Landmark Chambers

ALBA INTRODUCTION TO JUDICIAL REVIEW:
SESSION 2: PRELIMINIARY PROCEDURAL ISSUES

TIM BULEY QC

22 February 2021

TIME LIMITS

Landmark Chambers

- Section 31(6) Senior Courts Act 1981 permits the court to refuse relief where it considers there has been “undue delay” in applying for judicial review, if that would cause “substantial hardship” or “substantial prejudice” to any person or “be detrimental to good administration”.

- More importantly, CPR 54(5)(1) sets out the general time limit for brining judicial review claims:

(1) The claim form must be filed –

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose.

(2) The time limits in this rule may not be extended by agreement between the parties.

- There are specific time limits for certain kinds of judicial review claim:
  - Planning, 6 weeks from decision (CPR 54(5)(5)
  - Procurement, 4 weeks (CPR 54(5)(6) and see the Public Contracts Regulations

- Note the absence any separate “promptness” requirement in that context

- NB pre-action protocol makes clear you must comply with time limits despite obligation to comply with pre-action process

TIME LIMITS (2): *Uniplex* and EU law

Landmark Chambers

- C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] PTSR 1377, CJEU decision, in which CJEU held that "promptness" requirement too uncertain to comply with rule of law / requirement for clear laws concerning access to justice.
- As a result, in areas of law governed by EU law, "promptness" requirement may have to be disapplied.
- This is part of reason for amendment to planning and procurement law provisions, where EU law may be highly pertinent (planning) or omnipresent (procurement)
- Can be relevant in other areas such as environmental permitting or other areas where EU law is directly effective: see e.g. ***R (Buglife) v Medway Council*** [2011] 3 CMLR 39

TIME LIMITS (3): Promptness

Landmark Chambers

- Case law on what is required by promptness does not always speak with one voice
- A useful case is *R (Finn-Kelcey) v Milton Keynes BC* [2009] Env LR 17
  - Planning case, so strictly not relevant since specific amendment for planning cases
  - Emphasises need for particular celerity in cases where failure to bring case promptly may cause hardship to an innocent third party, or prejudice to Defendant
  - By implication, arguably makes clear that where there is no such prejudice, there is no need to act with celerity over and above the 3-month time limit

TIME LIMITS (4): ONGOING ACTS

Landmark Chambers

- In some cases, challenge will be made to policy / legislation that is “always speaking” or which has continuing legal effects. In such cases, not always necessary to bring challenge within 3 months of enactment:
  - Can be argued that legislation is of continuing legal effects and so possibility of challenge is never excluded.
  - In any case, generally permissible to bring challenge to *general* measure at time of application to individual claimant (*Boddington v BTC* [1999] 2 AC 143, *Howker* [2003] ECR 405
  - Harder in cases where not obvious that particular individual is affected
  - May also be possible to make more persuasive case for extension of time (since other person will be able to challenge in future even if individual claimant late

TIME LIMITS (5): OTHER SPECIAL RULES

Landmark Chambers

- Note the possibility of other time limits for particular kinds of case in the Admin Court:
  - *Cart JRs,* CPR 54.7A(3), 16 days
  - Wide variety of statutory applications to quash, statutory review, appeal on points of law which may go to Admin Court for hearing on basis of JR principles (see Carnwath LJ in *E and R v SSHD* [2004] QB 1044 for range of cases). Will have own specific time limits. Note in particular that in many such contexts, court has no power to extend time even where time limit breached

ALTERNATIVE REMEDIES

Landmark Chambers

- General rule that permission for JR should not be granted, and / or claim refused, where "adequate alternative remedy" exists: see *R v Chief Constable of Merseyside Police, ex p. Calveley* [1986] QB 424
- General statement all very well but throws up all sorts of issues. Strength of the principle will vary greatly:
  - Cases where right of appeal to alternative court or tribunal
  - Cases where some alternative statutory procedure exists for complaint to *independent body (*Ombudsman, District Auditor, etc)
  - Requirement to exhaust internal remedies and avenues of complaint / review which may *change* the decision
  - Cases where public body offers some non-statutory informal process

Cart Judicial Reviews

Landmark Chambers

- Named after *R (Cart) v UT* [2012] 1 AC 663. Claims for judicial review of decisions of Upper Tribunal (itself a court of record which can hear judicial review claims) refusing permission to appeal to itself from decisions of First-tier Tribunal. Supreme Court held that such claims were possible, but only in cases which met a "second appeals test":
  - arguable case that both FTT and UT decisions were legally flawed,
  - and the claim either raises important point of principle or practice or some other compelling reason to hear claim
- Series of specific procedural rules:
  - 16 day time limit
  - No right to renew to oral hearing
  - If permission is granted, court will grant relief automatically (quash UT decision) unless interested party objects and indicates that they want to fight case substantively

COLLATERAL CHALLENGES AND PROCEDURAL EXCLUSIVITY

Landmark Chambers

- *O'Reilly v Mackman* [1983] 2 AC 237 holds that it is generally an abuse of process to bring a public law challenge otherwise than by way of application for judicial review.

- Now arguably overtaken by CPR 54.2 and 3. CPR 54.2 provides:

54.2 *The judicial review procedure must be used in a claim for judicial review where the claimant is seeking –*

(a) a mandatory order;

(b) a prohibiting order;

(c) a quashing order; or

(d) an injunction under section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act).

- CPR 54.3 provides that judicial review *may* be used where claimant is seeking declaration or injunction

COLLATERAL CHALLENGES AND PROCEDURAL EXCLUSIVITY (2)

Landmark Chambers

- In any case, *O'Reilly* principle substantially qualified:
  - Does not apply where public law issue is raised as a *defence* to claim ***Wandsworth LBC v Winder (No.1)*** [1985] AC 461
  - Claim for private law remedy where entitlement depends to some extent on public law, see ***Roy v Kensington & Chelsea & Westminster Family Practitioner Committee*** [1992] 1 AC 624
  - Claim to public law remedy in statutory tribunal – see *Chief Adjudication Officer v Foster* [1993] AC 754, *RR v SSWP* [2019] 1 WLR 6430

REMEDIES

Landmark Chambers

- Remedies available are those listed in CPR 54.2 and 54.3, plus damages (CPR 54.3(2))

- General principles as to final remedy:
  - Remedies generally at discretion of court, albeit that does not mean court will refuse relief on general merits grounds
  - Court will refuse relief where “inevitable” that outcome will be the same: see e.g. *Simplex* [2017] PTSR 1041. Overtaken by “highly likely” test for most cases but still relevant in statutory review
  - Court will now refuse relief under section 31 SCA 1981 where “highly likely” that outcome for claimant would be the same without the illegality
  - Court has flexibility to be pragmatic about remedy: see e.g. *R (Andrews) v Cabinet Sec* [2019] EWHC 1126 (Admin)

REMEDIES (2): Interim relief

Landmark Chambers

- General approach to interim relief save as in other areas of law, as laid down by *American Cyanamid:*
  - Serious issue to be tried
  - Balance of convenience (balancing unfairness to defendant of granting relief against unfairness to claimant of not doing so, whilst claim still hangs in balance)

- Some broad modification to these principles in public law (see e.g. *The Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2003] UKPC 63, [2003] 1 WLR 2839):
  - Court will take account that public body acts in public interest, and also that nature of interim relief may go beyond final relief that is possible
  - More general flexibility to consider all the circumstances including the relative merit

- NB cross-undertaking in damages often not possible or meaningful in public law because value of claim to both parties often not measurable in money. In environmental context, see CPR 25, PD 25A, para 5.3(1). Absence of cross-undertaking does not preclude interim relief
- Note possibility of applying for expedition in place of interim relief

Thank you for listening

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)

London
+44 (0) 20 7430 1221

Birmingham
+44 (0) 121 752 0800

Contact
clerks@landmarkchambers.co.uk

www.landmarkchambers.co.uk
@Landmark_LC