



Judicial Review: out of hours applications 31 January 2022

Chair: Diane Astin, Deighton Pierce Glynn

Speakers: David Carter and Daniel Clarke, Doughty Street Chambers

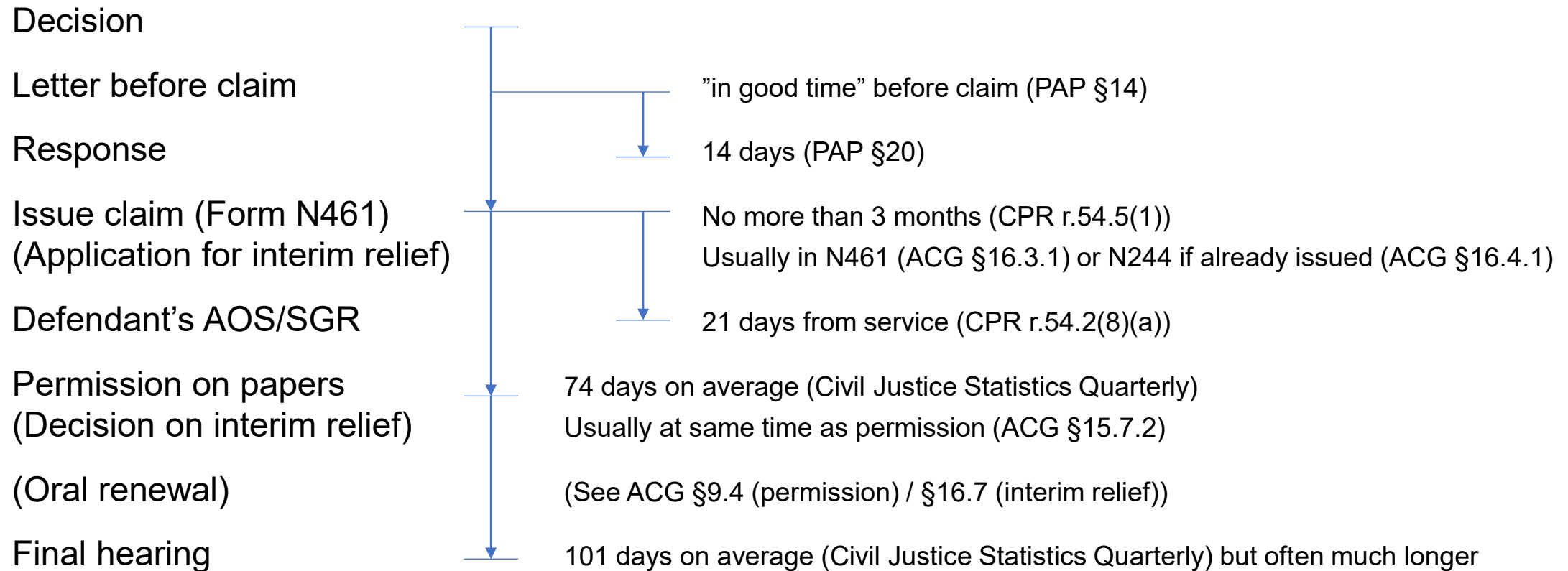
Key materials

- PD54B: Urgent applications and other applications for interim relief
 - Admin Court Judicial Review Guide 2021 (“ACG”) (esp. Ch. 15-17)
 - Form N461 (Jun 2021): Judicial review claim form
 - Form N463 (May 2021): Application for urgent consideration
 - Form QBD OHA (Sep 2019): Out of hours application
 - *Lawer v Restormel BC* [2007] EWHC 2299 (Admin)
 - *R (Hamid) v SSHD* [2012] EWHC 3070 (Admin)
 - *DVP v SSHD* [2021] EWHC 606 (Admin)
- n.b. Check for the latest versions

Part 1: When to make an application out of hours (or, how and why to avoid it)

Daniel Clarke

The usual JR timetable



The test for interim relief

JR cases generally

- *American Cyanamid/Medical Justice* (ACG §16.6.1)
 1. Real issue to be tried
 2. Balance of convenience, considering “any matters relevant to whether or not the interim relief sought should be granted, including any relevant public interests which either favour or oppose grant of the interim relief sought”
 - Note ACG §16.6.2: “*There is often a strong public interest in permitting a public authority’s decision to remain in force pending a final hearing of the application for judicial review, so the party applying for interim relief must make out a strong case for the grant of interim relief*”.

Application for order for accommodation by local authority

- *De Falco v Crawley LBC* [1980] 1 QB 460: “**strong prima facie case**”
- Possible argument that no separate test (see *Nolson v Stevenage BC* [2020] EWCA Civ 379 para 22) — but for settled for High Court purposes *R (Kaday) v SSHD* [2021] EWHC 3101 (Admin)

Dealing with cases urgently *without* going OOH

- Abridgement of PAP
- Agreement on limitation? (note r.54.5(2), but see PAP §1 & fn. 1)
- Agreement on interim relief
- Disapplication of PAP on grounds of urgency (see PAP §6)
- Expedited directions and decision on permission
- Urgent consideration of application for interim relief on the papers – can be within a matter of hours (and can even be before issue: see ACG §16.2) - not generally to QBD urgent applications judge (Court 37) (ACG §17.5.2)

Form N463: Request for urgent consideration

- Use of form N463:
 - Previous versions of the ACG suggested N463 needed “*where an expedited judicial review is required*”
 - Since made clear in *Re an application for judicial review (Practice Note)* [2021] EWHC 1895 (Admin) that only to be used where urgent interim relief needed or other proper reason to shorten 21-day period for AOS
 - Otherwise make application in N461 with covering letter asking for consideration within 21 days
- The form:
 1. Reasons for urgency
 2. Justification for request for urgent consideration (inc explanation of any delay)
 3. Request for consideration within 3 days (specify hours) or 3-6 days (specify days)
 4. Requests for consideration of interim relief, abridgement for AOS, permission decision, final hearing
 5. Grounds of application
 6. Draft of interim relief sought (with draft order)
 7. Details of service
 8. Statement of truth (now from client/solicitor, rather than advocate)
- Must complete the whole form and not simply cross-refer (*DVP* §16)
- Duty of candour particularly important (*DVP* §18)
- Where possible, the court will want to know D’s position (*DVP* §19)

Abuse of procedures for urgent consideration

- *R (Hamid) v SSHD* [2012] EWHC 3070 (Admin), per Sir John Thomas PQBD:

“7. ... If any firm fails to provide the information required on the [N463] and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated, and the efforts made to notify the defendant, the Court will require the attendance in open court of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case but the firm concerned.

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

- See ACG Ch 18 and cases cited there

Duty of candour

- ACG Ch 15:

15.2.1. A claimant is under a duty to make full disclosure to the Court of material facts and known impediments to the claim (e.g. alternative remedy, delay, adverse case law, statutory ouster, change of circumstances). This duty is a continuing one: it applies throughout the judicial review procedure.

15.2.2. The fact that a defendant has a right to file an Acknowledgment of Service and summary grounds of defence does not justify a claimant in taking a more relaxed view of the duty of candour.

15.2.3. The duty of candour applies to all claims and applications. However, it applies with particular force to applications made in circumstances where the other party or parties will not have the opportunity to respond (such as urgent applications). In this context, the claimant must:

15.2.3.1. disclose any fact (whether it supports or undermines the application) which it is material for the Court to know when dealing with the application, including (for example) any fact which is relevant to the degree of urgency;

15.2.3.2. make the court aware of the issues that are likely to arise and the possible difficulties in the application or underlying claim; and

15.2.3.3. present the information in a fair and even-handed manner, and in a way which is not designed simply to promote his own case.

Duties of a party seeking relief without notice

- *Lawer v Restormel BC* [2007] EWHC 2299 (Admin)

A party seeking relief without notice is under an obligation to make full and candid disclosure of the material facts known to him; he is also under a duty to make proper inquiries before making the application, so that there is a breach of the disclosure duty for non-disclosure of any additional material facts which he would have known if he had made proper inquiries before making the application; proper disclosure for this purpose means specifically identifying all relevant documents for the judge, taking him to the particular passages in the documents which are material and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read; that burden of full and frank disclosure is more onerous where a telephone application is being made to a judge who has none of the papers before him, nor it is removed by giving informal notice to the other party.

- *Interoute Ltd. v Fashion Gossip Ltd.* (1999, unreported):

“It is the duty of counsel and solicitors, when they make an ex parte application for relief ... to make in the course of the hearing a full note of the hearing, or, if this is not possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition to all parties affected by the grant of relief on that ex parte application.”

So when do you “go out of hours”?

- **Never, if you can possibly avoid it!**

- Or, rather:

*“If an urgent application needs to be made outside the sitting hours of the Administrative Court [10am to 4.30pm in London] and **the application cannot wait until the sitting hours recommence**” (ACG §16.7.4)*

“Legal representatives must consider very carefully whether an out of hours application really is required. They should make such an application only if the matter cannot wait until the next working day” (ACG §17.8.2)

- **Six questions:**

1. **Is the case strong enough (bearing in mind the relevant duties)?**
2. **What prejudice will be caused by waiting until 10am?**
 - Street homeless? For the first time? Particularly vulnerable? Children? Other risks?
3. **Can the prejudice be avoided *without* going OOH?**
 - Has IS spoken to friends/family directly about one more night? Other options?
4. **Can the prejudice be avoided by going OOH?**
 - What relief will you seek? If granted, how will it be put into effect tonight?
5. **What attempts have there been to notify the defendant?**
6. **What are the reasons for any delay?**

PART 2: MAKING AN APPLICATION OUT OF HOURS

David Carter

1. Funding

- No delegated functions on judicial review **except:**

- Part 7 HA 1996
- s21 NAA 1948
- s20 CA 1989
- s47(5) NHSCCA 1990
- s19(3) CA 2014

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017081/Table of Delegated Authorities Procedure Regulations September 2021 Update.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017081/Table_of_Delegated_Authorities_Procedure_Regulations_September_2021_Update.pdf))

- Civil Legal Aid (Remuneration) Regulations 2013, reg. 5A:

- If application for permission is issued and court refuses permission, LAA cannot pay for making of the application
- Does not include:
 - Cases where claim not issued
 - Work other than making of the application
 - Application for interim relief
 - Cases where court neither grants nor refuses permission, decision withdrawn, court orders oral permission/rolled-up hearing

2. Before the application

1. Carefully consider the 6 questions set out previously
2. Speak to relevant friends, family etc ***directly***
3. Speak to counsel ***early***
 1. Advice on merits
 2. Deadlines
 3. Further investigations
 4. Division of tasks for preparing to issue
4. Make sure you are able to contact (out of hours):
 1. The client
 2. The defendant
 3. Counsel (including for instructions during the hearing)
5. Ensure counsel has authorisation to give undertaking on issue and fee

3. The bundle

- PD54B §§1.3, 1.7:

1.3 The applicant must prepare an indexed and paginated bundle (“the application bundle”) which shall contain the Form N463 and any other material required by this Practice Direction to be provided as part of the application. The bundle should include the pre-action communication concerning the claim for judicial review, and all communication with the defendant concerning the urgent application. An electronic version of the application bundle shall also be prepared in accordance with the Guidance on the Administrative Court website. The application bundle shall be filed at the same time as the Form N463.

...

1.7 The applicant must serve the Form N463 and the application bundle on the defendant and any interested party either (a) before the application is filed with the court; or if that is not possible (b) when the application is filed with the court. The applicant must advise the defendant and any interested party of the nature of the application and that they may make representations.

4. After the hearing

That evening:

1. Contact client (if not present)
2. Contact Defendant, providing copy of order if available
3. Liaise with both to ensure order put into effect

Next day:

1. File claim, pay fee etc. in accordance with undertaking
2. Provide note of hearing to Defendant
3. Consider early offer of settlement?



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