Permission Applications and Responses

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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 ("**AOS**") "in the relevant practice form", i.e. the N462: CPR 54.8(1).

2. If that person wishes to contest the claim, they must also include "a summary of his grounds" for resisting the claim: CPR 54.8(4)(a)(i). These are usually referred to as "summary grounds of resistance" ("**SGR**") or "summary grounds of defence" ("**SGD**").

3. If the person intends to defend the claim on the ground that it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred (i.e. the test under section 31(3D) of the Senior Courts Act 1981, as amended by section 84 of the Criminal Courts and Justice Act 2015), they must *also* set out a summary of their grounds for doing so: CPR 54.8(a)(ia).

4. The AOS must be filed no later than 21 days after service of the Claim Form: 54.8(2)(a). However, in expedited cases where the Claimant has requested an abridgment of time for service of the AOS, this timeframe may be shortened by the Court (for example, to 7 days or 14 days). The parties cannot agree amongst themselves to extend time for service of the AOS: permission will have to be sought for an extension from the Court (54.8(3)). It is sensible to seek the Claimant's consent

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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.

5. A party who fails to file an AOS 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).

6. As for the contents of the AOS: Neither the rules nor the practice direction expand on what is meant by a "summary" of grounds. However, the "summary" required under this rule should 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]), however it is important to bear in mind the need to comply with the Defendant's duty of candour.

7. As a matter of good practice, the Defendant should address in the AOS:
   (1) Any jurisdictional issues e.g. as to standing or the availability of alternative remedies;

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

(3) Any issue of delay or limitation (because that issue cannot be reopened once permission is given, unless the judge in granting permission expressly indicates otherwise);

(4) Any application for directions: CPR 58.4(b);

(5) Any application for the costs of the acknowledgement of service (including the detail of the costs sought, usually given by means of a 'cost schedule'): if this is not included, the Court is likely to make no order as to costs.

8. 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).

9. An Acknowledgment of Service may be amended or withdrawn only with the permission of the Court: see PD10.5.4.

B. Permission

10. CPR 54.4 provides that 'The court's permission to proceed is required in a claim for judicial review'.

11. 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; (iv) order a 'rolled-up' hearing where the question of permission and the substantive hearing can be heard together. Where (ii) occurs, and permission is refused, the Claimant has the

right to renew the application at an oral hearing, unless it has been certified as being totally without merit (see below). An application must be renewed within seven days after service of the Court's reasons for refusing permission (CPR 54.12(4)). The Claimant must file grounds supporting the notice of renewal in which the Claimant must address the reasons given by the Judge in refusing permission (see the Administrative Court Guide 2020 at para 8.4.5).

12. Where, however, the court certifies the application as being totally without merit in accordance with CPR 23.12, the claimant cannot renew the application at an oral hearing (CPR 54.12(7)). This provision was considered by the Court of Appeal in *R(Grace) v SSHD* [2014] EWCA Civ 1091. The term "totally without merit" means "bound to fail" and does not connote vexatiousness or abuse of the process. If a claim is said to be "totally without merit" the only recourse is a paper appeal to a Lord Justice of Appeal.

13. Sometimes the parties may invite the Court to dispense with the consideration on the papers and invite the Court to hold a hearing on permission. This is rare and generally not advisable.

14. The Court may also direct a permission hearing in the first instance where it wishes to hear submissions on (a) whether it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred, and if so (b) whether there are reasons of exceptional public interest which make it nevertheless appropriate to give permission: CPR 54.11A)(1)(a) and (b).

15. A 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. Claimants will often proffer a "rolled up" hearing as a means of expediting matters: generally they are not desirable for defendants who think they have a real point on permission.

16. 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

17. 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.

18. 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. Note that the test for judicial review of decisions of the Upper Tribunal is more demanding: i.e. "an arguable case which was a reasonable prospect of success" and which either raises "an important point of principle or practice" or "there is some other compelling reason to hear it" (CPR 54.7A(7)(a) and (b).

19. For the Defendant, it is necessary, therefore, to strike the 'knock-out blow', which includes: showing the Court the authority or statement of fact that totally defeats the Claimant's case; explaining the statutory framework that shows that the claim 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 in pursuing the claim, or a lack of standing in bringing the claim.

20. 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, particularly where that delay has not caused any prejudice to the Defendant.

21. 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 Senior 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.

22. Where the issues at stake are especially important – raising issues or general public importance – the Court may grant permission even if the Claimant's arguments are weak: e.g. *R (Staff Side of the Police Negotiating Board v. Secretary of State for Work and Pensions* (CO/3570/2011) (per Ouseley J).

23. 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.

24. The Court of Appeal has stated 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.

25. This approach should be contrasted to *R (Federation of Technological Industries) v. Customs and Excise Commissioners [*2004] EWHC 254 (Admin), where Lightman J. stated that the Court may, in the exercise of its discretion, impose a higher hurdle than arguability if the circumstances require it. Factors may include: the nature of the issue, the urgency of resolution, an how detailed and complete the argument is before the Court. Administrative Court judges will be reluctant to follow this analysis, as it is unorthodox.

26. 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. Defendants will very occasionally put in a 'Rejoinder'. Whilst the CPR does not make any provision for a reply, they are referred to in the Administrative Court Guide 2020 at paragraph 7.2.5 provides that "*any reply that is received before a case is sent to a judge to consider permission will be put before the judge, but it is a matter for the judge as to whether she is willing to consider the document"* (*R (Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin) at §§80-81).

II. <u>Procedure</u>

27. A Defendant or Interested Party is not required to attend an oral permission hearing (CPR 54PD 8.5), unless the Court directs otherwise.

28. Unless directed otherwise, there is no *requirement* to submit a skeleton argument on a permission application (whether as Claimant, or Defendant). However, it is advisable to do so. The judges expect them, especially from Claimants. Where there are no standard directions, these should be filed two working days before the hearing.

29. There is usually a period of 30 minutes allocated to each application.[2] If the parties anticipate that 30 minutes will not be sufficient, they *ought* to let the Court know and seek to obtain extra time.

30. In certain circumstances, the <u>Defendant</u> may seek a greater time allocation for the hearing on permission – this is where they think the claim is weak, and the 'knock-out blow' requires more detailed consideration of the evidence.

31. Ordinarily, the Claimant is invited to speak first, presenting the case on arguability. Occasionally, the Judge will invite the Defendant to speak first, if he or she is minded to grant permission.

[2] For remote hearings listed during the Covid-19 pandemic, the default time allocation is 60 minutes.

32. 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

33. At the end of the permission hearing, the Judge gives an ex tempore decision (ie. gives the decision orally immediately at the end of the hearing). Where permission is granted on all grounds, the Judge may give little by way of reasons (since there is little basis to challenge the grant of permission in any event: see below). Otherwise, the judge will briefly summarise the facts of the case, summarise the arguments of the respective parties, indicate whether permission is granted and set out her reasons for the 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. Sometimes a judge may indicate that certain points (such as arguments as to standing or timing) are arguable for the purposes of permission but require final determination at the substantive hearing.

34. Rarely will permission decisions be reserved (ie handed down, either orally or in writing, at a date after the hearing).

35. 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'.

36. 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: CPR 54.12(1)(b)(ii).

37. 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[3]. Where permission is refused, the Claimant will ordinarily bear his/her own costs, and may have to pay some of the Defendant's costs.

38. Usually, the Defendant's costs will be limited to the costs of filling out the AOS (including the drafting of the 'Summary Grounds'), but only where the Defendant expressly asks for costs in the AOS itself, and it may be appropriate to include a schedule of costs at this stage. Otherwise, the Defendant should come along with a schedule of costs to the hearing. If a Defendant *does* attend a renewed permission hearing, the court will not generally make an order for costs against the claimant in respect of that hearing: PD54A para 8.6.

39. Where the AoS is itself very lengthy (and more than a summary of the grounds of defence is provided), it is possible that not all of the costs incurred in drafting will be recovered. It has been said that 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). In practice, however, the Court will tend to allow all the costs of drafting.

40. Occasionally, where there are 'exceptional circumstances', the Court *may* order more substantial costs, including the costs of preparing for and attending at the permission hearing: this is a matter of discretion (as with all costs decisions). 'Exceptional circumstances' are those 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 at [76]. Further, a relevant factor in 'exceptional' circumstances will be the extent to which the unsuccessful

[3] 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.

claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.

41. 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: PD54A para 8.6.

42. Wasted costs might also be recovered in exceptional cases.

43. 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. The parties should come to the permission hearing prepared to discuss directions.

IV. <u>Setting aside permission</u>

44. CPR 54.13 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.

45. 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'.

46. 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. <u>Appeals ie. renewals</u>

47. A Claimant who is refused permission on any of their grounds by a Judge after an oral renewal hearing, the unsuccessful Claimant can 'appeal' that refusal: this is by seeking to renew the application again in the Court of Appeal. The Claimant must file an Appellant's notice within seven days of the refusal of permission CPR 52.8(3).

48. The Court of Appeal 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.

49. The Court of Appeal can grant permission to appeal and then grant permission to proceed with the judicial review. Alternatively, the Court of Appeal may, instead of granting permission to appeal, simply grant permission to apply for judicial review (CPR 52.8(5)). The effect of this will ordinarily be that the substantive hearing will be heard by the Administrative Court.

50. Permission decisions are usually determined on the papers, unless the Court orders otherwise (CPR 52.5(1)-(2)). Neither party has any right to an oral renewal of the Court of Appeal's refusal of permission 'on the papers'.

51. 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.

52. In *Sky Blue Sports & Leisure v Coventry CC* [2013] EWHC 3366 (Admin) an application was made for disclosure following refusal of permission. Disclosure was sought of certain documents referred to in the summary grounds. The application was refused since it was only a permission application and the applicant had a good deal of information already. The existence of as yet undisclosed and potentially critical material might be a reason for granting permission, and may also be regarded by the court as a breach of the Defendant's duty of candour (see further, below).

C. <u>Post-permission steps</u>

I. <u>Defendant's detailed grounds of opposition and evidence</u>

53. 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(1).

54. 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.

55. In principle a Defendant who does not comply with this rule cannot take part in the hearing without an extension of time.

56. Where documents are relied on then they must be served in a paginated bundle (PD para 10.1).

57. 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?

58. Importantly, in deciding what documents to disclose, the Defendant must continue to bear in mind the Defendant's duty of candour. The duty of candour applies to both parties from the pre-action protocol stage and throughout the proceedings. The duty of candour has been described as "*a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide"*: Laws LJ in *R(Quark Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at para 50, applied in *R. (on the application of Al-Sweady) v Secretary of State for Defence* [2010] H.R.L.R. 2 at para 22. This includes "*disclosure which is relevant or assists the claimant, included on some* ***as yet unpleaded ground****"* (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.4))* [2016] UKSC 35, [2017] AC 30 at para 183 per Lord Kerr.

59. See also, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*, Treasury Solicitor's Department (January 2010): "A public authority's objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration"

60. What are the consequences of failing to comply? If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the defendant public authority upon points which remain obscure (*Quark Fishing* at [50]). There may also be adverse costs consequences; and aggravated damages (where compensation claim): see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [165]. There may also be reputational damage to the Defendant.

61. 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. That is not, however, the same as requiring standard disclosure under CPR 31.6 as per ordinary civil proceedings. Often the requirements of the duty of candour will be met by way of witness evidence.

62. Both Claimant and Defendant should consider whether other interested parties should be served with the claim form. Sometimes that can be a lot of people. 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.

63. In addition, parties should be aware of the Court's power to hear any person under CPR 54.17(1). Specifically, third party interveners may apply for permission to file evidence or make oral or written submissions at the judicial review hearing. The only requirement is that an application to do so must be made promptly: CPR 54.17(2). Prospective interveners will wish to be mindful of the cost implications of their intervention: under section 87(5) of the Criminal Justice and Courts Act 2015, the Court is required, on the application of a party, to order an intervener to pay costs if it is satisfied that the intervener has either acted in substance as a party; that the intervention, taken as a whole, has not been of assistance to the court; that the submissions addressed a matter which was unnecessary to the proceedings; or that the intervener has otherwise behaved unreasonably.

<u>Reconsideration by the Claimant after Defendant's evidence/grounds.</u>

64. 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: [1994] 4 All ER 681.

65. Particular care will need to be taken in a case where you are publicly funded as to the nature of any obligations to review the case.

66. 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.

67. 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.