

Judicial Review Remedies

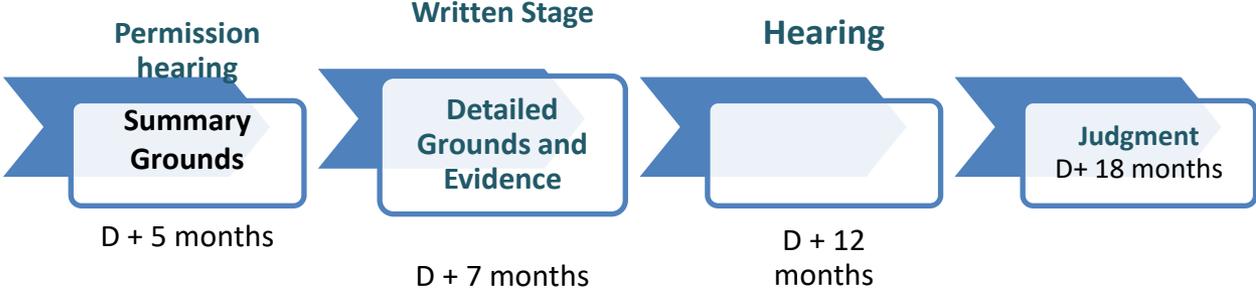


**Whitepaper Conference
29 June 2022**

**Anneli Howard QC
Barrister
Monckton Chambers**

Judicial Review Timeline

Administrative Court
JR in Specialist Tribunals (CAT)
“Joint Hats” (TCC)



Classic JR Remedies

- Quashing Order
- Mandatory Order
- Prohibiting Order
- Stay or Injunction
- Declaration -
 - Just and convenience test - Section 31(2) Senior Courts Act 1981
 - Advisory declaration where public interest
 - R (Miller and Santos) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5 (Miller 1)
 - R (Miller) v The Prime Minister, Cherry and others v Advocate General for Scotland [2019] UKSC 41 (Miller 2)
 - Wightman v SSEU [2019]
- Damages
 - R Quark Fishing Ltd v SS Foreign and Commonwealth Affairs [2005] UKHL 57
 - Section 31(4) Senior Courts Act 1981

Availability of Remedies

- “Last Resort”:
 - Need to consider ADR
 - Alternative remedies e.g. Appeal; Ombudsman or administrative complaint/process
 - Is there an alternative remedy that is “equally convenient, effective and expeditious”?
Mylan v MHRA:
- Discretionary Remedies :
 - Not granted as of right
 - Where just and convenient – s.31(2) Senior Court Act 1981
 - 2015 statutory test: is the outcome highly likely to have been substantially the same if the conduct complained of had not occurred?
 - If so, then the court must refuse to grant relief unless there is exceptional public interest to the contrary.

NSD Test

- “No Substantial Difference”:

s.31 of the Senior Courts Act 1981:

(2A) The High Court—

- *(a) must refuse to grant relief on an application for judicial review, and*
- *(b) may not make an award under subsection (4) on such an application,*

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

- **R (Good Law Project) v Secretary of State for Health and Social Care [2021] EWHC 346**

- Breach of equal treatment and transparency
- However, PPE orders for high volumes and such urgent demand that it was highly likely that the contracts would have been awarded even if they had not been allocated to the High Priority VIP lane.
- CA refused permission to appeal as considered in evidence and submissions

Judicial Review and Courts Act 2022

- MOJ Consultation on JR Reform – July 2020
- Independent Review of Administrative Law – March 2021
- Royal Assent 28 April 2022 – only applies to claims after entry into force

Introduces new s.29A Senior Courts Act 1981:

- Suspended quashing orders (SQOs)
- Prospective quashing orders (PQOs)
- Conditional quashing orders (CQOs)

“If a quashing order includes [suspension], the impugned act is (subject to any conditions under subsection (2)) upheld until the quashing takes effect.

Where (and to the extent that) an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect.”

IRAL did not recommend other reform proposals such as standing, candour, justiciability or statutory ouster clauses

Public v Private Remedies

Private Action CPR Part 7 or Part 8

- Declaratory relief
- Damages
- Injunction
- Statutory remedies
 - Regulatory frameworks
 - S.29 FRA 2020 (TCA)
 - S.70 SCA 2022 (recovery of subsidy or clawback)
 - Procurement remedies
- NB Attempts to have hybrid public law and private remedies and whether abuse of process

Judicial review

- Discretionary relief
- Last resort
- Range:
 - Quashing Order
 - Mandatory Order
 - Prohibiting Order
 - Declaration
 - Injunction
 - Damages

Public v private law

- “The appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system” (*O’Reilly v Mackman* [1983] 2 AC 237, HL)
- “English law, with that lack of a clear distinction between public and private law” (*R (Alconbury Developments)* [2001] UKHL 23)
- Judicial review:
 - Must be used in some cases: s 31(1) Senior Courts Act 1981; Rule 54.2 CPR
 - May be used in some cases: s 31(2) Senior Courts Act 1981; Rule 54.3 CPR
- Use of the wrong procedure may constitute an abuse of process in some cases (*O’Reilly v Mackman*)

Stagecoach v SoS for Transport

[2020] EWHC 1568 (TCC)

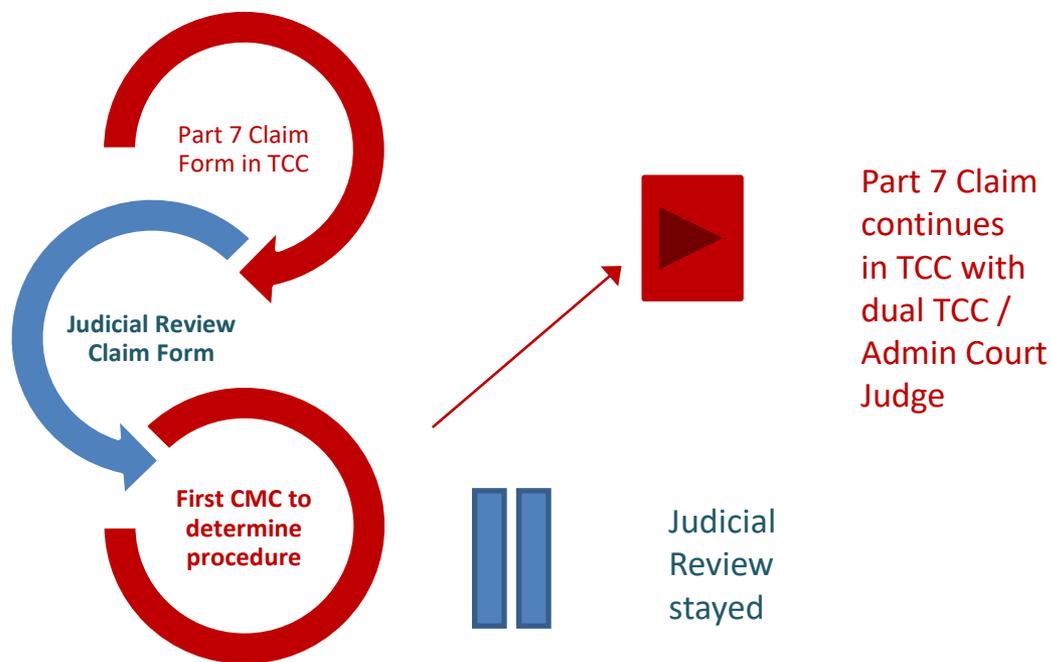
[2019] EWCA



- The ability to case manage and hear JR claims in the TCC was introduced in the 2017 TCC Guidance Note
- In **Rail Franchising Litigation** : Stuart Smith J made an order very early on that the JR and Part 7 claims to be managed and heard together
 - The JR Claim was stayed on the Claimants' application.
 - Claimants sought public law remedies to quash award decision and reinstate the Claimants in the competition
 - DFT sought strike out/SJ on basis that abuse of process
 - CA held that, although quashing order would be questionable, Claimants were entitled to pursue claim for declaratory relief or damages – not abuse of process
- National Lottery – **Camelot UK v Gambling Commission**:
 - Parallel JR and Part 7 Claims
 - Quashing order for the award of 4NLC to Allwyn
 - Damages
 - Also rely on s.29 FRA 2020 and WTO/GPA/UK-EU TCA

Hybrid Challenge

“Double tickets” – Admin Court Judge sits in another forum



Other Consequences:

- Judge plays split role between civil and public law
- Deference for policy and economic choices
- Applies public law principles and case law (as appropriate)
- Limits on public law remedies
- Injunctions to stop or suspend award difficult

BUT:

- Still have exacting disclosure
- Close scrutiny of evidence and reasoning in support of decision

**Thank You
for Listening
Any Questions**

