JUDICIAL REVIEW INTRODUCTORY SERIES

*Administrative Law Bar Association, Autumn 2019*

*SESSION 2: PRELIMINARY PROCEDURAL ISSUES*

Note re authorship: ALBA has offered its Judicial Review Introductory Series of lectures for many years. The notes provided have been contributed to over time by a number of ALBA members, many leading members of the Bar, including Nigel Giffin QC, Joanne Clement, Andrew Sharland QC, and James Cornwell. The quality and diversity of focus of its members is an important strength of ALBA and the course has been variously contributed to over time by lawyers representing applicants, government, or both. The session is presented tonight by Tim Buley QC of Landmark Chambers and Sandra Akinbolu of Lamb Building.

**Introduction**

1. The topics covered in this paper are as follows:-
2. Key duties to remember;
3. Venue (Administrative Court or Upper Tribunal)
4. Outline of CPR Part 54 procedure;

1. Standing;
2. Time limits;
3. Alternative remedies;
4. *Cart* challenges;
5. Collateral challenges and the “*exclusivity*” rule;
6. Remedies, including interim remedies.

##### (1) KEY DUTIES/ PROPOSITIONS

##### Judicial review is a cooperative enterprise.Fordham, *Judicial Review Handbook*, 6th edn, 2012, §10.1:

*The supervisory jurisdiction works best as a relationship of mutual respect and cooperation between Court and defendant public authority… Judges have high expectations of the behaviour of judicial review parties and their representatives, and will expect cooperation with the Court, with each other, and with the process.*

Fordham cites *inter alia* Lord Walker in ***Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers***[2011] UKPC 4, §23: ‘*judicial review proceedings are meant to be conducted with cooperation and candour*’, and Sir John Donaldson MR, in ***R v Lancashire County Council ex p. Huddleston*** [1986] 2 All ER 941, 945c describing judicial review as a ‘*relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim namely maintenance of the highest standards of public administration.’*

3. The relevant rules now reinforce the duty of cooperative endeavour. As to the Administrative Court and Court of Appeal **CPR 1.3** provides that:

* 1. *The parties are required to help the court to further the overriding objective [of dealing with cases justly and at proportionate cost- CPR 1.1]*

 In the Upper Tribunal (UT) para 2(4) of the **Tribunal Procedure (Upper Tribunal) Rules 2008 SI 2008/2698**, applicable both to appeals and to the UT in its JR mode, provides that:

  *2(4) Parties must-*

1. *help the Upper Tribunal to further the overriding objective [of dealing justly and fairly with cases]; and*
2. *co-operate with the Upper Tribunal generally.*

4. **There is a duty of candour upon the applicant/claimant. The duty is to make full and frank disclosure of (i) material facts; and (ii) potential legal impediments to judicial review such as alternative remedy.** *Cocks v Thanet DC* [1983] 2 AC 286, 294G ‘*frank disclosure of all relevant facts*’- this includes changes in underlying facts- ***R (Tshikanghu) v Newham LBC*** [2001] on claimants duty to inform court of ‘*material change in* circumstances’ or if claimant ‘*no longer needed judicial review*’) -see further Fordham, *Judicial Review Handbook*, §10.3.

5. **The respondent/defendant also bears critical duties.** Fordham states, as regards the duty upon a defendant or interested party, that (§10.4):

*A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include: (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground, and (3) disclosure at the permission stage if permission is resisted. A main reason why disclosure is not ordered in judicial review is because Courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so.*

 Fordham cites *inter alia* observations of the Court of Appeal, *per* Laws LJ, in**R (Quark Fishing Ltd) v Secretary of State for the Foreign and Commonwealth Affairs**[2002] EWCA Civ 1409, §50: *‘there is – of course – 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…’*. The Court found, §55*, ‘I am constrained to say that the Secretary of State in this case has fallen short of those high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review*’ and that (§68):

*I feel constrained to add, and I do it with a sense of melancholy, that while for my part I have found nothing to demonstrate bad faith on the part of the Secretary of State, the history of this case has demonstrated to my mind that the approach taken to the public decisions that had to be made fell unhappily short of the high standards of fairness and openness which is now routinely attained by British government departments.*

6. **Government work and standards.** Fordham refers (§10.4.2) to the Treasury Solicitors’ (now GLD’s) *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (Jan 2010) [2010] JR 177, which states at §1.2 that ‘*the effect of the [duty of candour] is to require the public authority, when presenting its evidence in response to an application for judicial review to set out fully and fairly all matters that are relevant to the decision that is under challenge, or are otherwise relevant to any issue arising in the proceedings.*’ In enlarging statements it is recorded that the duty of candour ‘*gives rise to a weighty responsibility*’, ‘*is information-based and not restricted to documents*’, and ‘*applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel’s written and oral submissions.*’ The guidance invokes ‘values’ declared at §1.1:

*Values*

* As a civil servant you must act in accordance with the core values of the Civil Service: integrity, honesty, objectivity and impartiality.*

* Information must be handled as openly as possible within the legal framework, in compliance with the law and upholding the administration of justice.*

* The facts and relevant issues must be set out truthfully based on a rigorous analysis of the evidence.*

* Errors must be corrected as soon as possible.*

* Inconvenient facts or relevant considerations must not be ignored.*

* Always act in a way that is professional including, in the case of lawyers, taking into account the duty held to the Court.*

7. **Lawyers must maintain constant good practice, even in urgent situations**: see **R (SB (*Afghanistan*)) v SSHD** [2018] EWCA Civ 215​; [2018] WLR 4457:

1. *There are two points of criticism of Mr Bell and Mr Knight in relation to this application. First, they misrepresented the facts of the case to the judge. We accept they acted honestly and without any intention to mislead him. But there simply was no proper basis for the assertion that the Secretary of State had certified SB's claim for leave to remain pursuant to Article 8 as manifestly unfounded, so as to engage para. 6.2 of the EIG and to found their submission that the removal window had been suspended pursuant to that provision. It is difficult to find any basis upon which Mr Bell could have signed the statement of truth supporting the claim form. We were told that the foundation for their belief that SB's Article 8 claim had been certified was the statement in the letter from the Secretary of State dated 25 August 2017, set out above. However, it is not possible to derive from that statement, by implication, that SB's claim had been certified. …*
2. *Secondly, Mr Bell and Mr Knight did not attempt to give the Secretary of State notice of the out of hours application which was to be made to Morris J. Ms Lieven QC, for SB, suggested that there was no need for them to do so, because section 16.3 of the Administrative Court Guide, dealing with Out of Hours Applications, did not specify that they should and para. 16.3.4 referred to inquiries which the judge might make him or herself.*
3. *With respect, this is an unsustainable contention. Legal professionals should know that basic fairness means that (unless there is some special reason for secrecy or some insuperable practical impediment) notice must be given to an opposing party where an application is to be made for interim injunctive relief. There is nothing in section 16.3 of the Guide to displace or remove that basic obligation. On the contrary, section 16.3 appears in the chapter on Urgent Cases, in which para. 16.2.2.4 states that form N463 should include a statement of the efforts taken to put the defendant on notice, thereby plainly indicating that the usual obligation of fairness applies (see also para. 16.2.8)…*

**(2) Venue (Administrative Court or Upper Tribunal)**

8. Lawyers must choose the correct venue for judicial review. From 17 October 2011, the Lord Chief Justice directed that certain immigration JRs (challenges to decisions by the Secretary of State for the Home Department not to treat further representations as a fresh asylum claim or human rights claim under paragraph 353 of the Immigration Rules) were transferred to the Upper Tribunal (Immigration and Asylum Chamber) for determination. The direction was made under section 15 and 18 of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal then exercises its statutory jurisdiction which is the equivalent of the judicial review jurisdiction of the Administrative Court. On 21 August 2013, the Lord Chief Justice made a further direction, transferring the vast majority of all immigration claims to the Upper Tribunal for determination.[[1]](#footnote-1) Any application for permission to apply for judicial review and any application for judicial review that calls into question: (i) a decision made under the Immigration Acts, or any instrument having effect under an enactment within the Immigration Acts, or otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules; or (ii) a decision of the Immigration and Asylum Chamber of the FTT, from which no appeal lies to the Upper Tribunal, is transferred to the Upper Tribunal from 1 November 2013. Applications for permission lodged after 9 September 2013, including those where permission had been refused on the papers and oral renewal was pending, were transferred. Where the conditions for transfer under SCA 1981 s.31A are satisfied then transfer must take place: see ***R (Huang) v Secretary of State for the Home Department*** [2015] UKUT 662 (IAC); [2016] Imm AR 299.

9. As to judicial review work- especially but not only immigration work- transferred to the UT, see ss 15-19 Tribunals Courts and Enforcement Act 2002 and Consolidated Direction of the Lord Chief Justice, *Jurisdiction of the Upper Tribunal under s. 18 of the Tribunals, Courts and Enforcement Act 2007 and Mandatory Transfer of Judicial Review applications to the Upper Tribunal under s. 31A(2) of the Senior Courts Act 1981***,** 21 August 2013 (as amended) identifies the following cases for hearing in the UT:

*…any application for permission to apply for judicial review and any application for judicial review (including any application for ancillary relief and costs in such applications) that calls into question:*

*i. a decision made under the Immigration Acts (as defined in Schedule 1 to the Interpretation Act 1978) or any instrument having effect (whether wholly or partly) under an enactment within the Immigration Acts, or otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules; or*

*ii. a decision of the Immigration and Asylum Chamber of the First-tier Tribunal, from which no appeal lies to the Upper Tribunal.*

It excludes the UT in respect of ‘any application which comprises or includes’:

*i. a challenge to the validity of primary or subordinate legislation (or of immigration rules);*

*ii. a challenge to the lawfulness of detention (but an application does not do so by reason only of the fact that it challenges a decision in relation to bail);*

*iii. sa challenge to a decision concerning inclusion on the register of licensed Sponsors maintained by the United Kingdom Border Agency, or any authorisation of such Sponsors;*

*iv. a challenge to a decision as to citizenship under the British Nationality Act 1981 or any other provision of the law for the time being in force which determines British citizenship, the status of a British national (Overseas), British Overseas citizenship or the status of a British subject.*

*v. a challenge to a decision made under or by virtue of section 4 (accommodation centres) or Part VI (support for asylum seekers) of the Immigration and Asylum Act 1999;*

*vi. a challenge to a decision made under or by virtue of Part II (accommodation centres) or Part III (other support and assistance) of the Nationality, Immigration and Asylum Act 2002;*

*vii. a challenge to a decision of the Upper Tribunal;*

*viii. a challenge to a decision of the Special Immigration Appeals Commission;*

*ix. an application for a declaration of incompatibility under section 4 of the Human Rights Act 1998;*

*x. a challenge to a decision which is certified (or otherwise stated in writing) to have been taken by the Secretary of State wholly or partly in the interests of national security; or*

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

 In addition the following ‘classes of case’ have been specified for purposes of s18(6) TCEA 2007:

*a. Any decision of the First-Tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on review); and*

*b. Any decision of the First-tier Tribunal made under Tribunal Procedure Rules or section 9 of the 2007 Act where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of the 2007 Act.*

10. The High Court also has the power to transfer judicial review cases of other kinds to the UT if it appears ‘*just and convenient*’ to do so: see the SCA 1981 s.31A(3). The Court of Appeal has laid down a practice that when permission is granted in age assessment cases, those claims are transferred to the Upper Tribunal to be determined there, see **R (FZ) v London Borough of Croydon**[2011] EWCA Civ 59, [2011] PTSR 748, at [31].

11. Section II of PD54A deals with applications for permission to apply for judicial review in immigration and asylum cases where the claimant is challenging removal directions before being removed. It imposes additional requirements, such as requiring to be filed with the claim form a copy of the removal directions, any document served with the removal directions, and the UKVIs[[2]](#footnote-2) factual summary of the case. If a detailed statement of grounds cannot be provided (because of the shortage of time) it must be accompanied with a statement of the reasons why these are not provided. Immediately upon issuing the claim, the claimant must send copies of the claim form and accompanying documents to UKBA (as well as the Treasury Solicitor, i.e. the GLD).

##### (3) CPR Part 54

12. Applications for judicial review in the Administrative Court are governed by CPR Part 54.

13. This is the judicial review procedure referred to in s.31 of the Senior Courts Act 1981 (“**SCA 1981**”), to which reference should also be made (along with s.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[[3]](#footnote-3) to be commenced in, the Upper Tribunal: see SCA 1981 s.31A, and the explanation of this jurisdiction in **R (Cart) v The Upper Tribunal**[2011] UKSC 28, [2012] 1 AC 663 at [25]. This jurisdiction is discussed further below in the context of immigration cases.

14. The judicial review procedure *must* be used where the claimant is seeking one of the so-called prerogative orders,[[4]](#footnote-4) 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 SCA 1981 ss.31(1), (2).

15. 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 SCA 1981 s.31(4).

16. 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. Thus, CPR Part 54 has to be read, save to the extent that it provides otherwise, with CPR Part 1 (overriding objective), Part 2 (application/interpretation of rules), and Part 3 (case management powers) and other provisions of the CPR. The following provisions are disapplied:

* CPR Parts 15,16 and 26 (by CPR r.8.9, although CPR r.54.8 reapplies CPR PD 1, para.15);
* CPR r.10.3(2) (dis-applied by CPR r.54.8);
* CPR r.8.4 (dis-applied by CPR r.54.9);
* CPR rr.8.5(3)-8.5(6) (dis-applied by CPR r.54.14);
* CPR r.8.6(1) (dis-applied by CPR r.54.16).

17. The main features of CPR Part 54 are:

* CPR rr.54.4, 54.10-54.13 – The requirement for permission (see also SCA 1981 s.31(3)), the grant or refusal of permission, the right to renew the application for permission orally (unless a claim is certified as being totally without merit), and the prohibition on applications to set permission aside;[[5]](#footnote-5)
* CPR rr.54.5 – The time limit for filing the claim form (see below);
* CPR rr.54.6 and 54.7 – Contents and service of the claim form;
* CPR rr.54.8-54.9, 54.14 – Defendant’s acknowledgment of service, detailed response and evidence;
* CPR r.54.15 – Claimant requires permission to rely on additional grounds;[[6]](#footnote-6)
* CPR r.54.16 – Evidence;
* CPR r.54.17 – Applications to intervene;
* CPR r.54.18 – Power to decide application without a hearing where all parties agree;
* CPR r.54.19 – Powers in respect of quashing orders (see below);
* CPR r.54.20 – Transfer provisions - power to order claim to continue as if not brought by way of judicial review;
* CPR rr.54.21-54.24 - The Planning Court, which hears planning challenges including planning judicial reviews.

18. There are four Practice Directions to supplement Part 54 (as well as a prescribed pre-action protocol). Practice Direction 54C refers to references by the Legal Aid Agency (‘**LAA**’) of questions concerning eligibility for funding in criminal cases, and Practice Direction 54D is concerned with the appropriate venue for judicial review proceedings under the regionalisation policy implemented in 2009. The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, subject to various countervailing factors set out in §5.2 of PD54D. There are certain “excepted” classes of claim that are not handled in the regional courts, including extradition appeals and Divisional Court hearings. Practice Direction 54E concerns Planning Court claims.

19. 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).

20. A further Practice Statement ([2002] 1 WLR 810) deals, amongst other matters, with the procedure for urgent cases at the permission stage (application for urgent consideration / application for interim injunction, which must be accompanied by reasons for urgency and a draft order) and another ([2008] 1 WLR 1377) with uncontested proceedings.

21. It is now also necessary (and very helpful to new practitioners as to others) to consider *The Administrative Court: Judicial Review Guide 2018 (July 2018) [[7]](#footnote-7)* which parties are expected to act in accordance with (see §1.1.3 ‘*The Guide does not have the force of law, but parties using the Administrative Court will be expected to act in accordance with it*’). It may be expedient to see also the *Administrative Court Notes for Guidance on Applying for Judicial Review* (updated to 1 April 2011), although these notes are aimed largely at a non-professional audience.

##### (4) Standing

1. SCA 1981 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*.”

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

24. An individual with a direct personal interest in the outcome of the claim will have standing. It is also clearly established, for example, that a responsible pressure group or campaign 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 Movement Ltd.*** [1995] 1 WLR 386, DC. So too will 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] Env LR 111, and ***R (Hammerton) v London Underground Ltd*.** [2002] EWHC 2307 (Admin).

25. A company incorporated for the purpose of bringing proceedings (usually to obtain costs protection) will usually have standing. In ***R (Residents Against Waste Site Ltd) v Lancashire CC***[2007] EWHC 2558 (Admin), [2008] Env LR 27, 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 (see also ***R (Save Our Surgeries Ltd) v Joint Committee of Primary Care Trusts and Newcastle upon Tyne Hospitals NHS Foundation Trust***[2013] EWHC 439 (Admin), [2013] PTSR D16; ***R (Cherkley Campaign Ltd) v Mole Valley DC***[2013] EWHC 2582 (Admin), [2014] PTSR D1 (company formed after decision under challenge had standing).[[8]](#footnote-8) Incorporation for the purpose of avoiding cost liability may be viewed as an abuse of process, but that is dealt with by the courts imposing a requirement for security for costs rather than as a question of standing. In ***Save our Surgeries***(above) the Court held that the company had a sufficient interest in the proceedings, as it represented many individuals who had contributed financially in order to bring the proceedings and included individuals who would be directly affected by the closure of the hospital in question and clinicians who worked within the unit. The Judge stated that:-

*The adverse costs in litigation are such that no citizen of ordinary means would prudently contemplate bringing this litigation as an individual. Incorporation was and is the proper means of allowing the interests of a substantial number of persons who consider the defendant’s decision to be unfair and unlawful to be jointly represented. There is no obvious better placed challenger, in fact there is no other challenger.*

1. 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, HL. See also ***R (Grierson) v Ofcom and Atlantic Broadcasting Ltd.***[2005] EWHC 1899 (Admin), [2005] EMLR 37, 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.[[9]](#footnote-9)
2. 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 General Medical Council*** [2006] EWHC 3277 (Admin); in *Grierson*,where the claimant’s interest was purely derivative and the party directly concerned had not chosen to challenge the decision; in ***R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs***[2009] EWHC 1910 (Admin), [2009] ACD 76, expressing doubts about the standing of a foreign NGO to challenge a government decision when no more directly affected party had done so; and in ***R (Coedbach Action Team Ltd.) v Secretary of State for Energy and Climate Change*** [2010] EWHC 2312 (Admin)[2011] EnvLR 11, where the claimant had no direct interest in the decision under challenge, but wished to quash it because of its potential knock-on implications for a distinct planning application.
3. 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,[[10]](#footnote-10) the Court of Appeal in ***R (Chandler) v Secretary of State for Children, Schools and Families***[2009] EWCA Civ 1011, [2010] PTSR 749, 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. The individual must be affected in some identifiable way in the sense that compliance with the procurement regime would have had a direct impact on him. See also: (i) ***R (Waste Recycling Group Ltd) v Cumbria CC***[2011] EWHC 288 (Admin), [2011] Env LR 24, where the motive for the claim was to damage a commercial rival rather than because the claimant had any real concern about the alleged breach of the law; and (ii) ***R (Unison) v NHS Wiltshire Primary Care Trust and Secretary of State for Health***[2012] EWHC 624 (Admin), [2012] ACD 84, where the Court held that a trade union which was not an economic operator had not demonstrated that it had a sufficient interest in compliance with the public procurement regime in the sense that its members were affected in some identifiable way by outsourcing to one entity rather than tendering for services. For a recent application of this approach to a claim, see ***Wylde v Waverley Borough Council*** [2017] EWHC 466 (Admin), [2017] ACD 57, in which a council tax payer was held to lack standing to challenge a development agreement.
4. 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 the claimant complains that a decision was reached by the defendant without consulting another party, X, the claimant 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 Admin LR 121, CA.
5. The choice of a claimant in order to benefit from LAA funding may in certain cases be an abuse of process, but does not normally go to standing. For a discussion of this issue, see ***R (Edwards) v Environment Agency (No.1)***[2004] EWHC 736 (Admin), [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. For an example, see ***R (Williams) v Surrey CC***[2012] EWHC 516 (Admin) – a challenge to the creation of community libraries in Surrey, where the claimant put forward essentially on behalf of a campaign group did not live or work in Surrey, but was eligible for legal aid. The Court recognised that the library duties were owed only to those who lived, worked or were educated in the area. However, the duties under the Equality Act 2010 (which were also in play) were intended to further equality across the community as a whole. She had interests of a public nature in library services, and an interest in promoting the objectives of the Equality Act 2010. The fact that others who were not eligible for legal aid had more of an interest was not of much significance. Ms Williams, whatever her financial means, had the appropriate standing, and the fact that she also had the benefit of legal aid, when others with a like interest did not, did not make her choice as claimant an abuse of the process of the court.
6. In ***Walton v Scottish Ministers***[2012] UKSC 44, [2013] PTSR 51, Lord Reid emphasised that in many contexts, it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there are also cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority’s violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. In environmental law, an individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise, e.g. by way of noise and disturbance. But some environmental issues that can properly be raised by an individual are not of that character. Environmental law proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. This is not an invitation to a busybody to intervene: those who wish to bring environmental proceedings will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity (see Lord Hope).
7. It is also important to be aware of the different standing test for claims under the Human Rights Act 1998 (“**HRA**”). 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] EWCA Civ 284, [2005] 1 WLR 2668. Core public authorities (e.g. central and local government departments) cannot be “*victims*” and thus cannot bring claims under HRA s.6 for breach of their Convention rights. Unlike the rules on domestic standing, non-governmental organisations such as Liberty or Amnesty International will not be a victim unless the organisation can show that it itself has been directly affected by the act or proposed act challenged. It would seem probable that this requirement does not apply when seeking a declaration of incompatibility. For the position of the EHRC, see ***R (Equality and Human Rights Commission) v Prime Minister***[2011] EWHC 2401 (Admin), [2012] 1 WLR 1389.
8. In ***R (Broadway Care Centre Ltd.) v Caerphilly County Borough Council***[2012] EWHC 37 (Admin), (2012) CCL Rep 82, a care home attempted to bring a claim for judicial review, challenging the local authority’s decision to terminate its contract to provide care for elderly dementia sufferers. The Administrative Court held that it did not have standing to bring the proceedings to protect its residents’ Article 8 rights, because the care home was not the victim of a breach of those rights. In domestic law terms, the care home had standing to seek urgent interim relief, but once the residents had time and opportunity to seek their own advice and representation, there was a clear conflict of interest between the care home and the residents, and insufficient reason why the care home should purportedly act on their behalf.

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##### (5) Time limits

1. The general rule is set out in CPR r.54.5(1), which 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.
2. Any extension of time is governed by the court’s general power under CPR r.3.1(2)(a).
3. Also of importance is SCA 1981 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*.”

1. The following key points arise.
2. *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. A claim will not necessarily be made promptly simply because it has been made within the 3 months’ period. It cannot be stressed enough that the requirement to proceed “*promptly*” may require proceedings to be brought within (and sometimes well within) the 3 months’ period: see e.g. ***R v Independent Television Commission, ex p. TV NI Ltd*.**, Times 30th December 1991, CA. 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 grant of planning permission, or decisions about the allocation of school places.
3. Further, whilst applications made within that 3 months’ 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 months’ period without good reason is likely to fail irrespective of prejudice – a view confirmed in ***Melton v Uttlesford DC***[2009] EWHC 2845 (Admin), [2010] LLR 57. At one point, 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 (Burkett) v Hammersmith & Fulham LBC (No.1)*** [2002] UKHL 23,[2002] 1 WLR 1593. There were suggestions that a generalised requirement of “*promptness*” might be too unspecific to be compliant with ECHR Article 6. This suggestion was subsequently rejected in a number of cases, pointing out that a challenge to the promptness requirement failed in ***Lam v UK*** (Application No.41671/98). The argument was firmly rejected by the Court of Appeal in ***R (Hardy) v Pembrokeshire CC***[2006] EWCA Civ 240, [2006] Env LR 28. However, this line of authority may need to be reconsidered in light of the CJEU’s judgment in ***Uniplex***(see below). In ***Mulvenna v Secretary of State for Communities and Local Government*** [2015] EWHC 3494 (Admin), [2016] JPL 487, Cranston J held that a claimant’s waiting to see if another legal challenge succeeded was not a good excuse for extending time (even though the other claim did indeed succeed).
4. *Secondly*, however, where the Strasbourg court declined to intervene, the Luxembourg court has been bolder. In the very important decision of C-406/08 ***Uniplex (UK) Ltd v NHS Business Services Authority*** [2010] PTSR 1377, the CJEU held that the (then) time limit for bringing claims under the Public Contracts Regulations 2006 (promptly and in any event within 3 months) was contrary to EU law effective remedy requirements in certain respects. The CJEUheld that EU law precludes a national provision which allows a national court to dismiss, as being out of time, proceedings on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.
5. Although the decision related to the specific legislation governing public procurement, the CJEU’s reliance on general principles of EU law (effectiveness and legal certainty) in reaching this conclusion suggested that the same approach should be taken in the context of JR claims involving directly effective EU law. That view has now been confirmed both in ***R (Buglife) v Medway Council***[2011] EWHC 746 (Admin), [2011] 3 CMLR 39, and in ***R (U & Partners (East Anglia) Ltd.) v Broads Authority***[2011] EWHC 1824 (Admin), [2012] Env LR 5, the latter case also making clear both that the case must be one in which there is an (alleged) breach of EU law (as opposed to merely being a case in which the decision in question was subject to EU law, but the breach is of another kind), and that where ***Uniplex***applies there can equally be no withholding of relief on the ground of delay in bringing the claim.
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;[[11]](#footnote-11) and (b) so far as promptness was an additional requirement to the 3 months’ 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 months’ 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.
7. The latest word on this subject is ***R (Berky) v Newport City Council***[2012] EWCA Civ 378, [2012] 2 CMLR 44. However, each judge took a different view on the ***Uniplex***delay issues.
8. Carnwath LJ (as he then was) considered that:
	* + ***Uniplex*** probably did apply to planning cases but considered the position sufficiently uncertain that he would have made a reference had the case turned on delay;
		+ if ***Uniplex*** applied it would not have affected the promptness requirement in respect of the domestic law grounds in the case, only the Environmental Impact Assessment ground;
		+ contrary to what was said by Collins J in ***U & Partners***, assuming ***Uniplex*** applied, it was concerned only with the time allowed for commencing proceedings and did not affect the Court’s power to withhold remedies under SCA 1981 s.31(6).
9. Moore-Bick LJ and Sir Richard Buxton by contrast considered that, on the assumption that ***Uniplex*** applied in planning cases, it also applied to s.31(6). Sir Richard Buxton though thought that the application of ***Uniplex*** to planning cases merited reconsideration and that had delay been the determinative issue he would have made a reference. Sir Richard Buxton also said that assuming ***Uniplex*** applied to planning then it dis-applied the time limits in respect of all the grounds (both domestic and European) so long as one of the grounds raised was an EU point and not “*plainly unarguable*”.
10. While the full implications of ***Uniplex***are still being worked out, there is, for now at least, a two-tier approach to delay in judicial review claims. Where claims raise principles of EU law, ***Uniplex***would seem to apply. For those cases which do not, ***Uniplex***may not apply, and the promptness requirement is likely to remain (however, see ***R (Macrae) v County of Herefordshire DC***[2012] EWCA Civ 457, [2012] LLR 720 (cf. ***R (Powell) v Brighton Marina Co Ltd.***[2014] EWHC 2136 (Admin)).
11. Possible grounds for extending time, or excusing what might otherwise be a lack of promptness, include excusable lack of knowledge of the decision when it was taken, difficulties in obtaining public funding,[[12]](#footnote-12) general public importance of the issue (although the importance will usually have to be substantial and clear)[[13]](#footnote-13), sensible pursuit of attempts to resolve the matter without litigation, and the continuing nature of any breach.[[14]](#footnote-14) Again, there is a useful discussion of the authorities in the ***Hardy***decision. See also ***R (Cukurova Finance International Ltd.) v HM Treasury*** [2008] EWHC 2567 (Admin), [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. 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 Admin LR 790, QBD.
12. *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 ***Presvac***, above. 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. Further, if the decision under challenge has not been communicated there may be scope for arguing that until it has been communicated it has no legal effect (see ***R (Anufrijeva) v Secretary of State for the Home Department***[2003] UKHL 36, [2004] 1 AC 604) and therefore time does not start to run until communication of the decision (however see ***R (Lekstaka) v Immigration Appeal Tribunal***[2005] EWHC 745 (Admin)).
13. *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] Env LR 415, QBD. For a further application of this more liberal approach, see ***R (Catt) v Brighton & Hove City Council*** [2007] EWCA Civ 298, [2007] Env LR 32, 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 to that, see also ***Zeb v Birmingham City Council*** [2009] EWHC 3597 (Admin),[2010] Env LR 30). 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 Electoral Commission Boundary Committee for England*** [2009] EWCA Civ 239, [2009] BLGR 589, ***R (Risk Management Partners Ltd.) v Brent LBC***[2009] EWCA Civ 490, [2010] PTSR 349,[[15]](#footnote-15) and ***R (Easybus Ltd) v Stansted Airport Ltd*.** [2015] EWHC 3833 (Admin). The most recent significant decision on the vexed question of when time starts to run is that of the Court of Appeal in ***R (Nash) v Barnet LBC***[2013] EWCA Civ 1004, [2013] PTSR 1457.
14. 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] 2 AC 330. The defendant will in those circumstances be limited to relying upon SCA 1981 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 (Lichfield Securities Ltd.*) *v Lichfield DC***[2001] EWCA Civ 304, [2001] 3 LGLR 35.
15. 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.
16. From 1 July 2013, two important changes to the time limits for bringing judicial review claims were made:
17. Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts (as defined by s. 336 of the Town and Country Planning Act 1990 (“**TCPA 1990**”) as the TCPA 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990), the claim form must be filed not later than six weeks after the grounds to make the claim first arose: see CPR r.54.5(5). In ***R (Hillingdon LBC v Secretary of State for Transport)*** [2017] EWHC 121 (Admin) Cranston J held that this applied to challenges to a national policy statement and the 6 week period began once the national policy statement was designated or published.
18. Where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015, the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of the Regulations to start any proceedings under the Regulations in respect of that decision. Regulation 92(2) states that proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

##### (6) Alternative remedies

1. The general rule is that permission should not be granted to apply for judicial review where an adequate alternative remedy exists: see ***R v Chief Constable of Merseyside Police, ex p. Calveley*** [1986] QB 424, CA. 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): see e.g. ***R (Kalluri) v Secretary of State for the Home Department*** [2015] EWHC 4073 (Admin). This principle applies equally to judicial review in immigration cases before the Upper Tribunal: see ***R (Khan) v SSHD*** [2015] UKUT 353 (IAC). Conversely, where an appellate body has no jurisdiction to consider a particular matter, judicial review in respect of that matter may be appropriate: see ***Watch Tower Bible & Tract Society of Britain v Charity Commission*** [2016] EWCA Civ 154, [2016] 1 WLR 2625.
2. Whether an alternative remedy is available, that is adequate and appropriate, requires analysis of the particular situation. In ***R (Wilford) v Financial Services Authority*** [2013] EWCA Civ 677, Moore-Bick LJ at 37 emphasised, in relation to a complaint of inadequate reasons, that when considering alternative remedies, it was necessary to look at substance (the ‘*real issue*’), not merely form.
3. However even a statutory appeal may not be an alternative remedy barring judicial review, if it does not in fact offer a valid substitute means iof redress. In ***Ahsan & ors v SSHD*** [2017] EWCA Civ 2009; [2017] All ER (D) 19 (Dec) the Court of Appeal (applying the principle in ***R (otao Kiarie and Byndloss) v SSHD*** [2017] UKSC 42; [2017] 1 WLR 2380 that appeals from out of country in which foreign deportees might be unable to put a case adequately represented a disproportionate breach of article 8 ECHR) held that individuals whose immigration status had been terminated because of claimed cheating on a language exam, and who were entitled to an appeal exerciseable only from outside the UK, did not have an alternative remedy which excluded judicial review: ‘*With respect to the three appellants, whether, because they turned on a disputed question of (precedent) fact on which it had been necessary in the interests of justice that they be able to give oral evidence, and they would not be able to do so in an appeal from outside the country, the denial of an effective hearing was contrary to their rights both at common law and under art 8 of the European Convention on Human Rights.*’
4. In the light of **Ahsan** it is clear that the adequacy and appropriateness of an alternative remedy may be questioned, but it remains the case that if the remdy is adeuate and appropriate permission will be refused: see latterly **Glencore Energy UK Limited v Commissioners of HMRC** [2017] EWHC 1476 (Admin); [2017] BTC 20, in which the Administrative Court (Green J) held that permission to apply for judicial review should be refused where there are alternative remedies available to a claimant which are in substance adequate and appropriate.
5. Equally 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: see e.g. ***R (Shoesmith) v Ofsted***[2011] EWCA Civ 642, [2011 ICR 1195. For an *obiter* indication that the court would not, in the circumstances of the case before it, have regarded a complaint to an ombudsman as a suitable alternative remedy, see ***R (McIntyre) v Gentoo Group Ltd.***[2010] EWHC 5 (Admin), [2010] P & C R DG6.
6. Some of the case law concerning alternative remedy questions is helpfully reviewed in ***R (JD Wetherspoon plc) v Guildford BC***[2006] EWHC 815 (Admin), [2007] 1 All ER 400 at [87] to [91]. Amongst other points, Beatson J (as he then was) 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 (see also ***R (Islam) v Secretary of State for the Home Department*** [2016] EWHC 2491 (Admin), [2017] Imm AR 565; 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)). See also ***R (Willford) v Financial Services Authority***[2013] EWCA Civ 674, [2013] CP Rep 43.
7. 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***[2002] EWCA Civ 1822, [2003] ELR 104.
8. 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] EWHC 739 (Admin), [2008] ELR 268. See also the discussion in ***R (Enfield LBC) v Secretary of State for Health***[2009] EWHC 743 (Admin). In ***Carespec Ltd. v Wolverhampton City Council*** [2016] EWHC 521 (Admin) the fact that the measure that was being challenged had already expired rendered judicial review wholly inappropriate where alternative remedies had existed.
9. 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 (“**ADR**”) ought to be pursued. At the time, the Court of Appeal’s decision in ***R (Cowl) v Plymouth City Council*** [2001] EWCA Civ 1935,[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.[[16]](#footnote-16)

##### (7) “*Cart”* Judicial Reviews

##### In *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, the Supreme Court held that judicial review of the Upper Tribunal’s decision to refuse permission to appeal from the First-tier Tribunal was possible, albeit on a “*second appeals*” test. The challenge is thus to the decision to refuse to grant permission. CPR Part 54 has now been amended to incorporate a new CPR 54.7A which governs judicial review of decisions of the Upper Tribunal. In summary, rule r.54.7A provides that:-

1. There is now a 16 days’ fixed time limit for lodging a claim for judicial review of a decision of the Upper Tribunal: see CPR r.54.7A (3). The claim must be served with supporting documents including: (a) the decision of the Upper Tribunal; (b) the grounds of appeal to the Upper Tribunal; (c) the decision of the First-tier Tribunal, the application to that tribunal for permission to appeal and its reasons for refusing permission; and (d) any other documents essential to the claim. The claim form and supporting documents must be served on the Upper Tribunal and any other interested party no later than 7 days after the date of issue.
2. A defendant or interested party has the usual 21 day time period to file an Acknowledgment of Service or Summary Grounds: CPR r.54.7A(6).
3. The “*second appeals test*” for permission is codified – the court will give permission to proceed only if it considers: (a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First-tier Tribunal against which permission to appeal was sought are wrong in law;[[17]](#footnote-17) and (b) that either – (i) the claim raises an important point of principle or practice; or (ii) there is some other compelling reason to hear it. See CPR r.54.7A(7).
4. CPR r.54.7A(8) dis-applies CPR r.54.12(3), so that there is no right to renew to an oral hearing following refusal on the papers.
5. CPR r.54.7A(9) provides that where permission is granted, final relief will follow automatically, unless the defendant or Interested Party makes a specific request that there be a final substantive hearing.
6. There is a right of appeal, but under CPR r.52.8, the application for permission will be determined on paper only (as indeed will be the case from 2 October 2016 for all appeals against refusal of permission by the High Court, unless a judge considers an oral hearing necessary).

##### (8) Collateral challenges and the exclusivity rule

1. The House of Lords in ***O’Reilly v Mackman*** [1983] 2 AC 237, HL, 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 (i.e. what is now a Part 7 claim), 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 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.
2. Subsequently, however, the courts have for the most part 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 City Council***[1998] 1 WLR 840, CA (but contrast ***Clark v University of Lincolnshire & Humberside*** [2000] 1 WLR 1988, CA, and see now the rather greater enthusiasm for the merits of exclusivity in its proper place shown by the Court of Appeal in ***North Dorset DC v Trim***[2010] EWCA Civ 1446, [2011] 1 WLR 1901). Although in ***Newlyn plc v Waltham Forest LBC*** [2016] EWHC 771 (TCC) Coulson J held that there was no power to permit an action begun under CPR Part 7 to continue as an application for judicial review (but found that such an application would have been doomed to fail in any event).
3. In particular, ***O’Reilly*** has been qualified to the extent that:
4. Where the party seeking to raise the public law issue is doing so by way of a *defence* to a claim brought against him/her, in whatever forum, s/he will generally be permitted to do so. See ***Wandsworth LBC v Winder (No.1)***[1985] AC 461, HL, ***Wandsworth LBC v A*** [2000] 1 WLR 1246, CA, ***Boddington v British Transport Police***[1999] 2 AC 143, HL. Cf. ***R v Wicks***[1998] AC 92, HL.
5. 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 Secretary of State for the Home Department*** [2000] 1 WLR 1169, ***Bloomsbury International Ltd v Sea Fish Industry Authority***[2009] EWHC 1721 (QB), [2010] 1 CMLR 12,[[18]](#footnote-18) and ***Richards v Worcestershire CC*** [2016] EWHC 1954 (Ch), [2017] PTSR 165.
6. However, the approach 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.
7. There is an interesting discussion of the procedural exclusivity issue in ***Bunney v Burns Anderson plc***[2007] EWHC 1240 (Ch), [2007] 4 All ER 246, at [25] to [48]. In that case 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 (as he then was) 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. See also ***Arqiva Ltd v Everything Everywhere Ltd***[2011] EWHC 1411 (TCC).
8. 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), [2011] 2 All ER 364). See also ***R (Valentines Homes & Construction Ltd.****) v HMRC* [2010] EWCA Civ 345, [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.

##### (9) Remedies

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

*Final remedies*

1. 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 SCA 1981 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.
2. 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.
3. 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 Secretary of State for the Home Department, ex p. Salem*** [1999] 1 AC 450, HL – 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***[2005] EWCA Civ 1003, [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. The Court of Appeal has had a tendency in recent years to consider academic appeals, especially in the immigration sphere, where the appeal raises a point of statutory construction of wider significance.
4. 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.
5. Prohibiting orders are very rarely encountered in practice.
6. The grant of relief, or any particular form of relief, in judicial review proceedings is always at the discretion of the court.
7. If the claimant has established some illegality, then the starting-point is that some form of relief should normally follow. However, there are numbers of grounds upon which relief is commonly refused. The 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, HL. 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. For a recent example, where relief should have been refused on grounds of delay and prejudice to third party commercial interests, see ***R (Gerber) v Wiltshire County Council***[2016] EWCA Civ 84, [2016] 1 WLR 2593. 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 Admin LR 265, CA, 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 Eastern Derbyshire Primary Care Trust***[2006] EWCA Civ 1291, [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. In ***R (RB) v Devon CC and Devon Primary Care Trust***[2012] EWHC 3597 (Admin), [2013] Eq LR 113, concerning the public sector equality duty, the judge (HHJ Vosper QC) refused to quash an earlier decision when the public authority had clearly paid due regard to equality matters at a later stage in the process. Sub-sections 31(2A)-(2C) of the SCA 1981 (inserted by the Criminal Justice and Courts Act 2015) radically change the approach to the “*no difference*” ground for refusing relief. At the substantive stage, the court *must* refuse to grant relief if it appears to the court to be “*highly likely*” that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred, unless it considers it appropriate to do so for reasons of exceptional public interest (and certifies to that effect). Relief for these purposes includes a declaration: see ***R (Hawke)v Secretary of State for Justice*** [2015] EWHC 4093 (Admin), [2016] ACD 56.
1. Other grounds upon which relief might be refused include a failure to make proper disclosure at the permission stage, or other lack of “*clean hands*”. In ***R (Corus UK Ltd.) v Newport City Council***[2010] EWHC 1279 (Admin), the effect of the decision at first instance seemed to be that relief was withheld because its grant would cause disruption to the defendant or third parties disproportionate to the harm caused to the claimant by the illegality in question. However, the judge’s remedy was overturned by the Court of Appeal ([2010] EWCA Civ 1626): the decision was on the facts, but the court seemed distinctly unenthusiastic about such an approach being taken at all.
2. 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*

1. 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.
2. 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.[[19]](#footnote-19)
3. 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.
4. 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] UKPC 63, [2003] 1 WLR 2839, which reviews some of the earlier case law.
5. 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?
6. However, the approach taken will require modifications appropriate to the public law element of the case. If permission has been granted, it is generally difficult to persuade a Court that there is not a serious issue to be tried / arguable case. Further, 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 s/he does (e.g. in a claim under the HRA, 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.
7. 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[[20]](#footnote-20) 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 public 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 CCL Rep 354, CA.
8. The most important issue in considering interim relief in judicial review proceedings is where the balance of convenience lies. 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 Inner London Education Authority***[1978] 1 All ER 411, CA, ***R v Durham CC, ex p. Huddleston***[2000] Env LR D20, QBD, ***R (Medical Justice) v Secretary of State for the Home Department***[2010] EWHC 1425 (Admin), [2010] ACD 70, ***R (Easybus Ltd) v Stansted Airport Ltd.*** [2015] EWHC 3833 (Admin)). 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] EWCA Civ 443, [2003] 1 WLR 2248). 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.
9. 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 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. An example is the decision of Lewis J in ***R (Unison) v Lord Chancellor***[2013] EWHC 2858 (Admin), where permission was granted to apply for judicial review of the lawfulness of the new fees for proceedings in the employment tribunal and the EAT. However, Lewis J refused the application for interim relief. He held that:-
10. Unison had satisfied the criteria that there had to be a serious issue to be tried.

1. The question of whether damages were an adequate remedy did not assist in a public law case where the focus was on the legality of a decision or legislation.
2. It is important to bear in mind the wider public interest as well as the interests of the parties.
3. If the fee regime were stayed and was later held to be lawful, the defendant would not realistically be able to recover most of the fees that should have been paid. The fees order recognised the interests of those most economically vulnerable, and the remission arrangements were such that if someone could not actually pay the fee, they would not be required to do so. If people paid the fees and the order was held to be unlawful, the fees would be repaid. The balance of convenience therefore favoured refusing interim relief.[[21]](#footnote-21)

**November 2018**

1. https://www.judiciary.gov.uk/wp-content/uploads/2013/10/lcj-direction-jr-iac-21-08-2013-updated-2.pdf. [↑](#footnote-ref-1)
2. Now UK Visa and Immigration (“**UKVI**”). [↑](#footnote-ref-2)
3. See ss.15-18 of the Tribunals, Courts and Enforcement Act 2007 and the directions specifying classes of case issued by the Lord Chief Justice for the purposes of s.18(6). [↑](#footnote-ref-3)
4. Or an injunction under SCA 1981 s.30 (to restrain persons acting in offices in which they are not entitled to act). [↑](#footnote-ref-4)
5. The permission stage is covered in a separate talk. [↑](#footnote-ref-5)
6. On the need for properly formulated grounds and (prompt) amendments, see ***R (F) v Wirral BC***[2009] EWHC 1626 (Admin), [2009] BLGR 905 and ***R (Hinds) v Blackpool Council***[2011] EWHC 591 (Admin). [↑](#footnote-ref-6)
7. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727626/Admin_Court_>JRG\_ 2018\_content\_v3\_web.pdf [↑](#footnote-ref-7)
8. Overturned on other grounds – see [2011] EWCA Civ 567, [2014] PTSR D14. [↑](#footnote-ref-8)
9. For a discussion of the materiality or otherwise of a change in the claimant’s status after the grant of permission, see ***R (Developing Retail Ltd.) v South East Hampshire Magistrates’ Court***[2011] EWHC 618 (Admin), [2011] LLR 319. [↑](#footnote-ref-9)
10. 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. The 2006 Regulations have now been replaced by the Public Contracts Regulations 2015. [↑](#footnote-ref-10)
11. For further discussion, in the procurement context, of what degree of knowledge suffices for this purpose, see ***Sita UK Ltd. v Greater Manchester Waste Disposal Authority***[2011] EWCA Civ 156, [2012] PTSR 645. [↑](#footnote-ref-11)
12. But in matters of urgency, it may not be good enough for a claimant to let matters take their course with the LAA, rather than taking all possible steps to expedite a decision: see ***R (Patel) v Lord Chancellor***[2010] EWHC 2220 (Admin), [2011] ACD 5. Obtaining After The Event (“**ATE**”) insurance before taking proceedings was not a good reason for delay on the facts of ***R (English) v East Staffordshire BC***[2010] EWHC 2744 (Admin), [2011] ACD 34. [↑](#footnote-ref-12)
13. As in ***R (Law Society of England and Wales) v Legal Services Commission***[2010] EWHC 2550 (Admin), [2011] ACD 16. [↑](#footnote-ref-13)
14. For an example of the last two factors, see ***R (Independent Schools Council) v Charity Commission for England and Wales***[2010] EWHC 2604 (Admin), [2011] ACD 2. [↑](#footnote-ref-14)
15. Overturned by the Supreme Court on other grounds - ***Brent LBC v Risk Management Partners Ltd***. [2011] UKSC 7, [2011] 2 AC 34. [↑](#footnote-ref-15)
16. See the Public Law Project’s 2009 research into the use of mediation in judicial review, and its more recent handbook on mediation and judicial review. [↑](#footnote-ref-16)
17. A decision by the Upper Tribunal refusing permission to appeal may be vitiated if it misunderstands or misapplies the law in wrongly refusing permission for an argument that had a real prospect of success (i.e. was not plainly right or plainly wrong, but arguable): see ***R (G) v Upper Tribunal***[2016] EWHC 239 (Admin), [2016] 1 WLR 3417. [↑](#footnote-ref-17)
18. Reversed on other grounds by the Court of Appeal ([2010] EWCA Civ 263, [2010] 1 WLR 2117) and ultimately upheld by the Supreme Court ([2011] UKSC 25, [2011] 1 WLR 1546). [↑](#footnote-ref-18)
19. Such applications are dealt with in another talk. [↑](#footnote-ref-19)
20. See e.g. ***WM Morrison Supermarkets plc v Competition Commission***[2009] CAT 33, [2010] Comp AR 191. [↑](#footnote-ref-20)
21. Ultimately, the Supreme Court upheld the claim - ***R (Unison) v Lord Chancellor*** [2017] UKSC 51, [2017] 3 WLR 409. This leaves potentially interesting questions as to the position of those potential claimants who never paid any fees because they were discouraged by the fees regime from bringing a claim in the first place. [↑](#footnote-ref-21)