

## **“Getting your Tackle in Order - Good Practice in the Administrative Court”**

**Robert Latham and Alex Durance (12 September 2011)**

### **Checklist**

- Any challenge must be based on illegality within a decision making process;
- That illegality must be material or have some degree of substance;
- Did the defect make a difference? Did the illegality cause prejudice? But for the defect would the result have been the same?
- Is the outcome academic?
- If the outcome is academic is there a public interest in bringing such a claim?
- Is the claim premature?
- Is there an alternative remedy?
- Has the Claimant complied with the Pre-Action protocol?
- Has the Claim been brought promptly?
- Is the Defendant a public body susceptible to judicial review?
- Claimant’s duty of candour
- Ordinarily fresh evidence will not be admitted

### **Introduction**

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 by way of an application for judicial review. Over the last 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. In 2010, 13,335 applications for judicial review were issued, compared with 15,971 in 2009. The reduction reflects the 4,000 s.103A reconsideration applications under the Nationality, Immigration and Asylum Act 2002 which have now been removed from the jurisdiction of the Administrative Court. 1,998 applications (12% of the total) were issued in the four regional centres (Birmingham, Cardiff, Leeds and Manchester) which were opened in April 2009.

3. Applications are determined more promptly in these regional centres. There is evidence of a back log of cases accumulating in London<sup>1</sup>. On 28 June, at the ACO User Group, Ouseley J, the Lead Judge, reported that there are currently over 700 renewed applications for permission to apply for judicial review which have yet to be given hearing dates. In order to deal with these cases and to prevent an even greater backlog accruing the Court will, from mid October 2011, allocate more sitting days to hear renewed applications. Applications will now be fixed by the Administrative Court Office (ACO) without seeking the views of the representatives. However, several weeks notice of the hearing date will be given. As the Court considers that adequate notice of hearings is being given, parties should be aware that requests for adjournment or alternative dates will rarely be acceded to. Letters notifying hearing dates in October and later will be sent out from July.

4. Applications for judicial review in the Administrative Court are governed by CPR 54. This is the judicial review procedure to which reference is made in s.31 Senior Courts Act (SCA) 1981. Note that it is also now possible in many cases for claims for judicial review to be transferred to, and sometimes to be commenced in, the Upper Tribunal (see s.31A SCA 1981). Most “age dispute cases” are now being transferred to Upper Tribunal (Immigration and Asylum Chamber). The Supreme Court has recently given judgment as to the circumstances in which a decision of the Upper tribunal may be subject to judicial review (see *R (Cart) v The Upper Tribunal* [2011] UKSC 28; [2011] 3 WLR 107 – particularly with regard to the refusal of permission to appeal).

5. The Lord Chief Justice has issued *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 WLR 327 pursuant to [s.15\(1\) of the Tribunals](#),

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<sup>1</sup> On 19 December 2007, the Public Law Project sent a pre-action protocol letter to the Lord Chancellor complaining that the then delays breached the common law and A6 right to access of justice. As a result of this, additional Judges were appointed.

[Courts and Enforcement Act 2007](#). The Upper Tribunal now enjoys a judicial review jurisdiction over:

(a) any decision of the First-tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with s.5(1) Criminal Injuries Compensation Act 1995; and

(b) any decision of the First-tier Tribunal made under Tribunal Procedure Rules or [s.9](#) of the 2007 Act where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within [paragraph \(b\), \(c\), or \(f\) of s.11\(5\)](#) of the 2007 Act.

6. Judicial review procedure must be used where the Claimant is seeking one of the prerogative orders, namely a mandatory order, prohibiting order or quashing order (formerly known as mandamus, prohibition and certiorari) (CPR 54.2). It may be used where the Claimant is seeking a declaration or injunction (CPR 54.3(1)). CPR 54.3(2) provides that 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.

7. CPR Part 54 is a modified form of the CPR 8 (see CPR 54.1(e)). Thus CPR Part 54 should be read CPR 1 (overriding objective), CPR 2 (application/interpretation of rules), and CPR 3 (case management powers). Note that CPR 3.1(2)(a) is the provision permitting the Administrative Court to extend the 3 month time limit.

8. The most important provisions of CPR 54 are:

- Rules 4, 10-13 – The requirement for permission; the grant or refusal of permission, the right to renew the application for permission orally; and the prohibition on applications to set permission aside;
- Rule 5 – “promptly” and the three month time limit;
- Rules 6 and 7 – Contents and service of the claim form;
- Rules 8-9, 14 – Defendant’s acknowledgment of service, detailed

- response and evidence;
- Rule 15 – Claimant requires permission to rely on additional grounds;
- Rule 16 – Evidence;
- Rule 17 – Applications to intervene;
- Rule 18 – Power to decide application without a hearing where all parties agree;
- Rule 19 – Powers in respect of quashing orders;
- Rule 20 – Power to order claim to continue as if not brought by way of judicial review.

9. Three Practice Directions supplement CPR 54:

- CPR PD 54A – Judicial Review. Note Paragraphs 4.1 (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).
- CPR 54C – References by the Legal Services Commission;
- CPR 54D – Administrative Court (Venue).

10. In December 2009, May LJ (President of the Queen's Bench Division) consulted on proposals to amend the Practice Direction. At the ACO Users Group meeting on 28 June 2011, it was reported that these changes are still under review.

11. 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.

12. Useful material can be found at the Justice web-site<sup>2</sup>:

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<sup>2</sup> The Administrative Court index is to be found at [www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/index.htm)

- Administrative Court Guidance: Notes for guidance on applying for judicial review (April 2011)<sup>3</sup>;
- Administrative Court Officer Guidance: Regional Venues
- The Administrative Court Office Fees Table (from 4 April 2011)
- Judges Nominated to sit in the Administrative Court<sup>4</sup>;
- Topic Allocation – i.e. a useful list of the relevant lawyer to contact dependant upon the nature of the challenge<sup>5</sup>;
- The links for e-mailing Skeleton Arguments to the five Regional Admin Court centres

13. The following forms can be downloaded:

- [Form N461 - Judicial review claim form](#)
- [Form N462 - Judicial Review - acknowledgement of service](#)
- [Form N463 - Judicial review application for urgent consideration](#)
- [Form N464 - Application for directions as to venue for administration and determination](#)
- [Form N465- Response to application for directions as to venue for administration and determination](#)

Form 86B (Notice of Renewal) is not available on-line, but is sent out by the Administrative Court when permission to apply for judicial review is refused.

14. If in doubt about any procedural matter, contact the relevant ACO on the following numbers:

- Birmingham Civil Justice Centre – 0121 250 6319;
- Cardiff Civil Justice Centre – 029 2037 6460;
- Leeds Combined Court Centre – 0113 306 2578;
- Manchester Civil Justice Centre – 0161 240 5313;
- The Royal Courts of Justice in London – 020 7947 6655<sup>6</sup>.

<sup>3</sup> See [www.justice.gov.uk/downloads/guidance/courts-and-tribunals/courts/administrative-court/judicial-review.pdf](http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/courts/administrative-court/judicial-review.pdf)

<sup>4</sup> See [www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/judges-nominated-to-deal-with-the-admin.court-list.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/judges-nominated-to-deal-with-the-admin.court-list.htm)

<sup>5</sup> See [www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/guidance-documents.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/guidance-documents.htm)

<sup>6</sup> In April 2010, the ACO in London introduced a new automated phone system.

### **Alternative Remedies**

15. The Courts have 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. The leading case is the Court of Appeal decision in (*R (Cowl) v. Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803).

16. The cardinal rule is that judicial review should not be used where there is an alternative remedy. It is for the Claimant to establish that an alternative means of dispute resolution will not provide an effective remedy.

17. In *R (Ireneschild) v. LB Lambeth* [2006] EWHC 2354; (2006) 9 CCLR 686, a community care assessment was alleged to be defective in a number of respects. Lloyd Jones J accepted that as the case involved points of law, the complaints procedure was not appropriate (and further there had been considerable delay already in the assessment having only been produced post issue).

### **Public Funding**

18. Public funding for judicial review is provided by the Community Legal Service (CLS). There are a number of criteria which must be satisfied: the financial eligibility of the Claimant, the absence of alternative funding. There are also criteria specific to judicial review: Is judicial review available (i.e. is the decision susceptible to judicial review); the existence of administrative appeals or other procedures; prospects of success and cost benefit (i.e. whether costs are proportionate to likely benefit of proceedings) and slightly different criteria pre and post permission. Full details are set out in the Funding Code.

19. In an urgent situation, solicitors will be able to grant an emergency certificate for Full Representation under devolved powers. This will be limited to £1,500 unless a higher limit is specified and justified. It is normally inappropriate to grant a certificate under devolved powers until the protocol letter has been sent and any response has been considered.

20. If initial inquiries including taking instructions, drafting the protocol letter, and considering any response, are likely to amount to 6 hours or more of work, then solicitors should consider applying for Investigate Help. If necessary, an emergency certificate for Investigate Help can be granted under devolved powers. Devolved powers can also be used to amend the certificate to cover Full Representation during the emergency stage.

21. Legal aid for judicial review will remain within scope under the proposed Legal Aid reforms. However, the following will be taken out of scope: (i) non-detention immigration cases; and (ii) public interest claims with no direct benefit to the Claimant, save for environmental claims (i.e. to reinstate the changes to the Funding Code which were declared unlawful in *R (Evans) v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1146(Admin); [2011] 3 All ER 594).

22. The government have confirmed that the telephone helpline will be the mandatory single gateway for applying for legal aid. However, initially this will only relate to four initial areas of law, namely community care, discrimination claims under the Equality Act 2010, special educational need cases and debt.

### **Pre-Action Correspondence**

23. The Objective of the Pre-Action Judicial Review Protocol<sup>7</sup> is to focus the attention of the parties on the desirability of resolving any litigation without recourse to litigation. The parties should consider whether any other form of alternative dispute resolution is more suitable. Any claim for judicial review must indicate whether or not the protocol has been followed. Any failure to do so must be justified. It will be relevant to case management directions and to costs (see CPR 44.3(5)). On 26 July 2011, the Court of Appeal emphasised the importance of the protocol to costs in *R (Bahta and others) v SSHD* (see paras 95 and 97 below).

24. A protocol letter will not be appropriate where the Defendant does not have the legal power to change their decision – namely a tribunal. A letter may not be

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<sup>7</sup> available at [www.justice.gov.uk/civil/procrules\\_fin/contents/protocols/prot\\_jrv.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm)

appropriate where urgent interim relief is required. However, a Claimant should alert the Defendant to the substance of the claim, even if only by sending a copy of the draft claim form.

25. The protocol sets out a code of good practice. A well drafted protocol letter may achieve an effective outcome for the client. The protocol includes a template for the letter before claim. It is always best to follow this format. Remember:

- (i) identify clearly the decision or decisions which are being challenged;
- (ii) summarise the issues in dispute, namely why it is contended that the decision is unlawful;
- (iii) set out any information or documents that are sought.
- (iv) specify the timescale within which the Defendant should respond. This is normally 14 days.
- (v) copy the letter to the Defendant's legal department. The client department may concede if advised to do so by their legal department.

26. The consequences of sending a Protocol Letter:

- (i) It will not stop the implementation of the disputed decision – unless the Defendant agrees to do this pending the determination of the claim
- (ii) It does not affect the 3 month time limit for bringing the claim.
- (iii) It will not be appropriate if the situation is urgent – for example if a local housing authority is refusing to accommodate a homeless applicant. However, even in this situation, it will normally be appropriate to send the Defendant a copy of the draft claim form. It will concentrate the mind of the Defendant magnificently.
- (iv) The Protocol does impose a duty on the public authority to respond. There may be cost penalties if they fail to do so. Their response will be highly relevant if a Claimant is seeking interim relief.

27. The Defendant should 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; where the claim is contested, either in whole or in part, the response should similarly set this out. The response should also:

- (i) 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.
- (ii) give a more detailed explanation of the original decision.
- (iii) address any points in dispute.
- (iv) enclose any requested documentation.
- (v) state whether any application for interim relief will be opposed.

### **Interested Parties**

28. An interested party is someone who is likely to be directly affected by the claim for judicial review (CPR 54.1). Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties (CPR PD 54A – para 5). Where a declaration of incompatibility under s.4 HRA is sought, the relevant Minister of the Crown must be named and given appropriate notice of the claim (s.5 HRA).

29. An interested party should be named in the protocol letter and they should be sent a copy. If in doubt, it is always open to the Claimant to send a copy of the protocol letter to a potential interested party. This provides them with the option as to whether they wish to be named. The views of the Defendant can also be sought.

30. An interested party must also be named in the Claim Form (CPR 54.6). Once served, it is for the interested party to decide whether or not they wish to play any role in the proceedings. Their role may be limited. They may apply to make written representations.

### **Issuing the Claim**

#### **The Claim Form**

31. Applications for permission to apply for judicial review must be made by claim form using Form N461. The requirements are set out at CPR PD 54.5. The claim form must include or be accompanied by -

- a detailed statement of the Claimant's grounds for bringing the claim for judicial review;
- a statement of the facts relied on;
- any application to extend the time limit for filing the claim form; and
- any application for directions.

32. If the Claimant is seeking any remedy under the HRA, the claim form must specify that fact and give precise details of the Convention right alleged to have been infringed and specify the relief sought.

33. The claim form must also be accompanied by

- any written evidence in support of the claim or application to extend time. The Claim Form is attested by a statement of truth. Therefore additional evidence may not be necessary.
- a copy of any decision or order that you are seeking to have quashed.
- where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision;
- copies of any documents upon which you propose to rely;
- copies of any relevant statutory material;
- a list of essential documents for advance reading by the court. This should have page references to the passages relied upon. Where only part of a page needs to be read, that part should be indicated, by side-lining or in some other way, but not by highlighting. The critical documents are likely to be the decision under challenge and the pre-action correspondence.

34. The Bundle must be indexed and paginated. The list of essential reading should be clearly identified. The Claimant must file the original claim form, together with a copy for the court's use, and a paginated and indexed bundle containing the relevant documents. If the case is of a criminal nature then the Court will require a further copy bundle.

35. The Claimant must also lodge sufficient additional copies of the claim form for the court to seal them so that the Claimant can serve them on the Defendant and any interested parties. The sealed copies will be returned to the Claimant for service.

36. The ACO warn that they will not accept applications that do not comply with the requirements of CPR 54 and the Practice Directions 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.

37. A fee of £60.00 is payable when you lodge your application for permission to apply for Judicial Review. A further £215.00 is payable if you wish to pursue the claim after permission is granted (Civil Proceedings Fees (Amendment) Order 2011).

38. A Claimant must ensure that their claim is 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. Permission to amend must be sought, an application notice issued and the appropriate fee paid (£80).

On whom should proceedings be served?

39. 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 (CPR 54.7). The Administrative Court Office will not serve your claim on the Defendant or any interested party. They 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.

40. The Claimant must lodge a Certificate of Service in Form N215 in the ACO within 7 days of serving the Defendant and other interested parties

#### The Acknowledgement of Service

41. Any person who has been served with the claim form and who wishes to take part in the judicial review should file an acknowledgment of service (Form N462) in the ACO, within 21 days of the proceedings being served upon him (CPR 54.8).

42. The acknowledgement of service must set out the summary of grounds for contesting the claim and the name and address of any person considered to be an interested party (who has not previously been identified and served as an interested party). The acknowledgement of service must be served upon the Claimant and the interested parties no later than 7 days after it is filed with the court.

43. Failure to file an acknowledgement of service renders it necessary for the party concerned to obtain the permission of the court to take part in any oral hearing of the application for permission (CPR 54.9).

44. A Claimant is expected to fully reconsider their claim in the context of the reply filed by the Defendant. Thus in *R v Liverpool City Justices ex p Price* [1998] COD 453, a legally aided challenge was hopeless and was clear as such once the Defendant’s evidence had been filed. The judgment in that case was sent to taxing authorities for the purposes of restricting costs.

#### Response to the Defendant’s Summary Grounds

45. Although CPR 54 makes no provision for this, there may be exceptional circumstances where a Claimant should file a response to the Defendant's Summary Grounds. If the Claimant intends to do this, the ACO should be informed and asked to delay the process of placing the papers before the Judge. This step may be appropriate where the Defendant has raised factual or legal issues which have not been address in the Claim Form. In complex cases, it may be appropriate to identify the issues in dispute, the respective position of the parties, and explain why there is a clear arguable case.

46. If the decision-making process has developed, it may be necessary to amend the Claim Form. If the Defendant suggests that the application has become academic, it is important to address this point. Otherwise permission may be refused. If the Defendant have agreed to revisit their decision, it may be appropriate to stay the proceedings pending that redetermination. Alternatively, it may be appropriate to withdraw the application, but invite the judge to award costs on the ground that the concession should have been made at the protocol stage (see paras 96-7 below).

### **Delays and Extensions of Time**

#### **Delay**

47. 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 a claim. The Court has power to extend the 3 month time limit, but will only do so if there are good reasons for so doing (see 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.

48. Section 31(6) of the SCA 1981 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 (a) leave for the making of the application; or (b) any relief sought on the

application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”.

49. Accordingly, even where the application has been made within the three-month limit, permission or relief can still be refused if the application was not made promptly. 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).

50. 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).

#### When to argue delay

51. Delay may be relevant at both the permission stage and at the substantive hearing. There are two leading cases in which the courts have considered the stages at which delay may be relevant. In *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, Lord Slynn of Hadley (at p.341) noted that at the permission stage, the judge may either grant or refuse permission to apply for judicial review depending upon whether good reason for extending time has been established. Alternatively the issue of delay may be deferred to the substantive hearing. The good reason for any delay is generally to be seen from the standpoint of the Claimant. If permission is given, then unless set aside, it does not fall to be reopened at the substantive hearing on the basis that there is no ground for extending time. The Court should normally consider the issues of hardship, prejudice or detriment to good administration at the substantive hearing. These would only be relevant to the issue of relief.

52. In *R v Lichfield DC, ex p Lichfield Securities Ltd* [2001] EWCA Civ 304; (2001) 3 LGLR 35, Sedley LJ (at [34]) considered this issue in the context of the new procedural regime, and held that, regardless of whether it involves repetition of the arguments about promptness canvassed at the permission stage, s.31(6)(b) SCA 1981 places the issue of undue delay on the agenda at the substantive hearing. However, as a matter of practical case management, the normal course in such cases would generally be that the Defendant should only be permitted to reconvass by way of undue delay, an issue of promptness which has been decided at the permission stage in the Claimant's favour: (i) if the judge hearing the initial application has expressly so indicated, (ii) if new and relevant material is introduced on the substantive hearing, (iii) if, exceptionally, the issues as they have developed at the full hearing put a different aspect on the question of promptness, or (iv) if the first judge has plainly overlooked some relevant matter or otherwise reached a decision per incuriam.

### **Emergency and Out of Hours Applications for Interim Remedies**

#### The Duty Judge

53. Interim relief can be very important in judicial review. The Administrative Court has efficient procedures for determining such applications on the papers. Applications outside London must now be made to judge designated to deal with such applications in the relevant District Registry (CPR PD 54D – at para 4). However, if the procedures are abused, a solicitor may face a wasted costs order.

54. 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.

55. The ACO office hours are 10.00 – 16.30. There is a duty judge who determines the urgent paper applications. S/he sits until 17.00.

56. In an emergency, it should be possible for the Administrative Court to place any application issued before 14.30 before a judge on the same day. If the application is issued between 14.30 and 16.30, it becomes increasingly unlikely that the application will be determined that day. You must liaise with the Issue Section of the Administrative Court or the relevant District Registry.

#### The Out of Hours High Court Judge

57. 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 ACO.

58. 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 (there is no regional out of hours judge). 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.

59. The Judge will know nothing about the case. He may be a QBD judge who is not nominated to sit in the Administrative Court and who is unfamiliar with the jurisdiction.

60. It will help if you have a clear note in front of you setting out what order you want and why you say that you are entitled to it. You must make full disclosure of all matters which you know or ought to have known.

61. You should have a draft of the order sought from the judge. You will normally need to fax or e-mail this to the judge.

62. Next day, a copy of the order signed by the judge must be filed in the Administrative Court or the relevant District Registry. If proceedings have not already been issued, you will be required to give an undertaking to issue the proceedings next day.

63. You should keep a careful record of the telephone hearing. The judge may request you to provide him/her with a copy of your note.

64. The Claimant's solicitor must ensure that the Defendant is able to contact him/her out of hours.

65. *R (Lawer) v Restormel BC* [2007] EWHC 2299 (Admin); [2008] HLR 20 provides a cautionary tale where the correct procedures were not followed:

(i) This was a case where the Claimant's lawyers sought the provision of emergency accommodation for a homeless applicant who had been found to be intentionally homeless.

(ii) An appropriate pre-action letter had not been sent which should have been sent to the housing department and copied to the legal department.

(iii) The Claimant's solicitor had not made arrangements so that the Defendant could contact her out of hours.

(iv) The Claim Form had not explained why the pre-action protocol had not been followed.

(v) Counsel did not make full disclosure to the judge.

(vi) Munby J was satisfied that this application which was made at 6pm on a Friday evening should not have been made. He noted that cases did not become urgent "because of unnecessary, inappropriate and usually unexplained delay"

(vii) The judge discharged the order that had been made by his colleague.

The lawyers involved faced the real risk of wasted costs orders.

Collins J gave guidance on the appropriate steps to take when an authority fail to comply with an order in *R (JM) v Croydon LBC* [2009] EWHC 2474 (Admin); [2010] 1 WLR 1658. An application should be made to the court for a finding of contempt and, if necessary, a further mandatory order.

### **Urgency**

66. In cases of urgency, the claim form should be accompanied by a Form N463 specifying the date by which the application should be heard. If a Claimant merely wishes to abridge time, an application should be issued to be considered by a Master.

67. 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 Lewisham LBC [2005] EWHC 354 (Admin)*). Section 2(b) of the template for Form N463 is therefore extremely misleading

68. 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. Recently, Judges have recently become more reluctant to order “rolled up” hearings. Directions should therefore be sought for an expedited hearing, i.e. (i) abridgement of time within which a Defendant should file their acknowledgment of service; (ii) the papers to be put before a judge for permission to be determined upon the Defendant filing their Acknowledgement of Service or on the day after that by which the Defendant should have done so; (iii) a hearing of the substantive hearing by a specified date. Always be specific with dates (i.e. 17 October 2011); otherwise the judge is likely to give the Defendant 14 days from the date on which the order is made.

### **The Permission Stage, including oral, renewed and ‘rolled up’ applications**

#### **The Initial Decision**

69. Applications for permission to proceed with the claim for judicial review are considered by a single judge on the papers. The purpose of this procedure is to ensure that applications may be dealt with speedily and without unnecessary expense.

70. The papers will be forwarded to the judge by the Administrative Court Office upon receipt of the Acknowledgement of Service or at the expiry of the time limit for lodging such acknowledgement – whichever is earlier. If the time expires and an early hearing is sought, it is good practice to chase up the ACO and ask them to put the papers before the single judge at the earliest opportunity.

71. The judge's decision and the reasons for it (Form JRJ) will be served upon the Claimant, the Defendant and any other person served with the claim form. It is best practice for judges to identify the documents which were considered. There is always a danger that any documents outside the claimant's bundle and the defendant's Acknowledgement of Service may not have been placed with the

papers before the judge. This may be highly relevant to any renewed application for permission.

72. If the judge grants permission and the Claimant wishes to pursue the claim, s/he must lodge a further fee of £215.00 with the ACO within 7 days of service of the judge's decision. If the additional fee is not lodged, the file will be closed.

#### Renewing the Application for permission

73. If permission is refused, or is granted subject to conditions or on certain grounds only, the Claimant may request a reconsideration of that decision at an oral hearing.

74. Request for an oral hearing must be made on the Notice of Renewal (Form 86B), a copy of which will be sent to the Claimant at the same time as the judge's decision. It must be filed within 7 days after service of the notification of the judge's decision (CPR 54.12(3)). Grounds for renewing the application should be specified. These should address the reasons given by the judge for refusing permission.

75. An oral hearing will then be arranged at which the renewed permission application will be determined. The Court will normally allocate 30 minutes for the hearing. The Administrative Court must be notified if this will not be sufficient. A Skeleton Argument should always be served in support of the application addressing the issue as to why the Judge was wrong to grant permission.

76. In a civil matter, if permission is then refused at the subsequent oral renewal then, the Claimant can appeal to the Court of Appeal Civil Division with the permission of the Court of Appeal (CPR 52.15). The application to the Court of Appeal must be made within 7 days of the refusal of permission. On such an application, the Court of Appeal may (and usually will), give permission to apply for judicial review, instead of giving permission to appeal. In such circumstances, the case will proceed in the Administrative Court unless the Court of Appeal orders otherwise. In a criminal matter, there is no further remedy.

### Setting aside permission

77. The strict procedure prior to the permission hearing – i.e. the requirement to file and serve materials before the permission hearing, including basic grounds and arguments for both sides, and the right of the Defendant to put her/his case in an acknowledgment of service or at an oral hearing – renders otiose a power to set aside a grant of permission. CPR 54.13 accordingly expressly prohibits the Claimant, Defendant or any interested party from making an application to set aside.

78. The court retains an inherent jurisdiction to set-aside permission. This may be exercised where a Judge has granted permission without the Defendant having been provided with the opportunity to file their Acknowledgment of service (see *R (Webb) v Bristol CC [2001] EWHC Admin 696*).

### What happens when permission is granted?

79. On granting permission the court may make case management directions for the progression of the case (CPR 54.10(1)).

80. A party upon whom a claim form has been served and who wishes to contest the claim (or support it on additional grounds) must, within 35 days of service of the order granting permission, file and serve on the Court and all of the other parties:

- (i) detailed grounds for contesting the claim or supporting it on additional grounds and
- (ii) any written evidence relied upon.

### **The Substantive Claim**

#### Who can be heard?

81. 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 54.17). Such an application must be made promptly.

### Skeleton Arguments/Bundles

82. The Claimant must file and serve a skeleton argument not less than 21 working days before the hearing or warned date (CPR PD 54A – para 15.1). The Claimant must file a paginated and indexed bundle of all relevant documents required for the hearing when the Skeleton is filed (PD – para 16). In practice, the trial bundle needs to be completed in advance so any Chronology or Skeleton can be cross-referenced to the relevant documents.

83. Skeleton arguments may now be filed by e-mail, the addresses for which can be found at [www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/index.htm). An automated confirmation of receipt will be sent.

84. 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 (PD – para 15(2)).

85. Paragraph 15.3 of the Practice Direction prescribes the matters that must be contained in the skeleton arguments. These include: a time estimate for the completed hearing (including delivery of judgement); a list of issues; a list of legal points to be taken; copies of authorities; a chronology (with page references to the Bundle of Documents); a list of persons referred to (if appropriate); and a list of essential reading and a time estimate for that reading.

### Compromising the Claim before the Hearing

86. The Administrative Court has issued a *Practice Direction (Administrative Court: Uncontested Proceedings)* [2008] 1 WLR 1377 detailing the process to be followed where the parties are in agreement as to the terms on which proceedings in the Administrative Court can be disposed of and where an order

of the court is required to put these into effect. The parties should lodge two copies of the draft consent order, signed by the parties. A fee of £45 is payable.

87. If the Order provides that the proceedings are to be withdrawn (on terms which may include undertakings), the order may be approved by a Master. If a quashing order, or other public law remedy is required, the Order must be approved by a Judge. In these circumstances, a short statement should be provided justifying the proposed agreed order, with reference to statutes and authorities as appropriate (see PD para 17). The approval of a Judge is required if the costs are unresolved and these are to be dealt with by written representations. However, “when relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol” (see *R (Bahta and others) v SSHD* and para 96 below).

88. It is therefore important to consider carefully how any Consent Order should be framed. There may be some delay if the matter must be put before a Judge. Can it be framed in such a way that the approval of a judge is not required? If the decision is being withdrawn, on what basis is the Defendant conceding that it is unlawful? Are there any findings of fact which should be recorded in the recital to the Order? If the matter is to be reconsidered by the authority, should a timescale be specified? Are there any procedural safeguards relating to the authority’s reconsideration of the matter which should be included in the recital to the Order?

### **Costs**

89. 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 - see CPR 44.3(2)). A legally aided client will have their normal protection in costs provided

by s.11 of the Access to Justice Act 1999. 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 Access to Justice Act 1999).

90. An *inter partes* costs order makes a substantial difference to the costs payable to solicitors. Publicly funded solicitors can only survive financially if they are properly remunerated in respect of the successful claims which they bring. 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. For Solicitors, the standard legal aid rate is £79.50 per hour (with the possibility of a percentage uplift in a complex case). These rates have not increased since 1994. Even for a junior London based solicitor, the rate which can be claimed on an *inter partes* order is more than double this rate, and for a moderately senior solicitor the rate will be considerably higher than this. The guideline rate, as at 2010, for a solicitor under 5 years call, based in outer London, was £165 per hour. The guideline rate for a solicitor between 5 and 10 years call, based in central London, was £242 per hour, and for a solicitor over 10 years call the rate is higher again (HMCTS guideline rates 2010). The discrepancy is the more important in Very High Cost Cases where both solicitors and counsel contract with the CLS to be remunerated at “risk rates”.

90A. As a result of the Community Legal Services (Funding) (Amendment No.2) Order 2011 (SI 2011 No.2066) which applies to certificates issued after 3 October 2011, all remuneration for lawyers funded by the LSC is reduced by 10% and hourly rates have now been fixed for barristers (High Court Rates: £135 for juniors; £180 for QCs; £112.50 for led juniors).

91. Where permission to apply for judicial review is refused, and where the Defendant has complied with the pre-action protocol, the Defendant will usually be able to recover the costs of filing the Acknowledgement of Service, but generally cannot recover the costs of attending any oral permission hearing unless there are exceptional

circumstances (*R (Mount Cook Land) v Westminster City Council* [2003] EWCA Civ 1346; [2004] C.P.Rep 12).

92. Where the case is settled after issue, but before permission, Taylor J has suggested that a Court should only order costs against a Defendant in a “clear case” (see *R v Kensington and Chelsea RBC, ex p Ghebrejiogis* [1994] 27 HLR 602). The failure of a Defendant to compromise a claim at the Pre-Action Protocol (PAP) stage may now be highly relevant to establishing such a clear case.

93. Where a case is settled before the substantive hearing, the following principles were established by Scott Baker J in *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258:

(i) The court has the power to make a costs order where the substantive proceedings have been resolved without a trial but the parties have not agreed about costs;

(ii) It will ordinarily be irrelevant that the Claimant is legally-aided;

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and additional costs;

(iv) At the end of each 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 would, in different degrees, be less clear. How far the court would 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.

(v) In the absence of a good reason to make any other order, the fall-back is to make no order for costs.

(vi) The court should take care that it does not discourage parties from settling JR proceedings for example by a local authority making a concession at an early stage.

94. This case was approved by the Court of Appeal in *R (Scott) v LB Hackney* [2008] EWCA Civ 217. Hallett LJ (at [51]) urged judges:

“to bear in mind that, when an application for costs is made, a reasonable and proportionate attempt must be made to analyse the situation and determine whether an order for costs is appropriate. 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.”

95. In *R (Bahta and others) v SSHD* [2011] EWCA Civ 895, the Court of Appeal revisited *Boxall* in the light of the recommendation by Sir Rupert Jackson that in any judicial review case where the Claimant has complied with the protocol, if the Defendant settles the claim after (rather than before) issue by conceding any material part of the relief sought, then the normal order should be that the Defendant pays the Claimant’s costs. Pill LJ endorsed the importance of the protocol at [64]:

“..... what needs to be underlined is the starting point in the CPR that a successful claimant is entitled to his costs and the now recognised importance of complying with Pre-Action Protocols. These are intended to prevent litigation and facilitate and encourage parties to settle proceedings, including judicial review proceedings, if at all possible. That should be the stage at which the concessions contemplated in *Boxall* principle (vi) are normally made. It would be a distortion of the procedure for awarding costs if a defendant who has not complied with a Pre-Action Protocol can invoke *Boxall* principle (vi) in his favour when making a concession which should have been made at an earlier stage. If concessions are due, public authorities should not require the incentive contemplated by principle (vi) to make them.”

96. The Court of Appeal (Pill LJ, Sullivan LJ and Hedley J) emphasised the following:

- (i) The merits of the case stand to be assessed at the date when the issue for costs is determined. This may be highly relevant when the law has been uncertain (see [58] and [75]).
- (ii) A Court is unlikely to be impressed by an argument that a Defendant has conceded a case for “purely practical reasons” (see [63]).
- (iv) where relief is granted by consent, the statement setting out the basis upon which the order is justified, will be highly relevant to the issue of costs (see [69] and para 87 above).
- (iii) Pill LJ endorsed the warning in *Scott* that a judge should not be tempted too readily to adopt a fallback position of no order as to costs.

97. Hedley J summarised the position in these terms (at [76]):

“It is clear to me that *Boxall* is a well-established guide in the area of judicial review but like all guides it must be applied both to the particular facts of the instant case and it must take account of procedural developments like PAPs. Compliance with PAP, whilst not determinative in itself, must now be a highly relevant factor in the exercise of the judicial discretion as to costs.”

98. Protected Costs Orders: In certain cases, it is possible for a Claimant to apply for a protected costs order where the application for judicial review raises a point of general public importance, the Claimant has no financial interest in the outcome of the case and it is fair and just to make such an order having regard to the financial resources of the Claimant and the Defendant. The principles are set out in the decision of *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600.

### **Appeals**

99. In substantive applications, permission to appeal should normally be sought from the judge who determined the application for judicial review. If an application for permission to appeal is not made at the conclusion of the case, the application for permission must be made to the Court of Appeal within 21 days (CPR 52.4(2)(b)).

### **Outcomes and Obtaining Effective Remedies**

100. In June 2009, the Public Law Project published “The Dynamics of Judicial Review: The Resolution of public law challenges before final hearing” (Bondy and Sunkin). Their research identified the following trends:

(i) Most claims for judicial review are settled and most settlements satisfy the claims made in the judicial review. A growing proportion of claims are settling before the permission stage. This evidences the success of the pre-action protocol. The researchers estimated that 60% of judicial review claims are resolved between solicitors before the commencement of proceedings.

(ii) However, the research found that many cases settled later than they could, and should have done. The researchers highlighted the need to involve expert lawyers at an early stage.

(iii) In recent years, there has also been a significant decline in the percentage of cases in which permission is granted. Between 1996 and 2006, this declined from 58% to 22%<sup>8</sup>. This is only partly explained by the impact of immigration and asylum claims<sup>9</sup>. The researchers concluded that it is now more difficult for Claimants to persuade judges that their cases are sufficiently arguable. However, despite this diminishing grant rate, overall Claimants were more likely to secure a successful outcome.

(iv) The research found that there were considerable differences in the percentage of cases for which different judges granted permission to apply for judicial review (varying from 11 – 46% in a survey of civil non-immigration/asylum cases)<sup>10</sup>. The researchers identified judicial inconsistency as a matter for concern. They suggested that such consistency may become the more (?) important with the Regionalisation of the Administrative Court.

(v) The right to make an oral application for permission, where this had been refused on the papers was an important procedural safeguard given these judicial inconsistencies. The researchers queried why less than 50% of Claimants who were refused permission on the papers failed to renew their applications for permission to apply for judicial review.

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<sup>8</sup> See Table 4.1 at p.50 of “The Dynamics of Judicial Review: The Resolution of public law challenges before final hearing” (Bondy and Sunkin) published by the Public Law Project (June 2009).

<sup>9</sup> Between 1996 and 2006, the grant rate in civil claims excluding immigration and asylum declined from 71% to 35% (Table 4.3). The grant rate in immigration cases declined from 37% to 14%.

<sup>10</sup> Table 4.6 at p.68).

(vi) Where permission to apply for judicial review was granted, the majority of cases settled prior to the final hearing<sup>11</sup>. The researchers found that the granting of permission strengthened the hands of the Claimant's lawyers in negotiating a successful outcome.

**Robert Latham**  
**Alex Durance**

Housing and Social Welfare Team,  
2011  
Doughty Street Chambers  
54 Doughty Street  
London WC1N 2 LS  
020-7404 1313  
[r.latham@doughtystreet.co.uk](mailto:r.latham@doughtystreet.co.uk)  
[r.durance@doughtystreet.co.uk](mailto:r.durance@doughtystreet.co.uk)

8 September

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<sup>11</sup> Table 3.3 at p.41

**In the High Court of Justice  
Queen's Bench Division  
Administrative Court  
Manchester Civil Justice Centre**

**CO Ref:**

Between:

The Queen on the application of  
JANET SMITH

Claimant

- and -

MANCHESTER CITY COUNCIL

Defendant

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**DRAFT ORDER  
(Interim Relief)**

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Before Mr Justice \_\_\_\_\_

Upon reading the Claim Form and the Bundle filed by the Claimant,

**IT IS ORDERED that:**

1. the Defendant do forthwith secure suitable accommodation for the occupation of the Claimant pending the hearing of this matter or further order;
2. there be liberty to the Defendant to apply to discharge this order on two days written notice to the Claimant;
3. the Defendant do file their acknowledgement of service and any evidence upon which they seek to rely by 3<sup>rd</sup> October (i.e 21 days of service of the Claim Form on the Defendant)).
4. the papers be placed before a Judge at the earliest opportunity after 3 October or service of the Acknowledgement of Service (whichever is the sooner) to consider permission and whether this order should be extended.

Signed: \_\_\_\_\_

Dated 12 September 2011

**In the High Court of Justice  
Queen's Bench Division  
Administrative Court  
Manchester Civil Justice Centre**

**CO Ref:**

Between:

The Queen on the application of  
JANET SMITH

Claimant

- and -

MANCHESTER CITY COUNCIL

Defendant

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**DRAFT ORDER  
(Urgency)**

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Before Mr Justice \_\_\_\_\_

Upon reading the Claim Form and the Bundle filed by the Claimant,

**IT IS ORDERED that:**

1. the Defendant do file their acknowledgement of service and any evidence upon which they seek to rely by 3<sup>rd</sup> October (i.e 21 days of service of the Claim Form on the Defendant).

Either:

2. the papers be placed before a Judge at the earliest opportunity after 3 October or service of the Acknowledgement of Service (whichever is the sooner) to consider permission and whether the hearing of this matter be expedited.

Or:

- 2A the matter be listed on the first open date 17 October with a time estimate of three hours for a rolled up hearing at which both the issues of permission and substantive relief be considered. The parties to file their Skeleton Arguments sequentially 5 and 3 days before the hearing.

Signed: \_\_\_\_\_

Dated 12 September 2011