

WHITE PAPER CONFERENCE 2025

RELIEF AND REMEDIES IN JUDICIAL  
REVIEW

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Matrix

25 June 2025

# INTRODUCTION

- Roundup of the case law on remedies from the last 12 months.
  - Remedies: the basics;
  - Interim relief;
  - Suspended quashing orders;
  - No substantial difference test; and
  - Alternative remedies.

# REMEDIES: THE BASICS

- Remedies in judicial review proceedings are in the discretion of the Court.
- The Court may grant more than one remedy.
- Even where a defendant has acted unlawfully, the Court may refuse relief:
  - Delay in filing the claim and the granting of the remedy would be likely to cause substantial hardship to, or would substantially prejudice the rights of any person, or would be detrimental to good administration;
  - Error of law made was immaterial to the public body's decision;
  - The remedy would serve no useful practical purpose;
  - The claimant suffered no harm or prejudice.
- See the Administrative Court Guide (2024) at §12.9.

# INTERIM RELIEF (1)

- *RRR Manufacturing Pty Ltd* [2024] EWCA Civ 530
- **Ground one: did the Judge apply the relevant principles applicable to the grant of interim relief on an application for judicial review?**
  - The Court’s jurisdiction to grant interim relief in judicial review proceedings derives from section 31 of the Senior Courts Act 1981: it does not exercise an equitable jurisdiction, and the court applies the *American Cyanamid* principles by analogy only: §76.
  - Approved the decision in *Medical Justice* [2010] EWHC 1425 (Admin) that the court will not readily restrain a public authority in the exercise of its functions: §79.

# INTERIM RELIEF (2)

- The Judge erred in two respects: (i) she gave decisive weight to the commercial damage which the BSI’s action would inflict on RRR; and (ii) she failed to put on the other side of the balance BSI’s concern that RRR had not met the essential requirements: §82.
- Identified three relevant underlying principles: (i) great weight must be given to the protection of public health; (ii) in this regulatory framework, that the manufacturer must satisfy the approved body that a device is safe and effective; and (iii) the court should also give great weight to the assessment of the relevant material by the expert regulator: §84.
- Any commercial damage “*was obviously outweighed by BSI’s concern that RRR had not provided it with material to satisfy it that the device was safe and effective and that another relevant device was available*”: §85.

# INTERIM RELIEF (3)

- **Ground two: what is the court's approach, on an application for judicial review, to the grant of a mandatory injunction requiring a decision-maker to make a particular decision?**
  - Section 31(5) Senior Courts Act 1981:
    - *“If, on an application for judicial review, the High Court makes a quashing order in respect of the decision to which the application relates, it may in addition—(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or (b) substitute its own decision for the decision in question.”*
  - Section 31(5A) Senior Courts Act 1981:
    - *“But the power conferred by subsection (5)(b) is exercisable only if—(a) the decision in question was made by a court or tribunal, (b) the quashing order is made on the ground that there has been an error of law, and (c) without the error, there would have been only one decision which the court or tribunal could have reached.”*

# INTERIM RELIEF (4)

- **Laing LJ**: it was not open to a court, when it makes its decision on the merits of an application for JR in cases in which the defendant is not a court or tribunal, to quash a decision and substitute its own view for that of the decision-maker—see sections 31(5) and (5A): §88.
- The Judge erred in granting a mandatory order compelling BSI to grant any future renewal application.
  - *“Neither counsel could think of a case in which a court has, without deciding whether or not a public authority has acted unlawfully in relation to a decision which is challenged in existing proceedings, required a public authority to exercise a power on a future occasion in a particular way... even when it has quashed a decision because it is unlawful, a court has limited powers to usurp the powers of a public authority by making a particular decision, which, in normal circumstances, it would be for the public authority to make in the future, after remittal by the court. A fortiori, a court has no such power when it has not even decided that the decision which is under challenge is unlawful. In this case, no future decision had been made, and no decision about its lawfulness could therefore be made... there are no circumstances in which such an order would be lawful”*: §89.

# INTERIM RELIEF (5)

- Nugee LJ: *“I am reluctant to say that this can never be done as it is seldom sensible to say never... but it is not easy to envisage the circumstances in which such an order would be appropriate”*: §111.
- Snowden LJ agreed with the judgments of Laing and Nugee LJJ on ground two: §95.
- **Ground three: costs where a defendant has unsuccessfully resisted an application for interim relief.**
  - The Judge erred in ordering BSI to pay the costs of the interim relief hearing; the costs should have been reserved until the outcome of the application for judicial review: §§92-93.

# INTERIM RELIEF (6)

- ***R (EK and SK) v. Secretary of State for the Home Department*** [2024] EWCA Civ 1601
- On an application for an interim mandatory order was it open to the Judge to substitute her decision for that of the SSHD?
- **Underhill LJ**: noting that the point raised some “*potentially far-reaching questions*”, including about the effect of section 31(5A) of the SCA 1981, noted that it was not necessary to decide the question, but that:
  - “*I should be reluctant to hold that the Judge had no jurisdiction, however strong the case, to make an order in the terms that she did*”: §33.
- **Baker LJ**: agreed with **Underhill** and **Singh LJJ**: §72.

# INTERIM RELIEF (7)

- **Singh LJ:**

- The original wording of section 31(5) did not refer to the court substituting its own decision for that of a lower court or tribunal; amendments made by section 141 of the Tribunals, Courts and Enforcement Act 2007: §65.
- The comments of Laing LJ did not form part of the ratio of *RRR*: §68; and said it was unclear whether there had been full argument in *RRR* on the impact of the legislative changes made to section 31: §69.
- *“It is one thing to say that a court may not ‘substitute’ its own decision for that of the body being reviewed save in the limited circumstances set out in section 31(5) and (5A). It does not follow that the court has no power to make a mandatory order, or an interim mandatory order, where justice requires that in other circumstances”*: §69.
- Supported by section 37(1) SCA 1981: *“The High Court may by order (whether interlocutory or final) grant an injunction... in all cases in which it appears to the court to be just and convenient to do so.”*
- In practice it is not rare for an interim mandatory order to be made.

# SUSPENDED QUASHING ORDERS (1)

Pre 2022 position:

- *P* [2004] EWHC 2027 (Admin): no part of the function of the Administrative Court to “*monitor, regulate or police the performance*” of a public authority; it exists to “*adjudicate upon specific challenges to discrete decisions*”.
- Where a public authority has been found by a court to have acted unlawfully, it can generally be trusted to comply with the judgment: **Horeau** [2018] EWHC 1508 at §20. Rolling review deprecated: **Dolan** [2021] 1 WLR 2326 at §118.
- **ClientEarth** [2018] EWHC 398 (Admin): “*a continuing failure by the government to meet its obligation to reduce air pollution*” (§12); a need for the Court to “*keep the pressure on the government*” (§14); “*in the particular circumstances of this case*” extended liberty to apply granted (§16); but that this was “*exceptional*” (§17).

# SUSPENDED QUASHING ORDERS (2)

- s.29A of the SCA 1981 (inserted by Judicial Review and Courts Act 2022):
  - (1) A quashing order may include provision—(a) for the quashing not to take effect until a date specified in the order, or (b) removing or limiting any retrospective effect of the quashing.
  - (2) Provision included in a quashing order under subsection (1) may be made subject to conditions.
- Subsection (8) sets out matters to which a court must have regard before making a suspended quashing order:
  - The nature and circumstances of the relevant defect;
  - Any detriment to good administrative that would result from exercising or failing to exercise the power;
  - The interests of expectations of persons who would benefit from the quashing of the impugned act;
  - The interests or expectations of persons who have relied on the impugned act;
  - So far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
  - Any other matter that appears to the court to be relevant.

# SUSPENDED QUASHING ORDERS (3)

- ***ECPAT (1)*** [2023] EWHC 1953 (Admin) (27 July 2023);
  - Kent and SSHD acting unlawfully;
  - Order quashing the Kent Protocol and an order quashing the NTS protocol insofar as it permitted the SSHD to transfer children outside of Kent to hotel accommodation;
  - Suspended the effect of both quashing orders under s. 29(1)(a) of the SCA 1981 for 3 weeks until 18 August; listed a further hearing on 17 August.
- ***ECPAT (2)*** [2023] EWHC 2199 (Admin) (1 September 2023);
  - Suspended quashing order granted as: would be “*counterproductive*” if the unlawful conduct had to stop immediately.
  - Further hearing ordered as (§16)
    - Despite knowing it was acting unlawfully, Kent continued to do so for more than 2 years;
    - The history of the litigation showed that an impasse had been reached where Kent and the SSHD blamed one another for the unlawfulness;
    - The illegality had, and continues to have, very serious consequences for identifiable children who are not being looked after by any LA.
    - As in *ClientEarth*, the litigation has been responsibly and proportionately conducted by expert claimants (ECPAT and the local authorities).

# SUSPENDED QUASHING ORDERS (4)

- *“two features of the evidence prepared for this hearing which strongly support a continuing remedial role for the court”* (§53):
  - Considerable work remains to be done.
  - There appear to be further disputes emerging between Kent and the SSHD as to how matters should not progress. “If the court does not retain some further role, there is a serious danger that the parties will revert to positions of each blaming the other and that these positions will lead, again, to an impasse”.
- Remedies hearing on 15 September 2023;
  - Chamberlain J ordered the SSHD to take all possible steps to transfer UAS children into LA care.
- ***Kent CC (3)*** [2023] EWHC 3030 (Admin) (28 November 2023):
  - NTS scheme unlawful between December 2021 to 27 July 2023.
  - A plan would be needed to ensure the use of hotels to accommodate UAS children ceases and does not resume (at §55).
  - Further hearing to be listed to consider relief between 2 and 4 weeks after judgment handed down.

# SUSPENDED QUASHING ORDERS (5)

- Remedies hearing on 15 December 2023:
  - Kent and SSHD directed to file an agreed action plan setting out how each UAS child arriving in Kent would be accommodated and looked after by Kent under the Children Act 1989.
- ***ECPAT*** [2024] EWHC 1353 (Admin) (5 June 2024; heard on 14 March)
  - Chamberlain J noted that although initially all parties welcomed the court's supervision of relief granted, “*we have now reached the point at which both the principle of continued supervision and the issues capable of being covered by it are contentious*” (§74).
  - Noted the “*exceptional*” nature of the remedies granted in the first claim (§75).
  - Concluded that no further relief was required.

# NO SUBSTANTIAL DIFFERENCE (“NSD”) TEST (1)

- Senior Courts Act 1981:
  - “*The High Court—(a) must refuse to grant relief on an application for judicial review... 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*”: section 31(2A).
  - “*the conduct complained of*” means “*the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief*”: section 31(8).
- What judicial guidance existed?
  - ***Gathercole*** [2021] PTSR 359 : “*The provision is designed to ensure that the judicial review process remains flexible and realistic*”: §38
  - ***Plan B Earth*** [2020] PTSR 1446 (CA): “*the threshold remains a high one*”: §273.
  - Fourteen principles set out in ***Cava Bien Ltd*** [2021] EWHC 3003 (Admin) at §52.

# NSD TEST (2)

- **Bradbury** [2025] 4 WLR 58 (Davies, Lewis and Holgate LJJ):
  - “There is limited guidance from this Court as to the operation of section 31(2A)”: §72.
  - The court is concerned with “*evaluating the significance of the error on the decision-making process. It is considering the decision that the public body has reached, and assessing the impact of the error on that decision in order to ascertain if it is highly likely that the outcome (the decision) would not have been substantially different even if the decision-maker had not made that error*”: §71 (emphasis in underline added)
  - “*It is not for the court to try and predict what the public authority might have done if it had not made the error. If the court cannot tell how the decision-maker would have approached matters, or what decisions it would have reached, if it had not made the error in question, the requirements of section 31(21) are unlikely to be satisfied*”: §71.

# NSD TEST (3)

- Principles in *Cava Bien*: “*unhelpful, and capable of leading to error to apply those principles as if they were some form of checklist*” (at §73) and a number of the principles did not accurately reflect what the cases decided (at §74).
- Rather “*it is far better to refer to the judgment of a particular case if it is said to be relevant to an issue in the case under consideration*”.
- ***Greenfields (IOW) Limited*** [2025 EWCA Civ 488 (Singh and Lewis LJJ):
  - Lewis LJ repeated the analysis of section 31(2A) set out in *Bradbury* (at §§72-74).
  - Singh LJ emphasised the importance of the duty of candour and cooperation to the court in cases where the defendant relied on section 31(2A):
    - “*The Court should (in proper evidence, i.e. in a witness statement) be given a full, accurate and clear explanation of the decision-making process used by the public authority concerned and should not have to depend upon submissions by advocates nor should it have to piece together a number of different documents in order to understand what happened*”: §106,

# ALTERNATIVE REMEDIES

- ***In re McAleenon*** [2024] UKSC 31
  - “judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective”: ***Glencore*** [2017] 4 WLR 213 at §55.
  - “If other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review” at §50.
  - Statutory appeals will “*in ordinary circumstances*” be regarded as a suitable alternative remedy: §51.
  - In this case:
    - “no statutory right of appeal in relation to a failure by the defendant regulators to carry out their public law duties”: §52.
    - “... there were different forms of legal proceedings available to her” which might achieve her desired outcome, and she was “entitled to choose which claim she wished to bring. She was entitled to assess that her overall objective might best be promoted by ensuring that the defendant regulators did their job properly, as she saw it, and brought their more extensive resources to bear on the problem...” (at §§53-54).

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