

*Is there a shift in the wind over the court's
requirement for procedural rigour in
administrative law?*

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Spoiler alert – the answer is “yes”

Momentum has built in recent years.....

- ***R (Talapada) v SSHD* [2018] EWCA Civ 841** (Singh LJ) (para 67):

“It cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court. However, both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.”

- ***R (Dalton) v CPS [2020] EWHC 2013 (Admin)*** (Andrews J) (para 11):
“The message is still not being heeded, or not being heeded sufficiently.”
- **The latest (2021) Administrative Court Guide (“ACG”)** – for the first time, an entire section is given over to “Procedural Rigour”, where it is emphasised that, despite the particular nature of public law litigation -
“[...] the Court will [not] overlook or tolerate breaches of directions made by the Court or of obligations imposed by the CPR or Practice Directions or this Guide. The appellate courts have identified an increasing concern about the need for appropriate procedural rigour.”

STRUCTURE OF THIS PRESENTATION

1. What do we mean by procedural rigour?
2. Four key categories of procedural failing
3. When is a more flexible approach warranted?
4. Potential sanctions for procedural failings

(1) WHAT DO WE MEAN BY PROCEDURAL RIGOUR?

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See the key procedural expectations in the ACG at para 2.1.

Parties must:

1. Consider carefully who are the **proper parties** to the proceedings;
2. Comply with the **duty of candour** at all times, especially when making applications for **urgent consideration**;
3. Ensure that **applications are made at the earliest stage possible**;
4. Comply with **deadlines** set by the Court, the CPR or PDs;
5. File documents and authorities in the **correct format**;
6. Inform the Court if unable to comply with procedural directions or orders (para 13.2.3).

REASONS FOR RIGOUR

Fairness between partes: *“It is important that everyone should know where they stand, so that, for example, the defendant can properly prepare evidence in a timely fashion.”*

- *R (Dolan) v SSHSC* [2020] EWCA Civ 1605, (para 117)

Efficiency in the administration of justice: *“If the Court is to have a good chance of redeploying its resources by listing another case, then it needs to be notified of the possibility of a settlement as soon as possible and typically at least 4 weeks before the fixture.”*

- *Westminster City Council v SSHLG* [2020] EWHC 1472 (Admin), (para 90)

(2) FOUR KEY CATEGORIES OF PROCEDURAL FAILURE

Four categories of “procedural failing” have attracted recent judicial rebuke:

1. Abuse of the urgent applications procedures
2. Failures to “act promptly” and in accordance with the overriding objective
3. Inadequate pleadings
4. Attempts to bring “rolling” judicial review claims

(1) ABUSE OF THE URGENCY PROCEDURE

Form N463

- The Court has express procedures to deal with applications that must be considered urgently.
- A specific application notice: Form N463 - Judicial Review: Application for Urgent Consideration (cf standard A/N Form N244).
- When should it be used?

“It will very often be possible to point to a reason why the claimant’s interests would be better served if an application for interim relief or permission to apply for judicial review were determined quickly. However this is not enough to justify using the court’s procedures for urgent consideration. Those procedures are made available **only** for urgent cases where there is a **genuine need** for the application to be considered urgently.

Such a need may arise where: [...] the claimant seeks an interim order preventing a defendant from doing something with **irreparable consequences** which they are proposing to do imminently.” (ACG para. 17.2)

- Two examples of misuse (pto)

(1) *In re An Application for Judicial Review* [2021] EWHC 1895 (Admin)

- JR of regulations made by the SoS under the EU Withdrawal Act 2018.
- Claimant sought an urgent ruling that permission would be considered within 4 to 5 weeks.
- Court (Lewis LJ and Swift J) characterised this as *“a longstop date by which the application for permission to apply for judicial review would be considered.”* (para 26)
- Counsel was summoned to explain why the urgency procedure was used.
- Counsel argued that the procedure may be used in situations *where “the court ought to act more quickly than it would otherwise do”* (para 24)
- Court expressed strong criticism of Counsel for using the procedure essentially *“to set a timetable for the future progress of the case.”* (para 26)

- Court did indicate how the matter should have been handled:

“The appropriate place for that application was in section 8 of the N461, together with a covering letter or e-mail to the Court Office, drawing attention to the need to determine those parts of the application form before the end of the 21-day period for the filing of an acknowledgment of service. If counsel had had any real doubt about whether the Administrative Court Office would take steps to ensure that the papers were put before a judge within that timescale, he could have made an application on notice using Form N244.” (para 26)

Takeaways:

1. Urgency procedure can only be used where “exceptional urgency is being claimed”. “Urgent”, for this purpose, means within a timescale of hours of days.
2. Ct has effectively created an informal channel of correspondence for cases of “*intermediate urgency*” (don’t use that phrase). This does seem to work!

(2) *R (DVP) v SSHD* [2021] EWHC 606 (Admin)

- Asylum seekers brought an urgent application for judicial review, seeking their removal from accommodation at a military barracks.
- Before the application had been made, the claimants were removed from the military barracks.
- The claimants proceeded with the challenge and purported to justify the urgent application on the basis that the SSHD had refused to remove *other* asylum seekers (not parties to the proceedings) from the camp.
- This was a “*clear abuse of the procedures for urgent applications*”:

It is of the utmost importance that this limited resource is not abused ... If cases that are not truly urgent displace those that are, this will have serious consequences for litigants who have a good reason for applying for urgent relief. (para 7)

- The Court was also critical of the claimants' failure to comply with the duty of candour (para 9).
- Parties must:
 1. Disclose any relevant information which supports or undermines the application.
 2. Make the court aware of the issues that are likely to arise and the possible difficulties in the application or claim.
 3. Present information in a fair and even-handed manner, which is not designed simply to promote their own case.
- The duty “*applies with particular force*” when making urgent applications (Admin Court Guide, para 15.2.3)

(2) FAILURE TO ACT PROMPTLY

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Westminster City Council v Secretary of State for Housing [2020] EWHC 1472 (Admin) (Holgate J)

- In December 2019, a substantive hearing was listed for 5 March 2020 and procedural directions were laid down.
- On 26 February, the court was notified of the parties' intention to settle the claim.
- The court criticised three procedural failings:

1. Claimant's failure to discontinue the claim sooner:

- *"The court has not been given any clear reason as to why the Council's view that it was not worthwhile to pursue the claim could not have been reached substantially before 7 or 12 February."* (para 38)
- *"From the moment when permission is granted, a defendant should be keeping under review whether it is appropriate to submit to judgment, and if so on what grounds."* (para 62)

FAILURE TO ACT PROMPTLY

2. Claimant's late notification of the withdrawal of the claim following the decision to discontinue:

“The Claimant’s decision to discontinue occurred about four weeks before the date of the hearing. If the court had then been notified of this decision, the hearing on 5 March could have been used for another case.” (para 39)

3. Claimant's failure to file a skeleton by the relevant deadline:

The Claimant had *“arrogated to itself a decision not to comply with the orders.”* Instead, the Claimant should have informed the court of its intention to discontinue and *“sought an extension of time for the procedural steps which remained to be taken in case the substantive hearing had to go ahead”*. (para 59)

(3) INADEQUATE PLEADINGS

Recent case-law is replete with examples of courts criticising parties for raising new grounds in oral submissions for which permission has not been obtained.

R (A) v SSHD [2022] EWHC 360 (Admin), [40] (Fordham J) (refusing to consider the claimant’s alternative argument at permission hearing):

“At no stage – in the judicial review grounds, in the permission stage reply, or in the skeleton argument – was this narrower fallback argument identified or articulated. On grounds of "procedural rigour" alone, I would refuse to entertain a last-ditch line of argument of this kind, advanced for the first time orally at a permission renewal hearing.

Takeaway:

*The statement of facts and grounds should be “**treated in the same way as a Particulars of Claim** ... it is even more important in public law claims that claimants are kept to their pleaded case.”*

- *R (Wingfield) v Canterbury City Council [2020] EWCA Civ 1588, [36]*
(Sir Keith Lindblom, Coulson and Andrews LJJ)

A number of consequences follow from this approach

(1) The claim must adhere to the pleading

See: ***R (Dalton) v CPS [2020] EWHC 2013 (Admin)*** (Andrews J)

- Challenge to a decision of the CPS to refuse a data subject access request.
- CPS accepted that the initial decision had been unlawful, reconsidered the matter and made a further decision.
- Claimant persisted with original claim and did not seek to amend the claim form in order to challenge the later decision. Nevertheless the case advanced in the Skeleton argument addressed that later decision.

“This case was ... not just a case of informally evolving grounds of challenge to the decision for which permission to bring judicial review was granted. It was an attempt to bring a claim for judicial review of a different decision or decisions, on different grounds to those which for which permission was granted. A line must be drawn somewhere, and this case falls comfortably on the wrong side of it.”
(para 13)

(2) The pleading must be adequately particularised:

***Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984**

One of the grounds pleaded alleged that the lack of reasons provided by the respondent “*affect matters generally, but so far as relevant affect all of the questions the subject of the grounds above.*”

Holgate J stated that “*it is high time that these generalised or unparticularised forms of pleading should cease to be used*” (para 30)

(3) Pleadings must be “as concise as possible” (PD54A, para 4.2(3)):

***R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605**

- SFG ran to 87 pages:

“we are concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than illuminate the essence of the case being advanced.” (NB now a limit of 40 pages)

(4) ROLLING JUDICIAL REVIEW

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R (Dolan) v SSHSC [2020] EWCA Civ 1605 (Lord Burnett CJ, King and Singh LJJ)

- What do we mean by “rolling” judicial review: *“where fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment.”*
- Court was critical of an attempt to challenge the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, which had been repealed and replaced multiple times – *“effectively a rolling claim to all and any iterations of the regulations.”*
- *Although there is **no hard and fast rule**, it will **usually be better** for all parties if judicial review proceedings are not treated as “rolling” or “evolving”.*
- *Particularly in circumstances where a challenge is made to secondary legislation which has been amended, sometimes very quickly, and where the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time.” (para 118)*

ROLLING JUDICIAL REVIEW

Hussain v SSHSC [2022] EWHC 82 (Admin) (Fordham J)

- A challenge to a prohibition on collective worship under “lockdown” regulations had become academic after the prohibition ceased to have effect in July 2020.
- The Claimant applied for a stay, with liberty to restore in the event that a prohibition on collective worship was re-introduced.
- The Court again refused the application as “*fly[ing] directly into the teeth of the Court of Appeal's description of a 'rolling' approach to judicial review involving amendments to challenge a fresh decision.*” (para 34)

ROLLING JUDICIAL REVIEW

When is rolling judicial review appropriate?

Raja v Redbridge LBC [2020] EWHC 1456 (Admin) (Fordham J)

- *“The conduct under challenge, and the alleged default, may be of a continuing nature. ... The dynamic reality can mean that there is a moving target and a moving picture.”* (para 19)
- Rolling judicial review was appropriate for a challenge to an “ongoing refusal” to provide urgent care and support:

“a continuing statutory function; a continuing request for a particular care provision response; a continuing refusal of that request; and the consistent central issue as to whether the requested response was, in all the circumstances, the sole justifiable response such that the refusal was unreasonable in a public law sense.” (para 16)

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- *“Procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court.”*
 - ***R (Talpada) v SSHD [2018] EWCA Civ 841***, [67] (Singh LJ)
- *“This court must be assiduous to avoid form taking precedence over substance in cases where this would inhibit its important function of holding public bodies to account for abuses of power or other serious public law errors affecting the rights of the citizen.”*
 - ***R (Dalton) v CPS [2020] EWHC 2013 (Admin)***, [9] (Andrews J).

FLEXIBILITY NOT LIMITED TO CLAIMANTS

R (Safe Passage International) v SSHD [2021] EWHC 1821 (Admin)

- Challenge to policy guidance describing the SSHD's duties under retained EU law in respect of applications for asylum by unaccompanied minors.
- The SSHD sought permission to rely on a late witness statement from a Home Office official.
- *“There was no good reason not to have served the statement on Ms Farman on 31 March.”* (para 72)
- Yet, the court admitted the statement on the basis that (i) it provided relevant information and (ii) both parties were able to deal fairly with the material.
- But the SSHD had to bear the costs consequences of applying for late admission of the statement.

SANCTIONS

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1. Strike out / Exclusion of Arguments

*“Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them.” – **Talapada** (Singh LJ) (para 69).*

2. Adverse costs order:

- E.g. ***Safe Passage International***.
- ***Dalton***: The court may penalise a claimant for an “*evolving*” claim by imposing an adverse costs order, “*even in cases where the claimant is ultimately successful in obtaining judicial review on new or expanded grounds.*” (para 12)

3. The “Hamid” jurisdiction:

- The Court may hold a hearing to hear explanations from legal representations as to the reasons for procedural failings (***R (Hamid) v SSHD*** [2012] EWHC 3070 (Admin)).

REFERRAL TO A REGULATOR?

- To date, there has been a reluctance to make a reference to SRA or BSB.
- The court will consider (1) any apology from the legal representatives, and (2) any measures put in place to prevent future non-compliance.
- In *Re Judicial Review*, Leading Counsel “*fairly and creditably took responsibility at the outset for what occurred, thereby sparing his junior and solicitors the anguish of having to deal with these matters.*”
- In *DVP*, the firm adduced evidence of training and procedures which had been put in place to prevent failings happening again.
- But: “*The court will in future consider referring a case to the SRA on the first occasion that the lawyer falls below the relevant standards.*” – *R (Sathivel) v SSHD* [2018] EWHC 913 (Admin), (para 97).

Thank you