# INTRODUCTION TO JUDICIAL REVIEW

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## Preliminary procedural issues

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## CPR Part 54

Applications for judicial review in the Administrative Court are governed by CPR Part 54 (previously RSC O.53).

This is the judicial review procedure referred to in section 31 of the Senior Courts Act 1981, to which reference should also be made (along with section 29, the High Court's jurisdiction to grant the prerogative orders). Note that it is also now possible in many cases for claims for judicial review to be transferred to, and sometimes to be commenced in, the Upper Tribunal: see SCA81 s 31A.

The judicial review procedure *must* be used where the claimant is seeking one of the so-called prerogative orders[1], i.e. a mandatory order, prohibiting order or quashing order (formerly known as mandamus, prohibition and certiorari): CPR r.54.2. It *may* be used where the claimant is seeking a declaration or injunction: CPR r.54.3(1). See also SCA81 ss 31(1), (2).

[1] Or an injunction under s 30 of the Senior Courts Act 1981 (to restrain person acting in office in which not entitled to act).

CPR r.54.3(2) provides that a claim for judicial review may include a claim for damages, restitution, or the recovery of a sum due, but may not seek such a remedy alone. See also SCA81 s 31(4).

It is important to note that CPR Part 54 is not a "stand alone" code. As the definition of "judicial review procedure" in CPR r.54.1(2)(e) shows, the procedure is a modified form of the CPR Part 8 procedure (which replaced the old RSC originating summons procedure). Thus CPR Part 54 has to be read, save to the extent that it provides otherwise, with (*inter alia*) CPR Part 1 (overriding objective), Part 2 (application/interpretation of rules), and Part 3 (case management powers).

The main features of CPR Part 54 are:

- Rules 4, 10-13 – The requirement for permission (see also SCA81 s 31(3)), the grant or refusal of permission, the right to renew the application for permission orally, and the prohibition on applications to set permission aside[2];

- Rule 5 – The time limit (see below);

- Rules 6 and 7 – Contents and service of the claim form;

- Rules 8-9, 14 – Defendant's acknowledgment of service, detailed response and evidence;

- Rule 15 – Claimant requires permission to rely on additional grounds[3];

[2] The permission stage will be covered in a separate talk.

[3] On the need for properly formulated grounds and amendments, see *R (F) v Wirral BC* [2009] LGR 905.

- Rule 16 – Evidence;

- Rule 17 –Applications to intervene;

- Rule 18 – Power to decide application without a hearing where all parties agree;

- Rule 19 – Powers in respect of quashing orders (see below);

- Rule 20 – Power to order claim to continue as if not brought by way of judicial review.

There are three Practice Directions to supplement Part 54 (as well as a prescribed pre-action protocol). Practice Direction 54C refers to certain specialist proceedings, and Practice Direction 54D is concerned with the appropriate venue for judicial review proceedings under the regionalisation policy implemented in 2009.

The general guidance on procedural matters is contained in Practice Direction 54A. The most important features of general application include paragraphs 4 (date when grounds arise to challenge a judgment, order or conviction), 5.6 and 5.7 (documents to be filed with claim form), 8.5 and 8.6 (defendant not required to attend oral permission hearing and will not normally recover costs if it does so), 11 (minimum 7 days' notice of reliance on additional grounds), 12 (no obligation of disclosure unless court orders otherwise), 15 (skeleton arguments), 16 (bundles) and 17 (agreed final orders).

A further Practice Statement ([2002] 1 WLR 810) deals amongst other matters with the procedure for urgent cases at the permission stage, and another ([2008] 1 WLR 1377) with uncontested proceedings.

See also the Administrative Court Notes for Guidance on Applying for Judicial Review (October 2009), although these are aimed largely at a non-professional audience.

## Standing

SCA81 s 31(3) provides that the court shall not grant permission to apply for judicial review:

> ". . . unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

In practice, a very broad approach is now taken, and it is unusual for a claim to fail for lack of standing, assuming that the claimant is not a mere "busybody".

It is clearly established, for example, that a responsible pressure group may have the necessary standing to apply for judicial review: see e.g. *R v Secretary of State for Foreign & Commonwealth Affairs ex p. World Development Ltd.* [1995] 1 WLR 386. So too an individual whose concern is, for example, with the environment rather than with any personal interest of his own: see e.g. *R v Somerset CC ex p. Dixon* [1998] EnvLR 111, and *R (Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin). In *R (Residents Against Waste Site Ltd) v Lancashire CC* [2007] EWHC 2558 (Admin), standing was afforded to a company which had been formed by objectors to a proposed development, seemingly for the purpose of limiting their costs exposure in the litigation.

The impact of standing arguments is further diminished by the suggestion that it may often be inappropriate for the court to reach a final conclusion on the issue until it has had the opportunity to hear and consider the substantive arguments at the full hearing of the case: see *R v IRC ex p. National*

*Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617. See also *R (Grierson) v Ofcom and Atlantic Broadcasting Ltd* [2005] EWHC 1899 (Admin), making express the trade-off at the permission stage between the apparent strength or otherwise of the claim on the one hand, and the extent of the claimant's interest on the other (and similarly in relation to delay in bringing the proceedings) – that is, the stronger the case, the greater the degree of indulgence that may be appropriate in relation to standing and delay.

Nonetheless there may be limits to how far the court will go in taking a generous approach to standing: see e.g. the doubts expressed, without deciding the case on this basis, in *R (Singapore Medical Council) v GMC* [2006] EWHC 3277; in *Grierson*, where the claimant's interest was purely derivative and the party directly concerned had not chosen to challenge the decision; and in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), expressing doubts about the standing of a foreign NGO to challenge a government decision when no more directly affected party had done so.

It is also noticeable that, in departing from previous assumptions and holding that a person other than an economic operator might be able to base a judicial review claim upon a breach of an authority's duties under the Public Contracts Regulations 2006[4], the Court of Appeal in *R (Chandler) v Secretary of State for Children Schools and Families* [2010] LGR 1 appeared to mitigate the consequences of this conclusion by taking a stricter approach to standing than would normally apply in judicial review – in effect, that the claimant had to be motivated by a desire to see the Regulations complied with, rather than someone taking an opportunistic advantage of the breach to derail a project which they opposed.

[4] This is legislation which implements EU obligations in relation to the procurement by open competition of public contracts. A specific right of action is conferred by the Regulations upon "economic operators", defined in effect as those who bid or would have wished to bid for the contract in question.

However, a question of greater consequence than pure standing in practical terms may sometimes be whether the claimant is sufficiently affected by any illegality demonstrated to justify the grant of relief (or a particular form of relief) as a matter of discretion – for example, if C complains that a decision was reached by D without consulting X, C may have standing if affected by that decision, but may not be granted a remedy if he is merely seeking to take advantage of a failure to consult another party. See e.g. the discussion in *R v Secretary of State for Transport ex p. Presvac Engineering Ltd.* (1991) 4 Ad LR 121.

The choice of a claimant in order to benefit from LSC funding may in certain cases be an abuse of process, but does not normally go to standing. For a recent discussion of this issue, see *R (Edwards) v Environment Agency* [2004] 3 All ER 21, in effect suggesting that unless there is a clear abuse of the court's own process, these matters are for the LSC to consider.

Note also issues which now arise concerning "victim" status under the Human Rights Act 1998. Under HRA s 7(3), a judicial review claimant will only have a sufficient interest if he is or would be a victim of the allegedly unlawful act, and by s 7(7) this depends on whether the ECtHR would treat him as a victim for the purposes of bringing proceedings in Strasbourg. See e.g. *Lancashire CC v Taylor* [2005] 1 WLR 2668. It would seem probable that this requirement does not apply when seeking a declaration of incompatibility.

## Time limits

CPR r.54.5(1) provides that the claim form must be filed **promptly** and *in any event* **not later than 3 months** after the grounds to make the claim first arose.

The old RSC O.53 included an express power to extend time where there was good reason to do so. Now, any extension of time is governed by the court's general power under CPR r.3.1(2)(a).

Also of importance is SCA81 s 31(6). Where the court considers that there has been "undue delay" in applying for judicial review, it may refuse to grant permission or any relief sought on the application:

> ". . . if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

The following key points arise.

First, the general approach of the courts to late applications for judicial review is undoubtedly more stringent now than in the early days of the jurisdiction. Much greater rigour is shown in deciding that in a particular case promptness required the application to be made sooner than the outer time limit of 3 months. Further, whilst applications made within that 3 month period are generally unlikely to fail in the absence of prejudice to any other party arising from a failure to apply sooner, an application made outside the 3 month period without good reason is likely to fail irrespective of prejudice – a view confirmed in *Melton v Uttlesford DC* [2009] EWHC 2845 (Admin).

At one point in recent years it looked as if the pendulum might be about to swing the other way, as a result of comments made by the House of Lords (in particular Lord Steyn) in *R v Hammersmith & Fulham LBC ex p. Burkett* [2002] 1 WLR 1593. There were suggestions that a generalised requirement of "promptness" might be too unspecific to be compliant with ECHR Article 6. But any such suggestion was subsequently rejected in a number of cases, pointing out that a challenge to the promptness requirement failed in *Lam v UK* (applicn. no. 41671/98). The argument was firmly rejected by the Court of Appeal in *R (Hardy) v Pembrokeshire CC* [2006] EnvLR 28.

However, where the Strasbourg court declined to intervene, the Luxembourg court has been bolder. In the very important decision of C-406/08 *Uniplex*, given on 28 January 2010 and whose implications have yet to be fully worked out[5], the ECJ held that the time limit for bringing claims under the Public Contracts Regulations 2006 was contrary to EU law effective remedy requirements in certain respects. Although the decision relates to the specific legislation governing public procurement, the Regulations adopted materially identical wording for their time bar provision to that used in CPR Part 54. It is therefore not easy to see why any different conclusion should be reached in any judicial review claim founded upon a breach of EU law and for which judicial review is the only available (effective) remedy[6]. Specifically, it was held in *Uniplex* that: (a) time could not start to run until the claimant was aware or ought reasonably to have been aware of the facts upon which the claim was based; and (b) so far as promptness was an additional requirement to the 3 month time limit, it was too imprecise. In effect, and pending any change in the CPR, the courts will be obliged to apply a straightforward 3 month time limit in EU cases, and to grant an extension in all cases to ensure that the claimant has 3 months from the date of knowledge. It remains to be seen whether it will be sustainable in the long term for a different approach to limitation periods to prevail according to whether a judicial review claim is based upon EU or on domestic law.

Possible grounds for extending time, or excusing what might otherwise be a lack of promptness, include excusable lack of knowledge of the decision when

[5] There is one UK decision to date which analyses it in detail, again in a procurement context: *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch). An appeal is due to be heard in December 2010.

[6] For the relationship between EU law and judicial review time limits more generally, see *R (Condron) v Merthyr Tydfil CBC* [2010] EWCA Civ 534.

it was taken, difficulties in obtaining public funding[7], general public importance of the issue (although the importance will usually have to be substantial and clear), sensible pursuit of attempts to resolve the matter without litigation, and the continuing nature of any breach. Again, there is a useful recent discussion of the authorities in the *Hardy* decision. See also *R (Cukurova Finance International Ltd) v HM Treasury* [2009] EuLR 317, which emphasises the importance of the apparent merit of the challenge as a factor to be taken into account alongside the length of the delay, the reasons for it, the importance of the case and the extent of any prejudice caused by the delay.

The latest significant appellate treatment of delay issues is to be found in *R (Finn-Kelcey) v Milton Keynes Council* [2009] EnvLR 17, which is again indicative of a fairly stringent approach to promptness, at least in the planning context. The court emphasised that writing a pre-action letter did not absolve the claimant from the requirement to launch proceedings promptly. Contrast the *Residents Against Waste Site* case, above, where Irwin J was unimpressed by delay arguments in circumstances in which the defendant, being well aware of the likelihood of challenge, had gone ahead regardless with its project.

Secondly, it cannot be stressed enough that the requirement to proceed "promptly" may require proceedings to be brought within (and sometimes well within) the 3 month period: see e.g. *R v Independent Television Commission ex p. TVNI Ltd.* Times 30th December 1991. That is especially so where the defendant, or a third party, is likely to enter into commitments on the faith of the challenged decision; or where the striking down of that decision is likely to lead to substantial disruption affecting many persons. Examples might include the granting of commercially valuable licences, the

[7] But in matters of urgency, it may not be good enough for a claimant to let matters take their course with the LSC, rather than taking all possible steps to expedite a decision: see *R (Patel) v Lord Chancellor* [2010] EWHC 2220 (Admin).

grant of planning permission, or decisions about the allocation of school places.

In time-sensitive cases, where there is likely to be any material delay in commencing proceedings, the prospective claimant ought to put the prospective defendant and any affected third parties on notice of the contemplated proceedings at the earliest opportunity: see e.g. *R v Swale BC ex p. Royal Society for the Protection of Birds* (1990) 2 Ad LR 790, and *Health and Safety Executive v Wolverhampton CC* [2009] EWHC 2688 (Admin).

Thirdly, time starts running from the date when grounds for making the application first arose, *not* from when the claimant first knew of those grounds: see *R v Secretary of State for Transport ex p. Presvac Engineering Ltd.* (1991) 4 Ad LR 121. However, the point at which the claimant acquired the requisite knowledge may be material to any application for an extension of time – and in EU cases see the discussion of *Uniplex*, above.

Fourthly, the question is when grounds for the application first arose, and the claimant will not be able to evade problems of delay by "dressing up" his challenge as one to some subsequent stage in the decision-making process. However, the decision in *Burkett* (where time was held to run from the formal grant of planning permission, rather than from the resolution to grant it) represents some mitigation of the very strict approach previously taken in *R v Secretary of State for Trade and Industry ex p. Greenpeace Ltd. (no.1)* [1998] EnvLR 415. For a further application of this more liberal approach, see *R (Catt) v Brighton & Hove BC* [2007] EWCA Civ 298, indicating that it is not until a decision is made which actually affects the citizen's interests that time starts to run against him – although it was indicated that where some earlier step along the way had served to give notice of the likely point of legal dispute, that might call for a greater degree of promptness in challenging the eventual decision once it was taken. As a defendant's intentions develop, it may not always be easy to know whether time has started to run for a

challenge, or whether on the other hand such a challenge might be characterised as premature: see e.g. *R (Breckland DC) v Boundary Committee* [2009] LGR 589, and *R (Risk Management Partners Ltd) v Brent LBC* [2010] LGR 99.

It is important to note that, if the court decides at the permission stage that the claimant's time for applying for judicial review should be extended, that is not a matter which can be reopened at the substantive hearing: see *R v Criminal Injuries Compensation Board ex p. A* [1999] 1 AC 330. The defendant will in those circumstances be limited to relying upon SCA81 s 31(6), and will therefore have to be able to show prejudice as well as delay. Even then, if issues of prejudice have been extensively canvassed at the permission stage, the court will be reluctant to permit the defendant to go over the same ground at the substantive hearing unless there has been some change of circumstances: see *R v Lichfield DC ex p. Lichfield Securities Ltd.* [2001] 3 PLR 33.

One response to these cases has been the emergence of the "rolled up" hearing – if the defendant wishes to argue a point on delay which cannot conveniently be dealt with in a short permission hearing, the question of permission may be adjourned to be considered along with the substantive issues – tantamount for most purposes to granting permission without prejudice to the defendant's ability to take the delay point at the substantive hearing.

## **Alternative remedies**

The general rule is that permission should not be granted to apply for judicial review where an alternative remedy exists: see *R v Chief Constable of Merseyside Police ex p. Calveley* [1986] QB 424.

Certainly judicial review would not normally be appropriate where there is a statutory right of appeal against the decision in question (whether or not that right of appeal has been exercised within the applicable time limit). More difficult questions arise with regard to alternative remedies of an administrative rather than judicial nature: for example, the right to raise a matter with the district auditor, or the possibility of inviting a minister to exercise default powers. Here, the court is likely to be concerned with issues such as the suitability of the alternative procedure to decide the issues raised by the claimant, the likely timescale for that procedure, and the efficacy of any remedy that might be granted. For a recent *obiter* indication that the court would not, in the circumstances of the case before it (but ones which may apply quite frequently), have regarded a complaint to an ombudsman as a suitable alternative remedy, see *R (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin).

Some of the caselaw concerning alternative remedy questions is recently and helpfully reviewed in *R (JD Wetherspoon plc) v Guildford BC* [2006] LGR 767 at paragraphs 87 to 91. Amongst other points, Beatson J acknowledged that questions about alternative remedy would normally arise at the permission stage rather than at a substantive hearing following the grant of permission, but rejected the suggestion that only exceptionally could a claim be dismissed or relief be refused on this ground at the substantive hearing (but cf. Cranston J's lack of enthusiasm for such a course in *R (Crest Nicholson plc v Office of Fair Trading* [2009] EWHC 1875 (Admin)).

There is a linkage in some cases between questions of alternative remedy and the issues relating to delay already discussed. If an initial decision is thought to be unlawful, but there is some statutory mechanism for challenging it, the claimant will normally be required to make use of that mechanism. However, if the alternative remedy fails to overturn the original decision, the claimant may then be out of time to challenge it by way of judicial review, or in some cases the exercise of the alternative remedy may have operated so as to cure

any defect in the original decision: see e.g. the discussion in *R (DR) v Headteacher of S School* [2003] ELR 104.

The fact that the alternative remedy may no longer be available by the time the judicial review proceedings are brought may not prevent permission being refused, if that remedy ought to have been pursued whilst it was available: see *R (Carnell) v Regents Park College* [2008] ELR 268. See also the discussion in *R (Enfield LBC) v Secretary of State for Health* [2009] EWHC 743 (Admin).

A connected question is whether the court may refuse to grant permission to apply for judicial review if it considers that some form of alternative dispute resolution ought to be pursued. At the time, the Court of Appeal's decision in *R (Cowl) v Plymouth CC* [2002] 1 WLR 803 seemed to prefigure an activist judicial role in encouraging mediation or other ADR by this means. In practice, it does not appear that there are many cases where permission has been refused or adjourned on this basis – although see *R (S) v Hampshire CC* [2009] EWHC 2537 (Admin). In part this is because mediation remains relatively little utilised in judicial review proceedings: this is for a variety of reasons, some valid and others not[8].

## Collateral challenges and the exclusivity rule

The House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237 held that it was, generally speaking, an abuse of process to bring a public law challenge otherwise than by way of an application for judicial review. That decision arose in the context of an attempt to obtain, by way of a writ action, declarations that a particular public body had acted unlawfully by reason of a failure to comply with the rules of natural justice. The House of Lords was

[8] See the Public Law Project's recently published research into the use of mediation in judicial review.

particularly concerned that litigants should not be able to evade the requirement to obtain permission, and the short time limit applicable to judicial review proceedings.

Subsequently, however, the courts have been markedly reluctant to hold the *O'Reilly* line. There has been a tendency to regard exclusivity arguments as a matter of sterile procedural squabbling: see e.g. *Trustees of Dennis Rye Pension Fund v Sheffield CC* [1998] 1 WLR 1629 (but contrast *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988).

In particular, *O'Reilly* has been qualified to the extent that:

(i) Where the party seeking to raise the public law issue is doing so by way of a *defence* to a claim brought against him, in whatever forum, he will generally be permitted to do so. See *Wandsworth LBC v Winder* [1985] AC 461, *Wandsworth LBC v A* [2001] 1 WLR 1246, *Boddington v British Transport Police* [1999] 2 AC 143. Cf. *R v Wicks* [1998] 2 AC 92.

(ii) Where a party is making a claim of a private law nature (e.g. a claim for a particular sum of money as being due and owing), the fact that his entitlement to that sum may depend in part upon the resolution of a public law issue will not normally make it inappropriate for him to have proceeded otherwise than by way of judicial review. See *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624, *Steed v Home Secretary* [2000] 1 WLR 1169 and *Bloomsbury International Ltd v Sea Fish Industry Authority* [2010] 1 CMLR 12.

However, the approach recently taken by the courts often fails to come to grips with the fact that the way in which the public law issue is raised may not simply be a matter of procedure. Rather, it may impact upon the

substantive outcome of the case. This is most immediately apparent in cases where the public law issue is raised at a time when an application for judicial review would in all probability have failed on discretionary grounds.

There is an interesting discussion of the procedural exclusivity issue in *Bunney v Burns Anderson plc* [2007] 4 All ER 246 at paragraphs 25 to 48, where the Financial Services Ombudsman gave a direction requiring the defendant firm to pay compensation. The direction was not challenged by judicial review, but the firm raised its alleged invalidity in public law when the individual to whom it had given financial advice later brought a claim to enforce the direction. Lewison J was of the view that *O'Reilly* had lost much of its force, and that there was normally no discretion to refuse to allow a defendant to a claim to raise a challenge to a public law decision by way of defence. Whilst the true construction of the statutory scheme concerned might be that a particular decision could only be challenged by way of judicial review, there was a strong presumption against such a reading. Unsurprisingly (since the case had only been decided the previous day) Lewison J did not refer to the Court of Appeal's judgment in *Ford-Camber Ltd v Deanminster Ltd* [2007] EWCA Civ 458. It is hard to derive a clear statement of principle from that decision, but it suggests that (at any rate) as between two private parties, the court may have a much wider discretion than *Bunney* recognised to say that a public law argument is an abuse of process where it should have been raised earlier by way of judicial review, in particular if the delay in raising the point has led to prejudice.

In the *McIntyre* case, above, raising the public law issue collaterally in an ordinary civil claim was held to be an alternative remedy which ought to have been pursued instead of judicial review. However, this may be a comparatively unusual outcome, save in cases where there are disputes of fact which ought to be resolved (as in *R (Sher) v Chief Constable of Greater Manchester Police* [2010] EWHC 1859 (Admin)). See also *R (Valentines Homes & Construction Ltd) v HMRC* [2010] STC 1208, where it was not an

abuse of process to commence judicial review proceedings rather than waiting to raise a defence if sued for the tax alleged to be due.

## Remedies

The claim form must state any remedy (including any interim remedy) that the claimant is claiming: CPR r.54.6(c).

### *Final remedies*

By far the most common remedy granted on a successful application for judicial review is a quashing order. This reflects the fact that, when the court allows an application for judicial review, it generally does so on the basis that a decision has been improperly taken, but that it remains a matter for the decision-maker as to what the ultimate decision should be. It is not for the court to substitute its own view, except in those cases where there is only one possible lawful answer (a situation catered for by SCA81 ss 31(5) and (5A)). Another type of case for a quashing order would be where the defendant has done something which it simply has no power to do.

Declarations are also fairly common in practice. They may serve, for example, to crystallise a definitive decision on the rights and obligations of the parties in a manner which will be relevant to their future relationship – although often it will suffice to let the court's judgment speak for itself. A declaration may also be appropriate where the defendant has acted unlawfully but for one reason or another it is inappropriate as a matter of discretion to grant any more substantive form of relief (see further below). A party which has succeeded in the ultimate result, but has lost on some discrete issue which it considers of wider importance, may wish to consider inviting the court to make a declaration on that issue so that it has something to appeal against.

Sometimes a claim for a declaration may be pursued in an appropriate case designed to resolve an important point of principle even though the dispute has become academic on the facts of the particular case. For a discussion of the circumstances in which it is appropriate to consider an "academic" appeal in a public law case, see *R v Home Secretary ex p. Salem* [1999] AC 450 – some of the same considerations will apply in considering whether it is appropriate to give permission for such a case to proceed at first instance. See the discussion in *R (Raw) v Lambeth LBC* [2010] EWHC 507 (Admin), and see also *R (Burke) v General Medical Council* [2006] QB 273 for a warning against the temptation to make declarations about issues divorced from the facts of a particular case properly before the court.

Injunctions are less common at the end of the substantive hearing (although frequently encountered at the interim stage), as are mandatory orders requiring the defendant to perform a particular duty. Usually it can be taken as read that, once the court has given judgment, a public body will act in accordance with that judgment without being specifically ordered to do so. However, there may be cases of (for example) extreme procrastination by a defendant in which it is necessary to enlist the coercive power of the court to ensure it does its duty within a specified time. If an injunction or a mandatory order is to be made, it is important (from the perspective of both parties) to ensure that its terms are clear and precise.

Prohibiting orders are very rarely encountered in practice.

The grant of relief, or any particular form of relief, in judicial review proceedings is always at the discretion of the court.

If the claimant has established some illegality, then the starting-point should be that some form of relief should normally follow. However, there are

numbers of grounds upon which relief is commonly refused. The two most common are:

- Delay, coupled with prejudice (see above). The leading case on the refusal of relief, on grounds of delay, at the substantive hearing is *R v Dairy Produce Quota Tribunal for England and Wales ex p. Caswell* [1990] 2 AC 738. It is clearly established by *Caswell* that this may occur even though time has been extended for the purposes of granting permission to apply for judicial review. What is less clear is how far it is open to the court to refuse relief on the grounds of prejudice or detriment to good administration in a case *not* involving undue delay. There is a conflict here between the approach taken by the Court of Appeal in two cases, on the one hand *R v Brent LBC ex p. O'Malley* (1997) 10 AdLR 265, and on the other hand *Lichfield*, above.

- Alternative remedy (see above); and

- In cases where the illegality is of a procedural nature, or consists of a failure to take account of all relevant considerations or the taking into account of irrelevant considerations, that in the view of the court the illegality has made no difference to the end result. But the Court of Appeal emphasised in *R (Smith) v North East Derbyshire PCT* [2006] 1 WLR 3315 that probability is not enough in this connection – for relief to be refused, the defendant must show that the decision would inevitably have been the same.

Other grounds upon which relief might be refused include the following:

- Failure to make proper disclosure at the permission stage, or other lack of "clean hands"; and

- The fact that the grant of relief would cause disruption to the defendant or third parties disproportionate to the harm caused to the claimant by the illegality in question. This seems to be the main basis for the decision to withhold relief in *R (Corus UK Ltd) v Newport CC* [2010] EWHC 1279 (Admin), where a number of the issues mentioned above were discussed.

It is vital to ensure that any evidence relevant to discretion arguments is properly before the court, just as much as with evidence relevant to the substantive merits.

*Interim remedies*

Interim relief in judicial review will normally mean either a negative injunction to stop the defendant taking certain action until the claim for judicial review has been dealt with (e.g. not to close a care home), or a positive order to take or continue to take certain steps (e.g. to provide the claimant with accommodation). CPR r. 54.10(2) refers specifically to a "stay of proceedings" as one direction that may be given where permission to apply for judicial review is granted, but it is unclear that there is much if any practical difference between a stay on the one hand and an interim injunction in negative form on the other.

Sometimes the anticipated timetable of events will allow for any claim for interim relief to be dealt with at or after the time when permission to apply for judicial review is considered, and for the permission application to take its normal course. More commonly, it will be necessary to couple an application for interim relief with an application for urgent consideration[9].

[9] Siuch applications will be dealt with in a further talk.

Interim relief may be dealt with on the papers, at least initially, but if there is a contest about whether such relief should be granted or continued, that will usually be a matter for an oral hearing.

The most helpful and authoritative general discussion of the approach to the grant or refusal of interim relief in public law proceedings is to be found in *The Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2003] 1 WLR 2839, which reviews some of the earlier caselaw.

The essential test for whether interim relief should be granted is the familiar *American Cyanamid* set of questions. Is there a serious issue to be tried? If so, will damages be an adequate remedy? If not, where does the balance of convenience lie? However, the approach taken will require modifications appropriate to the public law element of the case.

In reality, the particular characteristics of judicial review make it unlikely that damages will often be an adequate remedy for either party. Since there is no right to damages for unlawful administrative action as such, the claimant will often have no cause of action for damages in any case. Even if he does (e.g. in a claim under the Human Rights Act, or where a sufficiently serious breach of EU law is alleged), the real purpose of the judicial review will usually be to prevent the unlawful course of conduct, rather than to claim compensation of uncertain amount.

On the other side, the claimant (especially if an individual) will very often not be able or willing to offer a worthwhile cross-undertaking in damages in favour of the defendant (which will in any case often not itself be exposed to financial loss). In the context of normal civil litigation, the absence of such a cross-undertaking would generally be regarded as a factor militating quite strongly against the grant of interim relief in a case in which the injunction would potentially cause financial loss. It is possible to find statements in

judicial review caselaw to similar effect. Nonetheless, it appears that in practice cross-undertakings in judicial review tend to be the exception rather than the rule, at any rate outside the sphere of commercial disputes[10] or challenges to projects of major public interest, and their absence is not usually regarded as fatal. The Privy Council in the *Belize* case drew the distinction between a straightforward dispute between authority and citizen on the one hand, and on the other hand cases where the commercial interests of a third party were engaged. For an example of the court declining to require a worthless cross-undertaking, see *R v Servite Houses and Wandsworth LBC ex p. Goldsmith* (2000) 3 CCLR 354.

In determining where the balance of convenience lies, the court will have regard to the totality of the circumstances, and will ultimately seek to make a general assessment of whether the risk of causing injustice is greater if the injunction is granted or if it is refused. In doing so, account will be taken not only of the immediate interests of the parties, but also of the wider public interest (see e.g. *Smith v ILEA* [1978] 1 All ER 411, *R v Durham CC ex p. Huddleston* [2000] EnvLR D21).

Other relevant considerations include whether the effect of granting interim relief would merely be to maintain the status quo, and the extent to which the claimant is seeking to impose positive, and burdensome, obligations upon the defendant (*Francis v Kensington & Chelsea RLBC* [2003] 2 All ER 1052). It will not usually be appropriate to grant interim relief when the practical result of doing so would be to pre-empt the substantive outcome of the judicial review.

In reality, the outcome of many applications for interim relief will turn upon three key factors. How strong does the claim appear to be? Will the defendant suffer real prejudice through the grant of interim relief? Will the claimant suffer real harm if it is refused? In cases where the issue is the

[10] See e.g. *WM Morrison Supermarkets plc v Competition Commission* [2009] CAT 33.

personal welfare of an individual pending the hearing, interim relief will not very often be refused if the case appears reasonably strong. Where less pressing interests are at stake, the result may be different, especially if the claimant has not acted very promptly.