judicial review settlement include the following.

    a. The defendant often takes only some of the action the claimant asks for, but not all of it. The question of whether LAA funding continues to be justified must then be considered.

    b. The defendant may take this action very shortly before the hearing. It is regularly the case that crucial evidence is submitted a day or two before the substantive hearing. There are procedural rules about when the defendant's evidence and grounds should be submitted. But those deadlines are regularly missed. Even if they are, the Administrative Court will normally accept fresh significant evidence from a defendant, and will expect the claimant to address

[1]With thanks to Adam Straw, Jude Bunting and Caoilfhionn Gallagher of Doughty Street Chambers, Ben McCormack of Garden Court North and Mathieu Culverhouse of Irwin Mitchell Solicitors.

the updated position. The court may agree to adjourn the case if the claimant can show prejudice by the late service. Procedural breaches may, however, lead to costs being awarded against the defendant.

c. Costs are more difficult to obtain if the claimant has only received part of the relief sought.

Facilitating settlement

5. Judicial review claimants may wish to consider the use of offers made under CPR Part 36 in appropriate cases. These have traditionally been more familiar to civil litigators than judicial review practitioners. They are offers to settle that can be made at any time in the course of a case (or even before proceedings are issued). CPR 36.5 states:

"(1) A Part 36 offer must—

(a) be in writing;

(b) make clear that it is made pursuant to Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue;

…."

6. The idea behind a Part 36 offer is to put pressure on the other party to settle because of the costs consequences of refusing to settle and subsequently failing to beat the rejected Part 36 offer. Those costs consequences can be severe, and can include the payment of costs on an indemnity basis and interest on those costs at 10% above base. The making of offers is necessarily a fact-sensitive exercise, and needs to be carried out only on instructions and with the greatest care, and – if necessary – with the benefit of counsel's advice.

Settlement by agreement

7. CPR r. 54.18 states:

> *"The court may decide the claim for judicial review without a hearing where all the parties agree."*

8. If the parties agree about the final order, the claimant must file at the court:

a. a consent order (with 2 copies) signed by all the parties setting out the terms of the proposed agreed order;

b. a short statement of the reasons relied on as justifying the proposed agreed order; and

c. copies of any authorities or statutory provisions relied on (PD54A, §17.1).

9. A statement of reasons is required because the Administrative Court is not bound by the agreed view of the parties. It can refuse to make the order. However, in practice the reasons do not need to be detailed because it is very rare that the Court will refuse to make an agreed order.

10. A precedent is attached to these notes. That order includes a direction that the claim is discontinued. It is not inevitable that the claim will be discontinued at the time of a consent order. For example, the consent order may relate to only one aspect of the claim, or the remedy given to the claimant may reveal further errors.

Discontinuing without consent

11. CPR Part 38 applies to judicial review claims and sets out the procedure and criteria for withdrawal. CPR 38.2(1) permits a claimant to discontinue all or part of a claim at any time. There are certain exceptions to that, including when the Court has granted an injunction, an undertaking has been given to the Court, or where there is more than one claimant. In those cases either the consent of another party or the consent of the Court is necessary.

12. A claimant who claims more than one remedy and subsequently abandons one or more (but not all) of them, is **not** treated as discontinuing part of the claim. She is treated as amending the claim and should follow the procedure for amending the statement of case, which is in CPR 17.

13. The procedure for discontinuance is set out in CPR 38.3, and includes the requirement that the claimant file and serve a notice of discontinuance.

14. The problem with withdrawing a claim without consent is that CPR 38.6 states:

> *"(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."*

15. As will be seen below, in the Administrative Court the court may order otherwise if the claimant has obtained the relief sought. But CPR 38.6(1) means it is preferable, if possible, to agree a consent order which deals with costs and discontinuance. Unfortunately, often defendants are unwilling to agree to pay a claimant's costs, and prefer to agree that written submissions on costs will be made.

Inter partes costs

16. There have been recent significant changes to the Administrative Court's approach to costs. The previous '*Boxall'* approach (after R(Boxall) v. Waltham Forest LBC [2001] 4 CCL Rep 258), which often led to no order for costs being made upon settlement, has been departed from. These changes resulted, in part, from the introduction of the pre-action protocol for judicial review, from recommendations in Jackson LJ's final report, at paragraph 4.13[2], and from subsequent caselaw. PLP has played an important part in the changes.

17. A summary of the current position is that the claimant should normally obtain costs if (1) he or she has complied with the pre-action protocol; and (2) obtains the relief sought, or substantially similar relief, through settlement or judgment. However, if the claimant is only partly successful, the court will often decide to make no order for costs, unless it can form a tolerably clear view without much effort about who has won.

18. In R (Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895 [2011] CP Rep 43 Pill LJ, giving the leading judgment, said:

> *"59. 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."*

19. Similarly, in R (M) v Croydon LBC [2012] EWCA Civ 595 [2012] 1 WLR 2607 the then Master of the Rolls, Lord Neuberger concluded that *"the position should be no different for litigation in the Administrative Court from what it is in general civil litigation"* (paragraph 58). In general civil litigation, the ordinary rule is that costs follow the event. The claimant should receive costs if he or she gets in settlement "*all, or substantively all, the relief which he has claimed"* (para. 49). If the Claimant succeeds only in part, there will be no order for costs unless the court is able *"to form a tolerably clear view without much effort"* about who has won (paras. 50-51).

20. Lord Neuberger later decided that there are three types of case:

> *"60. Thus in Administrative Court cases just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or*

[2] *"…in any judicial review case where the claimant has complied with the protocol, if the defendant settles the claim after (rather than before) issue by conceding any material part of the relief sought, then the normal order should be that the defendant pays the claimant's costs."*

pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and as the successful party that he should recover his costs. In the latter case the defendants can no doubt say that they were realistic in settling and should not be penalised in costs, but the answer to that point is that the defendants should on that basis have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately it seems to me that the Bahta case [2011] 5 Costs LR 857 was decided on this basis.

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases the court will be able to form a view as to the appropriate costs order based on such issues; in other cases it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in the Scott case [2009] EWCA Civ 217 . However, where there is not a clear winner, so much would depend on the particular facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial as, if it is tolerably clear, it may for instance support or undermine the contention that one of the two claims was stronger than the other. The Boxall case 4 CCLR 258 appears to have been such case.

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may

well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

21. The decision indicates that the contentions regularly made by defendants in judicial review (pragmatic solution not an acceptance we got it wrong; not clear the claimant would have won, etc) will not normally be sufficient to result in no order as to costs.

22. In R(Emezie) v. Secretary of State for the Home Department [2013] EWCA 733 [2013] 5 Costs LR 685, at para 4 the Court of Appeal said: *"the starting point now is whether the claimant has achieved what he sought in his claim."*

23. It is important that the three categories set out by Lord Neuberger are not applied mechanically. In R (Dempsey) v. Sutton LBC [2013] EWCA Civ 863 the claimant was awarded costs when it had been reasonable to issue judicial review proceedings and in substance she had achieved what she set out to achieve in the proceedings (paras. 22-24). Pill LJ cautioned against an *"over-technical view"* of costs being taken, focusing upon *"the hypothetical situation of what might have happened if events had taken a different course. One has to take an overall view of the situation and, applying good sense, decide on the reasonableness of the conduct of the parties including the conduct of the party seeking costs."*

24. One other relevant consideration is whether the claim was brought in the wider public interest. In R (Public Interest Lawyers) v LSC [2010] EWHC 3227 the decision in question was not quashed but the LSC was ordered to change the way it acted with other applicants. The claimants were awarded 70% of their costs.

25. One of the main lessons from the recent caselaw is that it is important to carefully formulate the letter before claim, and in particular the relief sought. A failure to obtain the relief sought in the pre-action letter is the key factor in determining costs.

26. However, non-compliance by the claimant with the pre-action protocol does not inevitably mean he will not obtain costs. In R (KR) v Secretary of State for the Home Department [2012] EWCA Civ 1555 the claimant did not comply with the pre-action protocol in a challenge to the certification of an Article 8 claim in an immigration context. The claim was robustly defended, but the Secretary of State subsequently conceded that the claimant was entitled to an in-country appeal on her Article 8 claim. The failure to comply was causally insignificant, and the claimant was awarded her costs. Similarly, where there was a god reason to depart from the protocol in the first place (perhaps the claim was urgent) then the failure to adhere to it strictly should not count against an otherwise successful claimant. Even in urgent cases however, it is wise, if at all possible to send a letter setting out the information that would be contained in a formal pre action protocol letter, and a claimant who does so and then wins is far more likely to recover inter partes costs.

Submissions on costs

27. Administrative Court judges may want to deal with costs very quickly. Recently, guidance was produced by the Administrative Court Office which indicated that costs submissions should normally be no longer than two pages. That guidance has subsequently been withdrawn, after submissions were made by various groups. A further draft was produced, and has been in force since 13 January 2014. A copy of the guidance is enclosed with this paper. Discussions are ongoing about whether that will be revised. Whether or not that happens, it is worth bearing in mind that judges may lose interest in longer submissions.

28. At the same time, the courts have recognized the importance of costs. In R (Scott) v Hackney LBC [2009] EWCA Civ 217 Lady Justice Hallett, giving the judgment of the Court of Appeal, stated:

> *"I would… urge all judges to bear in mind that, when an application for costs is made, a reasonable and proportionate attempt must be made to analyse the situation and determine whether an order for costs is appropriate… A judge must not be tempted too readily to adopt the fall back position of no order for costs." §51*

29. Similarly, in In re appeals by Governing Body of JFS [2009] UKSC 1, [2009] 1 WLR 2353 Lord Hope of Craighead DPSC, giving the judgment of the Supreme Court, said as follows:

> *"24. … the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the public sector…*
>
> *25. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable… the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it."*

30. In R (Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895 [2011] CP Rep 43 Pill LJ said *"Lord Hope's statement that "the consequences for solicitors who do publicly funded work are a factor which must be taken into account" is intended to be of general application"* (para. 49).

Consent order – settlement by agreement

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Claim No:

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

THE QUEEN (on the application of XXX) –and- HM ASSISTANT DEPUTY CORONER FOR INNER SOUTH LONDON

Before the Honourable Mr/Mrs Justice ………………………

The claimant and defendant do hereby consent to an order of the court being issued in the terms of the attached order

Dated this day of June 2012

……………………………………
[*Please insert name*]
Signed on behalf of the claimant

…………………………………….
[*Please insert name*]
Signed on behalf of the defendant

Statement of Reasons

The defendant now accepts that further investigations should take place into the monitoring and care of the deceased before and up to her fall on 15 March 2011.

The reasons for this are those stated in paragraphs 18 to 45 of the claimant's statement of facts and grounds relied on.

Dated the ......

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Claim No:

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

THE QUEEN (on the application of XXX) –and- HM ASSISTANT DEPUTY CORONER FOR INNER SOUTH LONDON

Before the Honourable Mr/Mrs Justice ……………..

Upon reading the claim form and grounds in this matter

AND UPON READING the form of consent together with the statement of reasons signed by all parties to these proceedings

AND the Court being satisfied that the Consent Order set out here should be made

BY CONSENT

IT IS ORDERED that

1. The claimant be allowed to withdraw his claim for judicial review.

2. A fresh inquest shall take place before a different coroner to investigate the monitoring and care of the deceased before and up to her fall on 15 March 2011.

3. There be no order for costs save that the costs of the claimant be subject to a detailed Community Legal Services funding assessment.

BY THE COURT.

OTHER COSTS ORDERS

31. Private law claims offer a salutary warning to public law litigants. In such claims, it is more frequent for costs to be awarded against legal representatives, personally, and also for costs orders to be made against those who are not even parties to the litigation. It is therefore necessary for a judicial review claimant to be well-advised about the possible orders that can result from such a claim.

32. This paper addresses three costs orders that, although infrequently made, can have a major impact on judicial review claims:

    a) Wasted costs orders against legal representatives;
    b) Non-party costs orders; and
    c) Pro-bono costs orders.

A. Wasted Costs Orders

33. The power to award wasted costs against legal representatives personally is contained in section 51 of the Senior Courts Act 1981, which provides, so far as is relevant:

"51 Costs in civil division of Court of Appeal, High Court and county courts.

(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
(a) the civil division of the Court of Appeal;
(b) the High Court; and
(c) any county court,

shall be in the discretion of the court.

…

(6) ***In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.***

(7) ***In subsection (6), "wasted costs" means any costs incurred by a party—***
(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) ***which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.*** *" (emphasis added)*

34. The procedure by which wasted costs orders are made is contained in the relevant rules of court: CPR r. 46.8 provides:

"(1) This rule applies where the court is considering whether to make an order under section 51(6) of the Senior Courts Act 19813 (court's power to disallow or (as the case may be) order a legal representative to meet, 'wasted costs').

(2) The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.

(3) When the court makes a wasted costs order, it will –

(a) specify the amount to be disallowed or paid; or

(b) direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.

(4) The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct –

(a) of any proceedings under this rule; or

(b) of any order made under it against his legal representative".

35. The provisions of CPR r.46.8 seek to give effect to the previous common law position, as set out in the decision of the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205. In that case, the Court of Appeal suggested that a three-stage test is to be applied:

(iv) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

(2) If so has such conduct caused the applicant to incur unnecessary costs?

(3) If so, is it just, in all the circumstances, to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

36. Although Ridehalgh suggests a relatively high threshold, the Administrative Court has shown an increasing enthusiasm for these orders. Some comfort may be drawn from the fact that the cases in which such orders have been made have arisen in extreme factual circumstances.

37. In R (Gassama) v Secretary of State for the Home Department [2012] EWHC 3049 (Admin), Haddon-Cave J made a wasted costs order on the indemnity basis. The claimant's solicitors had disregarded case management directions, failed to respond to correspondence, and permitted a substantive judicial review hearing to proceed without responding to the defendant's detailed grounds or filing a skeleton argument. On the morning of the hearing, they wrote to the Court to suggest that they were withdrawing from acting on behalf of the claimant: "*Should this position change we will notify you*," their letter concluded. Haddon-Cave J. concluded that, this was "*a paradigm case"* for a costs order: "*It is difficult to think of a more disgraceful dereliction of duty to the court than in the present case*" (at [27]).

38. In R (Grimshaw) v Southwark LBC (unreported, 17th July 2013) Leggatt J made a wasted costs order on the indemnity basis against solicitors who had failed to inform the court until two days before a substantive hearing that its client had obtained the relief sought in judicial review proceedings (a dispute over the provision of temporary accommodation), and had persisted with a "*manifestly spurious*" claim for damages despite its legal aid duties in respect of public funds. Leggatt J. Was concerned at what he saw as a breach of "*the duty to keep the court informed of any relevant changes to the circumstances"*. It was no excuse for the firm to suggest that it was "*simply following instructions"*. Because the claimant's firm had caused costs to be incurred, their arguments that "*some items on the local authority's bill of costs were not proportionate or reasonable"* carried little weight.

39. The approach in Grimshaw is of concern. It suggests that, in the event that the Court concludes that a claim is "*manifestly spurious"*, it may award wasted costs against the legal representative. This test is not dissimilar from the new "*totally without merit"* test that can apply at the permission stage (CPR, r. 54.12(7)). There is a lack of guidance as to how that test will be applied and recent experience suggests that the Court has not always applied that test in a consistent fashion. This gives rise to a concern, particularly for publicly funded claimant lawyers, that pursuing a claim that is subsequently classed as "*totally without merit"* may leave them personally liable to a wasted costs order. Claimant's advisers will therefore want to make sure that whatever the Court makes of the *merits* of the case advanced, they cannot be criticized for being *improper, unreasonable, or negligent* conduct. (In Grimshaw the solicitors reason for the failure to discontinue was really nothing more than that their client had told them that she wanted to pursue what was a fairly hopeless damages claim.)

40. Some support for claimant solicitors in these situations may however be sought in the older authority of Orchard v South Eastern Electricity Board [1987] Q.B. 565, in which the Court of Appeal suggested that courts should be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the relevant regulations and that "i*n a legal aid case there would have to be a finding*

of serious dereliction of duty or serious misconduct in allowing the case to proceed before a wasted costs order would be made" (at 580).[3]

Also note that the Upper Tribunal also has the power to make wasted costs orders in judicial review cases. See R(Okondu) v Secretary of State for the Home Department [2014] UKUT 377 (IAC)

Under section 51 of the Senior Courts Act 1981 (as amended by section 67 of the CJCA 2015 and brought into force on 13 April 2015) when a wasted costs order is made the Court must inform as it considers appropriate the relevant regulatory body (e.g. the SRA or BSB) and the Director of Legal Aid Casework (if appropriate).

B. Non-Party Costs Orders

41. The Court has discretion to make a non-party costs order, pursuant to s.51 Senior Courts Act 1981.

42. In Symphony Group Plc v Hodgson [1994] QB 179, at 191G-192E, Balcombe LJ considered this discretion and set out the following categories of non-party costs orders:

> (iv) *Where a person has some management of the action, e.g. a director of an insolvent company who causes the company improperly to prosecute or defend proceedings … It is of interest to note that, while it was not suggested in any of these cases that it would never be a proper exercise of the jurisdiction to order the director to pay the costs, in none of them was it the ultimate result that the director was so ordered.*
>
> *(2) Where a person has maintained or financed the action …*
>
> *(3) … the power of the court to order a solicitor to pay costs …*
>
> *(4) Where the person has caused the action …*
>
> *(5) Where the person is a party to a closely related action which has been heard at the same time but not consolidated …*
>
> *(6) Group litigation where one or two actions are selected as test actions …*

43. These categories were described as being "*neither rigid nor closed"*, but represented the sorts of connections which had led the courts to consider making a non-party costs order.

[3] Applied more recently by Maurice Kay J, as he then was, in R (Atem and others) v Secretary of State for the Home Department [2003] EWHC 341 (Admin), at [2].

44. Balcombe LJ gave the following guidance, at 192H-194D:

> (iv) *An order for the payment of costs by a non-party will always be exceptional … The judge should treat any application for such an order with considerable caution.*
>
> *(2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make [a Part 36 offer]; and the knowledge of what the issues are before giving evidence.*
>
> *(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action …*
>
> [these principles were described as "*an obvious application of the basic principles of natural justice*"]
>
> *(4) An application for payment of costs by a non-party should normally be determined by the trial judge …*
>
> *(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function …*
>
> *(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger … Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible …. This departure from basic principles can only be justified if the connection of the non-party with the*

original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.

(7) *Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly*[4] *… In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.*

(8) *The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company …*

(9) *The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the [Legal Aid Agency] … is very limited. Nevertheless the [relevant regulations] lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations … and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred.*

45. The Privy Council has given similar guidance, in Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807 Lord Brown summarised the relevant principles governing the exercise of this discretion at [25]:

"Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and for their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against;

---

[4] This aspect of Balcombe LJ's reasoning should now be read subject to the subsequent disapproval of class-based immunities in, for example, Jones v Kaney [2011] 2 A.C. 398 (in respect of expert witnesses).

Generally speaking the discretion will not be exercised against "pure funders" i.e. those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights;

Where the non-party not merely funds the proceedings but substantially controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party", or "a real party" to the litigation;

A non-party costs order should not be made when the relevant costs would have been incurred anyway without the involvement of the non-party.

It follows that a non-party costs order is more likely where (a) the party to the litigation is unable to pay costs, (b) the non-party has played an active part in the conduct of the litigation, (c) the non-party has an interest in the subject of the litigation (see Flatman v Germany [2013] 1 W.L.R. 2676, at [26], applying the decision of the High Court of Australia in Knight v FP Special Assets Ltd [1992] 174 CLR 178, at 192).

A solicitor who not merely funds the proceedings but substantially also controls or at any rate is to benefit from them falls within these categories (Myatt v National Coal Board (No 2) [2007] 1 WLR 1559, per Dyson LJ, as he then was, at [8]). However, a solicitor who funds disbursements as the case proceeds, on a conditional basis, will not, without more, be be the real party to the litigation and so potentially liable to a third party costs order under s.51 Senior Courts Act 1981 (Flatman, at [47])."

Criminal Justice and Courts Act 2015

Interveners

46. As we will see in session 6, section 87 of the CJCA 2015 provides that if certain conditions are met the Court must make an adverse costs order against an intervener for costs that a party has incurred as a result of the intervener's involvement in the proceedings, unless there are exceptional circumstances. Also the Court must not order a party to pay the interveners costs unless there are exceptional circumstances.

Third parties

47. As already noted, when sections 85-86 of the CJCA 2015 come into force, unless claimants provide information about how the claim is being financed then permission will not be granted, and the court must have regard to that financial information when determining by whom and to what extent costs are to be paid. Section 86 will place a duty on the court to consider whether to order costs to be paid by a third party who is identified from that information as someone who is providing financial support for the purposes of the proceedings or likely or able to do so[5].

C. Pro Bono Costs Orders

48. The law on costs is not all bad news for claimant legal representatives. Where a claimant pursues a judicial review claim on a *pro bono* basis and succeeds, the claimant is still entitled to an order for costs in their favour. The costs, in such a case, are payable to the prescribed charity, the Access to Justice Foundation. The Foundation then distributes the money to agencies and projects that give free legal help to those in need.

49. The power of the Court to make such an order arises under s.194 Legal Services Act 2007, which provides, so far as is relevant for this session:
    - An order can only be made where a party was represented by a legal representative and the representation was provided free of charge, whether in whole or in part (s.194(1));
    - The fact that the party was also represented by a legal representative who was not acting free of charge does not mean that an order cannot be made (s.194(2));
    - The order is payable to the "*prescribed charity"* in respect of the representation that was provided for free, or, if only part of the representation was provided for free, in respect of that part (s.194(3));
    - The "*prescribed charity"* is the Access to Justice Foundation: Legal Services Act 2007 (Prescribed Charity) Order 2008, Article 2.

50. In considering whether to make such an order and the terms of such an order, the Court must have regard to: (a) whether, had the party's representation not been provided free of charge, the Court would have ordered the person to make a payment to the party in respect of the costs payable in respect of that representation, and (b) if it would, what the terms of the order would have been (s.194(4)).

51. Such orders can be made by the High Court (s.194(10)).

52. The Administrative Court has demonstrated some reluctance to make pro bono costs orders in favour of claimants, so it is particularly important that applications for such costs are made where possible (in R (Bewry) v Norfolk CC [2010] EWHC 2545 (Admin), when an application was made, Holman J commented, "*I have never ever had this animal before"* and refused to make such an order, although the claimant's representative did not provide the Court with a copy of s.194 and made the application at the end of a long court day).

[5] S.86(3) Criminal Justice & Courts Act 2015

53. The Access to Justice Foundation has produced guidance as to how to make applications for pro bono costs orders.[6] The guidance recommends that, where an order is sought, the claimant's representatives should:

(i) Seek such an order when a claim succeeds, whether following a hearing or following settlement;

(ii) File and serve a statement of costs using court form N260. This shows what free work the claimant's representatives did, and what it would have cost a paying client at your normal rates;

(iii) Seek an order in the following terms:

"The Defendant must pay costs for pro bono representation on or before [date] to The Access to Justice Foundation (PO Box 64162, London WC1A 9AN), [summarily assessed at £____] [or] [to be assessed on the standard / indemnity basis if not agreed]."

(iv) Tell the Access to Justice Foundation when an order has been obtained (by way of email to costs@ATJF.org.uk).

Public Law Project
March 2023

[6] Available at http://www.accesstojusticefoundation.org.uk/downloads/Advocates_guide_Pro_Bono_Costs.pdf

Public Law Project

How to do judicial review

March 2023

SESSION 6: COSTS CAPPING ORDERS AND THIRD PARTY INTERVENTIONS[1]

COSTS CAPPING ORDERS

Introduction

1. The Criminal Justice and Courts Act 2015 brought in a new statutory framework for costs protection in public interest cases - Costs Capping Orders ("CCOs"). This put the common law regime of protective costs orders ("PCOs"), developed in particular by the Court of Appeal in R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, on a statutory footing.

2. The aim of CCOs, like their predecessor PCOs, is to ensure that public interest cases which would not otherwise be able to brought, are considered by the courts. As recognised by the Court of Appeal in Corner House, "access to justice is sometimes unjustly impeded if there is slavish adherence to the n normal private law costs regime". Recognising the importance of ensuring access to justice in public interest cases which could not, in practice, be brought without costs protection for the claimant, costs protection or costs capping orders are a departure from the general rule that costs will ordinarily follow the event and from the court's ordinary discretion to consider costs.

3. The new regime for Costs Capping Orders ("CCOs") is found in sections 88-89 of the CJCA 2015. In essence, the provisions formalise the Corner House criteria for PCOs in judicial review cases into a statutory formulation (with some additional criteria), including by defining the meaning of the public interest.

[1]With thanks to Sarah Burton of DLA Piper, Martha Spurrier of Doughty Street Chambers, Jamie Beagent of Leigh Day Solicitors, Jared Ficklin and Matthew Stanbury of Garden Court North, Azeem Suterwalla of Monckton Chambers, and Alex Peebles of Irwin Mitchell Solicitors and Kate Beattie of Doughty Street Chambers for their input into this document.

Background to costs protection - the common law regime

4. Before considering the new statutory regime, it is worth noting the development of the common law practice of costs protection by the courts, as interpretation of the new statutory tests will be informed by the courts' previous consideration of the public interest in under the Corner House principles.

5. Corner House was an expedited challenge to the Export Credits Guarantee Department's decision to change its anti-corruption procedures at the request of various exporters and banks. Corner House, an anti-corruption NGO, brought a claim for judicial review of this decision and was granted a PCO by the Court of Appeal.

6. In Corner House the Court of Appeal set down the following guidance on the grant of protective costs orders:

   a) A PCO may be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that:
      - The issues are of general public importance.
      - The public interest requires that those issues should be resolved.
      - The Claimant has no private interest in the outcome of the case.
      - Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.
      - If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in doing so.

   b) If those acting for the Claimant are doing so pro bono this will be likely to enhance the merits of the PCO application.

   c) It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the above considerations.

7. The courts indicated that the guidance in Corner House was to be interpreted flexibly, with the aim of doing justice between the parties. No one factor was considered decisive in itself (see R (Compton) v Wiltshire PCT [2009] 1 WLR 1436 per Waller LJ at [23] and Smith LJ at [25]; R (Buglife) v Thurrock Thames Gateway Development Corporation [2008] EWCA Civ 1209; Morgan v Hinton Organics [2009] EWCA Civ 107 at [40]).

The new costs capping rules

8. Section 88 sets out the conditions which must apply before an applicant for judicial review might benefit from a statutory costs capping order. Section 89 sets out the matters to which the court must have regard when considering whether to make an order, and what the terms of any such order should be.

When does the costs capping framework apply?

9. The new costs capping framework applies to all applications for protection made by parties to judicial review. Section 88(12) provides that "judicial review proceedings" means:

    a. proceedings on an application for leave to apply for judicial review;
    b. proceedings on an application for judicial review;
    c. any proceedings on an application for leave to appeal from such proceedings; and
    d. proceedings on an appeal from such a decision.

10. The statutory framework will not apply to the following:
    a. Applications for costs protection in judicial review cases by **non-parties**;

    b. **Proceedings other than judicial review**. For example, other civil claims, in respect of statutory appeals, common law claims in negligence or misfeasance in public office against public authorities, or statutory appeals against the conduct of public authorities. In these proceedings the common law will continue to apply to any application for costs protection;

    c. **Environmental litigation and the Aarhus Convention**. The Criminal Justice and Courts Act 2015 (Disapplication of Sections 88 and 89) Regulations 2017/100 disapply the new costs capping statutory provisions in Aarhus Convention cases. These regulations came into force on 28 February 2017.

11. Following the decision in Begg v HM Treasury [2013] EWHC 1851 (Admin) it seemed that the new statutory framework might not apply to closed material procedures and judicial review claims subject to section 6 of the Justice and Security Act 2012, involving closed material procedures. However this decision was successfully appealed and the Court of Appeal held that this was the kind of case where the interests of fairness might require a protective costs order.

When can the court make a costs capping order?

<u>*Public interest proceedings*</u>

12. The conditions for making a costs capping order are set out in section 88(6). This provides that the court may only make a costs capping order if it is satisfied both that the proceedings are "public interest proceedings" and that without such an order, the applicant would be acting reasonably by withdrawing or ceasing to participate in the proceedings.

13. Section 88(7) sets out that proceedings are only "public interest proceedings" if:
    a. an issue that is the subject of the proceedings is of general public importance;
    b. the public interest requires the issue to be resolved; and
    c. the proceedings are likely to provide an appropriate means of resolving it.

14. In determining whether proceedings are "public interest proceedings", section 88(8) requires the court to consider a number of matters. These include:

    a. the number of people likely to be directly affected if relief is granted to the applicant for judicial review;
    b. how significant the effect on those people is likely to be; and
    c. whether the proceedings involve consideration of a point of law of general public importance.

15. These factors are not exhaustive. The provisions do not require the court to attribute particular weight to any particular factor.

16. The Court of Appeal had previously considered the proper approach to the public importance and public interest principles under the Corner House principles in R (Compton) v Wiltshire PCT [2009] 1 WLR 1436. Smith LJ gave a detailed explanation [75]-[78]:

> *"The first governing principle requires the judge to evaluate the importance of the issues raised and to make a judgment as to whether they are of "general public importance". I have three observations to make about that judgment. First, there is no absolute standard by which to define what amounts to an issue of general public importance. Second, there are degrees to which the requirement may be satisfied; some issues may be of the first rank of general public importance, others of lesser rank although still of general public importance. Third, making the judgment is an exercise in which two judges might legitimately reach a different view without either being wrong.*
>
> *In my view, the Corner House case does not define what is an issue of general public importance. It provides some examples of the type of issue which will be of general public importance (see para 60 of Buxton LJ's judgment) but it does not seek to define or limit the field to issues of that nature. In particular, the Corner House case does not say that only issues of national importance will qualify. It does not, and could not, say how publicly important the issues have to be or how general the public importance has to be.*
>
> *During the hearing, there was some discussion about the meaning of the word "general" in the context of "general public importance". As Buxton LJ says, it must add something to mere "public importance". In some cases, the answer is easy. For example, if the case will clarify the true construction of a statutory provision which applies to and potentially affects the whole population, the issues are of general public importance. But if the issue is of public importance and affects only a section of the population, it does not in my view follow that it is not of general public importance, although it will not be in the first rank of general public importance. Mr Havers for the PCT accepted that a local issue might be sufficiently "general" to be of general public importance but submitted that one could not decide whether it was so merely by taking a headcount of the numbers of people who*

would be affected by the decision of the court. He may be right although he did not explain how the general importance of a local issue was to be assessed. It seems to me that a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general.

Holman J gave careful consideration to the question whether the closure of the MIU gave rise to issues of general public importance. He rejected the applicant's counsel's claim that the case raised issues of general legal importance. It was not, he said, a test case. But, none the less, he considered that the issues were of sufficient general public importance to satisfy the first requirement, largely because the closure directly affected 30,000 to 50,000 people. I think that the judge recognised that the issues were of "borderline" general public importance and that is why he made the order in the particular form that he chose (an issue to which I will return). In my view, Holman J applied his mind to the relevant issues in respect of the first requirement and I respectfully disagree with Buxton LJ that his conclusion was plainly wrong."

17. The guidance provided in Compton on the public importance and public interest principles may properly inform the interpretation and application of the new statutory costs capping criteria.

18. Section 88(9) empowers the Lord Chancellor to make regulations by affirmative resolution of each House of Parliament to amend section 88 "by adding, omitting or amending matters to which the court must have regard when determining whether proceedings are public interest proceedings". It would obviously be of very real concern if the Lord Chancellor sought to exclude particular types of proceedings or classes of litigant from the definition of the public interest. To date no such regulations have been made.

What kind of costs capping order?

19. Section 89(1) sets out the matters to which the court must have regard when considering whether to make a costs capping order, and what the terms of any such order should be. This is a non-exhaustive list. The matters are as follows:

    a. the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

    b. the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;

c. the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;

d. whether legal representatives for the applicant for the order are acting free of charge; and

e. whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

20. These considerations broadly reflect the Corner House criteria. It is important to note that there is now an express requirement to consider the appropriateness of the applicant to represent the interest of other persons or the public interest.

21. Section 89(3) empowers the Lord Chancellor to make regulations by affirmative resolution of each House of Parliament to amend section 89 "by adding, omitting or amending the matters listed". To date no such regulations have been made.

Private benefit

22. As previously under the PCO regime, the consideration of any benefit to the applicant in a case should not be determinative of the public interest in any case.

23. In Goodson v HM Coroner for Bedfordshire [2005] EWCA Civ 1172 the private interest requirement was interpreted restrictively. Ms Goodson sought a fuller enquiry into the circumstances of her father's death. The Court of Appeal held that she had a private interest and her application for a PCO failed.

24. The principle that the Claimant must have no private interest in the outcome of the case has been subject to criticism, not least because the court in Corner House was not asked to consider the private interest issue and so at its highest, the private interest requirement is an *obiter* comment, not a binding rule. In any event, none of the Corner House requirements are binding rules and so they may be departed from where the interests of justice so require. Goodson has not been formally overruled but no judge who has considered it has yet failed to distinguish or disapprove it.

25. Under the PCO regime, it was recognised that a private interest was a relevant matter to take into account, but was not a bar in itself to a PCO. For example, in Wilkinson v Kitsinger [2006] EWHC 835 (Fam) Potter J held that the private interest principle was no more than *"a flexible element in the court's consideration of whether it is fair and just to make the order"* [54]. Wilkinson was approved by the Court of Appeal in R (England) v LB Tower Hamlets [2006] EWCA Civ 1742 at [14]:

> *"It is important, however, that means should be found to do this without that process itself becoming a source of additional cost. The recent report of a group chaired by Lord Justice Kay "Litigating the Public Interest" (July 2006) provides a valuable discussion of*

the issues arising from the Corner House case. In particular, the report questions the requirement in the criteria there laid down that the applicant should not have any "private interest" in the outcome of the case. For our part we respectfully share the doubts expressed by Sir Mark Potter as to the appropriateness or workability of this criterion (Wilkinson v Kitzinger [2006] EWHC 835), but we note that a restrictive approach has been taken by this court in other cases (eg R (Goodson) v Bedfordshire and Luton Coroner [2005] EWCA Civ 1172)."

26. A series of decisions reached the same conclusion. In R (Eley) v SSCLG (1 July 2008) Collins J held that, *"the no personal interest condition in Corner House is in my view unsustainable".*

27. Cranston J's treatment of the application for a PCO by Public Interest Lawyers in R (Public Interest Lawyers v Legal Services Commission [2010] EWHC 3259 (Admin)) is of particular relevance to this case. PIL were challenging an LSC decision that was likely to deprive the firm of substantial fees. Although the private interest was relevant, it was not decisive [25]-[26]:

> *"I turn to the third principle, private interest. That is the most troubling aspect of the claimant's application. There is no doubt that both Public Interest Lawyers and RMNJ solicitors have a strong interest in the outcome of this case. In his second statement Mr Shiner, for the Public Interest Lawyers, identifies a benefit of some £44,000 over a three-year period as a result of the award of a contract as bid for. The equivalent figure for RMNJ is £135,000. There is no doubt that that represents a private interest. The supporting lawyers who have provided witness statements also have a financial interest in the outcome of the litigation. Mr Nicholls submitted that that was a fatal flaw in the award of a protective costs order. Moreover, he contended, that there was a lack of information about the financial situation of both law firms. On the other side of coin, the defendant was facing numerous calls on its resources and for money to be diverted into litigation about this matter would detract from the extent to which it could provide publicly funded legal assistance.*
>
> *In my view, however, the private interest which the claimants obviously have is not such as to determine this application for a protective costs order. As I have explained, the firms supporting the litigation, and the two firms themselves, are prominent players in advancing public interest matters. I regard the first claimant, in particular, as a surrogate for others who seek to advance the public interest through public law actions. That being the case, it seems to me that it devalues the work that these firms undertake to describe their action in this case as primarily commercial. It seems to me that private interest is not a major factor in the balance in this case. In particular I draw on the part of the judgment by Lord Hope in In re appeals by Governing Body of JFS [2009] UKSC 1, [2009] 1 WLR 2353, paragraph 25, where, in a different context, his Lordship said that the system of public funding would be gravely disadvantaged if the pool of reputable solicitors willing to undertake this type of work was to be adversely affected."*

Pro bono representation

28. As under the common law regime, section 89(1) required the court to consider whether legal representatives for the applicant are acting free of charge.

29. In Corner House the Court of Appeal held that an application for a PCO is more likely to succeed if the Claimant's lawyers are acting pro bono. However, in numerous cases PCOs have been granted where the Claimant's lawyers are not acting pro bono (see for example, R (Buglife) v Thurrock Thames Gateway Development Corporation [2008] EWCA Civ 1209; R (Eley) v SSCLG (1 July 2008)).

30. In R (Corner House & Campaign Against Arms Trade v Director of the Serious Fraud Office [2008] EWHC 71 (Admin) (known as 'Corner House 2'), the Defendant argued that the Claimant should have to adduce evidence that it had tried and failed to find pro bono representation as a pre-condition of obtaining a PCO. This argument failed on the facts, but Claimants would be well advised to deal with whether pro bono representation is a realistic option in their evidence in support of a PCO application.

Cost capping of Claimant's costs

31. The *quid pro quo* for granting the PCO was capping of the Claimant's costs. This is now provided for in section 89(2) which provides that:

> "*A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is.*"

32. However, there is no requirement that the cross-cap mirrors the level of costs protection afforded to the applicants.

33. In Corner House the Court indicated that only the costs of junior counsel would be reasonable, but that has subsequently been overturned and two counsel were permitted in R (Public Interest Lawyers v Legal Services Commission [2010] EWHC 3259 (Admin), R (Medical Justice) v SSHD [2011] EWCA Civ 269 and Corner House 2, among others.

34. In Corner House 2 the Divisional Court held that costs under a CFA should be recoverable:

> *"In this field of public interest litigation it is important that solicitors such as Leigh Day should be able to continue to operate so as to provide skilled public legal services to those concerned in public interest cases. To make an order that does not preserve the importance to them of CFA funding seems to me to be wrong, for it is inevitable that they will lose a percentage of their cases for which they will not recover any costs; and no*

firm can continue to operate bearing in mind that risk. So any order we make should reflect the fact that the party is CFA funded […]"

35. It should be noted that these cases were decided before the CFA uplift was removed, and so it is likely that arguments about Claimants getting their costs under a CFA will be even stronger now.

36. In terms of the level of fees, in Medical Justice Cranston J held that the Claimant should be able to recover modest fees for leading and junior counsel and solicitors and a success fee. The *"suitable benchmark of modesty"* was held to be Treasury counsel rates. However, in Public Interest Lawyers Cranston J adopted a different approach, permitting recovery of £375 per hour and LSC rates for counsel, but no recovery of a success fee. The latter is more analogous to the current situation than the former.

Timing of a Cost Capping Order

37. Section 88(3) provides that a costs capping order may only be made if permission to apply for judicial review has been granted. This represents a significant change in practice, as previously a PCO could be sought at any stage in proceedings.

38. The procedural requirement that a CCO is not able to be provided until permission to bring JR has been granted causes real practical problems for litigants in need of a costs cap because they will be liable for the costs of the Defendant's AOS if permission is refused. This can be contrasted with the previous position whereby a PCO application can be determined before the permission decision so that a litigant is able to make an informed decision about whether to incur any costs.

39. It is recognised that the defendant's costs of the permission stage may, in practice, be disproportionately high, despite being generally limited to the defendant's (and any interested parties') costs of preparing an Acknowledgement of Service.

40. This gives rise to concern that the costs associated with the permission stage could pose a significant deterrent to individuals with limited means who seek to challenge unlawfulness and that this could significantly restrict the ability of costs capping orders to serve the public interest. It may also have the effect of dissuading applicants from seeking a rolled-up hearing, if they need costs protection.

Procedure for applying for a CCO

41. The procedure for applying for a CCO is set out in CPR 46.16-46.19.

42. CPR 46.16 provides that an application for a judicial review costs capping order must:

    a. be made on notice, and in accordance with CPR Part 23;

b. be supported by evidence setting out:

i. why a judicial review costs capping order should be made, having regard, in particular, to the matters at subsections (6) to (8) of section 88 of the 2015 Act and subsection (1) of section 89 of that Act;

ii. a summary of the applicant's financial resources;

iii. the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and

iv. if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings.

43. A copy of the application notice and supporting documents must be served on every other party (CPR 46.17(2). On application by the applicant, the court may dispense with the need for the applicant to serve the evidence setting out a summary of the applicant's financial resources on one or more of the parties (CPR 46.17(3)).

44. The court may also direct the applicant to provide additional information or evidence to support its application (CPR 46.17(4)).

45. If the applicant for a CCO is a body corporate, and the evidence supporting its application sets out that it is unable to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings, the court must consider giving directions for the provision of information about the applicant's members and their ability to provide financial support for the purposes of the proceedings (CPR 46.18).

46. CPR 46.19 provides for applications to vary judicial review costs capping orders.

Tips for applying for a CCO

47. Any application for a CCO must follow the requirements of CPR 46.16-46.18.

48. The judicial review claim should be accompanied by an application in accordance with CPR 23 including a full witness statement setting out the public importance of the claim, the Claimant's means (see further below), why the case could not be brought without a CCO and why funds cannot be raised to bring it. The application and supporting evidence should address the matters set out at section 88(6)-(8) and 89(1) CJCA.

49. In any application for a CCO the applicant will need to be open about its financial position and a summary of the applicant's financial resources will be required. This is consistent with the approach to PCOs: see R (Badger Trust) v Welsh Ministers [2010] EWCA Civ 1316 per Pill LJ at [130], where he held that, *"frankness is required from a party seeking a PCO".* This means that it is advisable to disclose a set of accounts, with an accompanying witness statement explaining them. For NGOs and charities, bear in mind that there is a good argument that restricted funds should be disregarded by the court when it is considering the applicant's financial position. Thus, for example, grants that are restricted to discharging a particular charitable purpose or paying a particular salary should not form part of the assessment of how much a charity could contribute to its legal costs. It is advisable for details like this to be clearly explained so that an organisation that is not as rich as it looks does not get stung with an unmanageable CCO.

50. A Claimant will need to take a realistic view of how much money it can afford to risk on the litigation. Claimants will normally be expected to shoulder some risk. For example, in Buglife the Court required £10,000 from the Claimant and in Public Interest Lawyers the Claimant gathered £100,000 from a group of law firms who were affected by the decision under challenge.

51. The changes introduced by the CJCA require that information about the extent of financial resources "*likely to be available*" to the applicant be disclosed (sections 85-86 CJCA) and, as set out above, CPR 46.16 requires that if the applicant for a CCO is a body corporate, whether it is able to demonstrate that it is *likely* to have financial resources available to meet liabilities arising in connection with the proceedings. It remains to be seen how the courts will apply these new provisions consistently with the constitutional purpose of judicial review, the protection of the right of access to the courts protected by the common law and Articles 6 and 8 ECHR. It also remains to be seen how these requirements will be applied in cases funded through crowdfunding.

52. Given that an applicant for a CCO will need to justify their opponent not getting their costs, it is important to plead the underlying case clearly and succinctly. If particularly lengthy and rambling grounds are submitted with an application for a CCO, it is more likely that the court will consider that a defendant cannot be asked to resist the case without costs protection.

53. Finally, do not try to hide from difficult aspects of your CCO application. For example, if there is a private interest then be up front about it, demonstrate that it is not an absolute bar to getting a CCO and explain why no one else would be able to bring the claim. For example, in a pending application by the Howard League for Penal Reform and the Prisoners' Advice Service for a PCO to challenge the cuts to prison legal aid, the charities have been clear that although they have prison legal aid contracts, and therefore stand to gain from winning the challenge, these contracts actually account for a tiny proportion of their income, thereby reducing the extent of their private interest.

THIRD PARTY INTERVENTIONS

What are third party interventions?

33. Judicial review claims often raise wider issues of public interest that go beyond the interests of the parties directly involved in the litigation. Many of these cases affect disadvantaged, marginalised or specialist groups whose interests are represented by voluntary sector organisations. Because of their specialist knowledge about how particular decisions impact upon the group they represent, these organisations have the ability to make informed submissions that could assist the court in reaching its decision. Third party interventions are a method by which such an organisation not otherwise involved in the litigation may submit specialist information or expertise to the court.

34. In some cases there may be a third party intervention because a party is unrepresented and it is appropriate for the legal arguments to be made by a third party. For example, in Lassal C-162/09, a case raising an important point of EU law referred to the Court of Justice of the European Union by the Court of Appeal, the claimant was unrepresented. As a result the Child Poverty Action Group intervened to represent the interests of claimants in general. It may be that these types of third party intervention become more common as legal aid is restricted.

35. Salutary guidance on third party interventions can be found in Lord Hoffman's judgment in Re E [2008] UKHL 66:

> "It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."

What value can third party interventions add?

36. In a speech at the Public Law Project Judicial Review Conference 2013, Lady Hale, Justice of the Supreme Court, emphasised the importance of third party interventions:

> "But from our – or at least my - point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied. I believe, for example, that it was Liberty who supplied the killer argument in the Belmarsh case (A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68). And Justice intervened helpfully, for example, in the habeas corpus case of the man detained at Bhagram air base since 2004: Rahmatullah v Secretary of State for Defence [2012] UKSC 48, [2013] 1 AC 614."

37. Lady Hale also reminded her audience that an important class of interveners are government departments themselves:

> "They intervene principally in order to protect the legislation and policy for which they are responsible. A good example is again Seldon v Clarkson, Wright and Jakes: having successfully defended its age discrimination regulations in Luxembourg, the Secretary of State for Business, Innovation and Skills intervened in a private discrimination dispute in order to promote the department's view of how the legislation ought to work. A similar example is X v Mid-Sussex Citizen's Advice Bureau [2012] UKSC 59, [2013] ICR 249, where the Secretary of State for Culture, Media and Sport intervened to safeguard the government's view that 'occupation' in anti-discrimination law did not include volunteering; the Christian Institute intervened to the same effect, and other third sector organisations wrote to support the CAB's case; while the Commission for Equality and Human Rights supported the claimant.
>
> It should not be thought that the government's interventions go all one way. Sometimes they can surprise us. The best example is Yemshaw v Hounslow London Borough Council [2011] UKSC 3, [2011] 1 WLR 433, on the meaning of 'violence' and 'domestic violence' in the homelessness legislation. The Court of Appeal had held that this was limited to direct physical contact, but the Secretary of State for Communities and Local Government intervened in support of a much wider definition. This intervention was backed up by a large amount of helpful national and international material and dovetailed quite neatly with the material on victims of domestic violence presented by the Women's Aid Federation of England."

38. A recent example of an "added-value" intervention can be found in the Court of Appeal case R (Das) v Secretary of State for the Home Department [2014] EWCA Civ 45. That case concerned the Secretary of State's policy of detaining people with mental health problems in immigration detention. The case was brought by an individual who had been detained while she was suffering from various mental illnesses. The mental health charity Mind and the immigration detention charity Medical Justice were granted permission to intervene in the case because it raised an issue of principle and practice, namely

how should the policy be interpreted and what was the effect of that interpretation the ground. Mind and Medical Justice were able to provide case studies, expert reports and witness statements setting out the principles that should govern mental healthcare and demonstrating the problems with the policy. The interveners did this by providing written submissions and a small bundle of evidence, and then making oral submissions for 30 minutes during the hearing. The impact of the intervention is clear from the Court of Appeal judgment, which not only upheld the interveners' approach but referred to their contribution more than fifteen times.

39. An even more recent example was in the Supreme Court in R(SG) v Secretary of State for Work and Pensions [2015] UKSC 16 (see above under 'public law highlights') where the judges referred to Child Poverty Action Group's evidence that the cap disproportionately affects women and children; that it is unnecessary because families in work are already better off than families out of work and that the money saved is "marginal at best". Lady Hale in her dissenting judgment said: "As CPAG point out, the Government accepted in its grounds of resistance to the claim that 'the aim of incentivising claimants to work may be less pertinent for those who are not required to work' (such as parents with young children)".

40. Despite the courts' clear appreciation of interveners, it may be that due to the unpredictability of judicial review proceedings interveners will be much more reluctant to provide assistance in the High Court and Court of Appeal in light of adverse costs consequences as section 87 of the Criminal Justice and Courts Act 2015 (set out in more detail below).

Practical considerations and procedure for third party interventions

41. The potential benefits of doing an intervention include:
- Raising the organisation's public profile;
- Helping to achieve campaign objectives;
- Raising awareness of difficulties faced by particular groups in society, for example, children, elderly people or people with mental health problems.
- Raising awareness of issues that may not traditionally be at the forefront of a judge's mind, such as the impact of planning laws on wildlife.
- The court may, as a result, have the benefit of information or evidence relevant to its decision which would not be put before it by one of the litigants but which will make its decision more relevant and evidence-based.
- Enabling arguments to be aired by non-victims in HRA-based judicial review cases. Claimants for judicial review under the 1998 Act must satisfy the "victim test", which limits the issues of public interest that may be raised unless there are third parties that can intervene to do so.

42. The first question for any potential intervener must be to consider what they can add to a case that the parties cannot or have not already added. This may be expert evidence, information on the history or

development of a particular policy, case studies showing service user experience, an analysis of comparative law or a literature review.

43. If an organisation is sure that they have something to add that will assist the court, they will need to apply for permission to intervene in the case. In order to do this it is likely to be helpful to enlist the assistance of a solicitor and counsel, unless these services are available in-house. Many solicitors and counsel will do interventions pro bono or for greatly reduced fees. It is important that organisations have a good working relationship with their lawyers from the outset so that arguments that further the organisation's aims and objectives can be carefully put by the lawyers.

44. In preparing an application for permission to intervene it is important to consider the following issues. These are all issues that lawyers will be able to advise on:
    i) Permission of the parties
    ii) Costs and fees
    iii) Evidence
    iv) Written v. oral submissions
    v) Other possible interveners
    vi) Timing

Permission of the parties

45. Before making an application for permission to intervene, an organisation should write to the parties to the litigation seeking their consent to the intervention, setting out why the intervention is necessary and seeking agreement on the costs position (see below). The responses of the parties should be included in an application for permission to intervene. It is often the case that one or both parties to the litigation will consent to the intervention, though it is not decisive for the judge's decision.

Costs and fees

46. As stated above, most solicitors and barristers will be willing to represent an organisation doing a third party intervention pro bono or for reduced fees. The standard practice had previously been to state that the intervener will not seek its costs from any party and that in return it requires an undertaking that no party will seek their costs from the intervener. However for claims issued on or after 13 April 2015, section 87(3) of the Criminal Justice and Courts Act 2015 applies and interveners will be precluded from recovering its costs from another party unless the court considers there are exceptional circumstances which make it appropriate to do so.

47. Of more concern to interveners is the effect that section 87 of the CJCA will have in practice on liability for other parties' costs in the High Court or Court of Appeal (the Supreme Court has its own rules). Under section 87(5) of the CJCA if a party applies for costs against the intervener the court must order any costs that have been incurred as a result of the intervener's involvement the court if one of four

conditions are met, unless the court considers there are exceptional circumstances that make it inappropriate to do so. The four conditions are as follows:

(a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
(b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
(c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings;
(d) the intervener has behaved unreasonably.

48. As with costs more generally, it is important that an intervener protects its costs position by acting reasonably (have Lord Hoffman's warning in mind), only making points that the parties are not making, and not descending into the facts of the particular case or trying to advocate for a particular outcome on those facts.

49. It is still relevant for interveners to continue to seek the agreement of the parties that there should be no order as to costs for them; in effect, to ask other parties to confirm that they will not make an application under section 87(5) of the CJCA. This should be done prior to the application for permission to intervene and any related correspondence can be provided to the court in the application. It is difficult to see what incentive parties would have to agree to this, however time will tell.

50. Applying for permission to intervene at any level requires the intervener to pay a fee. There is no consistent guidance or practice on the circumstances in which the fee can be waived, although it is common practice for the Supreme Court to agree to waive the fee. If an organisation is in difficulty paying this fee, it should make representations to the court office about why the fee should be waived in its case.

Evidence

51. In some interventions it will be helpful and appropriate for the intervener to provide the court with evidence. If this is anticipated the application for permission to intervene should include a request for permission to make written and/or oral submissions (see further below) and a request for permission to provide succinct and relevant evidence. It will never be appropriate for an intervener to provide bundles and bundles of material for the court and the other parties to read and if it does, it risks getting into dangerous territory with costs. However, short bundles of pertinent evidence only can be of great assistance and can enable the intervener to make good their submissions in a unique way.

Written v. oral submissions

52. Interveners need to decide whether they want to apply simply to provide written submissions to the court or whether they want time to make oral submissions at the hearing. This is a matter of judgment depending on how much the intervener has to add. There is an argument that choosing not to do oral submissions risks the intervention being ignored, but there is clear evidence (see for example the Supreme Court's emphatic reference to Mind's written intervention in *SL (FC) v Westminster City Council* [2013] UKSC 27) that judges do pay heed to written submissions.

53. If a decision is taken to only make written submissions, it is possible for counsel for the intervener to attend the hearing anyway and then if an issue comes up which the judge would like assistance with from the intervener, counsel can provide that assistance.

54. If an intervener plans to apply for oral submissions, these should be realistic and modest. It is rare for the courts to grant permission for oral submissions from an intervener for more than one hour.

Other possible interveners

54. Interveners should consider approaching other organisations who might also have something to add to a case that is beyond the first intervener's experience or remit. Many cases have more than one intervention (in the Supreme Court appeal of Cheshire West and Chester Council v P and Surrey County Council v P and Q there were 3 interventions - Mind and the National Autistic Society, the AIRE Centre and the Equality and Human Rights Commission), and it is also possible for organisations to merge their expertise so as to provide a joint intervention (see for example, Mind and Medical Justice in R (Das) v Secretary of State for the Home Department [2014] EWCA Civ 45). In the recent case concerning whether women from Northern Ireland are currently unlawfully denied abortions paid for by the NHS in England, heard by the Supreme Court in November 2016 (on appeal from R (A and B) v Secretary of State for Health [2015] EWCA Civ 771, six organisations in total intervened. Five organisations (Alliance for Choice, British Pregnancy Advisory Service, Birthrights, The Family Planning Association, The Abortion Support Network) made a joint intervention (with oral and written submissions) focusing on the legal framework concerning women's autonomy, dignity and choicer, and the relevance of the wider international law framework. The British Humanist Association made a separate intervention (with written submissions) focusing on the approach to justification of discriminatory treatment.

Timing

56. Applications for permission to intervene should be done as soon as possible - it is neither advisable nor effective to wait to apply for permission only to find that the preparation of the intervention then has to be squeezed into a very short time frame. This risks lowering the quality of the intervention and damaging the changes of future interventions being granted. It should be borne in mind that even if a hearing is not listed for months, it may still take the court a long time to get around to determining the application for permission to intervene.

57. The Supreme Court Practice Direction 6 (available on the Supreme Court website) sets out clear rules and guidance on how to apply for permission to intervene and the timetable that kicks in if permission is granted. There is no equivalent guidance for the Administrative Court or the Court of Appeal. In order to ensure that parties are given sufficient time to consider the intervention and any evidence that is provided with it , it is advisable for interveners to prepare a draft order with a timetable for filing their documents. This is what Moses LJ advised in the case of R (HC) v Secretary of State for the Home Department and the Commissioner of Police of the Metropolis [2013] EWHC (Admin) 982:

> "Much of the substantial material with which the court was provided came as a result of the submissions of the two interveners. A single judge, who it was not intended should sit on the application, gave permission for Coram Children's League Centre and the Howard League to intervene in writing. Despite an application seeking directions by the Secretary of State, no directions as to timing or the sequence of events which should be followed were obtained from that judge. The result was that lengthy written submissions from both were sent to the court at the same time as the first defendant's response. The first defendant's counsel had no reasonable opportunity to consider them in depth before the application started. No adjournment was sought, but it placed the first defendant under some difficulty. The court ordered both interveners to produce a summary of their submissions and provide the authorities and materials on which they rely. A huge bundle of authorities and other materials then appeared on the second day.
>
> Counsel for the Secretary of State was too courteous to complain and skilfully dealt with the points which arose. But he should not have been placed under that sort of pressure. The interventions should have arrived at a proper time to be incorporated, insofar as the claimant wished, in the claimant's submissions and at a time when the defendants could properly respond. Many of the important arguments were not contained in the claimant's submissions but rather emerged, if one delved into the interstices, within the intervener's submissions.
>
> All of this could have been avoided if a timetable had been set which required the interventions to be served at a time when the defendants could properly respond and the claimant decide which of the arguments within those interventions he wished to deploy. This application cried out for directions to be obtained, either in writing or at a case management hearing well before the hearing of the application and, if at all possible, by one of the judges who was going to hear it."

<u>What to do if you don't get permission to intervene?</u>

58. If you are refused permission to intervene in a case then that might not be the end of your organisation's involvement in the issues. One way of trying to get your points across without intervening is to provide evidence through one of the parties to the litigation. This could take the form of a witness statement from your organisation that supports one of the party's approach or you could informally contact one of the parties and identify the evidence and material that you think the court should have regard to - many will be receptive to your views and advice and will try to get this evidence before the court if it assists their case by putting it in context and helping the judges reach a good decision.

59. It is possible that you will not get permission to intervene at one stage of the case but that you may want to apply to intervene again if the case proceeds to a different court. There is nothing to stop an organisation applying for permission to intervene in the Court of Appeal or Supreme Court where it has been refused permission in the court below.

Examples of cases where interventions have been valuable

60. There is not room to go through the myriad interventions that have assisted the courts to reach their decisions in public interest cases. The following is a list of some key interventions which, if you are considering making an application for permission to intervene, would be useful material to show the value of an intervention, the shape that effective interventions take and the reliance that judges place on them:

- R v Lord Chancellor, ex parte Witham [1997] 2 All ER 779 (Public Law Project intervening).
- A v Secretary of State for the Home Department [2004] UKHL 56 (Liberty intervening).
- R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 (Public Law Project intervening).
- Yemshaw v Hounslow London Borough Council [2011] UKSC 3 (Secretary of State for Communities and Local Government intervening).
- X v Mid-Sussex Citizen's Advice Bureau [2012] UKSC 59 (Secretary of State for Culture, Media and Sport intervening).
- R (T) v Greater Manchester Police and Secretary of State for the Home Department; R (JB) v Secretary of State for the Home Department; R (AW) v Secretary of State for Justice [2013] EWCA Civ 25 (Liberty and the Equality and Human Rights Commission intervening).
- Rabone v Pennine Care NHS Trust [2012] UKSC 2 (joint intervention by Liberty, JUSTICE, INQUEST and Mind).
- R (HC) v Secretary of State for the Home Department and the Commissioner of Police of the Metropolis [2013] EWHC (Admin) 982 (Coram Children's Legal Centre and the Howard League for Penal Reform intervening).
- HH and PH v Italian Judicial Authority; F-K v Polish Judicial Authority [2012] UKSC 25 (Official Solicitor, Coram Children's Legal Centre and JUSTICE intervening).
- R (Das) v Secretary of State for the Home Department [2014] EWCA Civ 45 (Mind and Medical Justice intervening).
- SL (FC) v Westminster City Council [2013] UKSC 27 (Mind and Freedom from Torture intervening).
- R(MM and DM) v Secretary of State for Work and Pensions [2013] EWCA Civ 1565 (Mind, the National Autistic Society and Rethink Mental Illness joint intervention).

Public Law Project
March 2023

Session 7: ACTING FOR DEFENDANTS IN JUDICIAL REVIEW CLAIMS

I. INTRODUCTION

1. We both act for Claimants, Defendants and Interested Parties, so have seen judicial review claims from all sides. Our aim is to help you understand how the process works from the Defendant's point of view. Our hope is that this will assist you to understand how you can best deploy your resources and arguments at each stage of the JR process.

II. THE ROLE OF LEGAL ADVICE IN DEFENDANT DECISION MAKING

Legal advice and legal risk

2. The extent to which a decision taken by a public authority that is subsequently the threat or target of an application for judicial review will have been the subject of prior legal advice varies substantially. The position will depend on the identity of the decision maker and the nature of the decision. Headline or "big ticket" policy decisions taken by central Government may well be the subject of detailed legal advice from the Government Legal Department ("**GLD**") (and, sometimes, external counsel) before they are adopted. That is less likely to be true of individual decisions taken by local authorities, for example. Depending on your case, therefore, it may well be that the first time a lawyer becomes involved is upon receipt of a pre- action letter. That is an important consideration, which we return to below.

3. It is also important to understand (and bear in mind, throughout the life of a JR) how the government uses legal advice internally and how it assesses legal risk.

4. The GLD has published guidance which explains its approach to legal risk.[1] That guidance defines legal risk in the following way:

> "*A risk involves a threat and the possibility of suffering harm or loss. 'Legal risk' means any risk of court action occurring whether domestic, European or international, or the risk of any penalty resulting from non-compliance with legal requirements. Losing a court action may lead to harm to the policy objectives and financial or reputational loss.*"

5. It also explains why legal risk is important:

> "*As civil servants, our job is to advise Ministers. Before deciding upon a policy or course of action they will want to understand the risks associated with it. Legal risk is one, but not the only, type of risk that they will want to consider. All legal advice should be risk-based and offer options for mitigating or avoiding risk. It is important that Ministers and officials have confidence that lawyers are acting in their interests and looking actively for ways to deliver policy objectives while identifying ways of minimising risks.*"

6. As to how legal risk is communicated within Government, the guidance explains that it must be categorised and then rated as follows:

[1] See here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736503/

Legal_Risk_Gui dance_-_Amended_July_2015.pdf

Defendant lawyers

7. The consequence of this is that public sector lawyers are: (a) first and foremost lawyers, bound by professional duties; and (2) managers of risk.

8. When considering a possible application for judicial review, therefore, it is in our experience important to always ask oneself an initial question: is there an obvious legal problem with what is being proposed, which may simply have been missed by the decision-maker? If so, might it help if I try to make the decision-maker realise that they need to talk to their lawyers? Is there any other way to influence the outcome before the decision is made?

9. This is important because although the ultimate decision is for the decision-maker, their lawyers will generally speaking be thinking like any other lawyer. They will appreciate, in particular, that it is preferable to avoid litigation where possible, and that one needs to get things right (or put things right) first time in order to do that. Of course, the extent to which the lawyer in question is able to influence the decision-maker will vary – and may be less where the target in question is a "big ticket" policy decision, where the content of a decision makes a challenge almost inevitable.

10. Even in those cases, however, Government lawyers will certain tools at their disposal which can help them get ahead of the risk of subsequent challenge.

III. PROCESS IN PUBLIC LAW DECISION-MAKING

11. The key tool which public sector lawyers have is an ability to influence the process by which decisions are reached. From a Claimant's perspective, where the decision-making process has obviously gone wrong there are likely to be good grounds for some kind of challenge. If you are a GLD lawyer, therefore, you want to: (1) get the process right, first time round, if you possibly can; (2) take particular note of any process points made by the other side in their pre-action correspondence or (subsequently) detailed grounds. Is there anything which can be done to retrospectively fix a process that has gone wrong?

12. Process issues which may arise include:

(i) Does the decision-maker have the power (statutory or otherwise) to take the proposed decision?

Has the source of their power been correctly identified?

(ii) Allied to that, has the right decision maker been identified? (Note, in this regard, the application of the *Carltona* principle and the recent judgment of the Supreme Court in *R v Adams* [2020] UKSC 19.)

(iii) Has the decision maker got the facts they need to make the decision in question? Do further factual enquiries need to be made?

(iv) Have all relevant considerations been identified and taken into account? Are any irrelevant considerations being considered, which the decision maker needs to put out of their mind?

(v) Is there a need to consult or seek representations? If so, with or from whom and when? Does the decision-maker understand the need to keep an open mind whilst that consultation is ongoing and does the process reflect that?

(vi) Have clear and factually correct reasons been provided for the decision? Allied to that, it is important to ensure there are good, contemporaneous notes of why the decision was taken (bearing in mind the courts' disdain for *ex post facto* justifications as to why a particular decision was taken).

(vii) Are there potential Equality Act issues? Is the Public Sector Equality Duty involved?

(viii) Are there possible Human Rights Act issues?

(ix) What about EU law (or going forwards, retained EU law) implications?

IV. THE PRE-ACTION PROTOCOL STAGE

Initial considerations

13. As noted above, it is often only when a PAP letter is received that a GLD lawyer will become involved on the Defendant's side. They will have numerous issues to consider:

(i) Timing is tight – 14 days but less if the matter is urgent. Is there a need for an extension?

(ii) Is further information required from the prospective claimant? If not, does a request for further information need to be made?

(iii) What documents need to be looked at in order for advice to be given and when can they be provided? Think ahead to candour obligations – documents must be obtained and preserved.

(iv) The big decision which has to be made is whether to concede, fight or negotiate. There may be half-way houses – e.g. if a potentially lawful decision has been arrived at by a bad process could it be retaken? Advice will need to be given as to the possible responses and the risk of each:

i. What are the risks involved? Legal? Reputational? Is there a bigger picture to consider? Will the decision taken here have an impact on other cases?

ii. How much will it cost to defend? Is the game worth the candle?

iii. Would now be a good time to seek advice from counsel?

(v) The lawyer will also need to consider which individual(s), within the public authority or government department, needs to make the decision on how to progress and who they therefore need instructions from.

The PAP Response

14. The above considerations will of course all feed into the ultimate PAP response. That response needs to clearly and succinctly set out what the Defendant's response will be if the claim is pursued. There are costs risks if the PAP response is inaccurate or inadequate (see *R (M) v Croydon London Borough Council* [2012]

EWCA Civ 595). It also needs to advance the Defendant's strategic objectives bearing in mind the assessment of risk.

15. Considerations that will always be in play when a Defendant is answering a PAP response (and which Claimant lawyers, therefore need to anticipate) include:

(i) Time: is the claim within three months and/or has it been brought promptly?

(ii) Alternative remedy: is there an alternative appeal / review/ body which could look at the issue?

(iii) Justiciability: is the subject matter of the claim suitable to judicial resolution?

16. Each of those could represent a knockout blow. A further question which arises is whether the prospective claimant is labouring under some kind of factual misapprehension. It does sometimes happen that people just get the wrong end of the stick. Allied to that, consideration will need to be given to what the duty of candour requires and whether disclosure of anything more (even if not required) would clear up any misapprehension.

17. Finally, is there any scope for agreement or resolution of the dispute? If so, how might the parties go about reaching that agreement? Would it be worthwhile proposing an immediate stay upon issue?

IV. THE PERMISSION STAGE

The Summary Grounds of Resistance

18. Before drafting work begins on the Summary Grounds of Resistance, one needs to carefully look at the Detailed Facts and Grounds and any evidence relied upon by the Claimants, re-assess the risks and the merits and advise the client.

19. Timing must be checked in the first instance. A Defendant usually has 21 days for the Summary Grounds, but that can be abridged if the matter is urgent. If more time is likely to be needed, it needs to be asked for and (in the absence of consent) applied for before the period expires.

20. If pressing ahead, the following questions should be considered:

(i) Ought permission to be conceded?

(ii) Ought counsel to be instructed?

(iii) Again, are there any knock-out blows (timing etc)?

(iv) Is any evidence needed at this stage? (Allied to that, is the Claimants' evidence admissible?)

(v) What is the position on costs? Is the Defendant seeking them (in which case, that needs to be made clear in the Acknowledgment of Service and a costs schedule provided)? Has a CCO application been made? Are there any Aarhus issues?

(vi) Are any directions required? Expedition? A stay behind other cases? A rolled up hearing?

(vii) Has interim relief been sought? If so, what is your position? Would it be sensible to agree it? If you want to resist, then ensure the Court knows you intend to make submissions and will wait for you to do so before making a decision.

(viii) Is the claim totally without merit (CPR r. 54.12(7))? In this context, totally without merits means "*no more and no less than 'bound to fail'*" (*R (Grace) v Secretary of State for the Home Department* [2014] 1 WLR 3432 (CA) at §13.

(ix) Is there an argument to be made under s.31(3D) of the Senior Courts Act 1981 to the effect that the outcome for the applicant would not have been substantially different even in the absence of the alleged unlawfulness?

21. New PD 54A para. 6.2 states:

"(1) If a defendant chooses to file an Acknowledgement of Service, the Summary Grounds referred to in CPR 54.8(4)(a) should meet the following requirements.
(2) The Summary Grounds should identify succinctly any relevant facts. Material matters of factual dispute (if any) should be highlighted. The Grounds should provide a brief summary of the reasoning underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information.

(3) The Summary Grounds should (again succinctly) explain the legal basis of defendant's response to the claimant's case, by reference to relevant facts.
(4) The Summary Grounds should be as concise as possible. Summary Grounds shall not exceed 30 pages. In many cases the court will expect the Summary Grounds to be significantly shorter. The court may grant permission to exceed the 30-page limit."

The Renewal Hearing

22. If permission is refused on the papers and the Claimant renews then an oral permission hearing will be listed. The typical time estimate is 30 minutes. Thought needs to be given to whether that is sufficient.

23. Usually a Defendant will want to attend an Oral Permission Hearing. However, the costs of doing so cannot usually be claimed (*Mount Cook*), so there is a resource cost for doing so.

24. This may be the first time counsel are instructed. If so, there will be a fresh and independent pair of eyes on the claim. Their view on merits may be different. If so the client will need to be advised of that. If the position does change, could consider conceding at this stage (but bearing in mind adverse costs if this is done).

Permission granted

25. The grant of permission means that a High Court judge has told you the decision is arguably unlawful. When that happens, there is a definite need to re-assess risk and decide whether to continue fighting the claim. All involved should be considering whether there is a need for further advice, and what the risks are of conceding or defending.

V. THE SUBSTANTIVE STAGE

Detailed Grounds of Resistance / Evidence

26. Again, the first thing to check is timing – 35 days is the standard period allowed for the preparation of detailed grounds, but it can be varied by the judge at the time permission is granted. If an extension is likely to be needed, it should be sought well before the deadline.

27. Evidence is often the most time consuming aspect and needs to be considered early. It is critical because if there is a dispute of fact, the Defendant's evidence will usually be preferred to the Claimant's on an application for judicial review (see for a recent example *R (End Violence Against Women Coalition) v Director for Public Prosecutions* [2020] EWHC 929 Admin at §15 and also *R (Safeer) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 at §§16 to 20).

28. GLD will need to identify the evidence required and who should give it. Likewise, full consideration needs to be given to documents and the duty of candour including whether any further searches are required. Documents will either need to be exhibited or fairly summarised. The lawyer will also need to consider whether there any redactions needed (including as a result of public interest immunity concerns).

29. At the same time, counsel needs to be instructed to draft the detailed grounds. Care should be taken to ensure they have what they need in terms of factual material and time.

30. Once everything is near final form, a step back should be taken so that everyone can consider whether the risk profile has changed and, if so, what the implications of that are and who needs to be informed.

31. New Practice Direction 54A provides as follows:

"Rule 54.14—Response

9.1 *(1) If a party required to file Detailed Grounds has already filed Summary Grounds, he may (if all relevant matters have already been addressed in the Summary Grounds) inform the court and all other parties that the Summary Grounds will stand as his Detailed Grounds.*
(2) If a party files and serves Detailed Grounds, that document should be as concise as possible, and shall not exceed 40 pages. The court may grant permission to exceed the 40-page limit.
(3) Where a party filing Detailed Grounds intends to rely on written evidence or on documents not already filed, he must prepare a paginated and indexed bundle containing that evidence and those documents. An electronic version of the bundle shall also be prepared in accordance with the Guidance on the Administrative Court website.
9.2 *The party shall file and serve electronic and hard copy versions of the bundle when he files and serves the Detailed Grounds.*

Rule 54.16—Evidence

10.1 *In accordance with the duty of candour, the defendant should, in its Detailed Grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted.*
10.2 *Disclosure is not required unless the court orders otherwise.*
10.3 *It will rarely be necessary in judicial review proceedings for the court to hear oral evidence. Any application under rule 8.6(2) for permission to adduce oral evidence or to cross-examine any witness must be made promptly, in accordance with the requirements of Part 23, and be supported by an explanation of why the evidence is necessary for the fair determination of the claim."*

The Substantive Hearing

32. All the usual considerations arise: listing, bundles, skeletons, cost schedules.

33. One difficulty which can arise when acting for Defendants is the taking of last-minute instructions. Arrangements need to be made to ensure relevant people are available on the day, if needed. That will include instructions on whether to seek permission to appeal in the event of an *ex tempore* judgment.

34. Further considerations will arise if the claimant is a litigant-in-person. If that is the case, the Defendant ought to assist them, including (for example) in the preparation of bundles.

The Morning After

35. Consequentials will have to be dealt with in the usual way – an order will need to be drawn up and agreed, covering costs and any application for permission to appeal.

36. If the claim was successful, the Defendant will need to consider if they wish to appeal. That may turn (amongst other things) on whether there is a point of legal principle in the judgment or whether it is fact specific. Advice will need to be given on merits and costs.

37. A further consideration is what (if anything) needs to be done differently in the meantime. This will depend on the relief granted. Per CPR r.52.16, an appeal does not operate as a stay of any order or decision of the lower court, unless an appeal court or a lower court orders otherwise or the appeal is from the Immigration and Asylum Chamber of the Upper Tribunal.

MALCOLM BIRDLING and EMMA MOCKFORD
Brick Court Chambers
November 2020

Public Law Project
November 2022

Case study

Today is 18 March 2021. You are a solicitor specialising in public law and community care law. You have been approached by a mother, Mrs H, who seeks to instruct you on the basis of being the litigation friend of her severely disabled son, M, who is in receipt of a care package from his local authority. There are two key issues that she seeks your advice on the local authority's failure:

i) To reassess M's social care needs; and
ii) To provide M with increased social care provision pending a full needs reassessment.

M is a 40-year-old man with a number of medical conditions as well as a severe learning disability. M needs significant care in order to manage his daily living needs, including assistance with physiotherapy, eating and drinking, and managing toilet and bathroom needs. M can read and write to only a very basic level. Mrs H and M agree that M does not have mental capacity to litigate.

M was assessed under the Care Act 2014 ('the Care Act') by the local authority in January 2017. In that assessment it had been determined that, among other things, M needed changing and repositioning during the night and that his mother could do that.

Mrs H is 70. She suffers from health problems of her own, including arthritis and sciatica. Mrs H's health problems are getting worse. This is partly due to the extensive care that she has to provide for her son, including repositioning him during the night. It has now got to the stage that on some occasions Mrs H cannot reposition M. This causes him significant pain and is distressing for Mrs H who feels guilty that she cannot properly care for her son.

Mrs H can still manage the care needs of M during the day but needs to be able to rest and recover during the night, and thinks a night-time carer is required for this reason.

The deterioration of Mrs H's health led her to request an updated Care Act needs assessment and increased night time social care provision in the meantime. She feels that the situation cannot wait until a full needs reassessment is undertaken.

She emailed the local authority on 2 March 2021 to make representations to this effect. She asked the local authority to respond within a week as she feels that the situation is urgent. She has phoned the local authority most days since. In exasperation at their lack of engagement, she has contacted your law firm to explore bringing a judicial review to challenge the lawfulness of the local authority's actions.

<u>The Care Act</u>

An outline of the key provisions in the Care Act 2014 is provided in the case of *R (GS) v Camden LBC* [2016] EWHC 1762 (Admin) [2017] PTSR 140 at paragraph 19:

> *'The way the Care Act works is as follows. Where it appears to a local authority that an adult may have need for care and support a care 'needs assessment' must be carried out by the local authority under section 9. Having carried out that assessment, the local authority must go on to consider whether the assessed person has any eligible needs under section 13 and the Eligibility Regulations. If the person assessed has eligible needs, the local authority is under a duty to provide support by section 18. If the assessed needs are not eligible needs than the local authority has power under section 19 to meet those needs.'*

The relevant provisions of the Care Act are set out in the Annex.

<u>Questions</u>

1) **Do you think Mrs H (or M) may have grounds for applying for judicial review? What decision do you think they could challenge?**

2) **Try to formulate potential grounds/arguments, in short summary form.**

3) **Are there any particular issues with procedure in this claim that may be relevant?**

4) **How would you explain the step-by-step procedure in bringing a judicial review claim?**

5) **What steps will you take when you have finished your initial appointment?**

6) **What will you be asking the local authority to do in your pre-action letter?**

7) **How long would you give the local authority to respond?**

8) **If you were acting for the local authority, what action would you advise in response to the letter before claim?**

9) **You receive the local authority's response to your letter. They resist the claim, arguing that there is insufficient evidence to justify the relief sought, and that the section 19 provisions do not apply in this case because M has already had a full assessment. What are your next steps?**

Annex

Care Act extracts

Section 9 – assessment of an adult’s needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—

(a) whether the adult does have needs for care and support, and

(b) if the adult does, what those needs are.

(2) An assessment under subsection (1) is referred to in this Part as a “needs assessment” .

(3) The duty to carry out a needs assessment applies regardless of the authority's view of—

(a) the level of the adult's needs for care and support, or

(b) the level of the adult's financial resources.

(4) A needs assessment must include an assessment of—

(a) the impact of the adult's needs for care and support on the matters specified in section 1(2),

(b) the outcomes that the adult wishes to achieve in day-to-day life, and

(c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.

(5) A local authority, in carrying out a needs assessment, must involve—

(a) the adult,

(b) any carer that the adult has, and

(c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

(6) When carrying out a needs assessment, a local authority must also consider—

(a) whether, and if so to what extent, matters other than the provision of care and support could contribute to the achievement of the outcomes that the adult wishes to achieve in day-to-day life, and

(b) whether the adult would benefit from the provision of anything under section 2 or 4 or of anything which might be available in the community.

(7) This section is subject to section 11(1) to (4) (refusal by adult of assessment).

Section 10 - Assessment of a carer's needs for support

(1) Where it appears to a local authority that a carer may have needs for support (whether currently or in the future), the authority must assess—

(a) whether the carer does have needs for support (or is likely to do so in the future), and

(b) if the carer does, what those needs are (or are likely to be in the future).

(2) An assessment under subsection (1) is referred to in this Part as a “carer's assessment” .

(3) “Carer” means an adult who provides or intends to provide care for another adult (an “adult needing care”); but see subsections (9) and (10).

(4) The duty to carry out a carer's assessment applies regardless of the authority's view of—

(a) the level of the carer's needs for support, or

(b) the level of the carer's financial resources or of those of the adult needing care.

(5) A carer's assessment must include an assessment of—

(a) whether the carer is able, and is likely to continue to be able, to provide care for the adult needing care,

(b) whether the carer is willing, and is likely to continue to be willing, to do so,

(c) the impact of the carer's needs for support on the matters specified in section 1(2),

(d) the outcomes that the carer wishes to achieve in day-to-day life, and

(e) whether, and if so to what extent, the provision of support could contribute to the achievement of those outcomes.

(6) A local authority, in carrying out a carer's assessment, must have regard to—

(a) whether the carer works or wishes to do so, and

(b) whether the carer is participating in or wishes to participate in education, training or recreation.

(7) A local authority, in carrying out a carer's assessment, must involve—

(a) the carer, and

(b) any person whom the carer asks the authority to involve.

(8) When carrying out a carer's assessment, a local authority must also consider—

(a) whether, and if so to what extent, matters other than the provision of support could contribute to the achievement of the outcomes that the carer wishes to achieve in day-to-day life, and

(b) whether the carer would benefit from the provision of anything under section 2 or 4 or of anything which might be available in the community.

(9) An adult is not to be regarded as a carer if the adult provides or intends to provide care—

(a) under or by virtue of a contract, or

(b) as voluntary work.

(10) But in a case where the local authority considers that the relationship between the adult needing care and the adult providing or intending to provide care is such that it would be appropriate for the latter to be regarded as a carer, that adult is to be regarded as such (and subsection (9) is therefore to be ignored in that case).

(11) The references in this section to providing care include a reference to providing practical or emotional support.

(12) This section is subject to section 11(5) to (7) (refusal by carer of assessment).

Section 18 - Duty to meet needs for care and support

(1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,[and]1

(b) the adult's accrued costs do not exceed the cap on care costs, and

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met.

(2) Condition 1 is met if the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are at or below the financial limit.

(3) Condition 2 is met if—

(a) the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are above the financial limit, but
(b) the adult nonetheless asks the authority to meet the adult's needs.

(4) Condition 3 is met if—
(a) the adult lacks capacity to arrange for the provision of care and support, but
(b) there is no person authorised to do so under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.

(5) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—
(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, and
(b) the adult's accrued costs exceed the cap on care costs.

(6) The reference in subsection (1) to there being no charge under section 14 for meeting an adult's needs for care and support is a reference to there being no such charge because—
(a) the authority is prohibited by regulations under section 14 from making such a charge, or
(b) the authority is entitled to make such a charge but decides not to do so.

(7) The duties under subsections (1) and (5) do not apply to such of the adult's needs as are being met by a carer.

Section 19 - Power to meet needs for care and support

(1) A local authority, having carried out a needs assessment and (if required to do so) a financial assessment, may meet an adult's needs for care and support if—
(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, and
(b) the authority is satisfied that it is not required to meet the adult's needs under section 18.

(2) A local authority, having made a determination under section 13(1), may meet an adult's needs for care and support which meet the eligibility criteria if—
(a) the adult is ordinarily resident in the area of another local authority,
(b) there is no charge under section 14 for meeting the needs or, in so far as there is such a charge, condition 1, 2 or 3 in section 18 is met, and
(c) the authority has notified the other local authority of its intention to meet the needs.

(3) A local authority may meet an adult's needs for care and support which appear to it to be urgent (regardless of whether the adult is ordinarily resident in its area) without having yet—
(a) carried out a needs assessment or a financial assessment, or
(b) made a determination under section 13(1).

(4) A local authority may meet an adult's needs under subsection (3) where, for example, the adult is terminally ill (within the meaning given in section 82(4) of the Welfare Reform Act 2012).

(5) The reference in subsection (2) to there being no charge under section 14 for meeting an adult's needs is to be construed in accordance with section 18(6).

Section 27 - Review of care and support plan or of support plan

(1) A local authority must—

(a) keep under review generally care and support plans, and support plans, that it has prepared, and

(b) on a reasonable request by or on behalf of the adult to whom a care and support plan relates or the carer to whom a support plan relates, review the plan.

(2) A local authority may revise a care and support plan; and in deciding whether or how to do so, it—

(a) must have regard in particular to the matters referred to in section 9(4) (and specified in the plan under section 25(1)(d)), and

(b) must involve—

(i) the adult to whom the plan relates,

(ii) any carer that the adult has, and

(iii) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

(3) A local authority may revise a support plan; and in deciding whether or how to do so, it—

(a) must have regard in particular to the matters referred to in section 10(5) and (6) (and specified in the plan under section 25(1)(d)), and

(b) must involve—

(i) the carer to whom the plan relates,

(ii) the adult needing care, if the carer asks the authority to do so, and

(iii) any other person whom the carer asks the authority to involve.

(4) Where a local authority is satisfied that circumstances have changed in a way that affects a care and support plan or a support plan, the authority must—

(a) to the extent it thinks appropriate, carry out a needs or carer's assessment, carry out a financial assessment and make a determination under section 13(1), and

(b) revise the care and support plan or support plan accordingly.

(5) Where, in a case within subsection (4), the local authority is proposing to change how it meets the needs in question, it must, in performing the duty under subsection (2)(b)(i) or (3)(b)(i), take all reasonable steps to reach agreement with the adult concerned about how it should meet those needs.

The Care and Support (Eligibility Criteria) Regulations 2014

Needs which meet the eligibility criteria: adults who need care and support

2.—

(1) An adult’s needs meet the eligibility criteria if—

(a) the adult’s needs arise from or are related to a physical or mental impairment or illness;

(b) as a result of the adult’s needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2); and

(c) as a consequence there is, or is likely to be, a significant impact on the adult’s well-being.

(2) The specified outcomes are—

(a) managing and maintaining nutrition;
(b) maintaining personal hygiene;
(c) managing toilet needs;
(d) being appropriately clothed;
(e) being able to make use of the adult's home safely;
(f) maintaining a habitable home environment;
(g) developing and maintaining family or other personal relationships;
(h) accessing and engaging in work, training, education or volunteering;
(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
(j) carrying out any caring responsibilities the adult has for a child.

(3) For the purposes of this regulation an adult is to be regarded as being unable to achieve an outcome if the adult—

(a) is unable to achieve it without assistance;
(b) is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;
(c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or
(d) is able to achieve it without assistance but takes significantly longer than would normally be expected.

(4) Where the level of an adult's needs fluctuates, in determining whether the adult's needs meet the eligibility criteria, the local authority must take into account the adult's circumstances over such period as it considers necessary to establish accurately the adult's level of need.

Letter before claim – urgent JR example

1. In this appendix we provide a real example of a letter before claim that was sent to the Home Office in an urgent case, where the claimant was facing removal from the UK the very next day.

2. It has been selected as an example of a letter before claim that follows the structure suggested in the pre-action protocol for judicial review ('the PAP'). It is also selected to illustrate the types of issues that a claimant lawyer will need to consider when preparing an urgent judicial review where interim relief is urgently sought.

3. It is not important if you are unfamiliar with this area of law. The letter is from 2017 and some matters have changed, such as the email address now used by the Home Office for PAP letters, and the relevant policies and case law. However, the real purpose of the letter is to illustrate how the principles and procedures actually work in practice and we consider it remains a good example of how a letter before claim should be set out.

4. Please note that the PAP states that its use is not appropriate in very urgent cases (such as imminent removal cases). In this sort of case, a claim should be made immediately. Nevertheless, we suggest that although it is not required it would still be advisable to send a letter before claim to a prospective defendant if practicable[1].

5. In this letter the claimant's lawyer was able to notify the SSHD of the intention to urgently issue a claim and that urgent interim relief was sought. The claimant's lawyer set out as much detail as time would permit about the claim, and also the limits of the claimant's lawyer's knowledge of the facts (here, the lawyer had only just been instructed and did not have sufficient time to investigate all the facts). In very urgent claims it is essential to notify the defendant of these matters before issuing the claim.

6. Whilst this letter follows the format of a letter before claim given in the PAP, the main difference is that under the PAP the defendant must be permitted an appropriate amount of time to respond (normally 14 days) and the claim should be issued after the response is received or after the deadline for the response has expired[2].

7. In this case the claimant was given less than 48 hours' notice of the date and time of his removal from the UK and he had only just been able to instruct

[1] PAP at §6. Even though the PAP does not apply in very urgent cases, wherever possible the claimant must take all necessary steps to notify the prospective defendant of the intention to issue a claim. If it is not possible or practicable to send a letter before claim to the defendant then at the very least a copy of the draft claim form and grounds and details of any urgent interim relief being sought, must be sent to the defendant before issuing the claim.

[2] Although note that this does not affect the time limits under CPR 54.5 including 54.5(1), which requires that any claim form in an application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose.

lawyers the day before that – so it was not practicable to allow the defendant time to respond and instead the claimant's lawyer put the defendant on notice of the steps that he intended to take.

8. Another reason why a letter before claim was submitted in this case, rather than sending a draft of the claim form and grounds to the defendant prior to issuing the claim, was that the claimant was simultaneously (due to the time constraints) making a first time written human rights claim to the Home Office. Many letters before claim will not contain this much factual detail and will not be as lengthy as this. But in this case the client did not have legal representation previously and had never set out his very strong Article 8 ECHR claim before.

9. The point here is the importance of ensuring that all relevant factual matters are brought to the prospective defendant's attention before the claim is issued.

10. We hope that you will find the structure of the letter useful, as it not only follows the PAP template for a letter before claim, but it also mirrors the way the statement of facts and grounds of the judicial review (that accompany the judicial review claim form) would be set out:

    - The details of the parties,
    - the target(s) for challenge,
    - the factual background,
    - the relevant legal framework (statute, rules, policy, case law),
    - the grounds/why the decisions under challenge are wrong,
    - proposals for ADR,
    - relevant information/disclosure/further information required,
    - any interim relief sought,
    - the final relief/remedy sought,
    - when a response is required.

11. Outcome: The case was issued the next day, the urgent interim relief (namely an injunction against removal) was granted by the judge. Permission was subsequently granted (after amended grounds were submitted). The case finally settled with costs in favour of the claimant without the need for a hearing. The Home Office conceded that the claimant had had Indefinite Leave to Remain (ILR) since 1990 and that his detention was unlawful and agreed to pay damages to the claimant.

12. It may be of interest that the "removal windows" policy that was referred to in this letter was subsequently quashed by the Court of Appeal in 2020 on the grounds that it unlawfully restricted the right of access to justice.[3]

Public Law Project
28 March 2022

[3] R(FB (Afghanistan) and Medical Justice) v SSHD [2020] EWCA Civ 1338

Public Law Project

Home Office

BY FAX – 0870 336 9480 & 020 8196 4533

RS

27 July 2017

*****URGENT*****

REMOVAL ON 28 JULY 2017 AT 12.25PM***

NOTICE OF INTENTION TO ISSUE A CLAIM FOR JUDICIAL REVIEW

ARTICLE 8 HUMAN RIGHTS CLAIM

Dear Sirs

H – Notice of Intention to Issue a Claim for Judicial Review

1. We act for Mr H in this proposed claim for judicial review of the Secretary of State for the Home Department.

2. In view of our client's removal with less than 48 hours notice this is an urgent case and the pre-action protocol for judicial review is not appropriate. Nevertheless we are alerting the SSHD to our intention to issue the claim to provide an opportunity to immediately defer removal and to avert the necessity of our client applying for interim relief and issuing a claim for judicial review.

3. In summary the claim is as follows:

    a. Mr H should not have been served with a removal window notice since he has ILR.

    b. Mr H's removal would be in breach of the Human Rights Act as he has made a first time human rights claim which has not been considered.

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c. Mr H's removal would be in breach of the removal window policy as the removal window must be brought to an end since he has made a fresh human rights claim involving issues of substance which have not been previously considered.

d. Mr H's removal must be suspended as we have notified you that the human rights claim will feature in his grounds of judicial reivew and the the barriers test in the removal window policy requires that removal is then suspended.

e. Mr H's removal is unlawful as he has not had sufficient access to the court. He has been unable to secure legal representation until recently and we do not have a full set of papers nor have we been able to arrange a legal visit with him before the scheduled removal.

f. Mr H's removal is unlawful because it breaches article 8 procedurally fairness guarantees as he has not had an opportunity to participate in the decision making process.

g. The SSHD has failed to make relevant enquiries in breach of her public law *Tameside* duty prior to deciding to remove Mr H particularly in connection with Mr H's grant of ILR and in relation to his Article 8 claim and this renders removal unlawful.

h. Mr H's detention is unlawful.

In view of the foregoing and for the reasons given below would you please immediately confirm whether or not you will suspend Mr H's removal scheduled for 28 July 2017 at 12.25pm.

The Claimant

4. The first Claimant is H, Jamaican national, d.o.b. [redacted], currently detained at Brook House Immigration Removal Centre, Perimeter Road South, Gatwick Airport, Gatwick RH6 0PQ. Prior to his detention on 13 July 2017 Mr H had resided at [redacted] [redacted] from [redacted] 1992.

The Defendant's reference details

5. The Home Office reference for the Claimant is [redacted]. A copy of this letter is being sent by email to the UKVI PAP email account.

The details of the Claimant's legal advisers dealing with this claim

6. We are the Claimant's legal advisers. Our details are on this letter. The solicitors with conduct of the case are Rakesh Singh (his direct contact details are at the end of this letter) and David Oldfield (direct line - 020 7843 1264; email – d.oldfield@publiclawproject.org.uk).

The details of the matters being challenged

7. The matters being challenged are:

a. The notice of removal window dated 13 July 2017
b. The removal of the Claimant on 28 July 2017
c. The lawfulness of the Claimant's detention

The issue

Factual Background

Lack of access to the Court

8. The Claimant and we are seriously disadvantaged by being notified of removal taking place with less than 48 hours' notice and with less than 72 hours from the time that we were instructed.

9. It has not been possible to arrange a legal visit to our client within that timescale. The earliest legal visit that we were able to attend and which is booked is for Friday 28 July 2017 at 6.30pm – but that is after our client's scheduled removal.

10. PLP is a charity whose remit includes access to justice issues in the context of public law remedies. As part of our charitable remit we undertake a low volume of casework and we have a public law legal aid contract. We were first contacted in relation to Mr H's case after close of business on Monday 17 July 2017 by his partner V in connection to funded research we are conducting on access to the court and the removal windows policy. We requested further information on 18 July 2017 from Ms V and indicated that we would need to see the papers to consider whether we could assist. Just after close of business on Friday 21 July 2017, after earlier unsuccessful attempts to send documents to us, Ms V emailed the removal notice and IS91R reasons for detention form to us both dated 13 July 2017. On 24 July 2017 we arranged an appointment with Ms V at our office for the following day at 3pm.

11. It is understood that shortly after his arrival at Brook House Mr H sought an appointment with the duty immigration solicitor at Brook House and had been given an appointment on 25 July 2017. This was one week after the 'removal window' had opened. On the basis of the few details we had seen on the case we considered that it was likely that Mr H would obtain representation from an immigration solicitor to challenge his removal by judicial review.

12. On 25 July 2017 Mr H saw the duty immigration solicitor at Brook House. However, the duty immigration solicitor refused to act for Mr H. Mr H was told that this was because his case was not an asylum case. He was told that he would have to pay a solicitor privately and that legal aid was not available for his case. He was told that it would be easy enough for him to make a subject access request to the Home Office himself rather than pay a solicitor to do it. We are unclear why Mr H was not advised about judicial review.

13. Ms V attended our offices for an appointment at approximately 3pm on 25 July 2017. She provided documents and spoke to us about the background to his case. We were then able to make an initial assessment

that Mr H would be eligible for legal aid to enable us to send a letter before claim requesting the SSHD to end the removal window as he had insufficient time to access legal representation and to access the court.

14. We spoke directly to Mr H for the first time in the late afternoon on 25 July 2017. The welfare office at Brook House returned his signed letter of authority to us later that evening after close of business. We attach his signed consent form.

15. Having received Mr H's letter of authority on 26 July 2017 we contacted Brook House to arrange a legal visit as soon as possible. The first available legal visit that we were able to book with our client at Brook House was Friday 28 July at 6.30pm. At that time neither our client nor we were aware that his removal had been scheduled for earlier on the same day i.e. Friday 28 July at 12.25pm

16. The Defendant SSHD arranged an appointment with our client at approximately 2.20pm on 26 July 2017. At that meeting our client was notified by an Immigration Officer that he would be removed on Friday 28 July 2017 at 12.25pm. Our client notified us at approximately 3.40pm and we received the documents at approximately 4pm when they were faxed to us by our client.

17. The documents faxed to us by our client included the undated Immigration Factual Summary and a 'courtesy letter' dated 25 July 2017 informing him of the date and time of removal when he will be removed. Prior to the meeting on 26 July 2017 he was only informed that his removal may take place at any time between 18 July 2017 and 13 October 2017.

18. We do not have all of the relevant documents in his case and are yet to take detailed instructions from him. There may be further documents that can be provided that may support Mr H's claim to have been granted ILR and/or his length of residence in the UK but we have not had sufficient time to obtain those yet.

19. The difficulties in taking instructions from Mr H not only include the inability to arrange a legal visit with him prior to removal, but also the fact that when he is locked in his room at the detention centre he is unable to communicate with us because there is no mobile phone signal there. We are only able to communicate with him at restricted times when he is permitted outside his room and is able to go to an area of the detention centre where there is a strong enough phone signal.

20. Mr H is and has been unable to adequately represent himself because he suffers from dyslexia and he has significant difficulty with reading and writing. It is understood that he has not had any significant level of formal education. He is dependent on others to assist him with official tasks including his applications and representations to the Home Office. Therefore Mr H requires legal representation.

21. In view of imminent removal and notwithstanding the fact that we have not had sufficient time to obtain all the necessary documents and instructions, Mr H now must take immediate steps to apply for legal aid in order to

apply for interim relief later today and issue a claim for judicial review tomorrow.

Article 8 – information from Mr H and Ms V so far

Private and Family Life

22. Having considered the documents provided and taken brief instructions from Mr H and Ms V, the factual background based on the information we have so far is set out below (and may be subject to revision once we have had a proper opportunity to take full detailed instructions and we have had full disclosure).

23. The claimant, Mr H, believes that he arrived in the UK on 1 December 1988 and was granted 6 months leave to enter as a visitor. He has been in the UK continuously since that time and his residence has been lawful. Mr H has not left the UK since arriving here in 1988. That amounts to 29 years continuous residence.

24. He married, N H, a person present and settled in the UK, on ██████ 1989. He understands that an in-time application to vary his leave on the basis of his marriage was submitted after his marriage and he was granted ILR approximately 6 months thereafter. He cannot remember the date but on his estimation it might be at the end of 1989 or the beginning of 1990.

25. Following the claimant's separation from N H he met his current partner, V who is a British citizen. They met in 1992 and were in a relationship since then. The claimant and Ms V have a son, A H, who was born on █ ██████ 1994. He is a British citizen. The claimant and Ms V lived together at ████████████████████████████ from approximately 1993 to 2013. Following the birth of their son, A, the three of them lived together as a family in Mr H's home until 2013.

26. Mr H reported the loss of his Jamaican passport to the police on ██ █████ 2011. This was the passport which was endorsed with his ILR stamp and which is at the centre of this dispute as the Home Office claim that following a thorough investigation there is no record of him being granted settled status. However it is not clear what checks have been made, nor what records are kept from the period that Mr H would have been granted ILR in approximately 1989 – 1990.

27. Ms V clearly recalls seeing Mr H's Jamaican passport which had the ILR endorsement on more than one occasion. She recalls seeing the passport because when she would tease Mr H about his passport photo. She also recalls seeing the ILR stamp. Mr H also explained to her his background and what he understood about his immigration status.

28. In 2013 the couple had a breakdown in their relationship

29. However although she and her son moved out, the couple reconciled soon afterwards, but since then they have maintained their own separate residences. Ms V informs us that although they moved into 2 households this was on account of difficulties that their son was having with reconciling himself with his father and this arrangement was mostly to put their son first. However this did not affect her eventual reconciliation and the strength of their relationship. Father and son are now reconciled and although the couple continue to have 2 households they consider themselves to be partners and are in a strong subsisting relationship which involves daily contact and frequent and regular periods of stay with each other.

30. Ms V says that she has a shared past with Mr H and they have faced many difficulties together. She is very dependent on him. She does not have extended family in London as they live in , she does not have close friends in London. Her son is at University and when he is away then Mr H is the only person she can rely on.

31. Mr H suffering from dyslexia means that he has significant difficulties in reading and writing. This means that he has difficulty in understanding official documents or writing letters. He has been very reliant on Ms V to assist him with official matters. He was unable to make the NTL applications to the Home Office himself and had to rely on others (see below).

32. Ms V has suffers from severe inflammatory bowel disease, which is not controlled by drugs. The disease leads to major complications and she has had hospital admissions.

33. Ms V has found it a very difficult illness to cope with and it can put a lot of strain on a relationship. She has found it very isolating. As a consequence of her illness she spends a lot of time in her house. Mr H only lives a few minutes away by taxi so it is easy for her to travel to him regularly. Mr H has been very understanding and accepting of her illness. He knew her before she suffered from the illness. Mr H gives her emotional support that she would otherwise not have. She feels that even having a few days without him is difficult and makes her feel very isolated. Ms V has had difficulty in visiting our offices due to her illness. She informed us today that after coming to visit our offices near Kings Cross from her home in , she was exhausted and has been in bed most of the day.

34. Ms V describes her and Mr H not only being a strong loving couple but also co-dependent. Mr H depends on her for reading and writing and

helping him with official matters when she is well enough. She is entirely reliant on him for emotional support.

35. Ms V is very anxious about the impact that separation would have on her due to her dependence on Mr H. She feels that it would completely devastate her if he was removed from the UK. When their relationship broke down she had to see a psychiatrist because I she found it very difficult being separated from him. She says that 'I wanted to give up I didn't know what to do.' In spite of all the difficulties she has had with her health she consider that the time that she was separated from Mr H was the only time that she thought that she wanted to 'give up'.

Legal representation and Mr H's NTL applications

36. Mr H did not have any difficulties in terms of housing, permission to work, accessing benefits on account of losing his passport with the ILR endorsement, as he already enjoyed those entitlements as a consequence of the grant of ILR. We understand that when Mr H decided to obtain a replacement ILR stamp in his replacement Jamaican passport both he and his partner considered that it would be a relatively straightforward matter as the Home Office would have a record of his grant of ILR. For that reason Mr H did not seek legal representation. Instead he was assisted with the first application he made on form NTL for his ILR stamp in December 2012 by Ms V. However not long thereafter Ms V father died and when she travelled up to her family in [redacted] following his death she became ill and was hospitalised. It was for that reason that Mr H did not pursue his NTL application and failed to register his biometric information.

37. Ms V again assisted Mr H with his NTL application in August 2016, as Mr H was unable to do this himself. Again, they thought it should be a straightforward matter. Ms V for health reasons felt unable to assist any further with the application. Mr H therefore was assisted by Mr J A G on an entirely voluntary basis. It is understood that Mr H was known to Mr G through his participation in the [redacted] employability programme which assists those facing long-term barriers into obtaining employment and that Mr G is also connected to the church. It is understood that Mr G was aware both of Mr H's difficulties with reading and writing and also Ms V' serious health problems and so volunteered to assist with filling in the relevant forms and submitting the evidence and did not request payment for this.

38. We do not have a complete copy of the correspondence or the documents that were submitted with the correspondence. However it is understood that Mr G corresponded with the Home Office after the NTL application was submitted in August 2016.

39. It is understood that Mr G has recently suffered a stroke and so it has been difficult for Ms V to obtain a complete copy of the correspondence sent to the Home Office with the attachments, although we are making enquiries to obtain these.

40. It appears from the correspondence from the Home Office that Mr H's NTL application was refused and the SSHD refused to reconsider the decision.

The SSHD also refused to consider any documents which were not originals. It does not appear that there was any consideration of Mr H's obvious Article 8 private life from the documents produced. There was no right of appeal against this decision.

Documentary Evidence of Private and Family Life

41. Mr H has lost the key document which is his previous Jamaican passport which confirms his date of entry to the UK and his grant of ILR. However Mr H was still able to provide documentary evidence to the SSHD that corroborates his claim to have resided in the UK for every year since 1989, apart from 1990. That is documentary evidence of continuous residence in the UK of at least 28 years.

42. From the documents referred to in the correspondence we have been able to ascertain the documents that have been sent to the SSHD. There are other documents we have been provided with where it is not clear whether they have been sent to the SSHD. We have set out below the range of documents that we understand were sent to the SSHD and where we are not certain the documents were sent to the SSHD we have marked those documents with an asterisk. We attach the documents in italics to this letter.

20 May 1989 –

<u>2016, 2017 to date</u> – Mr H's correspondence to and from the SSHD

42. There are other factors that indicate that Mr H has had ILR. His access to housing, the issue of a National Insurance number, his claims for welfare benefits, the fact that he is on the electoral register and has voted in elections (including the most recent general election).

Consideration of Article 8 ECHR and Removal Window Notices

43. Notwithstanding the documentary evidence provided to the SSHD there does not appear to have been consideration of Mr H's Article 8 rights to date.

44. Neither Mr H nor ourselves have received a copy of the 1st removal window notice that was dated 28 January 2017. The Immigration Factual Summary states that it was served on Mr H on that date, however Mr H informs us that is not correct and he has never seen the 28 January 2017 decision. It is not clear whether there was any consideration of Mr H's Article 8 rights in that decision. The Immigration Factual Summary only indicates that Mr H's application for ILR on form NTL has been refused twice. It indicates that Mr H has never put forward a human rights claim and has never had an appeal.

45. If the SSHD had served the RED.0001 1st removal window notice on Mr H then it would have included a s120 one-stop notice requesting him to put forward any reasons for wishing to stay in the UK and also advising him to seek legal advice. However Mr H did not receive this.

46. The first time that Mr H became aware that he could be removed was when Immigration Officers turned up unannounced at his home on 13 July 2017 at 7am. Ms V was also there at the time as she had stayed over with Mr H. It was not until then that they learned that there was a previous removal window notice dated 28 January 2017.

47. Mr H also informs us that he has not been provided with a s120 notice with the fresh removal window notice (RED.0004) or since his detention on 13 July 2017. It is also entirely unclear whether a mitigating circumstances interview has been conducted with Mr H. From the information he has given us it does not appear that it has. Therefore it appears that notwithstanding the strong documentary evidence of continuous residence in the UK for over 28 years, the SSHD has made no enquiries about Mr H's private or family life.

Legal Framework

Article 8 ECHR – Procedural Fairness Guarantees

43. Procedural fairness obligations is inherent in Article 8 ECHR.

44. In P, C & S v UK (2002) 35 EHRR 1075 the European Court of Human Rights (ECtHR) said at para 119:

    "… whilst Article 8 contains no explicit procedural requirements, the decision making process involved in measures of interference must be fair and such as to afford due respect to the interests protected by Article 8."

45. In W v UK (1998) 10 EHRR 29, the ECtHR stated at para 62:

    "It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter … [.] the court is entitled to have regard to [the decision making] process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8."

The Defendant's public law duty to make reasonable enquiries

46. The Defendant is under a public law '*Tameside*' duty to make reasonable enquiries and to ensure that she takes all reasonably practicable steps to make a fully-informed decision.

Constitutional right of access to the court

47. *R(Medical Justice) v SSHD [2010] EWHC 1925 (Admin) Silber J at para 45:*

    The correct recognition…of the need for somebody served with removal directions "*proper access to justice*" as well as to "*have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply [to court]"* means that it must be necessary for someone served with any removal directions, which must include those served with abridged notice under the 2010 exceptions and who so wishes to have sufficient time between service of the removal directions and the time fixed for removal to find and instruct a lawyer who:-

    a. is *ready* to provide legal advice in the limited time available prior to removal, which might also entail ensuring that the provider of the advice would be paid;

    b. *is willing and able* to provide legal advice under the seal of professional privilege in the limited time available prior to removal which might also entail being able to find and locate all relevant documents; and

    c. (if appropriate) would after providing the relevant advice be *ready, willing and able* in the limited time available prior to removal to challenge the removal directions.

The Defendant's policy on removal windows – Enforcement Instructions and Guidance, Chapter 60

48. In this case the Claimant was given a Notice of Liabilty for Removal ('NLR') and he was subject to a 'removal window'. The Defendant's policy guidance is found in the Enforcement Instructions and Guidance, Chapter 60, Section 2 and the relevant parts are as follows:

Section 2: Notice of removal
Notice of removal may be given in three different forms:

a. Notice of a removal window. The person is given notice of a period, known as the removal window, during which they may be removed…

2.1 Notice of a removal window
Under this form of notice the person is given notice of a removal window during which removal may proceed without further notice. This form of notice is suitable for the following persons, subject to exceptions:

Persons being removed under section 10 of the Immigration and Asylum Act 1999 as amended by the Immigration Act 2014. The person will be given a "Notice of Liability for Removal"…

…When "Notice of Liability for Removal" or "Deportation Decision Letter" is given, it starts the notice period. The person may not be removed during this period.
When the notice period ends, the removal window begins. A person may be removed during the removal window.

When does the notice period begin?

When the notice is given in person, the period begins at the time notice is given.

The notice may not be given to a person with leave to enter or remain, or during the period within which an in country appeal or an administrative review may be lodged in time or is pending.

When does the notice period end?

The notice will specify the length of the notice period. The minimum length of the notice period must comply with the policy at paragraph 2.4 below.

When does the removal window begin?

The removal window begins when the notice period ends.

…When does the removal window end?

… If the person makes an asylum, human rights or EU free movement claim, involving issues of substance which have not been previously raised and considered, or a further charged application for leave, the window ends.
[our underlining]

2.4 The notice period
Where notice is given of a removal window under paragraph 2.1 of this policy the notice period is 7 calendar days if at the point notice is given the person is not detained.

Otherwise, **subject to certain exceptions** described in this guidance at section 3, the notice period must be of the following minimum time periods:
Normal enforcement cases – minimum **72 hours** (including at least two working days)…

2.4.1 Normal enforcement cases (administrative removal and deportation)
Unless an exception applies, there are three rules to consider when calculating the minimum notice period:

b. A minimum of **72 hours** must be given.
c. This 72 hour notification period must always include **at least two working days**.
d. The **last 24 hours** must include a working day unless the notice period already includes three working days.

Section 6 – When judicial review proceedings will not suspend removal

6.1 The qualifying criteria
Where JR proceedings against removal are brought, the removal will normally be suspended. However in certain circumstances it will not be necessary to suspend removal.

The first consideration is whether one or more of the following qualifying criteria are met:
…

- the JR is brought while the person is within the removal window as defined in paragraph 2.1 of section 2 of Chapter 60 EIG and as long as the person remains within the removal window (unless another 'qualifying criteria' applies);

6.3.2 Are the issues raised in the JR a barrier to removal? ("the barrier test")
You must also consider whether the issues raised in the JR should be treated as a barrier to removal:

- Does the JR raise new grounds, for example a first time asylum or human rights claim or further submissions that fall to be considered under paragraph 353 of the Immigration Rules? If so, refer to the section "Fresh claims".
- Does the JR rely on new and relevant evidence that has not previously been considered by the SSHD in deciding a previous application or claim and (where a right of appeal was exercised against the refusal of that previous application or claim) by the court in an appeal? If so, consider the nature of that evidence. If it amounts to a first time asylum or human rights claim or further submissions that fall to be considered under paragraph 353, refer to the section "Fresh claims".

Grounds raised in the JR amount to a first-time human rights claim – where the grounds raised in the JR amount to a human rights claim and the claimant has not previously made a human rights claim and had a right of appeal against its refusal OSCU will:

- suspend removal; and
- consider the human rights claim.

Where the claim can be certified so that no right of appeal arises (section 96) or the appeal right can only be exercised from out-of-country (sections 94 and 94B) the JR will not suspend removal and OSCU will issue a decision on the human rights claim including the relevant notice of liability to removal / deportation giving 5 days notice of removal, and write to the person or their representatives to confirm that the judicial review will not suspend removal.

…Where the claim cannot be certified and there is an in country right of appeal against the refusal of the human rights claim, OSCU will suspend removal and refer the JR to Litigation Operations to be handled in accordance with the usual JR process (refer to the Judicial Review guidance)

Article 8 procedural fairness – certification under s94B NIAA 2002

R (Kiarie and Byndloss) v SSHD [2017] UKSC 42

Article 8 requires that an appeal against a deportation order by reference to a claim in respect of private and family life should be effective **[51-52]**. While the effect of an appellant's immediate removal from the UK is likely to significantly weaken his arguable appeal **[58]**, what is determinative of these appeals is whether the issue of a section 94B certificate obstructs an appellant's ability to effectively present his appeal against the deportation order **[59].** In an appeal brought from abroad, the appellant's ability to present his case is likely to be obstructed in a number of ways. Even if he is able to secure legal representation, the appellant and his lawyer would face formidable difficulties in giving and receiving instructions prior to and during the hearing **[60]**. Further, the effectiveness of an arguable appeal is likely to turn on the ability of the appellant to give live evidence to assist the tribunal in its assessment of whether he is a reformed character and the quality of his relationships with others in the UK, in particular with any child, partner or other family member **[61, 63]**.

An effective appeal requires that the appellants are afforded the opportunity to give live evidence **[76].** While the giving of evidence on screen is not optimum, it might be enough to render the appeal effective for the purposes of article 8, provided that the opportunity to give evidence in that way is realistically available to them **[67]**. However, the financial and logistical barriers to their giving evidence on screen from abroad are almost insurmountable.

The respondent has therefore certified article 8 claims of foreign criminals under section 94B in the absence of a ECHR-compliant system for the conduct of an appeal from abroad. The Ministry of Justice has failed to make provision for facilities at the hearing centre, or for access to such

facilities abroad, as would allow the appellants to give live evidence and participate in the hearing **[76]**. Deportation pursuant to the certificates would therefore interfere with the appellants' rights to respect for their private and family life in the UK pursuant to article 8 and, in particular, with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective. The respondent has failed to establish that deportation in advance of appeal strikes a fair balance between the rights of the appellants and the interests of the community and therefore the decisions to issue the certificates were unlawful **[78]**.

Power to detain

49. The power to detain pending deportation is contained in schedule 3, paragraph 2 of the Immigration Act 1971.

50. The SSHD's powers to administratively detain under the Immigration Acts must be construed consistently with the implied limits on the statutory power derived from the Hardial Singh principles. In R(I) v Secretary of State for the Home Department [2002] EWCA Civ 888, [2003] INLR 196 Dyson LJ (as he then was) summarised the effect of Hardial Singh principles at [46]-[48]:

    i. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

    ii. The deportee may only be detained for a period that is reasonable in all the circumstances;

    iii. If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

    iv. The Secretary of State should act with the reasonable diligence and expedition to effect removal.

The details of the matters under challenge

51. The matters under challenge are the removal window notice of 13 July 2017, the removal directions for 28 July 2017 at 12.25pm and the Claimant's detention from 13 July 2017 to date.

Why the matters under challenge are contended to be wrong

52. In view of the urgency we are necessarily brief. We may develop these grounds in due course and following further disclosure from the SSHD.

The Claimant's removal – removal window notice and removal directions

Right of access to the Court.

53. The Claimant, Mr H, had significant difficulties in obtaining legally aided representation to challenge his removal. The first appointment for him to

see a duty immigration solicitor at the detention centre was during the removal window and the immigration solicitor refused to take his case. We were approached and agreed to take his case on the same day, but in spite of acting promptly have insufficient time to take detailed instructions or obtain all the necessary documents, including disclosure from the SSHD in support of his judicial review, prior to his removal.

54. Mr H's removal will therefore be a breach of the right of access of the Court (see *Medical Justice* – above)

First time human rights claim & removal window policy

55. A removal window notice should not have been served on Mr H as he has ILR. Further enquiries should have been made about this before deciding to remove him.

56. However regardless of Mr H's inability to provide so far evidence of his grant of ILR, it is clear that there is evidence including documentary evidence from official sources of Mr H's continuous residence in the UK for at least 28 years. In addition to his continuous long residence in the UK Mr H has been in a subsisting relationship with a British citizen since 1992, Ms V, and they have a British son, A H. Mr H has not returned to Jamaica since arriving in the UK in 1988 when he was aged 22 years old. He is now 51 years old. He has spent over half his life in the UK. In view of that very strong private and family life and in view of Mr H's claim to have been granted ILR, his removal from the UK would be a disproportionate interference with his private life.

57. From the information we have, including the Immigration Factual Summary, Mr H has not previously made a human rights claim, nor has he had an appeal at which he could have raised human rights issues, nor has he been served with a s120 notice and/or interviewed and advised to raise these issues. If the SSHD had produced a record of the grant of ILR to Mr H or if Mr H had not lost his passport or had found a copy of it then he would have no need to make a human rights claim. Since the grant of ILR is disputed Mr H now makes a human rights claim.

58. Since this is Mr H's first time human rights claim the SSHD's policy now requires her to bring the removal window to an end and consider the human rights claim because he has made a human rights claim involving issues of substance which have not been previously raised and considered. The consequence of this would be to suspend removal.

59. The SSHD is on notice that Mr H's grounds for judicial review will refer to his first time Article 8 human rights claim. Normally the SSHD will not suspend removal if an individual is in the removal window. However since Mr H has raised a first time human rights claim the 'barriers test' in the SSHD's removal window policy means that the SSHD should suspend removal and consider the human rights claim.

60. In view of the first time human rights claim Mr H should not be required to issue a claim for judicial review or to seek an injunction to prevent his

removal because he will rely on the SSHD's policy that removal should be suspended as a first time human rights claim acts as a barrier to removal.

61. In addition it seems highly unlikely that even if the SSHD were to refuse Mr H's human rights claim that he would be able to certify it and remove any in-country right of appeal. It cannot be said that the human rights claim is unfounded. It is the first time he is making this claim and these matters have not and could not have been raised in an earlier appeal (as he has not had one). Following Kiarie and Byndloss, if the SSHD were to attempt to certify the appeal under s94B of the NIAA 2002 that is likely to be quashed as it would be procedurally unfair as Mr H would not be able to effectively pursue his appeal. It therefore seem highly likely that following consideration of his human rights claim Mr H could not be removed either because he would be granted leave to remain or he would have an in-country right of appeal.

Tameside duty to make reasonable enquiries

62. Notwithstanding a range of documentary evidence from official sources evidencing Mr H's long residence in the UK and strong private life which ought to have indicated the clear possibility that his removal would be in breach of the SSHD's obligations under the Human Rights Act and Article 8 ECHR the SSHD has failed to make reasonable enquiries concerning this. In failing to do so prior to removal the SSHD has acted in breach of her public law duty and for that reason Mr H's removal would be unlawful.

Procedural unfairness – Article 8

63. The evidence provided to the SSHD indicated a strong Article 8 claim. Mr H has not been able to put that forward due to a difficulties in securing legal representation prior to removal notwithstanding his efforts to do so, his difficulty in putting his case forward due to problems with reading and writing since he suffers from dyslexia, and also since the SSHD has failed to give him opportunities to provide this information either through providing him with a s120 notice or interviewing him (which would be more appropriate in view of his difficulties with reading and writing). Therefore Mr H has not been given a sufficient opportunity to participate in the Article 8 decision-making process prior to his removal. This would mean his removal is in breach of procedural fairness guarantees under Article 8 ECHR.

64. Moreover it is not clear what investigations the SSHD has taken in order to trace Mr H's grant of ILR and whether these were in fact 'thorough' or if there is a risk that those records from around 1989 or 1990 might be lost or require further lines of investigation. Further information is required from the SSHD but this may amount to procedural unfairness.

Unlawful detention

65. We will develop these arguments once we have further disclosure but on the face of it the Claimant's detention from 13 July 2017 appears unlawful. It is difficult to see the factual justification for some of the reasons for detaining Mr H e.g. failure to have close ties, previously absconded or escaped, failure to observe conditions of stay (this is disputed).

66. Such was the strength of the Claimant’s article 8 human rights claim even on the basis of the limited documents provided to the SSHD, that it cannot be said that his removal could have been imminent as the SSHD ought to have considered whether removal would breach Mr H’s Article 8 rights. Moreover the SSHD’s conduct has been procedurally unfair.

The details of the action that the defendant is expected to take

67. The Defendant must take the following action:

68. To immediately suspend the Claimant’s removal scheduled for 28 July 2017 at 12.25pm.

69. To consider the Claimant’s human rights application.

70. To release the Claimant.

71. To accept liability for his unlawful detention from 13 July 2017.

72. Should the Claimant have to issue a claim for judicial review he is likely to first seek urgent interim relief to prevent his removal.

ADR proposals

73. We consider that the case is not suitable for ADR, but we will carefully consider any suitable and effective ADR proposals put forward by the SSHD.

The details of any information sought

74. We seek the following information:

75. Your record of the grant of ILR to Mr H.

76. If you are unable to locate this then details of the searches conducted and what has happened to records of grants of settlement from that period (1989 – 1990).

77. Copies of the NTL applications in 2012 and 2015 and all documents submitted to the SSHD with those applications.

78. The SSHD’s removal window notice of 28 January 2017 with any accompanying documents.

79. Interview records with the Claimant.

The details of the documents that are considered relevant and necessary

80. The documents referred to in the factual background above and in the information sought are considered relevant and necessary.

The address for reply and service of court documents

81. Please send the reply and serve any court documents by email to r.singh@publiclawproject.org.uk wherever possible. If that is not possible then please send hard copies of documents by post to the Public Law Project, 150 Caledonian Road, London, N1 9RD and mark all correspondence for the attention of Rakesh Singh. Our details are on this letter.

Reply

82. This is notice of intention to issue a judicial review. We are immediately applying for legal aid and will then seek interim relief today. It is likely we will then issue the claim for judicial review tomorrow. If the SSHD agrees to suspend removal then please confirm that to us immediately so as to avoid the necessity of us seeking urgent interim relief from the court today and issuing a claim for judicial review tomorrow.

We look forward to hearing from you.

Yours faithfully

Rakesh Singh
Solicitor
Public Law Project

Direct line: 020 7843 1265
Email: r.singh@publiclawproject.org.uk

Judicial Review

Claim form

For Court use only

Name of court

High Court of Justice
Administrative Court

Reference number

Date

Day Month Year

Help with fees reference number

H W F – –

The rules relating to applications for Judicial Review are contained in CPR Part 54, and Practice Directions 54A – D. Search for the CPR on www.justice.gov.uk.

Additional information about judicial review proceedings can be found in the Administrative Court Judicial Review Guide. Search for the Guide on www.gov.uk.

Time Limit for filing a claim

A claim form must be filed promptly, and in any event **not later than 3 months** after the grounds to make the claim first arose: see CPR54.5(1).

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Section 1 – Details of the claimant and defendant

Note: If there is more than one claimant, set out the details required by questions 1, 1.1 and 1.2 on a separate sheet, marking that sheet so that it is clear it relates to this part of the claim form.

1. Claimant name and address(es)

First name(s)

Last name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email (if you have one)

1.1 Claimant or claimant's legal representative's address to which documents should be sent.

Name of claimant or claimant's legal representative's

Name of firm (if applicable)

Address for service

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

Reference number (if applicable)

Note 1.1: CPR 6.23 requires each party to proceedings to provide an address for service which must be an address in the United Kingdom. Communication concerning the claim is sent to this address. If a solicitor or legal representative acts for you, give that address (if in the United Kingdom). If not, provide an address to which communication concerning this claim should be sent.

1.2 Claimant's Counsel's details

First name(s)

Last name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

1.3 1st Defendant's name

1.4 Defendant or (where known) Defendant's legal representative's address to which documents should be sent.

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

Reference number (if known)

1.5 2nd Defendant's name

1.6 Defendant's or (where known) Defendant's legal representative's address to which documents should be sent.

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

Reference number (if applicable)

Section 2 – Interested parties

2.1 Interested party

Name

Organisation (if applicable)

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email

Reference number (if applicable)

Note 2: An Interested Party is someone other than a defendant who is directly affected by the claim.

Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties. Full details of interested parties must be included in the claim form.For example, if you were a defendant in a criminal case in the Magistrates or Crown Court and are making a claim for judicial review of a decision in that case, the prosecution must be named as an interested party.In a claim which does not relate to a decision of a court or tribunal, you should give details of any persons directly affected by the decision you wish to challenge.

If you consider there is more than one interested party, set out their details on a separate sheet, marking that sheet so that it is clear it relates to this part of the claim form.

Section 3 – Details of the decision to be judicially reviewed

Note 3.1: Use a separate sheet if you need more space for your answers, marking clearly which section the information refers to.

3.1 Give details of the decision you seek to have judicially reviewed.

3.2 Date of decision

Day Month Year

3.3 Name and address of the court, tribunal, person or body who made the decision to be reviewed.

Name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Section 4 – Permission to proceed with a claim for judicial review

This section must be completed. You must answer all the questions and give further details where required.

4.1 I am seeking permission to proceed with my claim for Judicial Review.

Is this application being made under the terms of paragraph 17 Practice Direction 54A (Challenging removal)?

☐ Yes

☐ No

4.2 Does your claim, or any interlocutory application, for example for interim relief or expedition, need to be decided urgently – i.e. within 7 days?

☐ Yes. Complete form **N463** and file this with your application.

☐ No

4.3 Are you making any non-urgent interlocutory applications?

☐ Yes. Complete Section 9.

☐ No

4.4 Does any part of the claim allege a breach of Convention rights protected under the Human Rights Act?

☐ Yes. Identify the Convention rights you contend have been breached in the box below

☐ No

4.5 Have you complied with the pre-action protocol?

Note 4.5: See Practice Direction 54C.

☐ Yes

☐ No. Give reasons for non-compliance in the box below.

4.6 Have you filed this claim in the region with which the claim is most closely connected?

☐ Yes. Give any additional reasons for wanting it to be dealt with in this region in the box below

☐ No. Give reasons in the box below

4.7 Is the claimant in receipt of a Civil Legal Aid Certificate?

☐ Yes

☐ No

Section 5 – Statement of facts relied on

☐ set out below

☐ attached

Note 5: Set out the facts on which your claim is based: see Practice Direction 54A, paragraph 4.2. Use separate sheets if you need more space; mark the sheets so that it is clear they relate to this section of the claim form.

Section 6 – Detailed statement of grounds

6.1 The detailed statement of grounds are:

☐ set out below

☐ attached

Note 6: Set out each ground of challenge: see Practice Direction 54A at paragraph 4.2. Use separate sheets if you need more space; mark the sheets so that it is clear they relate to this section of the claim form.

Section 7 – Aarhus Convention claim

Note 7: For the definition of an Aarhus claim, see CPR 45.41. The cost limit provisions are at CPR 45.43 – 44.

7.1 Is this claim an Aarhus Convention claim

☐ Yes. Give reasons why in the box below.

☐ No

7.2 Do you wish the court to vary or remove the limits on costs recoverable from a party?

☐ Yes. Give reasons why in the box below.

☐ No

Section 8 – Details of remedy (including any interim remedy) being sought

Note 8: State precisely the terms of the order you ask the court to make. The available remedies are at CPR 54.2 – 3. The court may make any/all of the following orders:

(a) a mandatory order;

(b) a prohibiting order;

(c) a quashing order; or

(d) an injunction restraining a person from acting in any office in which he is not entitled to act.

A claim for damages may be included but only if you are seeking one of the orders set out above.

Section 9 – Other applications (non-urgent)

9.1 I wish to make the following applications for directions and/or interlocutory orders:

Note 9: If you wish to make any interlocutory application now, set out the application and the reasons and/or evidence relied on in support of it in this Section. Use separate sheets if you need more space; mark the sheets so that it is clear they relate to this section of the claim form.

If, after this claim form has been filed, you wish to make an interlocutory application, use form N244.

Section 10 – Supporting documents

The Claim Form must include or be accompanied by certain documents: see Practice Direction 54A, paragraph 4.4(1) – (2).

Please complete the checklist below

10.1 ☐ Statement of Facts

10.2 ☐ Statement of Grounds

10.3 ☐ Any written evidence relied on in support of the claim.

10.4 ☐ Any written evidence in support of any other application contained in the claim form

10.5 ☐ If the claim seeks to have any order quashed, a copy of the order.

10.6 ☐ If the claim for judicial review is directed to a decision of a public authority, a copy of the decision challenged.

10.7 ☐ If the claim for judicial review is directed to the decision of a court or tribunal, an approved copy of the reasons for the decision.

10.8 ☐ Copies of any documents relied on.

10.9 ☐ A copy of any statutory material relevant to the claim.

10.10 ☐ A list of essential documents for advance reading by the court.

10.11 ☐ If paragraph 17 of Practice Direction 54A applies to the claim, copies of the documents specified at paragraph 17.2(1) (a) – (d).

If it has not been possible to file any of the above documents, state the reason why the document is not available.

Reasons why you have not supplied a document and date when you expect it to be available:-

10.12 ☐ If you contend the claim is an Aarhus Convention claim, the financial information required by CPR 45.42.

10.13 ☐ A copy of the legal aid or Civil Legal Aid certificate (if applicable)

Statement of truth

I understand that proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in this form are true.

☐ **The claimant** believes that the facts stated in this form are true. **I am authorised** by the claimant to sign this statement.

Signature

☐ Claimant

☐ Litigation friend

☐ Claimant's legal representative (as defined by CPR 2.3(1))

Date

Day Month Year

Full name

If claimant's legal representative, state name and firm

If signing on behalf of firm or company give position or office held

The Court and venue

CPR part 54 – claims for Judicial Review are dealt with by the Administrative Court.

The general expectation is that proceedings will be administered and determined in the region with which the claim has closest connection; see Practice Direction 54C paragraph 2.5.

- Where the claim is proceeding in the Administrative Court in **London**, documents must be filed in the Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.
- Where the claim is proceeding in the Administrative Court in **Birmingham**, documents must befiled in the Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 BullStreet, Birmingham B4 6DS.
- Where the claim is proceeding in the Administrative Court in **Wales**, documents must be filed in the Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.
- Where the claim is proceeding in the Administrative Court in **Leeds**, documents must be filed in theAdministrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.
- Where the claim is proceeding in the Administrative Court in **Manchester**, documents must befiled in the Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

Judicial Review

Application for urgent consideration

Name of court

High Court of Justice
Administrative Court

Claim number

Fee account number

Help with fees reference number (if applicable)

H W F – –

Name of claimant (including any reference)

Name of defendant

Interested parties

Date

Day Month Year

Complete this form if your application is urgent – i.e. it must be considered within 7 days.

The claimant or the claimant's solicitors must serve this form on the defendant(s) and any interested parties, together with the **N461** judicial review claim form (if not already served).

If you do not complete this form correctly, it may be rejected by the Administrative Court Office.

To the Defendant(s) and Interested Party(ies)

Representations in response to this application may be made by any defendant or interested party, by email to the relevant Administrative Office. See details on last page.

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You must complete sections 1 to 5 and attach a draft order.

Section 1 – Reasons for urgency

Section 2 – Justification for request for urgent consideration

2.1 Date and time when it was first appreciated that an urgent application might be necessary.

Day

Month

Year

Time

2.2 Please provide reasons for any delay in making the application.

2.3 What efforts have been made to put the defendant and any interested party on notice of the application?

Section 3 – Proposed timetable

Note 3: This will determine the time within which your application is referred for consideration.

Applications which do not need to be considered within 7 days should be made using form **N244**.

3.1 How quickly do you require the application (form **N463**) to be considered?

☐ **within 3 days**
indicate in hours (eg. 2 hours, 24 hours etc.)

[ ] hours

☐ **3 – 6 days**
indicate in days (eg. 4 days, 6 days etc.)

[ ] days

3.2 Please specify the nature and timeframe of consideration sought.

☐ **Interim relief** is sought and the application for such relief should be considered within

[ ] days [ ] hours

☐ **Abridgement of time for AOS** is sought and should be considered within

[ ] days [ ] hours

☐ **The N461 application for permission** should be considered within

[ ] days [ ] hours

☐ **If permission for judicial review is granted**, a substantive hearing is sought by

Day [ ] Month [ ] Year [ ]

☐ **Other interlocutory directions** are sought and the application should be considered within

[ ] days [ ] hours

Section 4 – Grounds for Application

4.1 Set out the factual and/or legal grounds relied on in support of your application

Section 5 – Interim relief/directions and draft order

5.1 A draft order must be attached, which sets out the order the court is invited to make

5.2 State what interim relief and/or directions are sought and why

Section 6 – Service

A copy of this form of application was served on the defendant(s) and interested parties as follows:

Defendant

☐ by handing it to or leaving it with

☐ by e-mail to

Date served

Day Month Year

Interested party

☐ by handing it to or leaving it with

☐ by e-mail to

Date served

Day Month Year

Statement of truth

I understand that proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in this form are true. I confirm that all relevant facts have been disclosed in this application.

☐ **The claimant** believes that the facts stated in this form are true, and confirms that all relevant facts have been disclosed in this application. **I am authorised** by the claimant to sign this statement.

Signature

☐ Claimant

☐ Litigation friend

☐ Claimant's legal representative (as defined by CPR 2.3(1))

Date

Day Month Year

What you do next

Send your completed form and draft order to the court where your case is proceeding:

London
email: immediates@administrativecourtoffice.justice.gov.uk

Birmingham
email: birmingham@administrativecourtoffice.justice.gov.uk

Cardiff
email: cardiff@administrativecourtoffice.justice.gov.uk

Leeds
email: leeds@administrativecourtoffice.justice.gov.uk

Manchester
email: manchester@administrativecourtoffice.justice.gov.uk

Find out how HM Courts and Tribunals Service uses personal information you give them when you fill in a form: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/personal-information-charter

Judicial Review

Acknowledgment of Service

Name of court

High Court of Justice
Administrative Court

Claim number

Name of claimant (including any reference)

Name of defendant

Interested parties

This Acknowledgment of Service is filed on behalf of

Name

who is the

☐ Defendant

☐ Interested party

Name and address of person to be served

Name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

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Section 1

Tick the appropriate box

- [ ] I intend to contest all of the claim
  – complete sections 2, 3, 4 and 6

- [ ] I intend to contest part of the claim
  – complete sections 2, 3, 4 and 6

- [ ] I do not intend to contest the claim
  – complete section 6

- [ ] The defendant (interested party) is a court or tribunal and intends to make a submission
  – complete sections 2, 3 and 6

- [ ] The defendant (interested party) is a court or tribunal and does not intend to make a submission
  – complete sections 2 and 6

- [ ] The applicant has indicated that this is a claim to which the Aarhus Convention applies
  – complete sections 5 and 6

- [ ] The Defendant asks the Court to consider whether the outcome for the claimant would have been substantially different if the conduct complained of had not occurred (see s.31(3C) of the Senior Courts Act 1981)
  – A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

Section 2

2.1 Insert the name and address of any person you consider should be added as an interested party.

Note 2.1: If you consider there is more than one interested party, set out their details on a separate sheet, marking that sheet so that it is clear it relates to this part of the Acknowledgment of Service.

Name

Organisation

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email (if you have one)

Reference, if known

Section 3

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Note 3: See Practice Direction 54A at paragraphs 6.1 – 6.2. Use separate sheets if you need more space; mark the sheets so that it is clear they relate to this section of the Acknowledgment of Service.

Section 4

4.1. Give details of any directions you want the court to make.

Note 4: If you wish to make any interlocutory application now, set out the application and the reasons and/or evidence relied on in support of it in this Section. Use separate sheets if you need more space; mark the sheets so that it is clear they relate to this section of the Acknowledgment of Service.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties form **N464** with this acknowledgment of service.

If, after this Acknowledgment of Service has been filed, you wish to make an interlocutory application, use form **N244**.

Section 5

Response to the claimant's contention that the claim is an Aarhus claim

5.1 Do you dispute that the claim is an Aarhus Convention claim?

☐ Yes. Set out your reasons in the box below.

☐ No

5.2 Do you wish the court to vary or remove the costs limits under CPR45.43(2)?

☐ Yes. Set out your reasons in the box below.

☐ No

Section 6

Statement of truth

I understand that proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in this form are true.

☐ **The defendant** believes that the facts stated in this form are true. **I am authorised** by the defendant to sign this statement.

☐ **The interested party** believes the facts stated in this form are true. **I am authorised** by the interested party to sign this statement.

Signature

☐ Defendant

☐ Defendant's legal representative (as defined by CPR 2.3(1))

☐ Interested party

☐ Interested party's legal representative (as defined by CPR 2.3(1))

☐ Litigation friend

Date

Day Month Year

Full name

If legal representative, state name and firm

If signing on behalf of firm or company give position or office held

Give an address to which notices about this case can be sent to you

Name

Organisation

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

If applicable

Phone number

DX number

Email

Reference number

If you have instructed counsel, please give their name address and contact details below.

Name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

If applicable

Phone number

DX number

Your reference

Email

Completed forms, together with a copy, should be filed at the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of filing with the Court. See CPR 54.8.

Administrative Court addresses

Administrative Court in London

Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

Administrative Court in Birmingham

Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

Administrative Court in Wales

Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

Administrative Court in Leeds

Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

Administrative Court in Manchester

Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

Find out how HM Courts and Tribunals Service uses personal information you give them when you fill in a form: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/personal-information-charter

HM Courts &
Tribunals Service

Administrative Court

Information for Court Users

Effective date: 19 July 2021

The following practical measures will remain in place until further notice, to assist the court to deal with its business as efficiently as possible.

Section A applies to all Administrative Court claims. Compliance with Section A is required by Practice Directions 54A and 54B.

Sections B to G also apply to claims, appeals and applications administered by the Administrative Court; but where arrangements differ depending on which Administrative Court office is dealing with the matter, this is explained in the text below.

All Administrative Court offices

A. ELECTRONIC BUNDLES
(Practice Direction 54A, §§ 4.5 and 15; Practice Direction 54B, §1.3)

Electronic bundles must be prepared as follows and be suitable for use with all of Adobe Acrobat Reader and PDF Expert and PDF Xchange Editor.

1. A bundle must be a single PDF.

2. If the bundle is filed in support of an urgent application (i.e., an application made using Form N463) it must not exceed 20mb, and (unless the court requests otherwise) should be filed by email

3. If the papers in support of any claim or appeal or non-urgent application exceed 20mb, the party should file:

   a a core bundle (no larger than 20mb) including, as a minimum, the Claim Form and Grounds or Notice of Appeal and Grounds, or Application Notice and Grounds; documents regarded

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as essential to the claim, appeal, or application (for example the decision challenged, the letter before claim and the response, etc.); any witness statements (or primary witness statement) relied on in support of the claim, appeal or application; and a draft of the order the court is asked to make; and

b a further bundle containing the remaining documents.

Such bundles should be filed using the Document Upload Centre: see the separate HMCTS "Professional Users Guide" for detailed information about the Document Upload Centre.

4. All bundles must be paginated in ascending order from start to finish. The first page of the PDF will be numbered "1", and so on. (Any original page numbers of documents within the bundle are to be ignored.) Index pages 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. If a hard copy of the bundle is produced, the pagination on the hard copy must correspond exactly to the pagination of the PDF.

5. Wherever possible pagination should be computer-generated; if this is not possible, pagination must be in typed form.

6. The index page must be hyperlinked to the pages or documents it refers to.

7. Each document within the bundle must be identified in the sidebar list of contents/bookmarks, by date and description (e.g., "email 11.9.21 from [x] to [y]"). The sidebar list must also show the bundle page number of the document.

8. All bundles must be text based, not a scan of a hard copy bundle. If documents within a bundle have been scanned, optical character recognition should be undertaken on the bundle before it is lodged. (This is the process which turns the document from a mere picture of a document to one in which the text can be read as text so that the document becomes word-searchable, and words can be highlighted in the process of marking them up.) The text within the bundle must therefore be selectable as text, to facilitate highlighting and copying.

9. Any document in landscape format must be rotated so that it can be read from left to right.

10. The default display view size of all pages must always be 100%.

11. 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.

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12. If a bundle is to be added to after the document has been filed, it should not be assumed the judge will accept a new replacement bundle because he/she may already have started to mark up the original. Inquiries should be made of the judge as to what the judge would like to do about it. Absent a particular direction, any pages to be added to the bundle as originally filed should be provided separately, in a separate document, with pages appropriately sub-numbered.

For guidance showing how to prepare an electronic bundle, see (as an example) this video prepared by St Philips Chambers, which explains how to create a bundle using Adobe Acrobat Pro https://st-philips.com/creating-and-using-electronic-hearing-bundles/

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. If the application is filed by a litigant in person the electronic bundle must if at all possible, comply with the above rules. If it is not possible for a litigant in person to comply with the rules on electronic bundles, the application must include a brief explanation of the reasons why.

B. APPLICATIONS FOR URGENT CONSIDERATION

Administrative Court, London (Royal Courts of Justice)

Urgent applications (i.e. applications within the scope of Practice Direction 54B) should be filed either electronically (preferred wherever possible), or by post or DX. Until further notice, urgent applications may not be filed over the counter at the Royal Courts of Justice.

The process explained below should be used for any urgent interlocutory application that is filed electronically.

1. Applications must be filed by email to immediates@administrativecourtoffice.justice.gov.uk accompanied with either a PBA number, receipt of payment by debit/credit card or a fee remission certificate (see below, Section G).

2. This inbox will be monitored Monday to Friday between the hours of 9:30am and 4:30pm. Outside of these hours the usual QB out of hours procedure should be used.

3. Your application must be accompanied by an electronic bundle containing only those documents which it will be necessary for the court to read for the purposes of determining the application –

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see Practice Direction 54B at §§1.3, and 2.2 – 2.3. The bundle must be prepared in accordance with the guidance at Section A; it must not exceed 20mb.

4. Any other urgent queries should be sent by email generaloffice@administrativecourtoffice.justice.gov.uk as high priority and with 'URGENT' in the subject line. Any such emails will be dealt with as soon as possible.

If you are not legally represented and do not have access to email, you should contact the Administrative Court Office by telephone on 020 7947 6655 (option 6) so that details of your application may be taken by telephone and alternative arrangements made if permitted by the senior legal manager or the duty judge.

Other Administrative Court offices

Out of London, urgent applications may be filed between 10am and 4pm, Monday to Friday. Urgent applications may also be filed in person. If you wish to file in person, you should contact the relevant office by phone to arrange to attend the public counter. The phone numbers are as follows

Birmingham 0121 681 4441 – pick option 2 then option 5.

Cardiff 02920 376460

Leeds 0113 306 2578

Manchester 0161 240 5313

If filing an urgent application by email, the arrangements at 1 – 4 above apply, save that: (a) see Section G below for how to pay the application fee; and (b) please use the following email addresses.

Birmingham:
birmingham@administrativecourtoffice.justice.gov.uk

Cardiff:
cardiff@administrativecourtoffice.justice.gov.uk

Leeds:
leeds@administrativecourtoffice.justice.gov.uk

Manchester:

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manchester@administrativecourtoffice.justice.gov.uk

C. NON-URGENT WORK: CIVIL CLAIMS AND APPEALS

All other civil business (i.e. non-urgent claims, appeals and applications) should be filed electronically (preferred wherever possible) or by post or DX. There may be a slight delay before claims/applications are issued, but the date the Claim Form or Notice of Appeal is received by the Administrative Court office will be recorded as the date of filing. It remains the responsibility of the party making an application or claim to ensure that it is filed within the applicable time limit.

If a decision on an interlocutory application is time-sensitive, please state (both in the Application Notice and in a covering letter) the date by which a decision on the application is required.

Filing claims, appeals and non-urgent applications

Represented litigants

1. Wherever possible, claims for judicial review, statutory appeals, planning matters, and non-urgent interlocutory applications are to be filed electronically using the Document Upload Centre. Please refer to the separate HMCTS "Professional Users Guide" for detailed information about the Document Upload Centre.

2. Requests to upload documents should be sent
   for London cases to: generaloffice@administrativecourtoffice.justice.gov.uk
   for other offices, use the appropriate email address at Section B above.

   You will receive an invitation by email to upload your documents. You should then upload the claim/appeal/application bundle (prepared in accordance with Section A).

3. If you are commencing a claim or appeal please upload a further PDF document comprising an additional copy of the Claim Form or Notice of Appeal and the decision document challenged. If filing in London include a PBA number or receipt of payment by debit/credit card or a fee remission certificate (see Section G); if you are filing the claim at any office out of London, also see Section G.

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4. Documents being uploaded must be in PDF format, no other format will be accepted by the system. If the papers in support of an application for judicial review or an appeal or an application exceed 20mb, the claimant/appellant/applicant should file:

   (a) a core bundle (no larger than 20mb) including, as a minimum, the Claim Form and Grounds or Notice of Appeal and Grounds, or Application Notice and Grounds; documents regarded as essential to the claim, appeal, or application (for example the decision challenged, the letter before claim and the response, etc.); any witness statements (or primary witness statement) relied on in support of the claim, appeal or application; and a draft of the order the court is asked to make; and

   (b) a further bundle containing the remaining documents.

5. All electronic bundles must be prepared/formatted in accordance with the guidance at Section A.

6. Once a claim or appeal has been issued, Administrative Court staff will provide the case reference number to the parties by email.

7. Interlocutory applications should be sent by email
   for London cases to: generaloffice@administrativecourtoffice.justice.gov.uk
   for other offices, use the appropriate email address at Section B above.

   If filing in London include a PBA number or receipt of payment by debit/credit card (see Section G); if filing at an office out of London, also see Section G.

Litigants in person

1. Wherever possible claims for judicial review, statutory appeals, claims in planning matters and application notices are to be filed electronically. The address for filing claims
   in London generaloffice@administrativecourtoffice.justice.gov.uk
   for any other office, use the appropriate email address at Section B above.

   If filing a claim, appeal or application in London you must also provide either proof of payment of the required fee (e.g., a receipt of payment by debit/credit card) or a fee remission certificate (see Section G); if filing at one of the out of London offices, also see Section G.

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2. When the claim or appeal has been issued, the Administrative Court staff will send the case reference number to the parties by email.

3. If the papers in support of an application for judicial review or an appeal or an application exceed 20mb, the claimant/appellant/applicant should file:

    (a) a core bundle (no larger than 20mb) including, as a minimum, the Claim Form and Grounds or Notice of Appeal and Grounds, or Application Notice and Grounds; documents regarded as essential to the claim, appeal, or application (for example the decision challenged, the letter before claim and the response, etc.); any witness statements (or primary witness statement) relied on in support of the claim, appeal or application; and a draft of the order the court is asked to make; and

    (b) a further bundle containing the remaining documents.

4. All electronic bundles must be prepared/formatted in accordance with the guidance at Section A.

5. If you are not legally represented and do not have access to email, contact the Administrative Court office by telephone so that alternative arrangements can be made. For London claims the number is 020 7947 6655 (option 6). For claims at other offices use the appropriate phone number at Section B above.

Responding to claims, appeals or application notices

Represented litigants

1. Wherever possible, any response to a claim or appeal or application notice should be filed electronically. If filing in London, represented parties should file all documents, including Acknowledgements of Service, Respondent's Notices, responses to interlocutory applications, and any supporting bundles using the Document Upload Centre. If filing at any of the out of London offices smaller document (less than 50 pages or less than 10mb) may be filed by email, for all other documents use the Document Upload Centre.

2. Any request to upload documents must be made by the professional representative by email:
    for London cases to: generaloffice@administrativecourtoffice.justice.gov.uk
    for other offices, use the appropriate email address at Section B above.

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3. The requirements for the preparation of bundles at Section A and Section C (filing claims, Represented Litigants) apply and must be followed. Please note the provisions on file size.

Litigants in person

1. Wherever possible, defendants/respondents who are litigants in person should send any Acknowledgement of Service or Respondent's Notice, or response to an interlocutory application, and any supporting bundles by email to the following address:
   for London cases to: generaloffice@administrativecourtoffice.justice.gov.uk
   for other offices, use the appropriate email address at Section B above

2. The requirements for the preparation of bundles at Section A and Section C (filing claims, Litigants in Person) apply and must be followed. Please note the provisions on file size.

3. If you are not legally represented and do not have access to email, you should contact the Administrative Court office by telephone so that alternative arrangements can be made. For London claims the number is 020 7947 6655 (option 6). For claims at other offices use the appropriate phone number at Section B above.

D. NON-URGENT WORK: CLAIMS IN CRIMINAL CAUSES OR MATTERS, APPEALS BY CASE STATED

<u>Filing claims and issuing applications and case stated appeals</u>

Represented litigants

1. Wherever possible, non-urgent claims for judicial review in criminal causes or matters and appeals by case stated are to be filed electronically using the Document Upload Centre. Please refer to the separate HMCTS "Professional Users Guide" for detailed information about the Document Upload Centre.

2. Requests to upload documents should be sent to
   for London cases to: crimex@administrativecourtoffice.justice.gov.uk
   for other offices, use the appropriate email address at Section B above.

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3. You will receive an invitation by email to upload your documents. You should then upload the claim/appeal/application bundle (prepared in accordance with Section A). If you are commencing a claim or appeal please also upload a further PDF document comprising an additional copy of the Claim Form or Notice of Appeal and the decision document challenged. If filing in London include a PBA number or receipt of payment by debit/credit card or a fee remission certificate (see Section G); if filing at any of the out of London offices, also see Section G.

4. Once a claim or appeal has been issued, Administrative Court staff will provide the case reference number to the parties by email.

5. Interlocutory applications should be sent by email to
   for London cases to: crimex@administrativecourtoffice.justice.gov.uk
   for other offices, please use the appropriate email address referred to at Section B above.

   For London include a PBA number or receipt of payment by debit/credit card (see Section G); if you are filing the claim in one of the out of London offices, also see Section G.

6. The requirements for the preparation of bundles at Section A and Section C (filing claims, Represented Litigants) apply and must be followed. Please note the provisions on file size.

Litigants in person

1. Wherever possible, non-urgent applications for judicial review in criminal causes or matters and appeals by case stated and non-urgent interlocutory applications are to be filed by email.

2. For London these should be sent to crimex@administrativecourtoffice.justice.gov.uk accompanied with a receipt of payment by debit/credit card or a fee remission certificate (see Section G).

3. For the out of London offices use the appropriate email address referred to at Section B above. Check Section G below for the arrangements for payment of fees and for applications for help with fees.

4. The Administrative Court staff will provide the case reference number to the parties by email.

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5. The requirements for the preparation of bundles at Section A and Section C (filing claims, Litigants in Person) apply and must be followed. Please note the provisions on file size.

6. If you are not legally represented and do not have access to email, you should contact the Administrative Court office by telephone on 020 7947 6655 (option 6) so that alternative arrangements can be made.

Responding to claims and case stated appeals

Represented parties

1. Wherever possible, any response to a claim or appeal or application notice should be filed electronically. If filing in London represented parties should file all documents, including Acknowledgements of Service, Respondent's Notices, responses to interlocutory applications, and any supporting bundles using the Document Upload Centre. If filing at any of the out of London offices smaller document (less than 50 pages or less than 10mb) can be filed by email, for all other documents use the Document Upload Centre.

2. Requests to upload documents should be sent to

   for London cases to: crimex@administrativecourtoffice.justice.gov.uk
   for other offices, use the appropriate email address at Section B above.

3. The requirements the preparation of bundles at Section A and Section C (in the part for Represented Litigants) apply and must be followed. Please note the provisions on file size.

Litigants in person

1. Wherever possible, Acknowledgements of Service in relation to judicial review claims in criminal causes or matters, and Respondent's Notices in relation to appeals by case stated, and any supporting bundles should be sent by email to:

   for London: crimex@administrativecourtoffice.justice.gov.uk
   for other offices, use the appropriate email address at Section B above.

2. The requirements for the preparation of bundles at Section A and Section C (filing claims, Litigants in Person) apply and must be followed. Please note the provisions on file size.

3. If you are not legally represented and do not have access to email, you should contact the Administrative Court Office by telephone on 020 7947 6655 (Option 6) so that alternative arrangements can be made.

E. EXTRADITION APPEALS

Filing appeals and issuing Application Notices

1. Wherever possible, extradition appeals and interlocutory applications in extradition appeals must be sent electronically to crimex@administrativecourtoffice.justice.gov.uk

   Include a PBA number or receipt of payment by debit/credit card (see Section G). If you are not legally represented and do not have access to email, you should contact the Administrative Court office by telephone 020 7947 6655 (Option 6) so that alternative arrangements can be made.

2. After the period for lodging amended grounds of appeal has expired the Appeal Bundle must be lodged. Professional representatives must use the Document Upload Centre. Please refer to the separate HMCTS “Professional Users Guide”. Any request to upload documents must be made by the professional representative by email to:
   crimex@administrativecourtoffice.justice.gov.uk

   Litigants in person should lodge the appeal bundle by email to:
   crimex@administrativecourtoffice.justice.gov.uk

   Litigants in person without access to email should contact the Court to make alternative arrangements – see paragraph 1 above.

3. Any further bundles (whether for renewed application for permission to appeal or for the hearing of the appeal) shall also be lodged in by the methods stated at paragraph 2 above.

4. All bundles for the appeal or (if heard other than at the permission to appeal hearing or the appeal hearing), for any application in the appeal must be prepared in accordance with the requirements at Section A above. If the papers in support of an appeal or application exceed 20mb, the Appellant/Applicant should file:

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(a) a core bundle (no larger than 20mb) including, as a minimum, the Notice of Appeal and Grounds, or Application Notice and grounds; documents regarded as essential to the appeal, or application (for example the extradition request, the judgment of the District Judge, the Respondent's Notice etc.); any witness statements (or primary witness statement) relied on in support of the appeal or application; and a draft of the order the court is asked to make; and

(b) a further bundle containing the remaining documents.

Responding to appeals and Application Notices

1. Wherever possible, responses to appeals and Application Notices should be filed electronically with the Administrative Court.

2. Represented parties should file all documents, using the Document Upload Centre. Please refer to the separate HMCTS "Professional Users Guide". Any request to upload documents must be made by the professional representative by email to crimex@administrativecourtoffice.justice.gov.uk

3. Litigants in person should file responses and any appeal bundles by email to crimex@administrativecourtoffice.justice.gov.uk

   Litigants in person without access to email should contact the Administrative Court office by phone on 020 7947 6655 (Option 6) so that alternative arrangements can be made.

4. Any documents for the hearing of the appeal or application must be prepared in accordance with the requirements at Section A, and be lodged in the manner described above in the paragraphs concerning the filing of appeals.

F. DETERMINATION OF CLAIMS

Paper applications

Applications for permission to apply for judicial review, applications for permission to appeal, and interlocutory applications will continue to be considered on the papers, as usual.

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Orders

Orders will be served on all parties by email or, if service by email is not possible, they will be served by post.

Hearings

1. All matters for hearing will appear in the Daily Cause List. The list may be subject to change at short notice.

2. Hearings will take place either in person (in court), or as hybrid hearings (some participants in court and others present by video, or remotely (i.e. all participants present by video or phone). Hybrid hearings are conducted using the Cloud Video Platform (CVP) for persons attending by video. Remote hearings are by Cloud Video Platform (CVP) or Microsoft Teams (video), or BT Meet Me (phone). If a hearing takes place by video and/or phone, the arrangements will be made by the court.

3. The decision as to how a hearing will take place is made by the judge who will hear the case; when possible the judge will make this decision taking account of the views of the parties.

4. All court rooms have been risk assessed and comply with current Government rules and guidance, and HMCTS policy on measures to minimise transmission of Covid-19. Hand sanitiser is available on entry to all courtrooms.

5. If it appears a hearing may need to be vacated (e.g. by reason of illness) or the arrangements for the hearing may need to be changed (e.g. because a party is required to self-isolate), please inform the court as soon as possible.

G. FEES (APPLIES TO ALL CLAIMS)

Payment by debit or credit card (by phone or email)

You can pay a court fee for a London claim by debit or credit card by contacting the Fees Office on 0203 936 8957 between the hours of 10:00am and 16:00pm, Monday to Friday (except bank holidays) or by emailing RCJfeespayments@justice.gov.uk Once the payment has been processed you will receive a receipt which you should submit with the claim form and/or application form.

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Court fees for claims at other offices can also be paid by debit or credit card – please provide your contact telephone number in the email/letter that accompanies the claim or application, you will be contacted to make payment by phone.

Payment by PBA

If you have a PBA account, then you must include the reference number in a covering letter with any claim form and/or application you lodge so the fee can be deducted from this account.

Payment by cheque

Cheques should be made payable to HMCTS. The cheque should be sent together with the Claim Form or Application Notice, either by post or DX.

For London claims cheques can be sent via the drop box at the main entrance in the Royal Courts of Justice. For claims at other offices, if you have arranged to file the claim/application in person, you may bring the cheque with you.

Attending the Fees Office counter (Royal Courts of Justice, London only)

The Fees Office counter is open to the public Monday to Friday 10:00am to 4:30pm (except Bank Holidays). **Access to the Fees Office counter is on an appointment only basis. There is no walk-in facility**. To make an appointment to attend the counter contact the Fees Office, Monday to Friday 10.00am to 4.00pm (except Bank Holidays), by phone 0203 936 8957 or by email (feesofficecounterbooking@justice.gov.uk). Do not attend without a confirmed appointment.

Once the fee has been taken or the fee remission form completed the Claim Form, or Notice of Appeal or Application Notice may be sent and will be forwarded to the relevant Administrative Court office for processing.

Help with fees

To apply for fee remission, go to the Help with Fees website www.gov.uk/get-help-with-court-fees and complete the step-by-step application process.

If your claim is in London forward your 'HWF' reference to the Fees Office feesrcj@justice.gov.uk along with a copy of your Claim Form and/or application form. Please note, the number is confirmation of applying and is not confirmation of Remission entitlement. The Fees Office will

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process your application and contact you with the outcome of the Help with Fees application and will advise your next steps. For the out of London offices send your HWF reference along with the Claim Form and/or application form.

UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

GUIDANCE NOTE ON CE-FILE AND ELECTRONIC BUNDLES

INTRODUCTION

1. This note contains guidance (issued under paragraph 7 of schedule 4 to the Tribunals, Courts and Enforcement Act 2007) for users of the Upper Tribunal (IAC) on two separate but related matters. The first part concerns the introduction of electronic filing via the CE-file system. The second concerns the filing of bundles by electronic means, including email and CE-file. The guidance applies to all cases in the UTIAC, whether it is sitting in its appellate or judicial review capacity.

CE-FILE

2. CE-File is the online system for filing documents electronically in the UTIAC for appeals and judicial reviews.

3. From 17 January 2022, CE-File will be a method permitted under rule 13(1)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") for documents to be filed with the UTIAC by parties and their representatives.

   IMPORTANT: CE-File MUST NOT at present be used for making urgent applications for interim relief in judicial reviews. Such applications must continue to be made by email to UTIACJudicialReviewApplications@justice.gov.uk as explained on forms UTIAC4 and UTIAC5 and at Apply for a judicial review in an immigration or asylum case - GOV.UK (www.gov.uk)

4. Any application for permission to appeal, which is (i) made to the UTIAC; or (ii) granted by the First-tier Tribunal on or after that day will be assigned a CE reference, as will any application for judicial review made on or after that day.

5. CE file references are in the form JR-2021-LON-XXXX or UI-2021-XXXX. Those references will be used in addition to the IAC's conventional references for appeals and judicial reviews.

REGISTERING FOR AND USING CE-FILE

6. To use CE-File to file and receive documents electronically, you must first register as an E-Filer by following the instructions described at E-Filing - Login (cefile-app.com)

7. Users of CE-file should continue to send a copy of any document they upload to CE-file to the other party by post, email or by hand. It should not be assumed that any document uploaded to CE-File will be sent by the Upper Tribunal to the other party, unless it is a document which the Rules specifically require the Upper Tribunal to send (such as a response to a notice of appeal under rule 24). Users must therefore continue to comply with rule 28A(2)(a) in judicial review proceedings, by providing a copy of an application for judicial review, and any accompanying documents, to each person named in the application as a respondent or interested party and filing with the Tribunal a completed Form UTIAC2 (Statement of service).

8. Where a party or representative chooses to use CE-File to send documents to the Tribunal, they will be regarded, for the purposes of rule 13(2) of the Rules, as providing details of CE-File as a means of electronic transmission of documents to them by the Tribunal. That means the party or representative must also accept delivery of documents by CE-File from the Tribunal as required by rule 13(2).

9. The Tribunal will use CE-File to send and deliver documents to all registered users in connection with their active CE-File cases.

10. Parties who register for CE-File may decide at any time that they will no longer accept receipt of documents in this manner by notifying the Tribunal and all other parties. Parties should be aware that it may take the Tribunal up to 7 days to process this notification.

11. Where a party or representative has registered to use CE-File, they may also request the Tribunal to send them a hard copy of documents delivered by CE-File as provided by rule 13(4). They must make such a request in writing as soon as reasonably practicable after receiving the document via CE-file.

12. The Tribunal may also request hard copies (or duplicates) of anything filed by CE-File.

BUNDLES

13. Electronic bundles must be prepared as follows and be suitable for use with all of Adobe Acrobat Reader, PDF Expert and PDF Xchange Editor.

14. A bundle which is sent by email must not exceed 20MB. A bundle which is uploaded to CE-File must not exceed 50MB. If the bundle is larger than this it must be split into the fewest number of sections and a note made in the comments box to show that this has occurred. Each part of a split bundle should be numbered sequentially ("Appellant's Supplementary Bundle Part 1, 2, 3," for example).

15. Any electronic bundle (<u>whether or not it is placed on CE-File</u>) must be paginated in ascending order from start to finish. The first page of the PDF will be numbered "1", and so on. If a bundle has to be split because it exceeds the maximum megabyte size for electronic transmission, the numbering must ignore the split. Index pages must be numbered as part of the document, they are not to be skipped. The pagination of any hard copy of the bundle must correspond exactly with the pagination of the PDF.

16. Wherever possible, pagination should be computer-generated; if this is not possible, pagination must be in typed form.

17. The index page must be hyperlinked to the pages or documents it refers to.

18. The bookmarks must be hyperlinked and 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.

19. All bundles must be text-based, not a scan of a hard copy bundle. If documents within a bundle have been scanned, optical character recognition should be undertaken on the bundle before it is lodged. The text within the bundle must therefore be selectable as text, to facilitate highlighting and copying.

20. Any document in landscape format must be rotated so that it can be read from left to right.

21. The display view size of all pages must always be 100%.

22. The resolution on the electronic bundle must be reduced to about 200-300 dpi to prevent delays whilst scrolling from one page to another.

23. An electronic bundle filed by a litigant in person must, if at all possible, comply with the above. If it is not possible for a litigant in person to comply, he or she must include a brief explanation of the reasons why.

24. For all hearings except Case Management Review hearings, the parties must provide paper copies of the hearing bundle, unless otherwise directed.

25. Any draft orders or directions must be sent as a Microsoft Word file, so as to assist the judge or lawyer in reviewing, editing and approving them.

FURTHER INFORMATION AND GUIDANCE

26. Further information and guidance about the operation of CE-File, as it already applies in some courts and tribunals, can be found at: HMCTS E-Filing service for citizens and professionals - GOV.UK (www.gov.uk)

27. A list of Frequently Asked Questions is also available at: FAQs on using the Courts Electronic Filing System (CE-File) | Practical Law (thomsonreuters.com)

28. For further assistance with CE, contact the support team on EfileSupport@justice.gov.uk

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

14 January 2022

Annex 8

How to contact the Administrative Court by email

The Court receives a lot of emails each day. We will be able to deal with your email more quickly if you:

- Only send your email to one of these addresses. If you send it to the wrong one, we will send it to the right one.
- Don't send your email to an individual. We will pass your email to the correct person.
- Include the hearing date in the subject line if it is soon
- Remember that emails sent after 4.30pm in London, and after 4pm in the regions, are unlikely to be seen until the next working day.

THE FOLLOWING EMAIL ADDRESSES ARE FOR LONDON CASES ONLY (see end for regional cases):

Email address	Nature of correspondence	Please include in subject line
immediates@administrativecourtoffice.justice.gov.uk	• Emails filing (or asking questions about) urgent/immediate applications **except CJA/DTA cases and Extradition cases**	• Case number if you have one • Proposed timeframe for urgent application to be considered
generaloffice@administrativecourtoffice.justice.gov.uk	• Correspondence about issuing new cases • Filing documents where a fee is payable (other than those send to Crimex or uploaded to DUC) • Sending proof of payment or PBA number where fee payable (except for consent orders) • General enquiries about the Court	• Case number if you have one • Hearing date if your query relates to an imminent hearing
crimex@administrativecourtoffice.justice.gov.uk	• Filing applications and short documents (other than those uploaded to the DUC) in Extradition or Criminal cases and CJA/DTA cases	• Case number if you have one • Hearing date if your query relates to an imminent hearing • Indication that email is urgent, if applicable

	• Case progression queries about Extradition and Criminal cases • Filing applications for bail on behalf of the RP, or prosecution appeals against the grant of bail, in Extradition matters only • Filing Consent Orders in Extradition and Criminal cases, and paying the related fee by PBA	
caseprogression@administrativecourtoffice.justice.gov.uk	• Case progression queries in Civil cases • Filing short documents in Civil cases where no fee is payable (other than those uploaded to the DUC) • Filing Consent Orders in Civil cases and paying the related fee by PBA	• Case number • Hearing date if your query relates to an imminent hearing • Indication that email is urgent, if applicable
Listoffice@administrativecourtoffice.justice.gov.uk	• Filing Renewal Notice • Queries about hearings in London, including: - Dates - Method of hearing - Attendees	• Case number • Hearing date if your query relates to an imminent hearing • Indication that email is urgent, if applicable
DUC@administrativecourtoffice.justice.gov.uk	• Only to be used for ACO cases in London • To request DUC links in order to upload documents • To notify the Court when documents have been	• Case number if you have one • When uploading documents please enter Court's case reference number (if you have one) when prompted to do so

	uploaded to the DUC, in new and existing cases	• Hearing date • Indication that email is urgent
London.skeletonarguments@administrativecourtoffice.justice.gov.uk	• Filing Skeleton Arguments for imminent hearing in London	• Case number • Hearing date
IF YOUR CASE IS NOT IN LONDON, PLEASE USE THE RELEVANT EMAIL ADDRESS FROM THE LIST BELOW:		
Manchester.skeletonarguments@administrativecourtoffice.justice.gov.uk Leeds@skeletonarguments@administrativecourtoffice.justice.gov.uk Birmingham.skeletonarguments@administrativecourtoffice.justice.gov.uk Cardiff@skeletonarguments@administrativecourtoffice.justice.gov.uk	• Filing Skeleton Arguments for imminent hearing in Manchester, Leeds, Birmingham or Cardiff	• Case number • Hearing date
Manchester@administrativecourtoffice.justice.gov.uk Leeds@administrativecourtoffice.justice.gov.uk Birmingham@administrativecourtoffice.justice.gov.uk Cardiff@administrativecourtoffice.justice.gov.uk	• All other queries regarding cases in the Administrative Court in Manchester, Leeds, Birmingham or Cardiff	• Case number • Urgency if applicable

Correct as at 8 December 2021