

**The Application for Permission and the Defendant’s Response**

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A. Defendant’s Acknowledgment of Service

1. Any person served with a Claim Form seeking judicial review who wishes to take part in the judicial review must file an acknowledgement of service including “a summary of his grounds” for resisting the claim: CPR 54.8(1).
2. It must be filed not more than 21 days after service of the Claim Form: 54.8(2).The parties cannot agree amongst themselves to extend time: permission will have to be sought for an extension from the Court (54.8(3). It is sensible to seek the Claimant’s consent before doing so; if the parties agree on this course of action then the Court’s permission to extend is most likely to be forthcoming.
3. A party who fails to file an acknowledgment of service may not take part in any permission hearing, unless the court allows him to (54.9(1)(a)), and the failure may be taken into account in later decisions as to costs (54.9(2)). He is not precluded from taking part in the substantive hearing of the judicial review, subject to complying with the relevant rules for detailed grounds and evidence in 54.9(1)(b).
4. As to the contents of the Acknowledgment of Service: “Neither the rules nor the practice direction expand on what is meant by a "summary" of grounds. However, the "summary" required under this rule must be contrasted with the "detailed grounds for contesting the claim" and the supporting "written evidence", which are required following the grant of permission (CPR54.14). In construing the rule, it is necessary also to have regard to its purpose, and place in the procedural scheme. If the parties have complied with the Protocol, they should be familiar with the general issues between them. The purpose of the "summary of grounds" is not to provide the basis for full argument of the substantive merits, but rather to assist the judge in deciding whether to grant permission, and if so on what terms. If a party's position is sufficiently apparent from the Protocol response, it may be appropriate simply to refer to that letter in the Acknowledgement of Service. In other cases it will be helpful to draw attention to any "knock-out points" or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition). It has been suggested that it should be possible to do what is required without incurring "substantial expense at this stage".” (emphasis added) (R (Ewing) v Office of the Deputy Prime Minister [2006] 1 WLR 1260 at [43]).
5. As a matter of good practice, the Defendant should address in the Acknowledgement of Service:

(1) Any jurisdictional issues e.g. as to standing or alternative remedies

(2) Any proposed ADR process the Defendant considers should have been or should now be used

(3) Any issue of delay (because that issue cannot be reopened once permission is given)

(4) Any application for directions

(5) Any application for the costs of the acknowledgement of service (including the detail of the costs sought): if this is not included, the Court is likely to make no order as to costs.

1. There is no express provision for submitting written evidence with the Acknowledgment of Service. It is not prohibited, however, and it may be advantageous in certain circumstances to provide it: especially where there is a document that may demonstrate a “knock-out point” (e.g. minute of a meeting which shows that a point was considered, thereby defeating a claim for failure to take into account a relevant consideration).

B. Permission

1. CPR r.54.4 provides that ‘The court’s permission to proceed is required in a claim for judicial review’.
2. The application for permission will ordinarily be considered first by a Judge on the papers. The Judge may (i) grant permission; (ii) refuse permission; (iii) order the parties to attend an oral hearing at which the issues can be aired. Where (ii) occurs, and permission is refused, the Claimant may seek to renew the application at an oral hearing. This must be done within seven days after service of the Court’s reasons for refusing permission (CPR r.54.12(4)).
3. Sometimes the parties may invite the Court to dispense with the paper sift and invite the Court to hold a hearing on permission. The hearing on permission may, occasionally, be followed by the substantive hearing: a ‘rolled-up’ hearing. This may be called for by the parties, or by the Judge reviewing the papers.
4. Where there is a requirement for permission to be considered urgently, form N463 should be used. The Claimant will need to explain why the matter needs to be considered as a matter of urgency, and what the timetable should be.

I. Test for grant of permission

1. The test for the grant of permission is a low one. Permission will be granted where the Claimant can show that there is an ‘arguable’ case. That is, if ‘there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law’: R v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107, 108 CA.
2. What is an ‘arguable’ case? This is not just something that can be argued. It will be something which is not hopeless, frivolous or vexatious, but may have some merit.
3. For the Defendant, it is necessary, therefore, to strike the ‘knock-out blow’. Showing the Court the authority that totally defeats the Claimant’s case. Explaining the statutory framework that shows that it has no merit. Informing the Court of an *alternative remedy* that the Claimant should have pursued, or is pursuing; or taking a point on delay, or lack of promptness in pursuing the claim. (Usually ‘delay’ points will only prevail if there is something else about the case that justifies dismissal of the claim. Courts are loathe to preclude deserving claimants from pursuing their remedies merely because of delay).
4. Also, where it can be shown that the Claimant has no *sufficient interest* in the matter to which the claim relates: s.31(3) of the Supreme Court Act 1981. This will be the case if the Claimant is simply a ‘meddlesome busybody’: R v. Monopolies and Mergers Commission, ex parte Argyll Group plc [1986] 1 WLR 763, 773. This is a pretty low hurdle, and the Courts will generally decide to defer the issue of ‘interest’ to the substantive hearing, taking it into account when determining whether, and if so what, relief should be granted.
5. On occasion, the permission application is conducted as if it is a mini-hearing, where much of the evidence on both sides is presented to the Court and pretty full argument is heard from both sides. In those cases, the Court will apply a more stringent test, looking for the Claimant to show a ‘reasonably good chance of success’: Mass Energy v. Birmingham City Council [1994] Env LR 298.
6. The Court of Appeal has recently noted that cases in which it is necessary or helpful to explore issues in depth at the permission stage will be ‘quite exceptional’: see Davey v. Aylesbury Vale District Council [2008] 1 WLR 878 at para. 12.
7. Although not catered for by the CPR, there is a growing (and some might say conventional) practice for Claimants to put in ‘Reply’ submissions in advance of the consideration of permission. This may be sensible if the Defendant has raised points in the summary grounds that appear to undermine important planks of the claim; or if there is a genuine dispute on the facts. Defendant’s will very occasionally put in a ‘Rejoinder’.

II. Procedure

1. A Defendant or Interested Party is not required to attend an oral permission hearing (CPR 54PD 8.5), unless the Court directs otherwise.
2. There is no *requirement* to submit a skeleton argument on a permission application (whether as Claimant, or Respondent). However, it is advisable to do so. The judges expect them.
3. There is usually a period of 30 minutes allocated to each application, although this rule is honoured more in the breach. If, however, the parties anticipate in advance that 30 minutes will not be sufficient, they *ought* to let the Court know and seek to obtain extra time. The disadvantage to this request is that the parties may find that their case is listed at the end of a very long list, with plenty of waiting time required.
4. Ordinarily, the Claimant is invited to speak first, presenting the case on arguability. Occasionally, the Judge will invite the Respondent to speak first, if s/he is minded to grant permission.
5. Snappy, concise arguments, taking the Judge to the key documents and issues is likely to endear the advocate to the Court.

III. Decision, costs and directions

1. Where permission is granted, the Judge will usually say very little, apart from announcing his/her decision. Occasionally, the Judge will make observations about the strength of the case (e.g. to say that just because permission had been granted does not mean that the Claimant is likely to win at the full hearing). Sometimes the Judge will invite the parties to think hard about settling the case.
2. Where permission is refused, the Judge will frequently give a pretty lengthy decision, setting out the background facts and his/her reasoning. This is usually done *ex tempore*, then and there. Rarely will permission decisions be reserved.
3. Where permission is granted on the papers, this will usually be done in note form by the Judge, touching on the issues in question. Sometimes, the Judge will say very little, save for ‘permission granted’.
4. Permission will not always be granted on every ground of claim. The Court may refuse those grounds that are genuinely unarguable, even if other grounds are allowed to proceed.
5. Where permission is granted, there is usually little discussion of costs, although the Court may order costs in the case, and this is the default position per *The Practice Statement (Judicial Review: Costs)* [2004] 1 WLR 1760[[1]](#footnote-1). Where permission is refused, the Claimant will ordinarily bear his/her own costs, and may have to pay some of the Defendant’s costs.
6. Usually, the Defendant’s costs will be limited to the costs of filling out the Acknowledgment of Service, but only where the Defendant expressly asks for costs in the Acknowledgment itself, and it may be appropriate to include a schedule at this stage. Otherwise, the Defendant should come along with a Schedule of Costs to the hearing. Where the Acknowledgment of Service is itself very lengthy (and more than the ‘Summary Grounds’ envisaged by the CPR), not all of the costs incurred in drafting will be recovered: if a party wishes to go further than summary grounds at the permission stage, ‘he does so at his own expense’ (per Brooke LJ in Ewing v. Office of the Deputy Prime Minister [2005] All ER (D) 315 at 53; followed in R (Roudham and Larling Parish Council) v. Breckland Council [2008] EWCA Civ 714).
7. Occasionally, the Court may order more substantial costs. This will apply where (i) the claim is hopeless; (ii) the Claimant persisted even though the hopelessness of the claim was pointed out; (iii) the Claimant may have sought to abuse the judicial review procedure for collateral ends; or (iv) where the Claimant has effectively had the chance of a ‘substantive’ hearing: R (Mount Cook) v. Westminster City Council [2003] EWCA Civ 1346. Further, a relevant factor in ‘exceptional’ circumstances will be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.
8. Where an ‘Interested party’ attends an oral hearing, it is unlikely to recover any of its costs, unless there was a distinct issue that required the interested party to appear.
9. Wasted costs might also be recovered in exceptional cases.
10. As well as issuing its decision granting permission, the Court may also issue directions. There may be directions to expedite the full hearing of the claim; directions as to the service of evidence (including abridging time for this – the default position is 35 days from the date permission is granted); and even directions as to the attendance of witnesses and cross-examination.

IV. Setting aside permission

1. CPR r54.13 provides that ‘Neither the defendant nor any other person served with the claim form may apply to set aside an order giving permission to proceed.’ In spite of these clear words, the Court has a residual inherent jurisdiction to do so: see R (Webb) v. Bristol City Council [2001] EWHC 696 (Admin). See also R (Nkongolo Tshikangu) v Newham London Borough Council [2001] EWHC Admin 92, where the Claimant had failed to keep the Court informed that the claim was academic, even before permission was granted: suitable accommodation had been provided.
2. It will be rare that permission is granted without the Defendant having had sight of the claim form, or having had the opportunity to respond. Where this does occur, however, the Defendant may invite the Court to set aside the grant of permission: see R (Enfield Borough Council) v. Secretary of State for Health [2009] EWHC 743 (Admin). In the latter case, it was noted at [6] that ‘the Court should not lightly assume that a defendant will have nothing worthwhile to say, even in a case where (unlike the present) the claim appears on its face to be well above the threshold for permission. There is always a risk in granting permission on the evidence and submissions of one side alone’.
3. Exceptionally, where permission was granted without reference to a conclusive legal authority or statutory provision, it may be appropriate to apply to the Judge inviting him/her to recall his/her original decision and order: R v. Chief Constable of West Yorkshire, ex parte Wilkinson [2002] EWHC 2353 (Admin), at 43.

V. Appeals

1. The unsuccessful Claimant can ‘appeal’: this is by seeking to renew the application again in the Court of Appeal. The procedure is set out in CPR r52.15: (i) file an Appellant’s notice within seven days of the refusal; (ii) file an appeal bundle, including a skeleton argument.
2. The Court will consider whether the appeal has a real prospect of success, or whether there is some other compelling reason why an appeal should be heard.
3. The Court can grant permission to appeal and then grant permission to proceed with the judicial review. The effect of this will ordinarily be that the substantive hearing will be heard by the Administrative Court.
4. The Defendant is not usually required to attend, but the Court may require his/her attendance, and may even ‘roll-up’ the permission/substantive issue itself as part of the appellate function.
5. If the Court of Appeal refuses permission to appeal, there is *no* further appeal to the Supreme Court. If, however, the Court of Appeal grants permission to appeal but then refuses to grant permission to apply for judicial review, this latter decision can be appealed to the Supreme Court.

C. Post-permission steps

I. Defendant's detailed grounds of opposition and evidence

1. Once permission is granted, the Defendant has 35 days after service of the Order giving permission to serve its response (Detailed Grounds) and the evidence on which it seeks to rely: CPR 54.14.
2. The detailed grounds should foreshadow the skeleton argument and should set out the propositions of law and fact which will be relied on at the full hearing in a logical and sequential fashion. Where the detailed grounds rely on factual propositions, the documents should cross-refer to the relevant parts of the witness statements and/or to the documents that are filed and served at the same time.
3. In principle a Defendant who does not comply with this rule cannot take part in the hearing without an extension of time.
4. Where documents are relied on then they must be served in a paginated bundle (PD para 10.1).
5. Relevant points to consider at this stage are:

a. Should the claim be opposed at all? Is it cost effective to do so?

b. ADR?

1. Importantly, the Defendant must consider the ‘Duty of candour’. That is, the Defendant has a “duty to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide”. As has been pointed out:

“The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why”.

R v Lancashire CC ex p Huddleston [1986] 2 All ER 941; and see also R(Quark Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at para 50; Belize Alliance of Conservation non Governmental Organisations v Department of the Environment [2004] UKPC 6, [2004] Env LR 761 at para 86 per Lord Walker (dissenting); Tweed v. Parades Commission for Northern Ireland [2007] 1 AC 650 at [31-2[[2]](#footnote-2)] and [54-7]; and R. (on the application of Al-Sweady) v Secretary of State for Defence [2010] H.R.L.R. 2.

1. A Defendant cannot make partial disclosure of documents or facts where the effect would be to give a misleading impression of the information that has been disclosed.
2. Both Claimant and Defendant should consider whether other interested parties should be served with the claim form. The timetable for their response and evidence runs from the date of service on them. Alternatively they can take the initiative and apply to file evidence or be heard under CPR Part 54.17. Application is made by letter explaining who the applicant is and why and in what form they want to participate in the hearing [PD para 13.1]. The application should be made as soon as possible so as not to delay the hearing.

Reconsideration by the Claimant after Defendant’s evidence/grounds.

1. The Claimant is under a duty to reconsider the claim following service of the Defendant’s detailed grounds and evidence – e.g R v Liverpool City Justices & Crown prosecution Service v Price (1998) 162 JP 766; R (Bateman & Ors v Legal Services Commission [2001] EWHC Admin 797. Failure to do so may result in a claim for wasted costs: R v Horsham DC ex p Wenman [1994] 4 All ER 681.
2. In a publicly funded case the position following permission is dealt with at paragraph 3C -142 of the Funding Code Guidance:

The grant of permission operates as a “passport” to funding in relation to legal merits and where the case is one where “the Commission is satisfied that the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues ” then funding will normally be granted. However, this is expressly subject to the duty to reconsider in the light of the Defendant’s evidence or new information. If this shows that permission might well have been refused then the presumption of funding ceases to apply.

1. If the Defendant has conceded all or part of the claim then the Claimant should consider whether the application has become academic, and if so whether the court should nonetheless be invited to continue to hear the claim. The court has power to do so if it is in the public interest. Typically that might arise where: “for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future”. See R v Secretary of State for the Home Department, ex p Salem [1999] A.C. 450, at 456-7 - concerning an appeal. See R. (on the application of Zoolife International Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2007] EWHC 2995 (Admin), Silber J for the same principles applied to a first instance claim; R. (on the application of Raw) v Lambeth LBC [2010] EWHC 507, Stadlen J.
2. The obligation to keep the proceedings under review applies throughout the case and not only on receipt of the Defendant’s evidence – see for example R (Nkongolo Tshikangu) v Newham London Borough Council [2001] EWHC Admin 92 – failure to inform the court that the case had become academic.

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1. See Davey v. Aylesbury Vale District Council [2008] 1 WLR 878, for discussion of ‘preparation’ and ‘acknowledgment’ costs if permission is granted but the claim ultimately fails. [↑](#footnote-ref-1)
2. Per Lord Bingham: ‘I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.’ [↑](#footnote-ref-2)