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PRACTICE AND PROCEDURE

THE EARLY STAGES OF JUDICIAL REVIEW: THE CHANGING LANDSCAPE

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1. Judicial review is unusual, in civil claims, in having a mandatory permission requirement, which is used to filter out unmeritorious cases. The purpose of the permission requirement has been described as being to shield public bodies "against weak and vexatious claims[1]", and in *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, Lord Diplock suggested that permission would be granted where "on a *quick perusal* of the material *then available*, the court thinks that it discloses what *might on further consideration turn out to be an arguable case"* (at 644A).

2. It seems clear that matters have moved on since Lord Diplock's remarks, both in the sense that a more stringent test is now applied to the grant of permission, not limited to the filtering out of "vexatious" claims, and because the court's scrutiny of claims, at least at oral hearings, is often searching, and even simple cases may now involve quite lengthy permission hearings lasting an hour or a morning at court. As to the test now applies, the most authoritative statement is again from Lord Bingham in *Sharma v Browne-Antoine* [2006] UKPC 57, [2007] 1 WLR 780:

> *... The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623 , 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468 , para 62, in a passage applicable, mutatis mutandis, to arguability:*

[1] Lord Bingham in *R v Secretary of State for Trade and Industry, ex p Eastaway* [2000] 1 WLR 2222.

> *"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*
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> *It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 , 733.*

3. Thus, the test is a flexible one, which requires at least an arguable case, and where the height of the hurdle may vary according to circumstances (the importance of the legal issue, the importance to the individual, the nature of the permission hearing, the consequences for the defendant and third parties, etc). Whether or not permission will ultimately be granted may by hard to predict at the outset of a claim.

4. Until relatively recently, all applications for judicial review would have followed a uniform pattern, of application made on the papers, followed by renewal to oral hearing as of right. All would be subject to the same (albeit flexible) test for permission, and (at least leaving aside cases where urgent interim relief was required), the consequences of failing to get permission would be the same, including leaving the same procedural remedies (renewal, and if necessary appeal to the CA on the papers and at oral hearing). All were subject to a single, identical (albeit again flexible) time limit.

5. That position has changed in the last few years, in so far as specific provision has been made, largely in immigration cases, for the court to consider whether a case is without merit, and limiting the circumstances in which certain claimants may apply for oral renewal. It is set to change far more radically, and with much more general effect on all kinds of claim for judicial review, in the relatively near future. All of the changes are dependent on, and relate in different ways to, the permission stage of the judicial review procedure. Those changes arise from two consultation papers issued by the Secretary of State for Justice, "Judicial Review: proposals for reform", issued in December 2012, concerned with proposed changes to the CPR ("the JR Consultation"), and one issued in April 2013, "Transforming Legal Aid: delivering a more credible and efficient system" ("the

Legal Aid Consultation"). The Secretary of State published his response to the JR Consultation in April 2013, so we are clear what reforms he will seek to enact. The consultation period for the Legal Aid Consultation closed yesterday.

6. The purpose of this paper is to consider what lessons can be learnt from the changes already enacted so as to ensure that future changes are made workable and effective, without (so far as possible) unduly impeding access to justice. Alongside that there have been developments in the court's approach to costs in the early stages of judicial review claims, the effect of which is in my view welcome, but which will become increasingly important in the light of changes proposed in the Legal Aid Consultation.

(1) "CLEARLY WITHOUT MERIT", "TOTALLY WITHOUT MERIT"

7. As I have already sought to suggest, it may be that at one point the permission requirement would itself have been understood in a way that involved filtering out frivolous or vexatious claims, or ones which were not even potentially arguable. In that sense the permission hurdle would have involved consideration of something akin to whether a case was clearly without merit. But things have moved on. The permission test is now clearly a higher test. A claim which fails to meet that test may nevertheless be very far indeed from a claim that is without merit.

8. To require judges to think, separately from the question of permission, about whether a case is clearly without merit is in effect to require consideration of two quite separate levels of arguability or merit, every time that they consider a case on the papers. It may be noted that in particular circumstances, this requirement to distinguish the question of permission / arguability, from some less stringent test, has been around for some time, albeit limited to particular circumstances, and arguably with less draconian consequences.

9. First, this requirement arises from the application of the criteria for the award of costs at permission hearings contained in *R (Mount Cook Land Ltd) v Westminster CC* [2004] 2 P & CR 22, whereby the general rule is that a defendant will not be awarded costs of attending an oral permission hearing, but where an exception can be made to this *inter alia* on the basis of the "hopelessness of the claim" and

persistence in a hopeless claim after that has been demonstrated by the Defendant (see §76(5)(a)). It is implicit in this guidance, which starts from the position that costs will not be awarded merely because permission is refused, that there is a (quite large) gulf between a case which is not sufficiently arguable to justify permission, and one that is "hopeless" in the sense identified in *Mount Cook*.

10. Secondly, albeit outside of the immediate context of judicial review, the Court of Appeal has for some time had power, under CPR 52.3(4A), when considering whether to grant permission to appeal on the papers, to certify that an appeal is "totally without merit", and on that basis to order that the application for permission cannot be renewed to an oral hearing. In their response to the December 2012 Consultation, the Senior Judiciary drew specific attention to this power (§21), noting that it had been "sufficiently effective" to justify its recent extension to appellate courts other than the Court of Appeal, and on that basis supported the creation of a similar power in High Court judges considering permission to apply for judicial review on the papers.

11. Thirdly, however, Administrative Court judges are already familiar with the need to consider whether a claim is "clearly without merit" in immigration cases, by reason of CPR 54 PD §18.4:

> *18.4 If, upon a refusal to grant permission to apply for judicial review, the Court indicates that the application is clearly without merit, that indication will be included in the order refusing permission.*

12. The effect of such an order is not obvious from the PD itself, because it ties in with the SSHD's published policy on judicial review claims and removal, Ch 60 of the Enforcement Instructions and Guidance ("EIG"). By that policy the SSHD undertakes, at least in the majority of cases, to defer removal of an individual once an application for judicial review has been lodged, but her policy is that undertaking need not be continued with in so far as, on a refusal of permission, a judge indicates that the claim is clearly without merit. Thus the effect of an order that a case is clearly without merit is potentially draconian, subject only to a claimant obtaining an injunction (which means persuading a different judge that the claim is sufficiently strong to merit this notwithstanding the permission order).

13. Following the December consultation, the Secretary of State for Justice now proposes an amendment to CPR 54 which will require a judge considering permission on the papers to decide whether a claim is "totally without merit" ("TWM"). Where he does so, there will be no right to renew orally. That will in effect mirror the power already given to appellate judges by CPR 52.4A.

14. My concern about this proposal arises, not from the fact that there could be no cases in which this would be appropriate, but from a concern about how it will be used in practice. My concern arises from the vagueness of the current provisions. The permission threshold is not codified[2], and as we have seen is flexible. The new test is not further explained in the existing rules, and the fact that there are old cases which talk about permission being used to filter our "vexatious etc" claims, whilst at the same time other cases suggest that the test is much higher, seems to me to give rise to a danger of conflation of the two tests which will defeat what, I hope, is clear, namely that they should be regarded as being very different. My experience of the Admin Court's deployment of the "clearly without merit" provisions in CPR 54 PD 18.4 considerably exacerbates my concern in that respect. In that regard, my experience is that there has been a very different approach by the Court of Appeal (for the purposes of CPR 54 PD 18.4) to whether a case is TWM.

15. I therefore hope that, if and when these change are enacted (and even if they are not) some consideration will be given to some clear guidance (whether in the rules, in case law, or elsewhere) to make clear how different the two tests (permission and TWM) are intended to be. If that does not happen then I suggest that there is a real danger that the adoption of a new TWM rule which could cut off an oral hearing may produce real injustice.

(2) TIME FOR A RIGHT OF REPLY: "Cart JRs", the TWM proposal

16. Quite apart from the power in CPR 52.3(4A), there are already circumstances in JR itself in which JR claimants do not have the right to renew orally following refusal on the papers.

[2] Contrast the ordinary test for permission in the Court of Appeal, which is codified in CPR 52.3(6).

17. When the Supreme Court held in *R (Cart) v UT* [2012] 1 AC 663 that judicial review of the Upper Tribunal was possible, albeit on a "second appeals" test, Lady Hale indicated, with support from other members of the court, that it might be permissible to make changes to the CPR for cases of that kind so that there was no right to renew an application refused on the papers to an oral hearing. That suggestion was taken up in CPR 54.7A.

18. CPR 54.7A contains a number of features that are novel in JR procedure:

    (i) There is now a 16 day time fixed time limit for lodging a claim (CPR 54.7A(3)). Strikingly, no alteration was made to the pre-existing 21 day time period for a defendant or interested party to file an Acknowledgement of Service or Summary Grounds (CPR 54.7A(6)). That would seem at odds with the presumed justification for a 16 time limit for claimants, which is presumably urgency and the need for finality. In any case the upshot is that claimants' lawyers have considerably less time in which to consider the merits, advise their clients, seek funding, and file fully argued grounds of claim, than the respondents are given to file a *summary* response.

    (ii) CPR 54.7A(7) codifies the second appeals test for permission.

    (iii) CPR 54.7A(8) dis-applies CPR 54.12(3), so that there is no right to renew to an oral hearing following refusal on the papers.

    (iv) CPR 54.7A(9) provides that where permission is granted, final relief will follow *automatically*, *unless* the defendant or IP makes a specific request that there be a final substantive hearing. The effect is procedural only: a substantive hearing may be sought by the respondents as of right.

    (v) There is a right of appeal, but pursuant to CPR 52.15(1A), the application for permission will be determined on paper only.

19. A possible lacuna arising from point (iv), is that the rule is silent on the costs consequences of the court making a final order under CPR 54.7A(b). On general principle, costs should follow the event here, but a claimant who does not make a specific application may find that they end up with final relief, but no entitlement to costs, and with nothing that they can do about it. I suggest that this is a point that may merit consideration by the Rules Committee.

20. The overall effect is that a claimant must set out a fully pleaded argument on why their case meets the (in some ways very high) second appeals hurdle, within a very short space of time. The respondents to the claim are given considerably more time in which to prepare what is, in theory if not in practice, supposed to be a mere summary response in which they identify a "knock-out points"[3], and they have the final word before the case goes before a judge. Given the lack of right to renew, the last word is truly the final word in a way that is not *presently* seen in JR paper permission decisions.

21. There is no right of reply on paper at the permission stage in CPR 54, so the absence of this in CPR 54.7A is not itself an innovation[4]. There have been previous calls for a reply to be built into the pre-permission timetable[5], but these have not been implemented. I want to suggest that the enactment of CPR 54.7A, on the one hand, and the proposal that a judge may in future make an order that there be no right of renewal, on the other, means that it is appropriate for a reconsideration of this issue.

22. My own experience of running Cart JRs, where permission has been refused on the papers but granted orally, supports this concern. In one case in particular the judge refusing on the papers expressly relied a case referred to in the Summary Grounds as containing a knock-out blow. In fact, it was anything but, as the judge who granted at a later oral hearing accepted. Without a right either of renewal (as still existed at that time) or reply, that would have been an end of matters.

23. There is some recognition of this in the Senior Judiciary Response, albeit approaching the matter on a somewhat narrower basis. At paragraph 27, it says (having made clear elsewhere that it supports the proposal that there be power to certify a claim as totally without merit):

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[3] Per Carnwath LJ in *R (Ewing) v Office of the DPM* [2006] 1 WLR 1260, explaining that Summary Grounds should be truly summary, should not involve "substantial expense".

[4] There is nothing to prevent a claimant from filing a reply, but experience suggests that it is at best *possible* that it will reach the judge, who may or may not be willing to consider it, and in any case there is nothing to prevent a judge from considering permission before there has been time to prepare a reply. Defendants frequently argue that the absence of a right of reply means that a reply is forbidden, and sometimes write to the court inviting it to ignore the reply.

[5] In 2010, the President of the QBD established working groups to consider possible changes to CPR 54, and invited comments on a proposal to build in a right of reply to address "any issue of fact or law which arises for the first time in the" AOS. In its consultation response (http://www.adminlaw.org.uk/docs/ALBA%20PCR54.pdf), ALBA agreed that this was appropriate.

There is an argument that Claimants should have a right of reply Claimants should have a right of reply to any contention in an Acknowledgement of Service that there is no right to an oral renewal.

24. Elsewhere, the Response makes two other observations which seem to me to bear on this issue:

> *29.* [The proposal] *is likely to lead to:*
> *a. High Court judges taking more time to consider paper applications before certifying a case TWM. The need for additional paper work time will need to be considered ...*
>
> *31. ... It is right to note, however, that an option supported by some judges is that Claimants should be allowed to respond to a TWM certification on the papers, following which the judge who made the certification would have a discretion to review it.*

25. The options of a right to reply to a TWM *allegation* by a respondent (para 27 above), or to respond to a TWM *decision* by a judge (para 31), are possible, but they are in some ways more cumbersome than simply allowing for a right of reply to an AOS in all claims. There are good arguments for a general right to reply which have been in existence for many years, not least that it may reduce the number of oral renewal hearings because good cases for permission will be identified earlier. In any case I suggest that the case for a right to reply is now extremely strong in all cases where, for whatever reason, the consequences of the judge's order refusing permission is to cut off any right to an oral hearing (whether in the Admin Court or the CA).

(3) COSTS ON CONCESSION

26. For many years it has been thought that the proper approach to costs in judicial review claim which become "academic", including where that is the result of the defendant giving a claimant most or all of what they are seeking, is that the "default" order is that there be no order for costs, and that a claimant must seek to persuade the court otherwise by showing he might, or was bound, to have won. That view was based on *R (Boxall) v Mayor and Burgess of the LB of Waltham Forest*, ((2001) CCL Rep 258. Some older cases, though not *Boxall* itself, seemed to suggest that costs would only be awarded in a "plain and obvious" case, and that that was a particularly high hurdle.

27. That view was shown to be wrong in *R (Bahta) v SSHD* [2011] CP Rep 43. Pill LJ, with the agreement of other members of the court, held that the proper approach was as follows:

> *65 When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in para.4.13 of the Jackson Report.*

28. Of course, the class of case in which a defendant acts so as to make the claim unnecessary must be distinguished from one in which some event outside of the control of the parties makes the claim academic (see *R (Naureen) v Salford CC* [2012] EWCA Civ 1795, [2013] 2 Costs LR 257, where a claim against a local authority became unnecessary when an individual was granted leave to remain by the SSHD). Here something closer to the *Boxall* approach continues to be appropriate. Equally, there may be cases where what looks at first sight like a concession by a defendant involves it doing what it would have done in any case, so that the case is not truly one where relief is "granted" or pursuant to the claim, or where the burden may be discharged.

29. *Bahta* has been reconsidered in a number of later cases, notably *R* (*M) v Croydon LBC* [2012] 1 WLR 2607, *AL (Albania) v SSHD* [2012] 1 WLR 2898, and *AN (Afghanistan) v SSHD* [2012]EWCA Civ 1333, all of which reaffirm the same approach (*AL (Albania)* explicitly identifies §65 as containing the *ratio* of *Bahta*, see §6*)*.

30. The hope of those, such as Public Law Project, involved in *Bahta* was, among other things, that it would produce a clear rule, capable of easy application, which would in large part avoid the need for lengthy costs disputes, long costs submissions, and judicial time being taken up with deciding costs issues in the very large number of cases in which defendants in effect give claimants the relief they are seeking. That seems also to have been the expectation of the Court of Appeal in the various cases I have already referred to.

31. There is no good reason why that expectation should not have been realised. On the face of it, the rule in *Bahta* is clear. It is really no more than an explicit statement of the rule that costs follow the event, coupled with a realistic approach

to the identification of the "successful party" (CPR 44.3(2)(a)) by reference to the relief that a defendant has been prepared to concede (rather than by trying to work out from scratch, on the papers, what the outcome would have been).

32. The difficulty is that, as a class, defendants do not seem to have seen it that way. Some defendants, notably the SSHD, routinely file costs submissions in which it is argued that the only *ratio* of *Bahta* is that all relevant circumstances must be considered, or indeed make no reference, or only passing reference, to *Bahta et al.* They continue to rely, and make submissions, that the true rule is that a case must be "plain and obvious", and rely on *Boxall* for a default position of no order as to costs, regardless of the fact that responded to the claim, sometimes for the first time in an AOS, by promising to do exactly what the claimant was seeking.

33. That is enough to ensure that the court's workload has not been diminished, and may well have increased. The more unfortunate consequence is that many judges of the Administrative Court, looking at matters almost exclusively on the papers, on the basis of submissions which ignore or downplay *Bahta*, seem to be equally unwilling to accept that the Court of Appeal meant what it said in §65 of *Bahta*. That in turn is likely to encourage further costs disputes, in so far as there is a degree of inconsistency amongst judges as to what the correct approach should be.

34. All of this is given much greater importance by the Legal Aid Consultation. Amongst the proposals there is that those acting on legal aid should only be paid for work after a claim is lodged if permission is granted. There are many objections to this proposal, including that (a) many cases in which permission is ultimately refused will have been of substantive benefit to the client (a point recognised in the Consultation at §3.73, and (b) given the nature of the test for permission, and the limited information sometimes available to claimant lawyers compared to the defendant, many cases will have been brought in good faith and on a reasonable expectation of good or even very good merits, but nevertheless have permission refused. Perhaps more fundamental still, however, is that in the vast majority of cases which are meritorious, and which produce substantive relief for the claimant, this is likely to have been achieved by way of a settlement. Indeed, the more meritorious the claim, the more likely that there will be an early pre-permission settlement.

35. The Consultation Paper gives some reluctant recognition to this problem, albeit without recognising settlement cases which produce a benefit are the norm rather than the exception. It proposes the following by way of mitigation of the proposal:

> *3.75 In addition, depending on the circumstances, it may well be possible for the provider to recover their costs in these situations, either as part of a settlement between the parties or through a costs order from the court. For example, if the challenge is to a failure by a public authority to make a decision, and the decision is taken after the permission application is made, permission may well be refused because the case is academic, however, the claimant can pursue a costs order and the court can grant any costs reasonably incurred by the claimant if, arguably, the proceedings have brought about the making of the decision.*
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> *3.76 The same reasoning applies in relation to cases where an application for permission for judicial review is made and the case is withdrawn because the defendant concedes or the parties settle the case. Again, depending on the circumstances, the claimant may agree the costs of the permission application as part of the settlement, or if no costs are agreed, the claimant can seek a costs order from the court.*
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> [Emphasis added]

36. It is obvious that the extent to which the underlined proposal provides any real mitigation of the MOJ's proposal will depend to a considerable extent on the court's willingness to take *Bahta* at face value. If, as for example the SSHD routinely argues in written costs submissions, the correct approach continues to be that the default position is no order as to costs, or that a case for costs must be "plain and obvious" or "exceptional", then the suggested mitigation will be no mitigation at all. If the courts are now willing to take seriously, the *Bahta* approach, which is really no more than to say that it will enforce strictly the rule that costs follow the event in the CPR itself, then that may provide some, albeit limited and unsatisfactory, comfort from this aspect of the MOJ proposals[6].

37. Of course even if *Bahta* is adopted fully, it will not provide a solution, in so far as the MOJ proposals are adopted, for cases which were properly pursued but permission was refused, which became academic for reasons outside of the control of the parties, and a range of other situations.

38. The importance of the *Bahta* issue is not limited to the proposal on paying for pre-permission costs. Given that the Legal Aid Consultation Proposals also change the conditions of eligibility for legal aid in significant respects (including wholly

[6] I should make absolutely clear that I am not suggesting that *Bahta* provides a satisfactory solution to the problems raised by this proposal in the Legal Aid Consultation. In my view it doe0s not come close. Nevertheless, a strict application of the *Bahta* approach would provide some comfort to the various problems for access to justice raised by the *Bahta* proposals.

removing entitlement in certain prisons cases, and for those who can't meet a residence test), the importance of finding alternative funding arrangements such as conditional etc fees may well increase. It is central to the operation of any such arrangements that a costs order can be obtained following success, regardless of whether that success is achieved following a contested hearing or by settlement pre-permission.

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