

AN INTRODUCTION TO JUDICIAL REVIEW

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THE IMPORTANCE OF JR

1. When a citizen, company or pressure group wishes to challenge a decision made in the public arena by public body it must do so in the Administrative Court (formally the Crown Office List) by way of an application for judicial review. Over the last twenty to thirty years the use of JR has grown exponentially and is now firmly established as the nearest thing in the UK to a bone fide constitutional court.
2. This is essentially judge made law. The subject matter is by definition controversial and raises questions about the separation of powers and parliamentary sovereignty. The courts have frequently resisted attempts by the legislature to oust the court's jurisdiction over certain issues or administrative decisions (for example by finding that an exclusion clause did not prevent the court from examining whether the act complained of was ultra vires – Anisminic v. FCC [1969] 2 AC 147 HL) and the decisions of the courts have frequently invoked ministerial ire (see David Blunkett's tirade against Collins J when he found the detention of asylum seekers at Oakington to be unlawful – R (Saadi) v. SoS Home Dept 2001 EWHC Admin 670).
3. In the absence of a written constitution or a constitutional court JR is of great importance – it is the arena in which the vast majority of the big constitutional and increasingly, the big moral questions in

society are played out (e.g right to die, treatment of terrorist suspects etc).

4. Of course, as we shall see the Courts must not overstep their role: as described by the late Lord Bingham:

“the constitutional imperative that the courts stick to their interpretative role and do not assume the mantle of legislators” (R (Quintavalle) v. SoS for the Home Department [2003] UKHL 12 at [15]).

WHEN IS JUDICIAL REVIEW APPROPRIATE?

5. Having regard to the delicate position that JR occupies within the constitutional framework of the UK it is obvious that its breadth of application will be controversial.

Who can be reviewed?

6. Judicial review is the procedure by which you can seek to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function. If you are challenging the decision of a court, the jurisdiction of judicial review extends only to decisions of inferior courts. It does not extend to decisions of the High Court or Court of Appeal.

Is there a definition of “judicial review”?

7. The definition of judicial review is in CPR Part 54.1(2)(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*

8. Of course sometimes it is obvious whether a particular body is public in nature: inferior courts and tribunals for example, a government ministry or the police. But in a time of quangos, contracting-out and increasing government privatisation the line between public and private endeavour has never been less visible, with larges swathes of what may once have been considered the business of government being undertaken by essentially private enterprises. How have the courts dealt with this phenomenon?
9. The starting point has to be the decisions of the Court of Appeal in R v. Panel on Takeovers and Mergers, ex p Datafin ([1987] 1 QB 815) and Ex p Aga Khan [1993] 1 WLR 909 at 931D. Both of these cases confirmed that whilst no single factor was determinative it was clear that some form of power had to be exercised by the entity concerned before it could be judicially reviewed. It is not however imperative that the power be derived from a "formal public source", i.e. from a statute or the royal prerogative: an implied or de facto mandate might also be sufficient. But it may not be enough.
10. LJ Hoffman (as he then was) said in Aga Khan "private power may affect the public interest and the livelihoods of many individuals... [but] that does not subject it to the rules of law", (Ex p Aga Khan at 932H). Therefore as stated by Simon Brown J "whether or not a decision has

public law consequences must be determined otherwise than by reference to the seriousness of its impact upon those affected" (R v. Chief Rabbi of the UHCGBC, ex p Wachman [1992] 1 WLR 1036 at 1042C). In general a body that derives its power from contract or a consensual submission to its jurisdiction is unlikely to ever be considered a public authority (Aga Khan).

11. In reality before a body will be considered amenable to JR its activities must be "*woven into a system of governmental control*", or into the fabric of public regulation: in other words there needs to be some form of state underpinning of the power concerned, or if not, then at least a close proximity with another recognised public body (Aga Khan 923H: R v. Cobham Hall School ex p G [1998] ELR 389: R v British Council ex p Oxford Study Centre [2001] ELR 803).
12. Significantly in this context it has not been enough to show (although it is clearly relevant) that were the body in question not supplying the service or exercising the power then the state would be required to do so instead (R v. Servite Houses ex p Goldsmith [2000] 3 CCLR 325): a local authority for example may discharge its obligations by entering into contractual arrangements with a private body without rendering any of the functions of that body public in nature.
13. Historically therefore the JR case law has focussed less on the character and impact of a particular act or function, than the form and type of the body executing it. Consequently, where the available private law remedies are inadequate, there is, again in the words of Hoffman LJ, a '*protection gap*' (Aga Khan 933A-G).

14. Of course it is not every action (or omission) of a public authority that can be challenged by JR. It is not available to enforce purely private rights against public bodies, for example employment of contractual rights as the act in question must be “in relation to the exercise of a public function”.
15. Some examples of bodies deemed amenable to JR are: an unincorporated organisation which derived its powers from the voluntary agreement of city financial institutions that they should be self-regulating (Datafin): the Advertising Standards Agency (R.v. ASA ex p Insurance Services (1990) 2 Admin LR 77): state but not independent school governors; a hospital ethics committee and managers of a private psychiatric hospital. Whereas Lloyds of London (ex parte Briggs [1993] 1 Lloyd’s reports): the Insurance Ombudsman: the Football Association (ex parte Football league [1993] 2 ALL ER 833): the British Council when operating a language tuition accreditation scheme: the Association of British Travel Agents and the Independent Broadcasting authority, to name a but a few, have not been considered to be public entities. The door has been left open in respect of the Press Complaints Commission and the BBC.

The Human Rights Act and Public Authorities

16. A key promise of the 1997 Labour party manifesto was to incorporate the ECHR into UK domestic law and soon after its election victory that year the Human Rights Act 1998 was on the statute books. The Act provides a mechanism designed to allow UK citizens to protect their most fundamental rights without having to resort to the ECtHR in Strasbourg. It achieves this by

placing all public authorities in the UK under a specific statutory duty not to act in a manner which is incompatible with a person's human rights ("the s.6 duty").

17. Parliament was clearly aware of the proliferation in quasi-public organisations when drafting the HRA as it included at section 6 a definition of a public authority which states:

"(3) public authority includes-

- a) a court or tribunal, and*
- b) any person certain of whose functions are functions of a public nature..."*

but,

"(5) In relation to any particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

18. This has been taken to mean that there are three different types of public authority for the purposes of the HRA, firstly, courts and tribunals; second, core or standard public authorities which must act compatibly with human rights in what ever they do; and finally "functional" public authorities, organisations that can be properly considered a hybrid of both public and private functions and which, by virtue of s.6(5), are only subject to the HRA duty in respect of their public acts (see Hansard HC 16/2/98, Col 775: Lord Woolf in Poplar v. Donoghue [2002] QB 48 at para. 63).

19. There are clear similarities in the CPR PT 54 JR definition and that contained in s.6 HRA. As noted by LJ Woolf in Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB

48, the definition of a functional public authority in s.6 "*was clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review*" [65(i)].

20. Therefore with the focus remaining very much on the source of the power being exercised and whether it was woven into a system of governmental control rather than a more function based test, the jurisprudence under the HRA has tended to follow the approach adopted in relation to JR. Accordingly it is of considerable importance when considering the current ambit of the Administrative Court.
21. The difficulties inherent in delineating the public and private divide are reflected by the extent of the division in the House of Lords in their latest attempt to tackle the problem in YL v. Birmingham CC [2007] UKHL 27. By a 3:2 majority the House decided that a healthcare company was not a public authority when making decisions about the welfare of an 84 year old resident of one its care homes. It took the Lords a collective 171 paragraphs to explain their differences of opinion.
22. The applicant in YL, like over 400,000 other elderly and infirm persons in the UK, was placed in a residential care home pursuant to statutory obligations owed by local authorities. It was common ground that if a placement at a private residential home was not available then the relevant local authority would have had to accommodate the applicant directly.
23. The Applicant was an 84 year old woman with Alzheimer's disease. She had lived at the Bramley Court Nursing Home since January

2006 having been placed there by Birmingham City Council pursuant to sections 21 and 26 of the National Assistance Act 1948. Bramley Court is run by Southern Cross Health Care Ltd, a private company which provides approximately 29,000 beds in the United Kingdom of which in the region of 80% are funded by local authorities in exactly the same way as the applicant was funded.

24. A dispute arose between Southern Cross and the applicant's relatives. As a consequence Southern Cross served the applicant with a notice to quit to the home. This caused considerable concern to the applicant's family and indeed the official solicitor. The expert evidence established that moving the applicant would present a 25% risk of death.
25. Residents in care homes enjoy no security of tenure. Their contractual rights afforded them no defence to the notice to quit. What is more, the Council that placed the applicant in the home was unable to force Southern Cross to keep on looking after the applicant. Although it would remain under a statutory duty to the applicant the Council would be limited to arranging another placement at another care home. It was in no position to eliminate the risk of her suffering harm or even death as a consequence of having to be moved to a different home.
26. The statutory duty to care for the elderly and unwell incumbent on the council dates from 1948, and its predecessor from as far back as the 1930s. It is therefore a long standing feature of the UK government's responsibility towards its citizens. There was no doubt that had the applicant been in a local authority nursing home

the authority would have had a positive obligation to protect her right to life, along with her right to respect for her home.

27. Prior to the decision the Joint Parliamentary Committee on Human Rights had expressed concerns about the narrow approach that had thus far been adopted in the cases, highlighting the resulting “*deficit in protection*”. It explained “*we conclude that, as a matter of broad principle, a body is a functional public authority performing a public function under section 6(3)(b) of the Human Rights Act where it exercises a function that has its origin in governmental responsibilities ... in such a way as to compel individuals to rely on that body for realisation of their Convention rights.*”
28. Another striking feature of the YL case was the fact that the SoS intervened in order to side with the applicant and seek an order that care homes were public authorities.
29. Lord Bingham of Cornhill, the senior Law Lord, gave a strong dissenting judgment as did Lady Hale of Richmond. Lord Bingham, in the shortest of the judgements concluded thus:

“When the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well-known fact in mind. The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would undoubtedly be a public function if carried out by B, is in my opinion, precisely the case which section 6(3)(b) was intended to embrace. It is, in my opinion, this case.”

30. Baroness Hale adhered to a strictly function orientated approach, concluding as she did that *“the company, in providing accommodation, health and social care for [YL], was performing a function of a public nature. This was a function performed for [YL] pursuant to statutory arrangements, at public expense and in the public interest”*. She found the distinction between providing care, and arranging for its provision, to be *“artificial and legalistic”*.

31. Lords Scott, Mance and Neuberger all disagreed. Lord Scott summarised as follows:

“Southern Cross is a company carrying out a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses (subject, of course, to anti-discrimination legislation ...) and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.”

32. Notably, similar arguments could be advanced on behalf of private companies running prisons although no serious argument has been made that they are not subject to the HRA duty to act compatibly with Convention Rights. Perhaps the apparent lack of focus on the rights of the individual by Lord Scott is best illustrated by his characterisation of residents in care homes as *“inmates”*, (para.32)

33. Arguably Lord Scott’s reasoning conflates the nature and composition of the company providing the service with the function that they are carrying out. It was not argued that Southern

Cross is a core public body, but that the provision (and removal) of accommodation and care for the applicant by the company but paid for by the local authority pursuant to the National Assistance Act, was a public function.

34. On the other hand Lord Neuberger was unable to escape a sense of discomfort with the notion that those residents of Southern Cross who were private paying would enjoy less protection than their state funded counterparts. Unable to see how it could possibly be argued that private residents could raise any argument that Southern Cross was a public authority he concluded that the mere fact other of its residents were subsidised by the state could not possibly alter its status.
35. In relation to the question of state funding generally Lord Neuberger formulated what may prove to be a significant distinction. Where a core public authority, such as a local council, subsidises or supports a private entity generally then that may mean the latter is also exercising public functions. But where the state is only funding services provided by the business to specific individuals, because for example they cannot afford to pay for it themselves, (as in the case of the care homes) then the opposite is true.
36. This principle, if applied generally, could at least provide some much needed certainty in an area where it is lacking. Ordinarily it is not hard to distinguish a wholly or mainly state subsidised organisation from one which provides services to individuals for payment, where some of those individuals are subsidised by the state.

37. All in all Lord Neuberger in YL was certainly correct in his analysis that *“any reasoned decision as to the meaning of s.6(3)(b) risks falling foul of circularity, preconception and arbitrariness”*, the words being so imprecise that *“one searches for a policy as an aid to interpretation”*.
38. The inevitability of value judgements being decisive was not lost on the Lord. He also articulated what is perhaps the dominant value when he said *“unattractive though it may be to some people, one of the purposes of contracting-out at least certain services previously performed by local authorities may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators”*.
39. The Government has attempted to overturn the decision in YL by enacting s.145 Health and Social Care Act 2008: “A person (“P”) who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (c. 42) (acts of public authorities) to be exercising a function of a public nature in doing so.” It remains to be seen whether this will have the desired effect as it still requires the court to address whether or not the particular act complained of is public or private (see Rix’s dissenting judgement in Weaver).

Who Can Bring a Claim?

40. The claimant must show that s/he has a “sufficient interest” to challenge the decision in question (Supreme Court Act 1981 s.31(3)).

41. If the Claimant has a direct personal interest in the outcome of the claim, s/he will normally be regarded as having a sufficient interest. The term interest is not to be given a narrow meaning, and includes any connection, association or interrelationship between the claimant and the matter to which the claim relates.
42. If the interest is not direct or personal, but is a general or public interest, it will be for the courts to determine whether s/he has sufficient standing.
43. Claims are often brought by public interest groups established to represent particular interest groups or campaign on a particular issue. The courts are taking an increasingly liberal approach to the issue. Claims have been brought by Corner House in respect of the arms trade (*British Aerospace and the SFO*), Child Poverty Action Group in relation to the administration of welfare benefit law and Greenpeace in relation to the construction of a new generation of nuclear power stations (*R (Greenpeace) v. SoS Trade Industry* [2007] EWHC 311).
44. One important factor when determining standing is whether there is a more appropriate challenger. In *R (Bulgar) v. SoS Home Dept* [2001] EWHC Admin 119 the father of a murdered child was denied standing to challenge the Lord Chief Justice's decision to reduce the tariff imposed on the perpetrators of the murder. The mere fact that the LCJ had invited the relatives to make representations to him regarding the tariff did not give them standing in order to challenge his ultimate decision. That was for the Crown or the Defendant, or both.

45. But generally the test has become quite liberal – really only the “meddlesome busybody” is prohibited from challenging a decision – (L Donaldson MR R (Argyll Grp) v. Monopoly and Mergers Cmm [1986] 1 WLR 763).
46. Ironically under the HRA 1998 the test for standing is arguably more restrictive, requiring the Claimant to be a “victim” (however there is no need to show any damage has been suffered – Cullen v. chief Con RUC [2003] UKHL 2003).
47. The parties to a JR are called “Claimant” and “Respondent” and no longer Applicant and Respondent.
48. Interested parties are defined as “*any person who is directly affected by the claim*” (54.1(2)(f)). By way of example the SoS was not an interested party in a JR of a local authority’s decision about housing benefit even though he would ultimately pick up the bill whereas the recipient of planning permission was an interested party in a claim brought by an objector against the grantor of permission, the city council (R (Muldoon) v. Liverpool CC (1996) 1 WLR 1103).

Does litigation that involves public law principles have to be conducted in the Administrative Court?

49. The starting point is the principle enunciated by the HL in O’Reilly v. Mackman [1983] 2 AC 237. It is an abuse of process to seek to impugn public law decisions or actions in private law proceedings. The protections inherent in the JR procedure, for example the time limits, are there to protect public bodies and should not be circumvented.

50. There are exceptions. Public law arguments can be raised as a defence to civil proceedings (LB Wandsworth v. Winder [1985] AC 461) and although traditionally a challenge to the decision to instigate proceedings should be by judicial review (Avon v. Buscott [1988] QB 656) the Supreme Court has now confirmed that tenants of public authorities can raise public law arguments against decisions to seek their eviction in the county court (Manchester City Council v. Pinnock [2010] UKSC 45; Birmingham CC v. Frisby [2011] UKSC 8).

SUBSTANTIVE GROUNDS OF CHALLENGE

51. The cornerstone of domestic administrative law is the judgment of Lord Greene M.R. in Wednesbury (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223).
52. Lord Greene M.R. identified a number of grounds of challenge: bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances and disregard of public policy. He viewed them as overlapping.
53. Traditionally the substantive Wednesbury test required the Claimant to show that the decision was one that “no reasonable authority could ever have come to” (Wednesbury *ibid*). This has been taken to mean that the Claimant must show perversity on the part of the decision maker. Needless to say, this proved a particularly high threshold to overcome. This concept has dominated substantive review of administrative and governmental action in England and Wales for as long as JR has existed.

54. The narrow test reflected the sentiment that Judges should not lightly interfere with administrative decisions and should not substitute their decision for that of the appointed decision maker. Rather, the starting point should be considerable judicial deference to the skill and expertise of the individual charged with making the decision.
55. In Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 A.C. 374 Lord Diplock reclassified the principles of administrative law as "illegality", "irrationality", and "procedural impropriety".
56. The multitude of different arguments that can be run under these broad heads means that any attempt at further clarification is inherently fraught with a danger to mislead and confuse. The extent to which the different terms are used interchangeably cannot be overstated. Therefore without being too prescriptive;
1. Illegality
 - Ultra vires
 - Misdirection of Law
 - Error of Fact
 - Relevant/irrelevant considerations
 - Frustration of the Policy of an Act
 - Fettering of discretion
 - Unlawful delegation/dictation
 2. Procedural impropriety
 - Bias

- Right to be heard
- Lack of reasons
- Appeals
- Legitimate expectation
- Consistency
- Consultation

3. Irrationality

- Improper motives
- Bad faith
- Unreasonableness/Illogicality

57. In reality the JR jurisdiction is concerned with unfairness (see for example R (Iran) v, SoS HDept [2005] 982 Civ 982), or natural justice and it is simply not possible to list all of the possible scenarios where judicial intervention would be justified. What is important is the extent of the judicial scrutiny of the decisions of public bodies, having regard to the issues of political theory outlined above.

58. However even before the introduction of the HRA the Courts had held that “*anxious scrutiny*” was required where fundamental rights were engaged: “the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable” (R v. MoD ex parte Smith [1996] QB 517 CA).

59. The Human Rights Act 1998 came into force on October 2, 2000 and is the vehicle for introducing into domestic law the European Convention on Human Rights.

60. The scheme of the Act is, first, to require that primary and subordinate legislation must be read and given effect in a way which is compatible with those Convention rights listed in the Schedule to the Act, so far as it is possible to do so (s.3(1)).
61. Secondly, the Act renders it unlawful for “public authorities” to act in a way which is incompatible with one or more of the Convention rights contained in the Schedule (s.6(1)) This includes a failure to act.
62. There is a distinction between the traditional Wednesbury approach to judicial review and an approach based on human rights. Wednesbury affords a decision-maker a very wide ambit of discretion: a decision is valid provided that there is no error of law made in reaching it and so long as it is within the “*range of reasonable responses*”. Wednesbury does not permit the courts to analyse the facts of the decision in any depth.
63. The courts are, however, required to consider “*proportionality*” when dealing with human rights cases. Proportionality is essentially reviewing whether a “fair balance” has been struck between the competing interests at stake. It arose from the ECHR jurisprudence on the qualified rights, such as the right to one’s home and private life (Article 8) and freedom of expression (Article 10). It seeks to ascertain whether the least intrusive method or practise has been adopted in pursuance of the legitimate aim advanced by the decision maker as justifying the interference. Crucially once it is established that a fundamental or human right is engaged then it is for the authority to justify the interference.

64. The Court of Appeal has observed that “the Wednesbury test is moving closer to proportionality” but also said that “it is not for this court to perform the burial rights” (R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence [2003] EWCA Civ 473, [2003] 3 WLR 80).
65. Lord Steyn considered the issue in R (Daly) v, SoD Home Dept [2001] UKHL 26 and identified three differences between proportionality and Wednesbury. Proportionality may require the reviewing court to:
- assess for itself the appropriateness of the balance between competing interests struck by the decision maker rather than simply ask whether that solution was within the range of reasonable responses
 - expressly consider the relative *weight* to be given to each of the various factors and
 - accept that where human rights were at issue even the heightened scrutiny test developed in Smith (anxious scrutiny) might not be enough.
66. However it is fair to say that a focus which was directed towards establishing the requisite degree of unreasonableness (equivalent to perversity) has moved to a more analytical and thoughtful approach to the question at hand – a culture of justification now exists. A decision may be unreasonable where the reasons display no adequate justification for the decision or there is an absence of logical connection between the evidence and the ostensible reasons

for the decision or there were clearly less intrusive means available of achieving the same result.

67. But don't be deceived – it is still a long way from a full merits review. And many warnings have been given: anxious scrutiny does not mean “*that the court should strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none*” (Munby J in Asif Mahmood Choudhrey v Immigration Appeal Tribunal [2001] EWHC Admin 613).

THE PRE-ACTION PROCESS

68. The procedure of bringing a Judicial Review claim is primarily governed by CPR Part 54. It is important to note that CPR Part 54 is not a “stand alone” code. As the definition of “judicial review procedure” in CPR r.54.1(2)(e) shows, the procedure is a modified form of the CPR Part 8 procedure (which replaced the old RSC originating summons procedure). Thus CPR Part 54 has to be read, save to the extent that it provides otherwise, with (*inter alia*) CPR Part 1 (overriding objective), Part 2 (application/interpretation of rules), and Part 3 (case management powers).
69. The general guidance on procedural matters is contained in Practice Direction 54A. The most important features of general application include paragraphs 4 (date when grounds arise to challenge a judgment, order or conviction), 5.6 and 5.7 (documents to be filed with claim form), 8.5 and 8.6 (defendant not required to attend oral permission hearing and will not normally recover costs if it does so), 11 (minimum 7 days' notice of reliance on additional grounds),

12 (no obligation of disclosure unless court orders otherwise), 15 (skeleton arguments), 16 (bundles) and 17 (agreed final orders).

70. A further Practice Statement ([2002] 1 WLR 810) deals amongst other matters with the procedure for urgent cases at the permission stage, and another ([2008] 1 WLR 1377) with uncontested proceedings.
71. See also the Administrative Court Notes for Guidance on Applying for Judicial Review (October 2009), although these are aimed largely at non-professional audience.
72. The Judicial Review Pre-action Protocol provides the formal basis for requiring defined procedures to be followed before most claims for judicial review are issued.¹
73. Although not a legal requirement - and therefore not enforceable - the protocol is expressed so that, if it has not been used or the defendant has not responded to it, the court may take any such failure into account in relation to case management or, more particularly, costs.² Given the discretionary remedy of judicial review, the failure may, potentially, go to the question of relief.
74. Central to the protocol is the requirement to serve a detailed letter before claim, setting out the essence of the challenge and the steps which it is believed should be taken. The letter must include, the name and address of the claimant and defendant, the defendant's reference details, the details of the matter being challenged, the

¹ The protocol provides that it does not apply to urgent cases (para. 6); similarly, the requirement to serve a pre-action protocol letter may be waived where the defendant has no power to alter its decision, *e.g.* where the decision under challenge is that of a tribunal.

² Protocol, para. 7

issue, details of the action the defendant is expected to take, details of the claimant's legal advisers, details of any interested third party,³ details of any information sought and documents considered relevant and necessary, the address for reply and service of court documents and a proposed reply date.⁴ It is also advisable for the letter to state the claimant's willingness to engage in ADR.

75. The defendant must respond to the letter before claim, setting out whether he accepts or does not accept the grounds on which the decision is being challenged. Where the defendant concedes the whole claim, the letter must say so in clear and unambiguous terms;⁵ where the claim is contested, either in whole or in part, the response should similarly set this out. The response should also:

- where appropriate, contain a new decision which identifies which aspects of the claim are conceded and which are not conceded or give a clear time-frame within which a new decision will be made;
- give a more detailed explanation of the original decision;
- address any points in dispute;
- enclose any requested documentation;
- state whether any application for interim relief will be opposed.⁶

76. Claimants' advisers should be aware of a number of other issues, such as the obligation to consider, and where appropriate, make use of other forms of dispute resolution and whether or not judicial

³ *Cf.* the requirement to invite the Secretary of State to be an interested party if a declaration of incompatibility is being made: Human Rights Act s.5(1)

⁴ It is open to a defendant, if he considers the proposed time limit unreasonable, to give an initial response requesting an extension of time

⁵ Protocol, Annex B, para.14

⁶ Protocol, Annex B, para.16

review is the most appropriate remedy, or whether some other alternative remedy or means of making a claim is more appropriate.

ISSUING A CLAIM

77. A Judicial Review claim is commenced by filing and serving at the Administrative Court Office, two copies of a paginated and indexed bundle, containing a completed claim form (N461) and additional documents that must be provided.⁷
78. The Administrative Court Office warn that they will not accept applications that do not comply with the requirements of CPR 54 and the Practice Direction unless the circumstances are exceptional. The urgency of the application may be an exception. However, if the only reason given in support of urgency is the imminent expiry of the three month time limit for lodging an application, the papers will nonetheless be returned. The claimant must seek an extension of time and provide reasons for the delay in lodging the papers in proper form.
79. A fee of £50.00 is payable when you lodge your application for permission to apply for Judicial Review. A further £180.00 is payable if you wish to pursue the claim after permission is granted Civil Proceedings Fees (Amendment) Order 2008.
80. Although guidance is given on the N461 as to content, the claim form must identify and contain:

⁷ CPR 54.1

- the question that the court is to decide - i.e. the decision under challenge
- the remedy sought, including any interim remedy
- the enactment - if any - under which the claim is made
- a detailed statement of the grounds for seeking judicial review
- a statement of the facts relied upon
- a time estimate for the substantive hearing

81. Where there is a claim for interim relief - such as injunctive relief requiring the provision of accommodation - such a claim must be included in the claim form and must be supported by a statement (on the claim form itself) and evidence as to why it is necessary.
82. The essential aspect of the claim form is the grounds for seeking review. They should be detailed and fully pleaded and contain references to authorities on which the claimant intends to rely. There is an obligation to include in the grounds reference to authorities (or statutory provisions) which are contrary to the claimant's claim, albeit that the grounds may seek to distinguish those authorities.
83. The importance of the grounds cannot be overstated; they will form the basis for the argument at both the permission stage (and as such will have an impact on whether the court grants permission) and the substantive hearing. It is therefore essential to set out clearly what is contended and the reasons why relief should follow; although grounds may be amended, permission is required to do

so⁸ and it is questionable whether amendment will be permitted simply to compensate for inadequate drafting in the first instance.

84. Furthermore, the grounds in a claim must be kept up to date. In R (B by her litigation friend MB) v Lambeth [2006] EWHC 639 the claimant was criticised because the original pleadings were unfocused. The claimant had failed to produce amended grounds to deal with new facts which occurred since the claim was issued. Munby J made clear that in such circumstances there was a real risk of such claims being summarily dismissed and a wasted costs order being made against lawyers.
85. An application to amend the claim form should be accompanied by a draft of the proposed amendment. Notice of intention to amend should be given at the earliest possible moment and, in any event, no later than 7 clear days before the hearing. The amended case should be set out in the proper form and in sufficient detail.
86. Additional documents which must be attached to the claim form are those which are submitted in support of the claim and may include:
- A copy of the decision under challenge;
 - Evidence in support of the claim (such as a witness statement by the claimant);⁹
 - Copies of documents on which the claimant intends to rely;
 - Copies of any relevant statutory material;
 - A copy of the claimant's funding certificate (where appropriate);

⁸ CPR 54.15

⁹ Note, however, that there is no requirement for a witness statement; form N461 contains scope for the claimant to provide a statement of the facts on which he relies

- Any application for directions;
 - A list of essential reading, with page references¹⁰
87. The sealed copy claim form and accompanying documents must be served on the defendant and any an interested party within 7 days of the date of issue (i.e. the date shown on the court seal). The Administrative Court Office will not serve your claim on the defendant or any interested party. The suggest that it is “good practice” to serve the defendant and any interested party with a Form N462 (An Acknowledgement of Service Form) for them to complete.
88. You must lodge a Certificate of Service in Form N215 in the Administrative Court Office within 7 days of serving the defendant and other interested parties.

RELIEF

89. A party bringing a claim for Judicial Review may seek:
- a quashing order (certiorari) - an order quashing the public body's decision;
 - a mandatory order (mandamus)- an order requiring the public body to do something;
 - a prohibiting order (an order of prohibition) - an order preventing the public body from doing something;
 - a declaration – i.e. a statement as to the parties respective status or position vis-à-vis one another;
 - an injunction;

¹⁰CPR PD 54 para.5.7

- or damages under the Human Rights Act. Guidance was given on the award of damages in HRA cases by the Court of Appeal in Anufrijeva v Southwark LBC [2004] QB 1124. A claim should normally be brought in the AC.

90. Relief in the Administrative Court is discretionary. Whilst there is a presumption that where a claimant establishes unlawfulness on the part of the public authority he will be afforded relief, there are certain circumstances in which it is established that the Court will decline to grant a remedy (or at least some of which the claimant has sought). Some of the situations in which the Court may refuse to grant relief are set out below.

Delay

91. Any 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 (CPR 54.5). The 3 month rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review. The Court has power to extend the 3 month time limit, but will only do so if there are very good reasons for doing so (CPR 3.1(2)(a)). If an extension of time is sought, an application must be made in the Claim Form setting out the grounds in support of the application (CPR 54.5). The time limit in this rule cannot be extended by agreement between the parties.

92. Section 31(6) provides:

“Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant:

leave for the making of the application; or

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”.

93. Accordingly, even where the application has been made within the three-month limit, permission or relief can still be refused. It is also important to note that compliance with the Pre-Action Protocol does not absolve the claimant from the requirement to bring the claim within the time limits set out in CPR 54.5(1).
94. It cannot be stressed enough that the requirement to proceed “promptly” may require proceedings to be brought within (and sometimes well within) the 3 month period: see e.g. R v Independent Television Commission ex p. TVNI Ltd. Times 30th December 1991. That is especially so where the defendant, or a third party, is likely to enter into commitments on the faith of the challenged decision; or where the striking down of that decision is likely to lead to substantial disruption affecting many persons. Examples might include the granting of commercially valuable licences, the grant of planning permission, or decisions about the allocation of school places.
95. The time constraints governing judicial review are not to be applied mechanically and where there is no prejudice to the Defendant and the Claimant has acted sensibly and reasonably, permission to proceed out of time will normally be granted (L.J Woolf in R v.

Commissioner for Local Administration, ex parte Croydon LBC [1989] 1 All ER 1033 at 1046g).

96. The discretion to extend time will be approached sympathetically where the Claimant has in the meantime "*not been sleeping on her rights but has been attempting to canvass them by other legitimate means*", (R v. University Collage London, ex parte Ursula Riniker [1995] 2 ELR 213, Sedley J at 215).
97. Pursuing an appeal, even if misconceived or dismissed on grounds that it was the "*wrong procedure*", is a good reason for applying out of time, (R v. Commissioners for Customs and Excise, ex parte Greenwich Property Limited [2001] EWHC Amin 230, 28/03/01 unreported, at 1: Lord Bridge in Din v. Wandsworth BC [1983] 1 AC 657 at 685 E-F).
98. In R v. Stratford on Avon DC, ex parte Jackson [1985] 1 WLR 1319 CA and R v. Dacorum BC. ex parte Brown (1989) 21 HLR 405, although there were substantially longer delays both applicants were granted permission. In summery their cause was dependant upon two factual matters – delays caused by waiting for relevant material/documents and delays in the obtaining of legal aid that could not be attributed to the fault of the applicant concerned.
99. It appears that the "*general importance of the issues*" and the public interest in the application can afford good reason, notwithstanding that the delay has not been satisfactorily explained (R (Ruddock) v. SoS Home Dept [1987] 1 WLR 1482). Lack of knowledge of a reviewable decision can amount to a good reason, as can the strength of the challenge, the absence of prejudice and the

importance of the rights at stake (Ahmad v Secretary of State for the Home Department [1999] Imm AR 356, CA)

100. By contrast, the default of a professional, non-legal adviser has been held not to constitute good reason (R v Tavistock General Commissioners ex p Worth [1985] STC 564)

Alternative remedy

101. In R (Cowl) v Plymouth CC [2001] EWCA Civ 1935 the Court of Appeal upheld the dismissal of a judicial review claim which was concerned with the threatened closure of two residential care homes. The defendant authority had offered to undertake not to move the claimants from the homes for six weeks while a statutory complaints procedure was utilised to investigate the claimants' complaints. The Defendant refused. The Court of Appeal considered that the parties should have adopted this route, if necessary with the aid of a mediator. It was "indefensible", particularly where public money was involved, to fail to adopt ADR which would have been far cheaper than judicial review proceedings. The Court stressed the importance of avoiding litigation wherever possible and that before permission will be granted the Claimant must show why making a complaint (internally or to the ombudsman) would not provide an *effective* remedy.

102. However see R (Ireneschild) v. LB Lambeth [2006] EWHC 2354 (not overruled by the Court of Appeal on this point). A community care assessment was alleged to be defective in a number of respects. The Court at first instance found that as the case involved points of law the complaints procedure was not appropriate (and further there

had been considerable delay already in the case – the assessment having only been produced post issue).

103. The availability of an alternative remedy does not prohibit the Administrative Court granting relief on an application for judicial review where it is not the individual decision that is in issue but the underlying legality of the decision of which the individual decision is a mere result of its application (R v. Paddington Valuation Officer ex parte Peachey Property Corp Ltd [1966] 1 QB 380 CA) or where to require the applicant to pursue the alternative remedy would in effect determine the issue against him (R v. Chief Immigration Officer Gatwick Airport, ex parte Kharrazi [1980] 3 ALL ER 373).

INTERIM RELIEF AND HOW TO OBTAIN IT

104. Interim relief can be very important in judicial review. The Administrative Court has efficient procedures for determining such applications on the papers. However, if the procedures are abused, a solicitor may face a wasted costs order.
105. Rule 25.2(1) provides that “an order for an interim remedy may be made at any time, including - (a) before proceedings are started”. You may therefore seek interim relief from a duty judge (considered below) before you have commenced proceedings in the AC.
106. Rule 25.2(2) provides that interim relief can only be granted before the claim has been made if “(i) the matter is urgent; or (ii) it is otherwise necessary in the interests of justice”.

107. The formal test that is applied when interim relief is sought in judicial review proceedings is the same as in private law claims: the balance of convenience. This involves considering firstly whether the claimant has a prima facie (in effect an arguable) case and then considering where the greater risk of injustice lies depending upon which party is ultimately successful.
108. Interim relief should normally be sought by filing a Form N463 "Application for urgent Consideration" together with the Claim Form. This should specify the timescale within which the application should be determined - for example 72 hours. In truly urgent situations it may be appropriate to issue the application first thing in the morning with a request that the application be determined by 16.30. A draft order must be provided.
109. Obviously the terms a potential order will depend on the facts of the particular case. However these general points may be made:
- the Order need not specify what type of order is being sought (i.e. mandatory, prohibitive etc.) but should as simply as possible set out what the Court is ordering the Defendant to actually do.
 - the Order should set out the proposed directions for the future management of the case. You will invariably want expedition. When should the AOS be served by? The standard time is 21 days but that will be too late in an urgent case. Is the claimant a child in which case you can seek

anonymity. Do you need to dispense with the need for a litigation friend?

110. It now seems to be accepted that a solicitor may sign the N463, although you must identify the name of Counsel on it.

MAKING "OUT OF HOURS" APPLICATIONS

111. In a real emergency, an application can be made to the out of hours judge by telephone. However, this procedure should only be used if it is impossible to file the papers in the Administrative Court. Applications to the out of hours judge are normally made by counsel. However, there is no reason why they cannot be made by a solicitor. A call should be made to 020-7947 6000 after 16.30. The High Court Security Service will transfer your call to the clerk to the Out-of Hours judge. Such applications should only be made in exceptional circumstances and the claimant must establish a strong prima facie case.
112. In R (Q and others) v SSHD [2003] EWHC 2507 (Admin), Maurice Kay J stated:

13. It is axiomatic that anyone who is deserving of interim relief is suffering or is about to suffer real hardship. If they are so deserving, they are entitled to expect that the Court will act quickly. However, in most cases, the circumstances do not justify an application to the out-of-hours judge. In most cases, the hardship which has been endured for days or hours can be endured until the following day without serious further risk. No doubt there are some truly exceptional cases which merit the most urgent and immediate attention. However, I repeat, out-of-hours applications should only be made in such truly exceptional cases. I well understand that committed legal advisers are anxious to get a result for their clients at the earliest opportunity, but I remain of the view that,

notwithstanding the impassioned submissions, there are many cases presented late in the day which could reasonably wait until the next morning.

113. That guidance was given in the context of a mass of similar cases arising out of a single provision denying support to asylum seekers who had made 'late' claims. Maurice Kay's guidance was intended to mitigate the unprecedented demands then being placed on the AC and duty judges.
114. As a matter of day to day practice, it is not most useful to ask whether the case is "truly exceptional" (not least because of the uncertainty as to the class with which it should be compared). The key question is whether the hardship caused to the claimant by waiting until the next working day outweighs the desirability of such applications being considered by an AC judge as opposed to an out of hours QBD duty judge.
115. When the duty judge considers the same question, s/he is likely to be swayed by the extent to which matters have been treated with similar urgency thus far.
116. You must be prepared to show why the application cannot wait until the next business day in order to be considered by an AC judge.
117. The rationale for an out of hours application looks neater where the predicament has only just arisen, for example where a vulnerable person has just been made homeless, and his representatives have sought to progress matters with the defendant with appropriate urgency.

118. Where a claimant has been suffering the hardship which forms the basis of the application for interim relief for some time, a judge is likely to ask why, if it is now said to be urgent, no application has been made to the court until now.
119. It will often be a good answer to say that the claimant simply had no access to legal representation until now and that the increasing hardship s/he has suffered in the meantime supports rather than detracts from the urgency of the application.
120. However, where a claimant has had representation for some time and the predicament arose some time ago, one can expect a duty judge to be sceptical of the case for urgency, especially if correspondence has proceeded in a relatively leisurely fashion. In those circumstances, it is likely to be necessary to refer to some recent deterioration in the claimant's circumstances.
121. It is occasionally suggested by defendants that claimants have deliberately delayed making urgent applications which could have been lodged in court hours in the belief that a non-AC duty judge hearing an application in the evening may be more generous. One can therefore expect a QBD duty judge to be particularly sceptical where it appears that a claimant could have made a paper application to the AC but instead is seeking to put the application orally out of hours.
122. Correspondingly, where an application has been submitted to the Administrative Court during court hours but for some reason, the urgent AC judge has not dealt with it, an out of hours judge may well be better disposed.

123. The claimant must make full disclosure of all matters which s/he knew or ought to have known. The claimant should have a draft of the order sought from the judge. A careful record should be kept of the basis upon which the order was made. The claimant's solicitor must ensure that the defendant is able to contact him/her out of hours. A cautionary tale where the correct procedure was not followed is to be found at R (Lawer) v Restmoral BC [2007] EWHC 2299 (Admin). According to Mumby J those who sought ex parte relief were under a duty to make full and frank disclosure. Proper disclosure meant specifically identifying all relevant documents for the judge, taking the judge to the particular passages in the material documents and taking appropriate steps to ensure that the judge correctly appreciated the significance of what he was being asked to read. The burden and duty on counsel was all the more onerous where a telephone application was being made to a judge who had none of the papers in front of him and knew nothing about the case. The injunction should be set aside on the ground of serious non-disclosure.
124. It may be that the claimant does not require any interim relief, but rather an early hearing date. In such circumstances, the claim form should be accompanied by a Form N463 specifying the date by which the application should be heard.
125. It must be noted that it is not open to a judge to grant permission to apply for judicial review until the Defendant has had an opportunity to file their acknowledgment of serve and summary grounds for resisting the claim (see R (Kurkut) v SSHD [2005] EWHC 354 (Admin)). A judge may be persuaded to order a "rolled up hearing", whereby a hearing is fixed at which the court first

decides whether to grant permission and if so, determines the substantive application. This procedure can avoid the delays occasioned by the standard procedure.

126. Ordinarily if interim relief is granted the Defendant will be at liberty to apply to vary or discharge the terms of any order granting relief.

THE ACKNOWLEDGMENT OF SERVICE

127. A person who has been served with the claim form and who wishes to take part in the judicial review proceedings must file and serve an Acknowledgement of Service¹¹. Form N462 should be used for this purpose¹². The Acknowledgement must be filed not more than 21 days after the service of the claim form¹³ and served on the claimant and, unless the court directs otherwise, any other person named in the claim form not later than 7 days after it is filed¹⁴.

128. The Acknowledgement must state whether the person filing it contests the claim¹⁵ and, if this is the case, must contain a summary of the grounds for doing so¹⁶. It must also state whether the person filing it (who may be an interested party wishing to support the claim) seeks a different remedy from that set out in the claim form and, if so, what remedy is sought¹⁷.

¹¹ CPR Rule 54.8(1)

¹² It appears that acknowledgement can be given by an informal document such as a letter, provided it contains all the requisite information: see CPR Practice Direction 8, para 3.2

¹³ *Ibid.*, Rule 54.8(2)(a)

¹⁴ *Ibid.*, Rule 54.8(2)(b) and see Rule 54.7(b)

¹⁵ CPR Rule 8.3(2)(a)

¹⁶ *Ibid.*, Rule 54.8(4)(a)(i)

¹⁷ *Ibid.*, Rule 8.3(2)(b)

129. A failure to file and serve an Acknowledgement of Service in time will preclude the defendant served with the claim form from taking part in a permission hearing, unless the court allows him to do so¹⁸, and may be taken into account by the court in relation to costs¹⁹.
130. There is no requirement under Part 54 CPR or indeed any provision for the claimant responding to an Acknowledgment of Service. However, given that in most judicial reviews the permission stage will be determined on the papers, it is advisable to submit a brief written response to the Court. The response should be timely as a decision by a judge is likely to be made on the papers soon after receipt of the AOS.

THE PERMISSION STAGE

131. Permission decisions are, generally, made on the basis of the papers - hence the emphasis above for providing detailed grounds for seeking judicial review.
132. The test for determining whether to grant permission is whether in principle, the court is satisfied that there is an arguable case for review, that the applicant has sufficient interest in the outcome, or standing.²⁰ The court may also consider questions of delay.
133. Where permission is granted, the court may also give directions, including ordering a stay of the proceedings to which the claim

¹⁸ CPR Rule 54.9(1)(a)

¹⁹ *Ibid.*, Rule 54.9(2)

²⁰ The decision as permission stage as to standing is not determinative of the question; the court at the substantive hearing may take an alternative view

relates (i.e. the decision-making process challenged, not the judicial review proceedings themselves)²¹

134. If the court is not sure whether permission should be granted on the papers, it has power to adjourn the permission application into open court for a hearing at which the defendant and other interested parties may - or must - attend²² This power is most likely to be used where the defendant is in possession of important information which will have a material influence on whether permission should or should not be granted, where the judge requires clarification of the defendant's position, or where issues of delay or interim relief arise for consideration.
135. There is no right of appeal against a paper refusal or conditional grant of permission, or a grant on restricted grounds only, but the claimant may request that it be reconsidered at an oral hearing. Such a request must be filed within 7 days of the service of the reasons²³. A Practice Statement²⁴ has been issued, which requires claimants, when completing the form used for renewing permission applications, to set out the grounds for renewal in the light of the reasons given by the single judge when refusing permission on the papers. In practice, the Administrative Court Office will serve, with the order and reasons for refusal/conditional/limited permission, a form to be completed and filed requesting an oral hearing.

²¹ *Ibid.*, Rule 54.10(1)-(2)

²² There is nothing in CPR Part 54 requiring the court to consider the application on the papers. This is referred to in the Practice Direction (paras 8.4-8.6) as a general rule but it is no more than that

²³ *Ibid.*, Rule 54.12(3)-(4). Under the old rules, the claimant had 10 days to renew the application: RSC Ord 53 r3(5)

²⁴ *Practice Statement*, Scott Baker J, 1st February 2002 [2002] 1 All ER 633 at 636

136. On granting or refusing permission, whether on the papers alone or following an oral hearing, the court will serve its order to that effect, including any directions given, on the claimant, the defendant and any other person who filed an acknowledgement of service.²⁵ Where the court decides on the papers to refuse permission, or to grant it subject to conditions or on certain grounds only, it will also serve its reasons for that decision at the same time as serving the order²⁶.
137. Where permission is refused following an oral hearing, in a non-criminal judicial review application, the claimant may - within seven days of the refusal - apply to the Court of Appeal for permission to appeal against the refusal²⁷ by completing an appellant's notice²⁸
138. Further appeal to the House of Lords now seems to be permitted In R (Burkett) v Hammersmith and Fulham LBC [2002] 1 WLR 1593, HL, the House of Lords rejected a contention that they had no jurisdiction to entertain an appeal from the Court of Appeal refusing permission to apply for judicial review. The House decided that where the Court of Appeal had granted permission to appeal against the first instance judge's refusal of permission, but had refused the appeal on the merits after a full hearing, the House of Lords plainly had jurisdiction to entertain an appeal and any indications in earlier cases to the contrary were wrong. Note there is no right to appeal a refusal of permission to appeal by the Court of Appeal.

²⁵ CPR Rule 54.11

²⁶ *Ibid.*, Rule 54.12(1)-(2)

²⁷ CPR Rule 52.15(1)

²⁸ Form N161 – see generally CPR Part 52

139. It is important to comply with any steps which are ordered in relation to the permission application, as failure to do so is itself a basis for refusing permission. In Gunasinghe v Henley Management College [2006] EWHC 346 (QB) the claimant was an MBA student at the defendant college. The college took the view that the claimant was no-longer to be allowed to work in groups with other students and offered to discuss alternative arrangements. The claimant treated this as expulsion and issued proceedings for the quashing of the decision and a mandatory injunction permitting her to return to the course before the start of the academic year.
140. The court ordered that the permission application be expedited. The claimant took no steps to achieve that. Underhill J took a dim view of the inaction and cited it as one of the reasons for the refusal of permission.

POST-PERMISSION

Further submissions

141. A new procedural requirement introduced under the new rules applies where a defendant wishes to contest the claim, or where an interested third party wants to support the claim on additional grounds. S/he must file and serve detailed grounds for doing so, accompanied by evidence in support, within 35 days of service of the Order granting permission: CPR Rule 54.14.

142. Although the need for this procedural step may not – given the existence of an acknowledgement of service and the requirement to prepare a skeleton argument in accordance with the Practice Direction – be obvious, it is important to note the requirement to file and serve evidence as written evidence may not be relied upon unless it has been served in accordance with Part 54; save where the court permits the admission of such evidence (Rule 54.16).
143. In limited circumstances, the defendant may supplement the reasons for the decision under challenge in a witness statement. As a general proposition, such supplementing may only elucidate or clarify the reasons originally given and may not seek to re-rationalise their decision (Ermakov above)
144. On receipt of the defendant’s response and (where submitted) additional evidence in support, the claimant’s legal representatives are under a duty to consider whether the evidence manifestly alters the prospects of the claim succeeding: Practice Direction 54 para. 11.1.
145. If the claimant wishes to adduce additional grounds of challenge, or either party wishes to introduce evidence not previously filed and served, permission must be obtained from the court to do so: Rule 54.15, 54.16(1)(b). Such permission may be obtained either as an interim application or at the substantive hearing.

Power to hear any person

146. Any person, even if not served as an interested party, may apply for permission to file evidence supporting or defending the claim

and/or may seek permission to be heard at the full hearing: CPR 54 Rule 54.17. Such an application must be made promptly.

Skeleton arguments

147. Skeleton arguments may now be filed by email. The relevant addresses are on the Information section of the court service website - <http://www.hmcourts-service.gov.uk/>.
148. The claimant must file and serve a skeleton argument not less than 21 working days before the hearing or warned date. The skeleton must be accompanied by two copies of a paginated and indexed bundle (Practice Direction 54, paras 17, 18).
149. The defendant and any other party who wishes to be heard (including interested third parties) must file and serve a skeleton argument in response not less than 14 working days before the hearing or warned date Practice Direction 54, para. 17.
150. The Practice Direction to Part 54 prescribes the matters that must be contained in the skeleton arguments. These include: a time estimate; a list of issues; copies of authorities; a list of essential reading; and a chronology of events.

Disclosure

151. CPR Part 31 (disclosure) applies to all proceedings except for those on the small claims track but CPR PD 54.12 states that disclosure is “not required unless the court orders otherwise”.

152. Formerly very restrictive criteria applied derived from R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement [1995] 1 WLR 386.
153. Disclosure would generally be ordered only where the Defendant's evidence could be shown to be materially inaccurate or misleading.
154. This is no longer the case. The rules were substantially relaxed by the House of Lords in Tweed v Parades Commission of Northern Ireland [2007] 1 AC 650.

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

Para 32 per Lord Carswell and see Lord Brown at para 56.

155. However, this does not mean that disclosure will be ordered as a matter of routine. Normally applications raise an issue of law and disclosure is unnecessary – See Lord Bingham at para 2/3. Disclosure should be limited to the minority of cases where the “precise facts are significant”. 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”.

156. Disclosure may 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.
157. It may also be necessary to make disclosure so that cross examination can be effective – Al Sweady above.
158. Claimants should also consider applications for information under the Freedom of Information Act 2000 and Data Protection Act 1998.

Cross examination

159. Judicial review applications are ordinarily heard on paper and factual disputes will generally be resolved at trial in the Respondent's favour – R. v Board of Visitors of Hull Prison Ex p. St Germain (No.2) [1979] 1 W.L.R. 1401
160. Examples of cases where applications to cross examine may be allowed are:
- 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. Even in this case the Court retains a discretion and may resolve the

issues on the papers (R v CC Thames Valley ex p Cotton [1989] COD 318).

- ii. Where there is disputed allegation of a human rights breach raising a hard edged question of fact. In R. (on the application of Al-Sweady) v Secretary of State for Defence [2009] EWHC 2387 (Admin) 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”.

- iii. 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.

161. Parties must consider at an early stage whether cross examination may be necessary and seek appropriate directions – Al Sweady para 64.

COSTS

162. The general rule in judicial review proceedings – as in most civil litigation – is that costs follow the event, i.e. the loser pays the winner’s costs. The fact that a party is in receipt of public funding is

not to be taken into account in deciding whether and what costs order to make - s 22 of the Access to Justice Act 1999. An *inter partes* costs order makes a substantial difference to the costs payable to solicitors. Where costs are recovered from the opposing party then legal aid solicitors may recover at their ordinary private paying rates and are not restricted to non-commercial legal aid rates. The indemnity principle, which restricts the paying party's liability to the amount that the receiving party is obliged to pay, does not apply (Civil Legal Aid (General) Regulations s. 107B). The discrepancy is particularly important in Very High Cost Cases and can make the difference between a practice being viable and non-viable.

163. In respect of legally aided claimants, if the defendant wins it is still entitled to its costs but, pursuant to s. 11 of the Access to Justice Act 1999, the order cannot be enforced without a applying to court for the claimant's means to be assessed and for the order to be enforced. The reality is in most cases involving legally aided claimants the defendant will never recover its costs. You may wish to reflect this reality by asking the court to make an Order in the following terms: *"Pursuant to section 11 of the Access to Justice Act 1999 the claimant do pay the defendant's costs, the claimant's personal liability to be determined under regulation 9 of the Legal Services Commission (Costs) Regulations 2000 as nil."*
164. Where the Court assesses that a legally aided claimant has the means to pay the defendant's costs it may order that it is reasonable for the Defendant to recover its costs by setting them off against any amounts payable by the Defendant – Lockley v National Blood

Transfusion Service [1992] 1 WLR 492 and R (Burkett v Hammersmith & Fulham LBC. [2005] 1 Costs LR 104.

165. As a matter of course regardless of the outcome of costs between the parties, a legally aided claimant should always ask for an order for a detailed assessment of his legally aided costs which are payable out of the Community Legal Service Fund.
166. In respect of claims that do not proceed to a full hearing but are settled guidance in relation to costs can be derived from R (Boxall) v Waltham Forest LBC (2001) 4 CCLR 258 where Scott-Baker J suggested that the following principles apply:
- “the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
 - it will ordinarily be irrelevant that the Claimant is legally aided;
 - the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;
 - at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
 - in the absence of a good reason to make any other order the fall back is to make no order as to costs.

- the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.”

167. This case was approved by the Court of Appeal in R (Scott) v LB Hackney [2008] EWCA Civ 217. The Court of Appeal also stated that all judges were “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. I emphasise a reasonable and proportionate attempt, bearing in mind the pressures on the Administrative Court, yet another hard pressed institution. A judge must not be tempted too readily to adopt the fall back position of no order for costs.”

168. A defendant who successfully resists an application for permission, and who attends a renewed permission application, may be awarded the costs of preparing the acknowledgement of service even if not those of attending the hearing (Mount Cook Land Ltd v Westminster City Council [2003] EWCA Civ 1346). The amount of the costs claimed should be set out in the acknowledgement of service.

169. In R (Ewing) v Deputy Prime Minister [2005] EWCA Civ 1583 the main issue concerned the bringing of judicial review proceedings by a vexatious litigant, and the relationship between the requirement for permission to bring the proceedings in the two contexts, the issue arose of the nature and function of the summary grounds for defence filed by defendants at the permission stage and of the costs of preparing them for which claimants might be held liable if permission be refused, on Mount Cook principles.

170. The following principles were suggested: (i) Where a proposed defendant or interested party wishes to seek costs at the permission stage, the acknowledgement of service should include an application for costs and should be accompanied by a schedule setting out the amount claimed. (ii) The judge refusing permission should include in the refusal a decision whether to award costs in principle, and (if so) an indication of the amount which he proposes to assess summarily. (iii) The claimant should be given 14 days to respond in writing and should serve a copy on the defendant. (iv) The defendant will have seven days to reply in writing to any such response, and to the amount proposed by the judge. (v) The judge will then decide and make an award on the papers.

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