PUBLIC LAW PROJECT – PRIVATE LAW FOR PUBLIC LAWYERS

Private law and public law – procedural issues and differences

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THE LAW AND PRACTICE AROUND CHOOSING THE CORRECT FORUM

The law

1. Even where it is possible to bring a judicial review claim against a public authority, it sometimes also possible to consider a private law action either instead or as well as a judicial review application. However, if the aim of the claim is to obtain one of the remedies which is only available in a judicial review action brought pursuant to CPR Pt 54 (a quashing order, a prohibitory order or a mandatory order), then judicial review is the only option: see CPR 54.2.

2. There are also situations where it is possible to use judicial review, but not essential. Thus, by CPR 54.3 the judicial review procedure may be used in a claim for judicial review where the claimant is seeking (a) a declaration; or (b) an injunction. Of course, if these remedies are sought in addition to one of the remedies in CPR 54.2 then judicial review must be used. A claim for judicial review may *include* a claim for damages, restitution or the recovery of a sum

due but may not seek such a remedy alone. If all a claimant wants is damages then judicial review is not possible. See s31 Senior Courts Act 1981 for the statutory underpinning for CPR 54.3.

3. Common examples of damages claims which are included in judicial review applications are claims for damages under the Human Rights Act 1998 (where the main thrust of the application is that a public authority has acted unlawfully in breach of a claimant's Convention rights), and damages for false imprisonment where the court has decided that immigration detention has been unlawful. An example of a possible claim in restitution might be in relation to nursing home fees wrongly paid, and included in a judicial review claim against an NHS body.

4. But in cases where the remedy could be awarded either in judicial review or in a private law action does it matter which forum is used? The "old" approach as to the proper demarcation between where cases should be heard was set out in *O'Reilly v Mackman [1983] 2 AC 237* , at 285, where Lord Diplock suggested that:

> "…. it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities… I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons."

5. However, with the coming into force of CPR 54 , the Court of Appeal has doubted the continuing relevance of *O'Reilly v Mackman* (see *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988) and it has been much-

criticised in a number of later cases. The emphasis now is on a flexible approach, to ensure that cases are dealt with expeditiously and fairly in accordance with the overriding objective, and avoiding sterile and expensive procedural disputes.

6. In *O'Reilly v Mackman*, and many other cases in this area, the courts were anxious to ensure that the proceedings went through the judicial review permission hurdle, which would not apply (at least, not in quite the same way) in private law cases. But as Fordham says at para 27.3 of the Judicial Review Handbook (6rh edition):-

> A sound starting point is that a good faith choice of appropriate forum, in a claim promptly and transparently brought, should not be seen as an abuse; and the central question should become whether transfer into or out of CPR 54 is necessary and appropriate to ensure just and effective resolution of the issues.

7. Thus, a private law action against a public body which should have been brought by way of judicial review, transfer to the Administrative Court can be considered, and judicial review cases can be transferred to the High Court, or heard by non-nominated judges.

JR where should be private law action

8. Judicial review is sometimes seen as an attractive option compared with a private law action. The permission stage can be seen as providing the claimant with an early indication as to the merits of the case (which often leads to early settlement). The procedure is streamlined and final hearings rarely last more than a couple of days. The judicial review court is often seen as a good place to explore interesting points of law. Legal aid might also be more easily available

for cases where the lawfulness of the actions of a public authority are at issue (rather than simply the payment of damages).

9. However, there are situations where the Court is resistant to such an approach. The judicial review court especially does not like cases where there are detailed issues of fact to be decided. Cases involving police powers often fall into this category. Even though for example a decision to arrest a person by a police officer is a public law decision carried out under s24 of PACE, and there are many public law powers involving police powers to search and seize premises, judicial review may well not appropriate. The case of *Sher v Chief Constable of Greater Manchester* [2011] 2 All E.R. 364 is a good example of what can happen. Judicial review was brought to test the lawfulness of arrest in a case where the court found there were complex factual issues involved (what was said at the time of the arrest for example)..

10. Laws LJ said:-

> 65... It has been said repeatedly by the courts that permission to proceed with a judicial review claim will be refused where a claimant has failed to exhaust his other possible remedies (see for example *R (Sivasubramaniam) v Wandsworth County Council [2002] EWCA Civ 1738*). Furthermore, a claim for judicial review cannot be used merely to enforce private law rights against a public body: see *R v East Berkshire Health Authority ex parte Walsh [1985] QB 152* at 162.
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> 66 False imprisonment is "the unlawful imposition of constraint on another's freedom of movement from a particular place": see *Collins v Wilcock [1984] 1 WLR 1172* at 1177. It is a tort established on proof of the fact of imprisonment, and the absence of lawful authority to justify that imprisonment. It is the subject of part 5 of chapter 15 of Clerk and Lindsell , 19th Edition, 2006. Thus, on the face of it, all the claims made against GMP and WYP can be brought in ordinary Queen's Bench Division proceedings.

11. The Court listed a number of reasons why judicial review was inappropriate and therefore permission would be refused:-

(a) There was a pre-existing remedy and the claimant would not be left without a remedy (indeed he could exercise his right to jury trial).

(b) There were potentially complex disputes of fact which would be "wholly inappropriate for judicial review proceedings".

(c) The claims were "historic" – damages and declarations were sought in relation to events a year before the court hearing. There was no reason to use the resources of the Administrative Court for such claims. That issues of public importance were involved was not a good reason in itself to justify the use of judicial review.

(d) The difficulty in getting legal aid for damages claims was not a reason for allowing the case to stay in the Administrative Court

12. However, this is not an absolute rule: cases involving police powers (including in relation to arrest) where the claimants have been prepared to accept the defendant's version of events have proceeded by way of judicial review, and even have included limited cross-examination where there are wider issues involved: see for example *R. (on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3. And there are many cases where the lawfulness of search warrants have been pursued successfully by way of judicial review (although the case could also sound in trespass to land and goods for example). See *R (Redknapp) v City of London Police* [2009] 1 WLR 2091 (successful JR of search warrants but JR not appropriate to challenge arrest).

Private law action where should be JR

13. In relation to starting cases by way of private law against a public body Lord Bridge stated in *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624 :

> 'where a litigant asserts his entitlement to a subsisting right in private law, whether by way of a claim or defence, the circumstance that the existence and extent of the private right may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons.'

14. An example of a case where the use of private law proceedings rather than judicial review was described as an abuse of process is *Jones v Powys Local Health Board* [2008] EWHC 2562 (QB). The case was brought against a health body where the allegation was that the health body was negligent because it had failed to carry out assessments over a number of years and if it had carried out the assessments then it would have decided to provide the claimant with services without charge and the claimant would not have had to pay towards the services himself. A claim in restitution was also included. The judge agreed with the health board's argument that, following *O'Rourke*, any remedy that the claimant had was one in public law and that any private law claim in restitution or negligence should be struck out as an abuse of process.

15. By proceeding as he had, the court found that the claimant had deprived the defendant of the right to rely on the JR time limit and also the need to obtain permission. The particulars of claim had been drafted very much in public law terms. There was a specialist review panel experienced in the determination of the needs of a patient for continuing health care and included members with clinical experience. Plender J explained:-

> 22. .....I must determine whether, on proper analysis, the present Claimant's case amounts to a challenge to a public law action or decision,

> rather than an attempt to assert some private right which cannot be determined without an examination of the validity of a public law decision."

16. The Court found that by bringing a private law action there had been an abuse of process.

17. By contrast, in *Saha v Imperial College of Science, Technology and Medicine* [2011] EWHC 3286 (QB), Lang J explained some of the matters the court should consider in a case where a claimant student made allegations based on the mistreatment of her by her supervisors at a London college and found that:-

> …I do not consider that this is primarily a public law challenge which should have been brought by way of judicial review. The court does not have to consider broad policy issues, nor does it have to consider issues arising from the exercise of statutory powers and duties. Nor would judicial review procedure be particularly appropriate for the determination of her claim, particularly the personal injury element. The issues in this case are similar to those frequently raised by employees of a public authority suing under their contract of employment, or in negligence in respect of the public authority disciplinary or grievance procedures. Such claims typically proceed by way of private action, not by way of judicial review.
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> 43 I have not seen any evidence of a deliberate intention by the Claimant to gain an improper litigation advantage by bypassing the judicial review procedure. She appears to have perceived this as a private law claim potentially from the outset.

Human Rights Act cases

18. In practice, cases for breaches of Human Rights can be brought either by way of judicial review or by way of a more usual action in the county court or High Court. The basis of any action is s6(1) of the Act that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right"

19. By s 7 of the Act a person who claims a breach of s6 may bring proceedings against the authority under the Act, if he is the victim of the unlawful act.

20. By s8, in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. So if a quashing order is required then an application for judicial review would be necessary. If a declaration and damages is the remedy sought, then judicial review is an option but not necessarily so.

21. If damages are awarded then that can only be on the basis that the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made: also s8.

22. Similar considerations need to be taken in to account when deciding whether to proceed by way of judicial review or not. If there are factual disputes then it may not be best to proceed by way of judicial review. The one year time limit for a human rights claim may be one factor which determines where the case is brought. Damages claims can be heard as part of a judicial review claim, but it may be that the court is minded to transfer the case out of CPR 54 where damages are the main remedy sought.

23. Cases under the Human Rights Act may also be attractive where normally cases for negligence would not be available against a public body (see Phillippa Kaufmann's paper). See for example *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) (police investigative failures can be a breach of Article 3) and *Sarjantson v Chief Constable of Humberside* [2013[3 WLR 1540 (delays in police attending a crime scene).

24. In deciding on the correct route for the case there will be some procedural issues which need to be taken into account. The procedure set out in CPR 54 for judicial review is fairly straightforward, and in many cases can be summarised as (a) claim form, (b) acknowledgement of service, (c) permission, (d) detailed grounds and evidence; (e) skeleton argument; (f) full hearing.

25. Here are some procedural issues to bear in mind when deciding on the route to be taken, flagging up some of the differences between public law and private law cases.

Pre-action protocol

26. Be aware of the different pre-action protocols for different kinds of action, http://www.justice.gov.uk/courts/procedure-rules/civil/protocol , and also of the much longer time scales envisaged in other actions. For example, the PI pre-action protocol (often adapted for other areas), the time table envisages that:-

> The defendant should reply within 21 calendar days of the date of posting of the letter identifying the insurer (if any) and, if necessary, identifying specifically any significant omissions from the letter of claim. If there has been no reply by the defendant or insurer within 21 days, the claimant will be entitled to issue proceedings.
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> The defendant('s insurers) will have a maximum of three months from the date of acknowledgment of the claim to investigate. No later than the end of that period the defendant (insurer) shall reply, stating whether liability is denied and, if so, giving reasons for their denial of liability including any alternative version of events relied upon.

27. Also note that the Defendant is expected to provide early disclosure of documentation at the pre-action stage (which often does not happen in judicial review cases:-

> If the defendant denies liability, he should enclose with the letter of reply, documents in his possession which are material to the issues between the parties, and which would be likely to be ordered to be disclosed by the court, either on an application for pre-action disclosure, or on disclosure during proceedings.

Limitation periods

28. Public lawyers are more or less comfortable with the judicial review time limit for filing a claim form (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose: CPR 54.5

29. But what if you want to bring a private law action arising out of the wrong committed by a public body?

    (a) There is a one year time limit for bringing an action under the Human Rights Act 1998. This can be extended if the court considers equitable having regard to all the circumstances: s7 of the Act and *D v Commissioner of Police of the Metropolis* [2012] EWHC 309 (QB). The time limit is subject to any rule imposing a stricter time limit in relation to the procedure in question (which means that the usual judicial review time limit would apply, if it is desired to bring a Human Rights Act claim by that route).

(b) For tortious claims claims like negligence, misfeasance in public office, assault, false imprisonment, the usual time limit is six years from the date of the tortious action: s2 Limitation Act 1980, but...

(c) Where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries, then the usual time limit is three years from (a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured: s11 Limitation Act 1980. "Breach of duty" has been held to include "intentional" torts such as assault, false imprisonment (and probably malicious prosecution and misfeasance): *A v Hoare* [2008] 1 A.C. 844. But...

(d) Wide discretion under s33 of the Act to extend the time limit in personal injuries: *B v Ministry of Defence* [2010] EWCA Civ 1317, (2011) 117 B.M.L.R. 101. And…

(e) In all cases s32 of the 1980 Act provides that there can be a "postponement of limitation period in case of fraud, concealment or mistake" which might be very relevant in cases where bad faith by a public body is at issue, especially because by s32(2) of the 1980 Act "...deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty".

(f) And see the Act for special time limits when a person is under a disability, or dies before the end of the period, and for other cases (including defamation).

Judgment in default

30. For Defendants, not responding to a claim for judicial review is not necessarily fatal. By CPR 54.9 the defendant will be excluded from the permission to apply process, but if permission is granted the defendant will still be able to file detailed grounds and evidence pursuant to CPR 54.19. This perhaps harks back to the days when a defendant would often not even be aware of an application for judicial review until permission was granted.

31. In private law cases, a failure to file an Acknowledgment of Service can be fatal. The claimant can apply for judgment in default pursuant to CPR 12. The defendant will then find itself having to apply to have judgment set aside. There is provision in CPR 13 for the court to do this on the basis that the defendant has a reasonable prospect of defending the case, but that is a discretionary provision and in these Mitchell days (see below) , good reason for failing to file an acknowledgment of service will be required.

Pleadings

32. Public law pleadings are well known for their discursive style. But private law cases are subject to more rigorous control. Thus by CPR 16.4, particulars of claim must include –(a) a concise statement of the facts on which the claimant relies; (b) if the claimant is seeking interest, a statement to that effect (c) if the claimant is seeking aggravated damages or exemplary damages , a statement to that effect and his grounds for claiming them.

33. In personal injury cases CPR PD 16 (4) states that (1) the claimant's date of birth, and (2) brief details of the claimant's personal injuries, and a schedule of expenses and loss, and a medical expert report should be attached.

34. Human rights cases get special attention. Statements of case must contain "precise details of the Convention right which it is alleged has been infringed

and details of the alleged infringement" as well as specifying the relief sought and other details: CPR PD 16 (15).

35. By CPR 16.2 (1A) In civil proceedings against the Crown, the claim form must also contain - (a) the names of the government departments and officers of the Crown concerned; and (b) brief details of the circumstances in which it is alleged that the liability of the Crown arose.

36. CPR 16 also contains details of what must be included in the defence and any reply from a claimant.

Disclosure

37. The limited nature of the right to disclosure in judicial review (but coupled with the defendant's duty of candour) is well known to public lawyers. CPR PD 54A paragraph 21.1 says "Disclosure is not required unless the court orders otherwise". There is a change to a more flexible approach to disclosure following *Tweed v Parades Commission of Northern Ireland [2006] UKHL 53* , [2007] 1 WLR 1. They reflect the fact that disclosure, standard or specific, may be ordered in judicial review. Recent case law indicates that pre-action disclosure (under CPR 31.16) will rarely be available in judicial review cases: *BUAV v Secretary of State for the Home Department* [2014] EWHC 43 (Admin).

38. Orders for specific disclosure in most cases are also fairly rare.

39. In private law actions, disclosure is more widespread. See above for the expectation that much disclosure will take place in the pre-action stage. Standard disclosure by both sides happens when pleadings have closed: CPR 31.6

31.6 Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

Mitchell

40. The approach by the Court to keeping to time limits imposed in the CPR and court orders has radically changed, and needs to be kept in mind by the public lawyer undertaking a private law case. The approach is now explained in the recent Court of Appeal case of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2013] 6 Costs L.R. 1008. It is clear from the comments in paragraph 40 of the judgment that the Court intended the principles set out in the judgment to be of general applicability. The Court of Appeal said:-

> 40 We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly....

41. The Court of Appeal continued in the *Mitchell* case to say:-

> 41 If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. ....But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. ...This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.

42. The Court of Appeal in *Mitchell* went on to say at paragraph 48 that:-

> "...we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial".

43. In the three months since the judgment in the Mitchell case, note the wide number of cases where it has been applied:-

Bank of Ireland v Philip Pank Partnership [2014] EWHC 284 (TCC); QBD (TCC); 2014-02-12

Thevarajah v Riordan [2014] EWCA Civ 15; CA (Civ Div); 2014-01-16

Harrison v Black Horse Ltd Official Transcript; Sen Cts Costs Office; 2013-12-20

Wheeler v Chief Constable of Gloucestershire Constabulary Unreported, December 18, 2013; CA (Civ Div); 2013-12-18

Chambers v Buckinghamshire Healthcare NHS Trust Official Transcript; QBD; 2013-12-18

Durrant v Chief Constable of Avon and Somerset [2013] EWCA Civ 1624; Official Transcript; CA (Civ Div); 2013-12-17

Adlington v Els International Lawyers LLP (In Administration) Unreported, December 12, 2013; QBD (Birmingham); 2013-12-12

SC DG Petrol SRL v Vitol Broking Ltd [2013] EWHC 3920 (Comm); QBD (Comm); 2013-12-09