PRE-ACTION IN JUDICIAL REVIEW – DAVID WOLFE QC, MATRIX

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- Costs pre-application are generally recoverable by the successful party if the claim proceeds but not otherwise: **Davey v Aylesbury Vale DC [2008] 1 WLR 878** [21-22]
- Duty of Candour applies pre-application:
    - TSol Guidance on Discharging the Duty of Candour #1.2: "applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies at every stage of the proceedings including letters of response under the pre-action protocol"
    - De Smith's Judicial Review 8th Edition #16.027: "The duty arises as soon as the public authority becomes aware that someone is likely to challenge a decision affecting them …"

- **Babbage v SSHD [2016] EWHC 148 (Admin)** [6-7]

- On access to information and documents note also:
  - **Data Protection Act 2018** s45(3):

    "Where a data subject makes a request under subsection (1), the information to which the data subject is entitled must be provided in writing—

    (a) without undue delay, and

    (b) in any event, before the end of the applicable time period (as to which see section 54). [one month from request]"

  - **Freedom of Information Act 2000** s10(1):

    "promptly and in any event not later than the twentieth working day"

  - **Environmental Information Regulations 2004**

JUDICIARY FOR
ENGLAND AND WALES

The Administrative Court Judicial Review Guide 2018

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4.11. The application will be placed before a judge who may, without the attendance of the litigant:[24]

4.11.1. Make an order giving the permission sought;

4.11.2. Give directions for further written evidence to be supplied by the litigant before an order is made on the application;

4.11.3. Make an order dismissing the application without a hearing; or

4.11.4. Give directions for the hearing of the application.

4.12. The Court will dismiss the application unless satisfied that the application is not an abuse of process and there are reasonable grounds for bringing the application.[25]

4.13. For vexatious litigants, an order dismissing the application, with or without a hearing, is final and may not be subject to reconsideration or appeal.[26]

4.14. For those subject to a CRO, there is a right of appeal (see chapter 25 of this Guide for appeals), unless the Court has ordered that the litigant has repeatedly made applications for permission pursuant to the CRO which were totally without merit, and the Court directs that if the litigant makes any further applications for permission which are totally without merit, the decision to dismiss the application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal.[27]

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[24] CPR PD 3A paragraph 7.6, CPR PD 3C paragraph 2.6, CPR PD 3C paragraph 3.6, CPR PD 3C paragraph 4.6

[25] s.42(3) of the Senior Courts Act 1981

[26] CPR PD 3A paragraph 7.6 and s.42(4) of the Senior Courts Act 1981

[27] CPR PD 3C paragraph 2.3(2) and 2.6(3), CPR PD 3C paragraph 3.3(2) and 3.6(3), CPR PD 3C paragraph 4.3(2) and 4.6(3)

5. Before Starting the Claim

5.1. General Considerations

5.1.1. Before bringing any proceedings, the intending claimant should think carefully about the implications of so doing. The rest of chapter 5 of this Guide considers the practical steps to be taken before issuing a claim form, but there are a number of general considerations, including personal considerations.

5.1.2. A litigant who is acting in person faces a heavier burden in terms of time and effort than does a litigant who is legally represented, but all litigation calls for a high level of commitment from the parties. This should not be underestimated by any intending claimant.

5.1.3. The overriding objective of the CPR is to deal with cases justly and at proportionate cost. In all proceedings there are winners and losers; the loser is generally ordered to pay the costs of the winner and the costs of litigation can be large (see chapter 23 of this Guide for costs).

5.1.4. Part B of this Guide outlines the procedure when bringing a claim. This section will outline the considerations before bringing a claim, including the pre-action procedure, factors which may make bringing a claim inappropriate, costs protection, the timescales in which proceedings should be started, and the duties of the parties concerning the disclosure of documents.

5.2. The Judicial Review Pre-action Protocol

5.2.1. So far as reasonably possible, an intending claimant should try to resolve the claim without litigation. Litigation should be a last resort.

5.2.2. There are codes of practice for pre-trial negotiations. These are called "Protocols". The appropriate pre-action Protocol in judicial review proceedings is the Judicial Review Preaction Protocol, which can be viewed on the Government's website via http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv. This is a very important document which anyone who is considering bringing a claim should consider carefully.

5.2.3. It is very important to follow the Judicial Review Pre-action Protocol, if that is possible, before commencing a claim. There are two reasons for this. First of all, it may serve to resolve the issue without need of litigation or at least to narrow the issues in the litigation. Secondly, failure to follow the Protocol may result in costs sanctions being applied to the litigant who has not followed the Protocol.

5.2.4. A claim for judicial review must be brought within the relevant time limits fixed by the CPR. The Protocol process does not affect the time limits for starting the claim (see paragraph 5.4 of this Guide). The fact that a party is using the Protocol would not, of itself, be likely to justify a failure to bring a claim within the time limits set by the CPR or be a reason to extend time. Therefore, a party considering applying for judicial review should act quickly to comply with the Protocol but note the time limits for issue if the claim remains unresolved.

5.2.5. The Protocol may not be appropriate in urgent cases (e.g., where there is an urgent need for an interim order) but even in urgent cases, the parties should attempt to comply with the Protocol. The Court will not apply cost sanctions for non-compliance where it is satisfied that it was not possible to comply because of the urgency of the matter.

5.2.6. Stage one of the Protocol requires the parties to consider whether a method of alternative dispute resolution ("ADR") would be more appropriate. The Protocol mentions discussion and negotiation, referral to the Ombudsman and mediation (a form of facilitated negotiation assisted by an independent neutral party).

5.2.7. Stage two is to send the defendant a pre-action letter. The letter should be in the format outlined in Annex A to the Protocol. The letter should contain the date and details of the act or omission being challenged and a clear summary of the facts on which the claim is based. It should also contain the details of any relevant information that the claimant is seeking and an explanation of why it is considered relevant.

5.2.8. The defendant should normally be given 14 days to respond to the pre-action letter and must do so in the format outlined in Annex B to the Protocol. Where necessary the defendant may request the claimant to allow them additional time to respond. The claimant should allow the defendant reasonable time to respond, where that is possible without putting the time limits to start the case in jeopardy.

5.3. Situations where a Claim for Judicial Review May Be Inappropriate

5.3.1. There are situations in which judicial review will not be appropriate or possible. These should be considered at the outset. Litigants should refer to the CPR and to the commentary in academic works on administrative law. The following are some of those situations in outline:

5.3.2. Lack of Standing (or *Locus Standi*)

5.3.2.1. A person may not bring an application for judicial review in the Administrative Court unless that person has a "sufficient interest" in the matter to which the claim relates.[28]

5.3.2.2. The issue of standing will generally be determined when considering permission but it may be raised and determined at any stage.

5.3.2.3. The parties and/or the Court cannot agree that a case should continue where the claimant does not have standing.[29] Nor does the Court have a discretion. A party must have standing in order to bring a claim.

5.3.2.4. The sufficient interest requirement is case specific and there is no general definition.[30] Those whom a decision directly and adversely affects will seldom (if ever) be refused relief for lack of standing. Some claimants may be considered to have sufficient standing where the claim is brought in the public interest.

5.3.3. Adequate Alternative Remedy

5.3.3.1. Judicial review is often said to be a remedy of last resort.[31] If there is another method of challenge available to the claimant, which provides an adequate remedy, the alternative remedy should generally be exhausted before applying for judicial review.

5.3.3.2. The alternative remedy may come in various guises. Examples include an internal complaints procedure or a statutory appeal.

5.3.3.3. If the Court finds that the claimant has an adequate alternative remedy, it will generally refuse permission to apply for judicial review.

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[28] s.31(3) of the Senior Courts Act 1981

[29] This principle has been confirmed in a number of other cases, for example in *R.* v *Secretary of State for Social Services* ex parte *Child Poverty Action Group* [1990] 2 Q.B. 540 at 556 and more recently in *R (Wylde)* v *Waverley Borough Council* [2017] EWHC 466 (Admin) from paragraph 19 onwards.

[30] *Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617

[31] See *R.* v *Epping and Harlow General Commissioners* ex parte *Goldstraw* [1983] 3 All E.R. 257 at 262, *Kay* v *Lambeth London Borough Council* [2006] 2 A.C. 465 at 492 (paragraph 30), and more recently in *R. (Gifford)* v *Governor of Bure Prison* [2014] EWHC 911 (Admin) at paragraph 37.

5.3.4. The Claim is Academic

5.3.4.1. Where a claim is purely academic, that is to say that there is no longer a case to be decided which will directly affect the rights and obligations of the parties,[32] it will generally not be appropriate to bring judicial review proceedings. An example of such a scenario would be where the defendant has agreed to reconsider the decision challenged.

5.3.4.2. Only in exceptional circumstances where two conditions are satisfied will the Court proceed to determine an academic issue. These conditions are: (1) a large number of similar cases exist or are anticipated, or at least other similar cases exist or are anticipated; and (2) the decision in a judicial review will not be fact-sensitive.[33]

5.3.5. The Outcome is Unlikely to be Substantially Different.

The Courts have in the past refused permission to apply for judicial review where the decision would be the same even if the public body had not made the error in question. Section 31(3C)-(3F) of the Senior Courts Act 1981 now provides that the Courts must refuse permission to apply for judicial review if it appears to the Court highly likely that the outcome for the claimant would not be substantially different even if the conduct complained about had not occurred. The Court has discretion to allow the claim to proceed if there is an exceptional public interest in doing so.

5.3.6. The Claim Challenges a Decision of one of the Superior Courts.

5.3.6.1. The Superior Courts[34] are the High Court, the Court of Appeal, and the Supreme Court. They cannot be subject to judicial review.

5.3.6.2. Where the Crown Court is dealing with a trial on indictment it is a Superior Court and its actions are not subject to judicial review.[35] Otherwise, its functions are subject to judicial review.

5.4. Time Limits

5.4.1. The general time limit for starting a claim for judicial review requires that the claim form be filed promptly and in any event not later than 3 months after the grounds for making the claim first arose.[36] It must not be presumed that just because the claim has been lodged within the three month time that the claim has been made promptly, or within time.[37]

5.4.2. When considering whether a claim is within time a claimant should also be aware of two important points:

5.4.2.1. The time limit may not be extended by agreement between the parties (although it can be extended by the Court, see paragraphs 5.4.4 and 6.3.4.4 of this Guide);[38]

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32 *R.* v *Secretary of State for the Home Department* ex parte *Salem* [1999] 1 AC 450

33 *R. (Zoolife International Ltd)* v *The Secretary of State for Environment, Food and Rural Affairs* [2008] A.C.D. 44 at paragraph 36

34 See the discussion of the differences between inferior and superior Courts in *R* v *Chancellor of St. Edmundsbury and Ipswich Diocese* ex parte *White* [1948] 1 K.B. 195.

35 ss,1, 29(3), and 46(1) of the Senior Courts Act 1981.

36 CPR 54.5 (1)

37 See for example *R.* v *Cotswold District Council* ex parte *Barrington Parish Council* [1998] 75 P. & C.R. 515

38 CPR 54.5(2)

5.4.2.2. The time limit begins to run from the date the decision to be challenged was made (not the date when the claimant was informed about the decision).[39]

5.4.3. There are exceptions to the general time limit rule discussed above. These include the following:

5.4.3.1. Planning Law Judicial Reviews:[40] Where the claim relates to a decision made under planning legislation the claim must be started not later than six weeks after the grounds to make the claim first arose. Planning Legislation is defined as the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990.

5.4.3.2. Public Contract Judicial Reviews:[41] Where the claim relates to a decision under the Public Contracts Regulations 2015 S.I. 2015/102, which governs the procedure by which public bodies may outsource public services (sometimes referred to as 'procurement'), the claim must be started within the time specified by r. 92 of those Regulations, which is currently 30 days from the date when the claimant first knew or ought to have known that grounds for starting the proceedings had arisen. Note that this time limit begins to run from the date of knowledge, in contrast to the general rule where the relevant date is the decision date itself. For further guidance on Public Contract Judicial Reviews, see paragraph 5.7 of this Guide.

5.4.3.3. Judicial Review of the Upper Tribunal:[42] Where the defendant is the Upper Tribunal the claim must be started no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant. Again, note the difference from the general rule, here the time limit is calculated from the date the decision was sent, not the date it was made.

5.4.3.4. Judicial Review of a decision of a Minister in relation to a public inquiry, or a member of an inquiry panel.[43] The time limit for these challenges is 14 days unless extended by the Court. That shorter time limit does not apply to any challenge to the contents of the inquiry report, or to a decision of which the claimant could not have become aware until publication of the report. [44]

5.4.4. Extensions of Time

5.4.4.1. CPR 3.1(2)(a) allows the Court to extend or shorten the time limit even if the time for compliance has already expired.

5.4.4.2. Where the time limit has already passed, the claimant must apply for an extension in section 8 of the claim form (form N461). The application for an extension of time will be considered by the judge at the same time as deciding whether to grant permission.

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[39] *R.* v *Department of Transport ex parte Presvac Engineering* [1992] 4 Admin. L.R. 121

[40] CPR 54.5(5).

[41] CPR 54.5(6),

[42] CPR 54.7A(3)

[43] s.38 (1) of the Inquiries Act 2005

[44] s. 38(3) of the Inquiries Act 2005

5.4.4.3. The Court will require evidence explaining the delay. The Court will only extend time if an adequate explanation is given for the delay, and if the Court is satisfied that an extension of time will not cause substantial hardship or prejudice to the defendant or any other party, and that an extension of time will not be detrimental to good administration.

5.5. Judicial Review of Immigration and Asylum Decisions

5.5.1. Since the 1st November 2013 the Upper Tribunal (Immigration and Asylum Chamber) ("UT(IAC)") has been the appropriate jurisdiction for starting a judicial review in the majority of decisions relating to immigration and asylum, not the Administrative Court (see Annex 1 for UT(IAC) contact details).

5.5.2. The Lord Chief Justice's Practice Direction[45] requires filing in, or mandatory transfer to, the UT(IAC) of any application for permission to apply for judicial review and any substantive application for judicial review that calls into question the following:

5.5.2.1. A decision made under the Immigration Acts or any instrument having effect, whether wholly or partly, under an enactment within the Immigration Acts, or otherwise relating to leave to enter or remain in the UK. The Immigration Acts are defined as: Immigration Act 1971, Immigration Act 1988, Asylum and Immigration Appeals Act 1993, Asylum and Immigration Act 1996, Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Immigration, Asylum and Nationality Act 2006, UK Borders Act 2007, the Immigration Act 2014; or

5.5.2.2. A decision made of the Immigration and Asylum Chamber of the First-tier Tribunal, from which no appeal lies to the Upper Tribunal.

5.5.3. All other immigration and asylum matters remain within the jurisdiction of the Administrative Court.[46] Further, even where an application comes within the classes of claim outlined at paragraph 5.5.2 above, an application which falls within any of the following classes must be brought in the Administrative Court:

5.5.3.1. A challenge to the validity of primary or subordinate legislation (or of immigration rules);

5.5.3.2. A challenge to the lawfulness of detention;

5.5.3.3. A challenge to a decision concerning inclusion on the register of licensed Sponsors maintained by the UKBA;

5.5.3.4. A challenge to a decision as which determines British citizenship;

5.5.3.5. A challenge to a decision relating to asylum support or accommodation;

5.5.3.6. A challenge to the decision of the Upper Tribunal;

5.5.3.7. A challenge to a decision of the Special Immigration Appeals Commission; and

5.5.3.8. An application for a declaration of incompatibility under the s.4 of the Human Rights Act 1998.

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[45] Lord Chief Justice's Practice Direction; Jurisdiction of the Upper Tribunal under s.18 of the Tribunals, Courts and Enforcement Act 2007 and Mandatory Transfer of Judicial Review applications to the Upper Tribunal under s.31A(2) of the Senior Courts Act 1981, dated 21st August 2013 and amended on the 17th October 2014, available at: https://www.judiciary.gov.uk/publications/lord-chief-justices-direction-regarding-the-transfer-of-immigration-and-asylum-judicial-review-cases-to-the-upper-tribunal-immigration-and-asylum-chamber/

[46] See paragraph 5.5.4. of this guide for an example.

5.5.3.9. A challenge to a decision which is certified (or otherwise stated in writing) to have been taken by the Secretary of State wholly or partly in reliance on information which it is considered should not be made public in the interests of national security.

5.5.4. Challenges to decisions made under the National Referral Mechanism for identifying victims of human trafficking or modern slavery[47] are not immigration decisions. They fall within the jurisdiction of the Administrative Court.

5.6. Judicial Review of First-tier Tribunal Decisions

5.6.1. Since the 3rd November 2008 the Upper Tribunal (Administrative Appeals Chamber) ("UTAAC") has been the appropriate jurisdiction for starting a judicial review that challenges certain decisions of the First-tier Tribunal, not the Administrative Court (see Annex 1 for UT(AAC) contact details).

5.6.2. The Lord Chief Justice's Practice Direction[48] requires filing in, or mandatory transfer to, the UT(AAC) of any application for permission to apply for judicial review and any substantive application for judicial review that calls into question the following:

5.6.2.1. 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) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on reviews); and

5.6.2.2. Decisions of the First-tier Tribunal 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 (appeals against national security certificates).

5.6.3. The direction does not have effect where an application seeks a declaration of incompatibility. In that case the Administrative Court retains the jurisdiction to hear the claim.

5.7. Public Contract Judicial Reviews

5.7.1. Where a decision made under the Public Contract Regulations 2015 is challenged, claimants may consider it necessary to bring proceedings for judicial review in the Administrative Court as well as issuing a claim in the Technology and Construction Court ("TCC"). Where this happens, the claim will, unless otherwise directed by the lead judge of the Administrative Court or of the TCC, proceed in the TCC before a TCC judge who is also designated to sit in the Administrative Court.

5.7.2. If this occurs, the claimant must:

5.7.2.1. At the time of issuing the claim form in the ACO, by letter to the ACO, copied to the lead judge of the Administrative Court and the lead judge of the TCC, request transfer of the judicial review claim to the TCC;

5.7.2.2. Mark that letter clearly as follows: "URGENT REQUEST FOR TRANSFER OF A PUBLIC PROCUREMENT CLAIM TO THE TCC";

5.7.2.3. If not notified within 3 days of the issue of the claim form that the case will be transferred to the TCC, contact the ACO and thereafter keep the TCC informed of its position.

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[47] Published by the National Crime Agency at http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism

[48] Lord Chief Justice's Practice Direction, Practice Direction (Upper Tribunal: Judicial Review Jurisdiction), pursuant to s.18(6) of the Tribunals Courts and Enforcement Act 2007

5.7.3. This procedure is to apply only when claim forms are issued by the same claimant against the same defendant in both the Administrative Court and the TCC simultaneously (ie within 48 hours of each other).

5.7.4. When the papers are transferred to the TCC by the ACO in accordance with the procedure outlined above, the lead judge of the TCC will review the papers as soon as reasonably practicable. The lead judge of the TCC will then notify the claimant and the ACO whether he/she considers that the two claims should be case managed and/or heard together in the TCC.

5.7.5. If he or she decides that is so, the claim for judicial review will be case managed and determined in the TCC.

5.7.6. If he or she decides that the judicial review claim should not proceed in the TCC, he or she will transfer the judicial review claim back to the Administrative Court and give his/her reasons for doing so, and the claim for judicial review will be case managed and determined in the Administrative Court.

5.8. Abuse of Process

5.8.1. It may be an abuse of process to file a judicial review in the Administrative Court, on the basis that under the Lord Chief Justice's practice direction it falls within its jurisdiction and not the jurisdiction of UT(IAC). An example would be a judicial review which purports to fall within the detention exception where there is no obvious distinct merit to that aspect of the claim.[49]

[49] See *R (Ashraf)* v *Secretary of State for the Home Department* [2013] EWHC 4028 (Admin)

6.4. Duty of Candour

6.4.1. There is a special duty which applies to parties to judicial review known as the 'duty of candour' which requires the parties to ensure that all relevant information and all material facts are put before the Court.[54] This means that parties must disclose any information or material facts which either support or undermine their case.

6.4.2. It is very important that you comply with the duty of candour. The duty is explained in more detail below at paragraph 14.1 of this Guide.

6.5. Disclosure

6.5.1. The duty of candour ensures that all relevant information is before the Court. The general rules in civil procedure requiring the disclosure of documents do not apply to judicial review claims. However, the Court can order disclosure, exceptionally, in a particular claim.

6.5.2. An application may be made in the course of a judicial review claim for disclosure of specific documents or documents of a particular class or type. A Court may order disclosure (under CPR 31.12(1)) of documents where this is necessary to deal fairly and justly with a particular issue.[55] An application under CPR 31.12(1) is made in accordance with the principles discussed in paragraph 12.7 of this Guide.

6.5.3. In practice, orders for disclosure of documents are rarely necessary in judicial review claims. The disclosure of documents may not, in fact, be necessary to allow the Court to consider a particular issue. Furthermore, a defendant may have disclosed the relevant documents (either before proceedings begin or as part of its evidence provided during proceedings (see paragraph 14.1 of this Guide on the duty of candour)).

6.6. Where to Issue the Claim (Appropriate Venue)

6.6.1. There are five ACOs in England and Wales in which a claim may be issued. They are situated in Birmingham Civil Justice Centre, Cardiff Civil Justice Centre, Leeds Combined Court Centre, Manchester Civil Justice Centre, and in the Royal Courts of Justice in London. Contact details for the ACOs can be found in Annex 1 to this Guide.

6.6.2. The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection.[56] As such the claim should be filed in the ACO with which the claimant has the closest connection.

6.6.3. Any claim started in Birmingham will normally be determined at an appropriate Court in the Midlands, in Cardiff in Wales, in Leeds in the North-East of England, in London at the Royal Courts of Justice; and in Manchester, in the North-West of England.

6.6.4. Claims where the claimant has the closest connection to the South West of England should be issued in the ACO in Cardiff Civil Justice Centre. The administration of the claim will take place in Cardiff, but all hearings will (unless there are exceptional circumstances) take place in the South West of England (principally in Bristol).

6.6.5. Whilst it is not encouraged, the claimant may issue a claim in a different region to the one with which he/she has the closest connection. The claimant should outline why the claim has been lodged in a different region in section 4 of the claim form. The decision should be justified in accordance with the following considerations:

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[54] See the discussion of this principle in *R. (Al-Sweady)* v *Secretary of State for Defence* [2010] H.R.L.R. 2 at 18

[55] As discussed in *R.* v *Secretary of State for Foreign and Commonwealth Affairs* ex parte *World Development Movement Ltd* [1995] 1 W.L.R. 386 at 396-397.

[56] CPR PD 54D paragraph 5.2

6.6.5.1. Any reason expressed by any party for preferring a particular venue;

6.6.5.2. The region in which the defendant, or any relevant office or department of the defendant, is based;

6.6.5.3. The region in which the claimant's legal representatives are based;

6.6.5.4. The ease and cost of travel to a hearing;

6.6.5.5. The availability and suitability of alternative means of attending a hearing (for example, by videolink);

6.6.5.6. The extent and nature of media interest in the proceedings in any particular locality;

6.6.5.7. The time within which it is appropriate for the proceedings to be determined;

6.6.5.8. Whether it is desirable to administer or determine the claim in another region in the light of the volume of claims issued at, and the capacity, resources and workload of, the Court at which it is issued;

6.6.5.9. Whether the claim raises issues sufficiently similar to those in another outstanding claim to make it desirable that it should be determined together with, or immediately following, that other claim; and

6.6.5.10. Whether the claim raises devolution issues and for that reason whether it should more appropriately be determined in London or Cardiff.

6.6.6. There are a number of exceptions to the general rule on venue outlined in paragraph 6.6.2 above. The exceptions can be found in CPR PD 54D paragraph 3.1. They are not repeated here as they do not relate to judicial review proceedings.

6.6.7. If the claim is issued in an ACO thought not to be the most appropriate, it may be transferred by judicial order, often made by an ACO lawyer. The Court will usually invite the views of the parties if it is minded to transfer the claim to a different venue. The defendant and any interested party can address the issue of venue in their summary grounds.

6.7. Filing Documents by Fax and Email

6.7.1. The Administrative Court Office will accept the service of documents by email provided:

6.7.1.1. The document being filed does not require a fee;

6.7.1.2. The document, including attachments, does not exceed the maximum which the appropriate court office has indicated it can accept by email[57];

6.7.1.3. The email, including any attachments, is under 10Mb in size.

6.7.2. Where a document may be emailed it must be emailed to the appropriate ACO general inbox (see the contacts list at Annex 1).[58] Any party filing a document by email should not also file a hard copy unless instructed;

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[57] In many instances, 50 pages, but parties should check with the appropriate court office.

[58] CPR PD 5B paragraph 2.1 and 2.2

PART C: SPECIFIC PRACTICE POINTS

14. Duty of Candour

14.1. There is a special duty which applies to parties to judicial review known as the 'duty of candour' which requires the parties to ensure that all relevant information and facts are put before the Court.[160] This means that parties must disclose any information or material facts which either support or undermine their case.

14.1.1. This rule is needed in judicial review claims, where the Court's role is to review the lawfulness of decisions made by public bodies, often on an urgent request being made, where the ordinary rules of disclosure of documents do not apply (see paragraph 6.5 and chapter 20 of this Guide on evidence) and where the witness statements are usually read (rather than being subject to cross examination by witnesses who are called to give their evidence orally).

14.1.2. The rule is particularly important where the other party has not had the opportunity to submit its own evidence or make representations (usually an urgent application – see chapter 16 of this Guide).

14.1.3. The Court will take seriously any failure or suspected failure to comply with the duty of candour. The parties or their representatives may be required to explain why information or evidence was not disclosed to the Court, and any failure may result in sanctions.

14.1.4. Specifically, claimants in judicial review proceedings must ensure that the Court has the full picture. In some circumstances, to ensure this, it is not sufficient simply to provide the relevant documents. Instead, a specific explanation of a document or an inconsistency must be given, usually by witness statement attested by the claimant.[161]

14.1.5. The duty of candour is a continuing duty. The claimant must reassess the viability and propriety of a challenge in light of the defendant's acknowledgement of service and summary grounds.[162]

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[160] See the discussion of this principle in *R. (Al-Sweady)* v *Secretary of State for Defence* [2009] EWHC 2387 (Admin) at paragraph 18

[161] *R (Mohammed Shahzad Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 at 45

[162] Ibid, 48

15. Interim Relief

15.1. When is Interim Relief Appropriate?

15.1.1. A party (usually the Claimant) may request an interim remedy whilst the case is pending. Common examples are:

15.1.1.1. An interim order stopping the action the defendant plans to take (e.g to prevent removal from the UK, assuming that UTIAC has no jurisdiction in the matter, see paragraph 5.5 of this Guide);

15.1.1.2. An interim order requiring the defendant to act in a certain way (e.g – to provide the claimant with accommodation).

15.1.2. Interim relief is usually requested in the claim form. But it can be applied for at any stage of proceedings and in exceptional cases can be applied for before proceedings are commenced. The procedure is outlined in CPR Part 23, supplemented in places by CPR Part 25 and CPR Part 54.

15.1.3. The Court may require the claimant to give undertakings as a condition of any interim relief:

15.1.3.1. The claimant may be required to give an undertaking in damages, so that if the defendant succeeds at the end of the day, and has suffered financial loss as a result of the relief ordered in the claimant's favour in the meanwhile, the claimant will have to compensate that loss; and

15.1.3.2. An undertaking operates as if it was a Court order, and breach of an undertaking is equivalent to breaching a Court order, which the Court can sanction by imposing an adverse costs order on the party in default, refusing to hear the application, striking out the claim and proceeding to consider committal for contempt of Court.

15.2. Interim Relief When Lodging the Claim

15.2.1. Interim relief is usually applied for at the same time as lodging the claim papers (see chapter 6 of this Guide on starting proceedings).

15.2.2. Such an application can be made by making the application in section 8 of the claim form (form N461). As with the statement of facts and grounds, the substance of the application can be contained in a separate document to which section 8 of the claim form refers.

15.2.3. The application for interim relief will be considered by the judge on the papers, usually at the same time as the application for permission to apply for judicial review. The advantage for all parties is that this process reduces paperwork, reduces Court time, and does not require an additional fee.

15.2.4. The judge considering the application for interim relief alongside permission may either make an order based on the papers alone or order that the application for interim relief be dealt with at a hearing in Court (see paragraph 13.2.3 of this Guide for listing of such hearings).

15.2.5. Where the circumstances of the case require urgent consideration of the application for permission to apply for judicial review and/or any interim relief, a different procedure applies. This is dealt with separately in this Guide (see chapter 16).

15.3. Interim Relief before Commencement of Proceedings

15.3.1. In exceptionally urgent circumstances a person may apply for interim relief before starting proceedings. See paragraph 16.4 of this Guide for the procedure where an urgent application is made before proceedings have been commenced.

15.4. Interim Relief in Ongoing Proceedings

15.4.1. Where a claim has already been lodged but it subsequently becomes clear that an interim order is required, the party seeking interim relief should issue an application on form N244 or PF244. If the application is urgent, the party should make that clear in the application form, and indicate the timescale within which the judge is requested to consider the application in that application and, preferably, in a covering letter as well. Such an application, whether it is made urgently or not, should always, unless it is impracticable, be served on all the other parties. The Court is unlikely to consider the application unless the opposing party has been given an opportunity to respond to the application in writing.

15.5. Reconsideration if Interim Relief is Refused

15.5.1. Where an application for an interim order has been refused without a hearing (that is to say that the judge made the order considering the papers alone), a party may request the decision be reconsidered.[163]

15.5.2. Reconsideration is requested by lodging an application notice (N244 or PF244) with the relevant fee within 7 days of service of the order made on the papers, unless the order allows for a different time limit.[164] The application must be served on all other parties.

15.5.3. If an application is made for reconsideration after refusal on the papers then reconsideration must take place at an oral hearing in Court (see paragraph 13.2.3 of this Guide on listing).

15.5.4. If reconsideration is required within a set time frame the application must make the relevant timescale clear in the application and, preferably, in a covering letter as well.

15.5.5. Where reconsideration of an order made on the papers is extremely urgent and cannot wait until the Court's sitting hours, then the application for reconsideration can be made to out of hours judge in accordance with paragraph 16.3 of this Guide. In such circumstances the practitioner will be asked to undertake to pay the relevant fee on the next working day.

15.5.6. A party who wishes to challenge a decision made on the papers must apply for reconsideration in the Administrative Court before they can appeal (see chapter 25 of this Guide for appeals).[165]

15.6. Criteria for the Grant of Interim Relief

15.6.1. When considering whether to grant interim relief while a judicial review claim is pending, the judge will consider:[166]

15.6.1.1. Whether there is a real issue to be tried. In practice, in judicial review claims, that involves considering whether there is a real prospect of succeeding at the substantive hearing, that is to say a more than a fanciful prospect of success;

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[163] *R. (MD (Afghanistan))* v *Secretary of State for the Home Department* [2012] EWCA Civ 194

[164] CPR 3.3(6)

[165] *R. (MD (Afghanistan))* v *Secretary of State for the Home Department* [2012] EWCA Civ 194 at paragraph 21

[166] *R. (Medical Justice)* v *Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) and *American Cyanamid Company v Ethicon Limited [1975] AC 396*

15.6.1.2. Whether the balance of convenience lies in granting the interim order;

15.6.1.3. Any other factors the Court considers to be relevant.

15.6.2. Generally, there is a strong public interest in permitting a public authority's decision to continue, so the applicant for interim relief must make out a strong case for relief in advance of the substantive hearing.[167]

15.6.3. The Court will be reluctant to grant any form of interim relief without establishing the defendant's response to the application. The Court is likely, if time permits, to permit the defendant an opportunity to respond to the application. In an urgent case, this may be by abridging time for service of the acknowledgement of service or calling the matter in for a hearing on short notice.

15.6.4. If time does not permit the defendant to be heard, then the Court will consider granting relief for a very short period until the defendant has been able to make its submissions (in writing or at a hearing).

15.6.5. Sometimes, if the merits of the underlying claim are unclear and there is no particular urgency in granting relief, the Court will give directions for an 'expedited' (speedy) determination of permission, or trial of the claim (possibly on the basis that permission should be 'rolled up' with the substantive hearing – see paragraph 8.2.6 of this Guide). In this way, the Court can be sure that both parties have had a chance to put their arguments before the Court before any form of order granting (or refusing) relief is made.

15.7. Removals Cases

15.7.1. There are particular rules relating to cases where a claimant challenges a decision to remove him or her from the jurisdiction, see CPR PD 54A, paragraph 18. Such challenges would now generally fall within the jurisdiction of UTIAC. A person who makes an application for permission to apply for judicial review of a removal decision must file a claim form which must:

15.7.1.1. Indicate on the face of the claim form that the practice direction applies (which can be done by ticking the relevant box in section 4 of the claim form);

15.7.1.2. Attach to the claim form a copy of the removal directions and the decision to which the application relates;

15.7.1.3. Attach any document served with the removal directions including any document which contains the UK Border Agency's factual summary of the case; and

15.7.1.4. Contain or be accompanied by the detailed statement of the claimant's grounds for bringing the judicial review (or give the reasons why compliance with the last two conditions is not possible).

15.7.2. That person must send copies of the claim form to the UK Border Agency.

15.7.3. The Court has set out certain principles to be applied when such applications are made in *R (Madan) v Secretary of State for the Home Department* [2007] EWCA Civ 770 which were endorsed by the Court in *R (SB (Afghanistan)) v Secretary of State for the Home Department* [2018] EWCA Civ 215:[168]

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[167] The position is different for cases involving removals from the UK involving claims of a breach of Articles 2 and 3 of the ECHR – see below at 15.7, and see *R (SB (Afghanistan)) v SSHD* [2018] EWCA Civ 215 at [78].

[168] See [55]-[56]. At [75], the Court suggested that a valid claim was one which was made at a time which afforded the Secretary of State a viable opportunity to appreciate that such a claim had been made and to take steps to address it.

15.7.3.1. Such applications must be made promptly on the intimation of a deportation decision and not await the actual fixing of removal arrangements;

15.7.3.2. The detailed statement of grounds must include a statement of all previous applications made in respect of that applicant's immigration status and indicate how the present state of the case differs from previous applications.

15.7.4. Counsel and solicitors appearing on the application, in the absence of the defendant, are under professional obligations to draw the judge's attention to any matter adverse to their client's case, including in particular any previous adverse decisions, and to take a full note of the judge's judgment or reasons, which should then be submitted to the judge for approval.

16. Urgent Cases

16.1. General

16.1.1. The Administrative Court often deals with urgent cases. This is a very important part of the Court's work, and the availability of the Court to deal with urgent cases is in the public interest. However, the Court's experience in recent years is that some litigants and practitioners are misusing, and even abusing, the procedures for seeking urgent adjudication. The consequence of this is or may be that those claimants with genuinely urgent cases have had to wait longer than they needed to, because wholly unmeritorious and/or non-urgent cases are ahead of them in the queue.

16.1.2. All litigants and their advisers are reminded of the rules relating to urgent applications which are summarised below. In particular,

16.1.2.1. It is very important that litigants and their advisors state clearly on the Court forms what are the reasons for urgency (see paragraph 16.2 below).

16.1.2.2. It is very important that litigants and their advisors comply with their duty of candour which requires them to disclose all relevant material to the Court (see paragraph 14.1 of this Guide).

16.1.3. The CPR, Practice Directions and other obligations owed to the Court must be complied with. If they are not complied with, the party in default is likely to be made subject to an adverse costs order (for example, being made to pay some or all of the other party's legal costs, or being unable to recover their own legal costs, even if successful), and risks having their claim dismissed for non-compliance. Professional representatives may face applications for wasted costs, or be referred to their Regulator for consideration of disciplinary action, for failure to comply with their professional obligations.

16.1.4. Professional representatives are reminded of the following passage from *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin):

"[7] ... If any firm fails to provide the information required on the form 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. ..."

16.2. Urgent Consideration – Form N463

16.2.1. Where the circumstances of the case require urgent consideration of the application for permission to apply for judicial review and/or any interim relief (which is not so urgent that it has been sought pre-action, but still sufficiently urgent that the Court is being asked to deal with it within a shortened timeframe), the Claimant may apply for urgent consideration at the same time as issuing the claim form.[169] These situations will generally be those where some irreversible action will take place if the Court does not act to prevent it, or where an expedited judicial review is required.

16.2.2. The claimant must complete form N463 (a new version is available as of 26 March 2018), providing the following information (which is required to be inserted in the relevant boxes on that form):

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[169] Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 W.L.R. 810

16.2.2.1. The circumstances giving rise to the urgency. If the representative was instructed late, an explanation must be provided as to why their client instructed them at the last moment. If the form is filed only shortly before the end of the working day, an explanation should also be provided as to why the application was not made earlier in the day;

16.2.2.2. The timescale sought for the consideration of the application;

16.2.2.3. The date by which any substantive hearing should take place;

16.2.2.4. Efforts taken to put the defendant on notice of the application for urgent consideration;

16.2.2.5. The grounds on which any interim order is sought.

16.2.3. A draft of the order sought should be attached which sets out the relief sought and any directions for an expedited hearing.

16.2.4. The full claim papers (see chapter 6 of this Guide on starting proceedings, i.e. claim form and required supporting documents) must be filed alongside the urgent application. Where the application for urgent consideration is filed at the same time as the claim papers there is no additional fee for the urgent application, it is covered by the fee to start proceedings.

16.2.5. The claimant should serve the claim papers and the Form N463 with supporting documentation on the defendant and interested parties, advising them of the application and that they may make representations.

16.2.6. The Administrative Court Office will have a judge available to consider any urgent application received between 10am and 4pm (4.30pm in London), Monday to Friday, excluding public holidays (See CPR PD 2A, paragraph 2.1). The judge may either make an order based on the papers alone or order that the application (or part of it) be dealt with at a hearing in Court (see paragraph 13.2.3 for listing of such hearings). In appropriate situations the Master or an ACO lawyer may consider the application and request further information or make an order.

16.2.7. It is not appropriate for any urgent application arising during court hours (see paragraph 16.2.6 above) in relation to a judicial review to be put before the judge in charge of the interim applications court in London ("Court 37"). The Administrative Court has a judge available to deal with immediate applications in the context of a judicial review. Court 37 deals with other Queen's Bench Division matters. If a matter is brought before Court 37 (or any inappropriate court) which should have been brought before the Administrative Court as a matter arising in judicial review proceedings (pre-claim or otherwise) then the judge is likely to refuse to deal with the application and direct the applicant to file proceedings in the Administrative Court Office unless doing so would cause any irreversible prejudice or harm.

16.2.8. Wherever possible the Court will want representations from the defendant before determining the application. In cases where interim relief is sought, the Court will generally make an order allowing the defendant a short time to file written submissions before deciding the application, unless irreversible prejudice would be caused to the claimant in the meanwhile; alternatively, the judge may list the matter for a hearing on notice to the defendant (see paragraph 13.2.3 of this Guide for listing). In cases where an expedited substantive hearing is sought, the Court may abridge time for service of the defendant's acknowledgement of service and request the defendant's views on the order sought, to enable the Court to take an early view on permission and any consequential case management directions.

16.2.9. If the matter is put before a judge who concludes that the application was not urgent, and is suitable for disposal according to the ordinary procedures of the Court, the judge may refuse to deal with the matter on an urgent basis, and may make an adverse costs order against the applicant or his legal representatives (see paragraph 23.1 of this Guide on costs).

16.2.10. If an urgent application is refused on the papers the applying party may request the decision be reconsidered at an oral hearing (see paragraph 15.5 of this Guide for the procedure). The application must be made by filing the application notice with the Administrative Court Office, not by applying in the interim applications court (or any other court).

16.3. Out of Hours Applications

16.3.1. In the event that an urgent application needs to be made outside the sitting hours of the Administrative Court (see paragraph 16.2.6 of this Guide) and the application cannot wait until the sitting hours recommence, then the claimant may make the application to the out of hours High Court Judge. A High Court Judge is on call at all times to deal with very urgent applications which cannot wait until the next working day.

16.3.2. If a party needs to make an out of hours application to the Court, the acting barrister or solicitors should telephone 0207 947 6000[170] and speak to the Queen's Bench Division out of hours duty clerk.

16.3.3. The out of hours duty clerk will require the practitioner to complete the out of hours form, which can be downloaded from the Government website (http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3007) and emailed to QBDutyClerk@hmcts.gsi.gov.uk. (Emails must not be sent to this address unless the out of hours duty clerk has invited you to do so.)

16.3.4. The out of hours judge may deal with the application on paper. Alternatively, the out of hours judge may telephone the representatives acting for the claimant to enable them to make their submissions orally before deciding the application. The representatives will be required to provide a telephone number on which they can be reached. The out of hours judge may also telephone any other party to the application if he or she considers that to be appropriate (this is often done in immigration cases where the application seeks a stay on removal).

16.3.5. The fact that a judge is being asked to make an order out of hours, usually without a hearing, and often without any representations from the defendant's representatives and in a short time frame, means that the duty of candour (to disclose all material facts to the judge, even if they are not of assistance to the claimant's case) is particularly important, see paragraph 14.1 of this Guide.

16.3.6. Legal representatives must consider very carefully whether an out of hours application really is required and should only make such an application if the matter really cannot wait until the next working day.

16.3.7. The out of hours service is not available to litigants in person.

16.4. Pre-Action Applications

16.4.1. In exceptionally urgent circumstances, a person may apply, typically for interim relief, before starting judicial review proceedings. The Court may only grant a pre-action order where:

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[170] As required by CPR PD 54D paragraph 4.2 and CPR PD 25A paragraph 4.5

16.4.1.1. The matter is urgent; or

16.4.1.2. It is otherwise necessary to do so in the interests of justice.[171]

16.4.2. The claimant should carefully consider whether the matter is really so urgent that an application should be made before the claim is started. It is much better to apply at the same time as lodging the claim papers if that is possible: this will make it easier for the Court to understand the issues and is likely to conserve legal costs.

16.4.3. The claimant should always try to reach an agreement with the public authority, even for a short period, before applying for pre-action interim relief. The Court will expect to be told about such efforts and why they have not succeeded, if the matter is brought before the Court instead.

16.4.4. If the matter really is urgent and no short-term compromise can be reached, then the claimant can make an application for a pre-action relief by filing an application notice (N244 or PF244) with the ACO.[172] The application must be accompanied by the relevant fee, must be supported by evidence establishing why the order is required,[173] and should enclose a copy of the draft order. Where possible a copy of the application, evidence, and draft order should be sent to the proposed defendants and interested parties to give them notice that the application is being made.[174] Where the application has been made without giving notice to the other parties then the evidence supporting the application should explain why the application has been made without giving notice.[175]

16.4.5. In the application notice the applicant may request the application be considered at a hearing or by a judge considering the papers. In either event, the ACO will send the papers to a judge, master, or ACO lawyer to consider in the first instance. A judicial order may be made on the papers alone if it is thought that a hearing would not be appropriate.[176] Otherwise, a hearing will be listed to consider the application. Such a hearing is usually listed at short notice.

16.4.6. Wherever possible the Court will want representations from the defendant before determining any application made in advance of issuing the claim form. Unless, by not granting that order, irreversible prejudice would be caused to the claimant, the Court will generally make an order allowing the defendant a short time period to file written representations or the Court will direct that the application should be dealt with at a hearing listed with notice being provided to the defendant.

16.4.7. The claimant will usually be required to undertake to file a claim form and grounds of claim, usually within a short period, or, if no satisfactory undertaking is offered, will be directed by the Court to do so.[177]

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[171] CPR 25.2(2)(b).

[172] CPR 23.3(1)

[173] CPR 25.3(2)

[174] CPR 23.4(1)

[175] CPR 25.3(3)

[176] CPR 23.8(c)

[177] CPR 25.2(3)

16.5. Abuse of the Procedures for Urgent Consideration

16.5.1. Where an application for urgent consideration or an out of hours application is made which does not comply with this Guide and/or it is manifestly inappropriate, the Court may make a wasted costs order or some other adverse costs order (see paragraphs 23.1 and 23.13 of this Guide respectively).[178]

16.5.2. In *R. (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) (see paragraph 16.1.4 above) the Court held that where urgent applications are made improperly the Court may summon the legal representative to Court to explain his or her actions and would consider referring that person, or their supervising partner (if different) to the relevant regulator. Examples (but not an exhaustive list) of applications which have been held to be inappropriate under the *Hamid* rule are:

16.5.2.1. The claimant's solicitor had delayed making the urgent application until the last minute and had not disclosed the full facts of the case in an attempt to use the urgent process to prevent his client's removal from the UK.[179]

16.5.2.2. The claimant's solicitor requested urgent interim relief against a decision that had been made three years earlier.[180]

16.5.2.3. A practitioner advanced arguments that his client was suicidal and psychotic when they knew or ought to have known were false and/or inconsistent with their own medical evidence.[181]

16.5.2.4. A practitioner lodged an application with grounds that were opaque and brief and failed to set out any of the claimant's history of criminality.[182]

16.5.3. Practitioners should be aware that the Court can identify those who are responsible for abusing the Court's processes by making adverse costs orders (see paragraph 23.1 of this Guide) or by activating the *Hamid* procedure outlined above which may lead to those practitioners being disciplined by their Regulator. If the *Hamid* procedure is activated any orders made in relation to the referral may be published and placed in the public domain and any such publication will include the explanation provided by the legal representative. Also see paragraph 12.10 of this Guide on abuse of the Court's process.[183]

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[178] Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 W.L.R. 810 at 811

[179] *R. (Hamid)* v *Secretary of State for the Home Department* [2012] EWHC 3070 (Admin)

[180] *R. (Butt) v Secretary of State for the Home Department* [2014] EWHC 264 (Admin)

[181] *R. (Okondu) v Secretary of State for the Home Department (wasted costs; SRA referrals; Hamid) IJR* [2014] UKUT 377 (IAC)

[182] *R. (Okondu) v Secretary of State for the Home Department (wasted costs; SRA referrals; Hamid) IJR* [2014] UKUT 377 (IAC)

[183] See also *R. (SB (Afghanistan) v SSHD* [2018] EWCA Civ 215 at [54]-[56]; and *Vai Sui Ip v Solicitors Regulation Authority* [2018] EWHC 957 (Admin) where a Divisional Court upheld the sanction of striking off a solicitor for making abusive applications for judicial review of immigration decisions.

Justice

Pre-Action Protocol for Judicial Review

Pre-Action Protocol for Judicial Review

Contents

Introduction

1. This Protocol applies to proceedings **within England and Wales only**. It does not affect the time limit specified by Rule 54.5(1) of the Civil Procedure Rules (CPR), which requires that any claim form in an application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. Nor does it affect the shorter time limits specified by Rules 54.5(5) and (6), which set out that a claim form for certain planning judicial reviews must be filed within 6 weeks and the claim form for certain procurement judicial reviews must be filed within 30 days. [1]

2. This Protocol sets out a code of good practice and contains the steps which parties should generally follow before making a claim for judicial review.

3. The aims of the protocol are to enable parties to prospective claims to—

(a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;

(b) make informed decisions as to whether and how to proceed;

(c) try to settle the dispute without proceedings or reduce the issues in dispute;

(d) avoid unnecessary expense and keep down the costs of resolving the dispute; and

(e) support the efficient management of proceedings where litigation cannot be avoided.

4. Judicial review allows people with a sufficient interest in a decision or action by a public body to ask a judge to review

the lawfulness of—

- an enactment; or
- a decision, action or failure to act in relation to the exercise of a public function. [2]

5. Judicial review should only be used where no adequate alternative remedy, such as a right of appeal, is available. Even then, judicial review may not be appropriate in every instance. Claimants are strongly advised to seek appropriate legal advice as soon as possible when considering proceedings. Although the Legal Aid Agency will not normally grant full representation before a letter before claim has been sent and the proposed defendant given a reasonable time to respond, initial funding may be available, for eligible claimants, to cover the work necessary to write this. (See Annex C for more information.)

6. This protocol will not be appropriate in very urgent cases. In this sort of case, a claim should be made immediately. Examples are where directions have been set for the claimant's removal from the UK or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so, such as where a local housing authority fails to secure interim accommodation for a homeless claimant. A letter before claim, and a claim itself, will not stop the implementation of a disputed decision, though a proposed defendant may agree to take no action until its response letter has been provided. In other cases, the claimant may need to apply to the court for an urgent interim order. Even in very urgent cases, it is good practice to alert the defendant by telephone and to send by email (or fax) to the defendant the draft Claim Form which the claimant intends to issue. A claimant is also normally required to notify a defendant when an interim order is being sought.

7. All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of the case. Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it in good time before proceedings are issued and will take into account compliance or non-compliance when giving directions for case management of proceedings or when making orders for costs. [3]

8. The Upper Tribunal Immigration and Asylum Chamber (UTIAC) has jurisdiction in respect of judicial review proceedings in relation to most immigration decisions. [4] The President of UTIAC has issued a Practice Statement to the effect that, in judicial review proceedings in UTIAC, the parties will be expected to follow this protocol, where appropriate, as they would for proceedings in the High Court.

Alternative Dispute Resolution

9. The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of proceedings to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court.

10. It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation which may be appropriate, depending on the circumstances—

- Discussion and negotiation.
- Using relevant public authority complaints or review procedures.
- Ombudsmen – the Parliamentary and Health Service and the Local Government Ombudsmen have discretion to deal with complaints relating to maladministration. The British and Irish Ombudsman Association provide information about Ombudsman schemes and other complaint handling bodies and this is available from their website at www.bioa.org.uk. Parties may wish to note that the Ombudsmen are not able to look into a complaint once court action has been commenced.

- Mediation – a form of facilitated negotiation assisted by an independent neutral party.

11. The Civil Justice Council and Judicial College have endorsed The Jackson ADR Handbook by Susan Blake, Julie Browne and Stuart Sime (2013, Oxford University Press). The Citizens Advice Bureaux website also provides information about ADR: http://www.ad viceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e /alternatives_to_court.htm.
Information is also available at: http://www.civilmediation.justice.gov.uk/

12. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate in ADR or refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

Requests for information and documents at the pre-action stage

13. Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions.

The letter before claim

14. In good time before making a claim, the claimant should send a letter to the defendant. The purpose of this letter is to identify the issues in dispute and establish whether they can be narrowed or litigation can be avoided.

15. Claimants should normally use the suggested standard format for the letter outlined at Annex A. For Immigration, Nationality and Asylum cases, the Home Office has a standardised form which can be used. It can be found online at: https://www.gov.uk/government/publications/chapter-27-judicial-review-guidance-part-1

16. The letter should contain the date and details of the decision, act or omission being challenged, a clear summary of the facts and the legal basis for the claim. It should also contain the details of any information that the claimant is seeking and an explanation of why this is considered relevant. If the claim is considered to be an Aarhus Convention claim (see Rules 45.41 to 45.44 and Practice Direction 45), the letter should state this clearly and explain the reasons, since specific rules as to costs apply to such claims. If the claim is considered appropriate for allocation to the Planning Court and/or for classification as "significant" within that court, the letter should state this clearly and explain the reasons.

17. The letter should normally contain the details of any person known to the claimant who is an Interested Party. An Interested Party is any person directly affected by the claim. [5] They should be sent a copy of the letter before claim for information. Claimants are strongly advised to seek appropriate legal advice when considering proceedings which involve an Interested Party and, in particular, before sending the letter before claim to an Interested Party or making a claim.

18. A claim should not normally be made until the proposed reply date given in the letter before the claim has passed, unless the circumstances of the case require more immediate action to be taken. The claimant should send the letter before claim in good time so as to enable a response which can then be taken into account before the time limit for issuing the claim expires, unless there are good reasons why this is not possible.

19. Any claimant intending to ask for a protective costs order (an order that the claimant will not be liable for the costs of the defendant or any other party or to limit such liability) should explain the reasons for making the request, including an explanation of the limit of the financial resources available to the claimant in making the claim.

The letter of response

20. Defendants should normally respond within 14 days using the standard format at Annex B. Failure to do so will be

taken into account by the court and sanctions may be imposed unless there are good reasons. [6] Where the claimant is a litigant in person, the defendant should enclose a copy of this Protocol with its letter.

21. Where it is not possible to reply within the proposed time limit, the defendant should send an interim reply and propose a reasonable extension, giving a date by which the defendant expects to respond substantively. Where an extension is sought, reasons should be given and, where required, additional information requested. This will not affect the time limit for making a claim for judicial review [7] nor will it bind the claimant where he or she considers this to be unreasonable. However, where the court considers that a subsequent claim is made prematurely it may impose sanctions.

22. If the claim is being conceded in full, the reply should say so in clear and unambiguous terms.

23. If the claim is being conceded in part or not being conceded at all, the reply should say so in clear and unambiguous terms, and—

(a) where appropriate, contain a new decision, clearly identifying what aspects of the claim are being conceded and what are not, or, give a clear timescale within which the new decision will be issued;

(b) provide a fuller explanation for the decision, if considered appropriate to do so;

(c) address any points of dispute, or explain why they cannot be addressed;

(d) enclose any relevant documentation requested by the claimant, or explain why the documents are not being enclosed;

(e) where documents cannot be provided within the time scales required, then give a clear timescale for provision. The claimant should avoid making any formal application for the provision of documentation/information during this period unless there are good grounds to show that the timescale proposed is unreasonable;

(f) where appropriate, confirm whether or not they will oppose any application for an interim remedy; and

(g) if the claimant has stated an intention to ask for a protective costs order, the defendant's response to this should be explained.

If the letter before claim has stated that the claim is an Aarhus Convention claim but the defendant does not accept this, the reply should state this clearly and explain the reasons. If the letter before claim has stated that the claim is suitable for the Planning Court and/or categorisation as "significant" within that court but the defendant does not accept this, the reply should state this clearly and explain the reasons.

24. The response should be sent to all Interested Parties [8] identified by the claimant and contain details of any other persons who the defendant considers are Interested Parties.

ANNEX A

Letter before claim

Section 1. Information required in a letter before claim

1 Proposed claim for judicial review
To
(Insert the name and address of the proposed defendant – see details in section 2.)

2 The claimant
(Insert the title, first and last name and the address of the claimant.)

3 The defendant's reference details (When dealing with large organisations it is important to understand that the

information relating to any particular individual's previous dealings with it may not be immediately available, therefore it is important to set out the relevant reference numbers for the matter in dispute and/or the identity of those within the public body who have been handling the particular matter in dispute – see details in section 3.)

4 The details of the claimants' legal advisers, if any, dealing with this claim
(Set out the name, address and reference details of any legal advisers dealing with the claim.)

5 The details of the matter being challenged
(Set out clearly the matter being challenged, particularly if there has been more than one decision.)

6 The details of any Interested Parties
(Set out the details of any Interested Parties and confirm that they have been sent a copy of this letter.)

7 The issue
(Set out a brief summary of the facts and relevant legal principles, the date and details of the decision, or act or omission being challenged, and why it is contended to be wrong.)

8 The details of the action that the defendant is expected to take
(Set out the details of the remedy sought, including whether a review or any interim remedy are being requested.)

9 ADR proposals
(Set out any proposals the claimant is making to resolve or narrow the dispute by ADR.)

10 The details of any information sought
(Set out the details of any information that is sought which is related to identifiable issues in dispute so as to enable the parties to resolve or reduce those issues. This may include a request for a fuller explanation of the reasons for the decision that is being challenged.)

11 The details of any documents that are considered relevant and necessary
(Set out the details of any documentation or policy in respect of which the disclosure is sought and explain why these are relevant.)

12 The address for reply and service of court documents
(Insert the address for the reply.)

13 Proposed reply date
(The precise time will depend upon the circumstances of the individual case. However, although a shorter or longer time may be appropriate in a particular case, 14 days is a reasonable time to allow in most circumstances.)

Section 2. Address for sending the letter before claim

Public bodies have requested that, for certain types of cases, in order to ensure a prompt response, letters before claim should be sent to specific addresses.

- Where the claim concerns a decision in an Immigration, Asylum or Nationality case (including in relation to an immigration decision taken abroad by an Entry Clearance Officer)— The claim should be sent electronically to the following Home Office email address: UKVIPAP@homeoffice.gsi.gov.uk

Alternatively the claim may be sent by post to the following Home Office postal address:

Litigation Allocation Unit
6, New Square
Bedfont Lakes
Feltham, Middlesex

TW14 8HA

The Home Office has a standardised form which claimants may find helpful to use for communications with the Home Office in Immigration, Asylum or Nationality cases pursuant to this Protocol, to assist claimants to include all relevant information and to promote speedier review and response by the Home Office. The Home Office form may be filled out in electronic or hard copy format. It can be found online at: https://www.gov.uk/government/publications/chapter-27-judicial-review-guidance-part-1

- Where the claim concerns a decision by the Legal Aid Agency—
  The address on the decision letter/notification;
  Legal Director
  Corporate Legal Team
  Legal Aid Agency
  102 Petty France
  London SW1H 9AJ
- Where the claim concerns a decision by a local authority—
  The address on the decision letter/notification; and
  their legal department [9]
- Where the claim concerns a decision by a department or body for whom Treasury Solicitor acts and Treasury Solicitor has already been involved in the case a copy should also be sent, quoting the Treasury Solicitor's reference, to—
  The Treasury Solicitor,
  One Kemble Street,
  London WC2B 4TS
- In all other circumstances, the letter should be sent to the address on the letter notifying the decision.
  9 The relevant address should be available from a range of sources such as the Phone Book; Business and Services Directory, Thomson's Local Directory, CAB, etc.

Section 3. Specific reference details required

Public bodies have requested that the following information should be provided, if at all possible, in order to ensure prompt response. Where the claim concerns an Immigration, Asylum or Nationality case, dependent upon the nature of the case—

- The Home Office reference number;
- The Port reference number;
- The Asylum and Immigration Tribunal reference number;
- The National Asylum Support Service reference number; or, if these are unavailable:
- The full name, nationality and date of birth of the claimant.

Where the claim concerns a decision by the Legal Aid Agency—

- The certificate reference number.

ANNEX B

Response to a letter before claim

Information required in a response to a letter before claim

1 The claimant
(Insert the title, first and last names and the address to which any reply should be sent.)

2 From
(Insert the name and address of the defendant.)

3 Reference details

(Set out the relevant reference numbers for the matter in dispute and the identity of those within the public body who have been handling the issue.)

4 The details of the matter being challenged
(Set out details of the matter being challenged, providing a fuller explanation of the decision, where this is considered appropriate.)

5 Response to the proposed claim
(Set out whether the issue in question is conceded in part, or in full, or will be contested. Where an interim reply is being sent and there is a realistic prospect of settlement, details should be included. If the claimant is a litigant in person, a copy of the Pre-Action Protocol should be enclosed with the letter.)

6 Details of any other Interested Parties
(Identify any other parties who you consider have an interest who have not already been sent a letter by the claimant.)

7 ADR proposals
(Set out the defendant's position on any ADR proposals made in the letter before claim and any ADR proposals by the defendant.)

8 Response to requests for information and documents
(Set out the defendant's answer to the requests made in the letter before claim including reasons why any requested information or documents are not being disclosed.)

9 Address for further correspondence and service of court documents
(Set out the address for any future correspondence on this matter)

ANNEX C

Notes on public funding for legal costs in judicial review

Public funding for legal costs in judicial review is available from legal professionals and advice agencies which have contracts with the Legal Aid Agency. Funding may be provided for—

- Legal Help to provide initial advice and assistance with any legal problem; or
- Legal Representation to allow you to be represented in court if you are taking or defending court proceedings. This is available in two forms—

Investigative Help is limited to funding to investigate the strength of the proposed claim. It includes the issue and conduct of proceedings only so far as is necessary to obtain disclosure of relevant information or to protect the client's position in relation to any urgent hearing or time limit for the issue of proceedings. This includes the work necessary to write a letter before claim to the body potentially under challenge, setting out the grounds of challenge, and giving that body a reasonable opportunity, typically 14 days, in which to respond.

Full Representation is provided to represent you in legal proceedings and includes litigation services, advocacy services, and all such help as is usually given by a person providing representation in proceedings, including steps preliminary or incidental to proceedings, and/or arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. Except in emergency cases, a proper letter before claim must be sent and the other side must be given an opportunity to respond before Full Representation is granted.

Further information on the type(s) of help available and the criteria for receiving that help may be found in the Legal Aid Agency's pages on the Ministry of Justice website at: https://www.justice.gov.uk/legal-aid

A list of contracted firms and Advice Agencies may be found at: http://find-legal-advice.justice.gov.uk"

Footnotes

1. The court has a discretion to extend time. It cannot be taken that compliance with the protocol will of itself be sufficient to excuse delay or justify an extension of time, but it may be a relevant factor. Under rule 54.5(2), judicial review time limits cannot be extended by agreement between the parties. However, a court will take account of a party's agreement 'not to take a time point' so far as concerns delay while they were responding to a letter before claim. Return to footnote 1
2. Civil Procedure Rules, Rule 54.1(2). Return to footnote 2
3. Civil Procedure Rules, Practice Directions 44-48. Return to footnote 3
4. See the Direction made by the Lord Chief Justice dated 21 August 2013 (as amended on 17 October 2014), available in the UTIAC section of the www. justice.gov.uk website. Also, the High Court can order the transfer of judicial review proceedings to the UTIAC. Return to footnote 4
5. See Civil Procedure Rules, Rule 54.1(2). Return to footnote 5
6. See Civil Procedure Rules, Practice Direction – Pre-Action Conduct and Protocols, paragraphs 2-3. Return to footnote 6
7. See Civil Procedure Rules, Rule 54.5(1). Return to footnote 7
8. See Civil Procedure Rules, Rule 54.1(2)(f). Return to footnote 8
9. The relevant address should be available from a range of sources such as the Phone Book; Business and Services Directory, Thomson's Local Directory, CAB, etc. Return to footnote 9

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