**ALBA Introduction to**

**Judicial Review 2016**

*Preparing a case for Judicial Review*

**Zoë Leventhal**

**Landmark Chambers**

**Preparing a case for Judicial Review**

**Introduction**

1. The topics addressed in this paper are as follows[[1]](#footnote-1):
	1. Pre-action protocol
	2. Alternative dispute resolution
	3. Protective costs orders and other costs management options
	4. Identifying the decision to be reviewed
	5. Identifying the appropriate defendant(s)
	6. Interested parties
	7. Interveners
	8. Claim form (Form N461)
	9. Evidence, bundle & authorities
	10. Where to issue
	11. Urgent consideration and interim relief (Form N463)
	12. Relief from sanctions

#### *A `front-loaded’ procedure*

1. A key difference between JR and mainstream civil litigation – in addition to the short time-limit for issue and the need for permission -- is the “front-loaded” nature of the process. Pre-issue preparation in JR incorporates much of the work that in ordinary proceedings is usually postponed till later. In order to get permission you need to present the court with a well-argued claim supported by a well-organised bundle – so far as time constraints allow.

**(1) Pre-action protocol**

1. In the vast majority of judicial review cases, the parties must comply with the pre-action protocol for judicial review (accessible on the Ministry of Justice website at: <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv>) (revised on 6 April 2015). The Court expects the parties to have engaged in correspondence in an attempt to avoid litigation (which should be a last resort). The protocol provides an opportunity for both parties to explain their positions and for the prospective Defendant to reconsider its position (where appropriate). Non-compliance with the protocol where it applies “will” be taken into account by the Court when determining costs (protocol, paragraph 7). See also CPR r.3.1(4)-(5) and r.44.2(5).

 Steps by prospective Claimant

1. The pre-action protocol requires the Claimant, before making a claim, to write a letter before claim to the proposed Defendant. The protocol recommends a letter in a standard form (see Annex A of the Protocol), although provided that the letter addresses the core issues a failure to use the standard form is unlikely to be significant.[[2]](#footnote-2)

1. The information which should be included in the pre action letter is as follows[[3]](#footnote-3):
* Details of the claimant and defendant
* Any reference details or details of the identity of those within the public body who has been handling the dispute
* The matter which is being challenged should be clearly set out
* The issue in the claim should be spelt out – the date and details of the decision, act or omission, a brief clear summary of the facts and an explanation as to why it is contended to be wrong.[[4]](#footnote-4)
* If the claim is considered to be an Aarhus Convention claim, this should be spelt out and reasons given, since specific rules on costs apply.
* Details of the action which the defendant is expected to take, including details of the remedy sought
* Details of the legal advisors if any dealing with the claim
* Details of any interested parties – NB a copy of the letter should be sent to them (omitting to do this is a favourite source of “prejudice” arguments on behalf of IPs and a failure to do so may impact upon the grant of permission or relief, in particular where it is coupled with delay)
* Details of any information sought, including any request for a fuller explanation of the reasons for the decision
* Details of any documents of which disclosure is sought, setting out why these are relevant and why disclosure is necessary
* Address for reply and service of court documents
* Proposed reply date (usually 14 days, although a longer or shorter time may be appropriate in a particular case).

The claim should not normally be issued until the proposed reply date has passed.

 Steps by prospective Defendant

1. Within (usually) 14 days the Defendant should send a letter of response. Again the protocol has a recommended standard form (see Annex B). This should provide where appropriate a fuller explanation of the decision, and indicate whether the claim is conceded in whole or in part, or will be contested. Where the Defendant does not propose to disclose any information or documents that have been requested, the reasons for this should be explained. The letter of response should be sent to the interested parties and should identify any parties who the Defendant considers have an interest and who have not already been named by the Claimant. If the claim is being conceded in full, the letter should clearly and unambiguously say so. If it is being conceded in part or not at all, again the Defendant’s position should be unambiguously set out.

#### Importance of compliance

1. The protocol letters are important: not to be treated as a tick-box exercise. A well-composed Claimant’s letter may persuade a sensibly advised Defendant to concede. Conversely the Defendant’s letter is an opportunity to confront the Claimant with an obvious weakness in its position.
2. Failure to comply with the pre-action protocol may well affect a party’s prospects of recovering costs:
	1. In *R (William Kemp) v Denbighshire Local Health Board* [2006] EWHC 181 (Admin) the Claimant had effectively succeeded in obtaining funding of his nursing home costs; but because he had failed to comply with the pre-action protocol, there was no evidence that the Defendant would not have offered a review had a protocol letter been written, so no order for costs was made.
	2. In *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260 Lord Justice Brooke commented (para 54):

“Needless to say, if the claimant skips the pre-action protocol stage, he must expect to put his opponents to greater expense in preparing the summary of their grounds for contesting the claim, and this may be reflected in the greater order for costs that is made against him if permission is refused.”

* 1. *Ewing* also implied that a Defendant who fails to provide a protocol response will not recover its full costs of acknowledging service, since an adequate protocol response will enable D to keep its summary grounds suitably brief and the costs lower.
	2. In *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468 (Ch) the Claimant discontinued judicial review proceedings, but because the Defendant took almost two months to reply to the Claimant’s initial protocol letter, it was awarded only 85% of its costs.
	3. The Court of Appeal has – see *R (Bahta & others) v Secretary of State for the Home Department* [2011] EWCA Civ 895 - re-emphasised the importance of compliance with the pre-action protocol: *“what is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specially identified in CPR r. 44.3(5). The procedure is not inflexible; an extension of time may be sought, if supported by reasons.”*
	4. For the most recent authoritative statement on costs in JR proceedings, see *M v Croydon LBC [2012] 1 WLR 2607*, where Lord Neuberger noted that *“defendants sometimes concede claims in the Administrative Court simply because it is not worth the candle fighting the case, or because the claim is justified on a relatively technical ground”*, but *“the defendants should make up their mind to concede the claim for such reasons before proceedings are issued. That is one of the main purposes of the Protocol, and, if defendants delay considering whether they should concede a claim, that should not be a reason for depriving the claimant of his costs”*.
	5. For the approach to costs in statutory appeals, which are not subject to a pre-action protocol and which generally do not feature the respondent prior to permission being granted (and, as such, non-compliance is not an issue), see *AL (Albania) v Secretary of State for the Home Department* [2012] 1 W.L.R. 2898. In this case, the Court of Appeal held that in statutory appeals disposed of by consent, “*the crucial question … will be the identification of the successful party*” (para. 23).
	6. In *R. (KR) v Secretary of State for the Home Department* [2012] EWCA Civ 1555, the claimant in an urgent judicial review challenge had not communicated with the respondent prior to commencing proceedings. The Court of Appeal held that, notwithstanding the urgency, it would have been possible for the claimant to have done so. However, even if there had been “meticulous compliance with the pre-action protocol”, the respondent would not have done anything other than robustly defend the claim. Accordingly, no reliance should have been placed by the judge below on the failure to comply, because that failure was “causally insignificant”.
	7. See also the recent decision of the Supreme Court’s decision in *Hunt v North Somerset Council* [2015] 1 WLR 3575 on costs – the driving consideration will not whether the claimant has achieved the specific relief sought but whether or not the claimant has succeeded in showing that a public authority has acted lawfully.
1. The administrative court has published “guidance as to how the parties should assist the Court when applications for costs are made following settlement of claims for judicial review” (December 2013):

[*http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review*](http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review)

1. Alternatively a failure to comply with the pre-action protocol may be taken into account by the court when making case management directions (e.g. a defendant who has not previously been notified of the claim through the pre-action protocol process may be afforded a longer period to file an acknowledgement of service).

#### Limits of the protocol

1. The protocol is not appropriate, and does not have to be used, where the Defendant is *functus officio* – i.e. it does not have the legal power to change the decision being challenged – for example, final decision of a statutory tribunal[[5]](#footnote-5), or certain kinds of licence or consent (protocol, paragraph 6). However, if the case is considered to be strong, it may be worth sending a protocol letter because the Defendant may agree to submit to judgment.
2. In urgent cases a Claimant may be justified in not using the protocol, where interim relief has to be sought because a decision is about to be implemented (e.g. removal of a failed asylum seeker, imminent withdrawal of community care services) (but see discussion of the scope for using the protocol even if urgent cases e.g. 13 days is enough time: *KR* (above)).
3. It is also recognised in the protocol that its use *may* not be appropriate in cases where one of the shorter time limits in CPR 54.5(5) or (6) arise (e.g. the 6-week time limit for planning claims): parties are urged to attempt to comply but the court will not apply normal costs sanctions where it is satisfied that it has not been possible to comply because of the shorter time limits.
4. It is important to remember that the protocol does NOT affect the time limit in CPR 54.5(1) which requires the filing of a claim form promptly and in any event no later than 3 months after the grounds to make the claim first arose (and now only 6 weeks in certain planning judicial reviews, 30 days in certain procurement judicial reviews). Although the courts have from time to time regarded compliance with the pre-action protocol and/or pre-action negotiations and/or an exploration of alternative dispute resolution as a sufficient explanation for delay and a good reason to extend time, there is no guarantee that the court will do so, and the more prudent course is therefore to issue proceedings (and then if appropriate seek a stay for a defined period to allow the negotiations/ADR to continue).

**(2) Alternative dispute resolution**

1. Prior to the issue of proceedings (and either prior to or as part of the pre-action protocol process) the parties should consider whether some form of alternative dispute resolution (ADR) would be more suitable than litigation in the Administrative Court and if so should endeavour to agree what form to adopt. The value of ADR in public law cases is that it can encompass substantive issues beyond the narrow questions of legality that JR can consider.
2. The courts take the view (see *Cowl v Plymouth City Council* [2002] 1 WLR 803) that litigation should be a last resort and that all members of the legal profession involved in litigation should routinely consider with their clients whether their disputes are suitable for ADR (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. In the latter case, the court said the fundamental principle is that departure from the general rule (i.e. the unsuccessful party should be ordered to pay the costs of the successful party) is not justified unless the unsuccessful party can show that the successful party acted unreasonably in refusing to agree to ADR. The court gave guidance (see para.16) as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable. These factors continue to be applied.
3. The courts cannot compel ADR but a failure to pursue ADR may affect the grant of permission and/or the grant of relief to an otherwise successful claimant and/or the award of costs. Methods of ADR may include RTMs (round table meetings), complaint to an Ombudsman, mediation or early neutral evaluation by an independent third party. ADR is addressed in these terms in detail the pre-action protocol (paragraphs 9-12).
4. If the Claimant has proposed ADR and the Defendant has rejected it, then (provided that any such discussions were not without prejudice) it may be sensible for the Claimant to refer to that fact in the judicial review grounds. If the Claimant considers that the case is unsuitable for ADR, then it may be prudent to anticipate any point the Defendant might take on this issue, and explain in the JR grounds why it is considered ADR is not appropriate at this stage.
5. In *PGF II SA v OMFS Co 1 Ltd* [2014] 1 WLR 1386 (not a judicial review case), the Court of Appeal said that “*silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds*” (para. 34). The court further held that “*a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or, which is more serious in my view, a refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty. It is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise* … *the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs*.” (para.51). At para. 52, the court further said: “[t]*here appears no recognition in the Halsey case that the court might go further, and order the otherwise successful party to pay all or part of the unsuccessful party's costs. While in principle the court must have that power, it seems to me that a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court had taken it on itself to encourage the parties to do so, and its encouragement had been ignored.”*
6. In *Laporte v The Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB), albeit in a damages claim in the QBD rather than a judicial review claim in the Admin Court), the defendant, who was successful on every substantive issue, was awarded only two thirds of his costs. This was the consequence of the Court finding that, applying *Halsey*, the defendant had failed without adequate justification to fully and adequately engage in the ADR process, notwithstanding that the outcome of such process was not certain.

**(3) Protective costs orders and other costs management options**

1. A protective costs order (PCO) limits a party’s costs liability at the outset of proceedings. It fixes in advance the maximum sum that may be awarded in costs against a party, irrespective of the outcome. A PCO can also direct that there shall be no order as to costs.
2. PCOs, or now Cost Capping Orders (CCOs) are now governed by sections 88-90 of the Criminal Justice and Courts Act 2015 and CPR 46.16 (and CPR 46PD.10), which came into force on 8 August 2016, whereas they were previously governed by the common law.
3. No CCO may now be granted in judicial review proceedings save in accordance with those sections (save for those cases commenced before 8 August 2016 which are governed by the transitional provisions in SI 2016/707): s 88(1).
4. The key provisions are ss 88-89 which are a departure from the previous law:
	1. s 88(3) provides that a CCO can only be granted after permission has been granted; and
	2. s 88(4) provides that it must be made in accordance with the rules of court i.e. CPR 46.16ff and the practice direction.
	3. a reciprocal cap must be imposed: s 89(2).
5. As to the basis on which a CCO can be granted:

 *(6) The court may make a costs capping order only if it is satisfied that—*

*(a) the proceedings are public interest proceedings,*

*(b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and*

*(c) it would be reasonable for the applicant for judicial review to do so.*

*(7) The proceedings are “public interest proceedings” only if—*

*(a) an issue that is the subject of the proceedings is of general public importance,*

*(b) the public interest requires the issue to be resolved, and*

*(c) the proceedings are likely to provide an appropriate means of resolving it.*

*(8) The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—*

*(a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,*

*(b) how significant the effect on those people is likely to be, and*

*(c) whether the proceedings involve consideration of a point of law of general public importance.*

1. The Court must have regard to the following in deciding whether to make a cost capping order and determining its terms include (s 89(1)):
	* 1. the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;
		2. the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
		3. the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
		4. whether legal representatives for the applicant for the order are acting free of charge;
		5. whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

New procedure under CPR 46

27. Rule 46.17 sets out the detail as follows.

*(1) An application for a judicial review costs capping order must—*

*(a) be made on notice and, subject to paragraphs (2) and (3), in accordance with Part 23; and*

*(b) be supported by evidence setting out—*

*(i) why a judicial review costs capping order should be made, having regard, in particular, to the matters at sub-sections (6) to (8) of section 88 of the 2015 Act and sub-section (1) of section 89 of that Act;*

*(ii) a summary of the applicant’s financial resources;*

*(iii) the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and*

*(iv) if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings.*

*(2) Subject to paragraph (3), the applicant must serve a copy of the application notice and copies of the supporting documents on every other party.*

*(3) On application by the applicant, the court may dispense with the need for the applicant to serve the evidence setting out a summary of the applicant’s financial resources on one or more of the parties.*

*(4) The court may direct the applicant to provide additional information or evidence to support its application.*

Previous law on PCOs

1. The previous leading case on the grant of PCOs in public law proceedings is *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600. This is likely to be of continuing relevance to some of the factors the Court will still need to determine. The case involved an application for judicial review of procedures adopted by the Export Credit Guarantee Department of the DTI. Corner House was a non-profit making company with a particular interest and expertise in examining bribery and corruption in international trade.
2. The general principles were stated as follows:

“1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

i) The issues raised are of general public importance;

ii) The public interest requires that those issues should be resolved;

iii) The applicant has no private interest in the outcome of the case;

iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.” [74]

1. The *Corner House*  requirements have been substantially modified:
	1. Assessing general public importance involves an element of subjectivity, and it need not mean “national” or “exceptional” importance: *R. (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749; [2009] 1 W.L.R. 1436. However, see *R. (on the application of Young) v Oxford City Council* [2012] EWCA Civ 46 at [11]-[12] (PCO refused where planning permission was of local community interest rather than general public importance);
	2. The nature and extent of the ‘private interest’ and its weight or importance in the overall context should be treated as a flexible element in the court’s consideration of the question whether it is fair and just to make the order: *Wilkinson v Kitzinger* [2006] 2 F.L.R. 397;*Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107; *Austin v MA* [2015] 1 W.L.R. 62
	3. The unlikelihood of discontinuation on refusal of a CPO is not determinative: *Wilkinson* at [58].
2. No PCO should be granted unless the judge considers that the application for judicial review has **a real prospect of success**…”: *Corner House* at [73] (emphasis added).
3. See also *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 regarding the Defendant’s decision to grant planning permission in respect of a development was challenged. The court held:
	1. Where a court was making a PCO in favour of a Claimant, it might also be appropriate to cap the liability of the Defendant should the Claimant win (this is now mandatory).
	2. There should be no automatic assumption that the Claimant’s and Defendant’s costs should be capped at the same amount: the amount of any cap depended on the circumstances.
4. For previous PCO examples which are likely to be informative on particular issues, see the Appendix to this paper.

PCOs where a directly enforceable EU environmental directive is engaged

1. Modification of the *Corner House* principles is required in so far as is necessary to secure compliance with directly enforceable EU environmental directives: *R. (on the application of Garner) v Elmbridge BC* [2011] 3 All E.R. 418. The two modifications are:
	1. There is no justification for the application of the issues of “general public importance”/“public interest requiring resolution of those issues” in the Corner House conditions. Both the Aarhus Convention and the EU environmental directives are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases: [39];
	2. There is no justification for conducting a wholly subjective assessment of the claimant’s financial resources. The question is instead whether the proceedings would be prohibitively expensive to an ordinary member of the public.

Costs rules in Aarhus claims

1. This has led to CPR 45.41-44 introducing special costs limits applying to so called “Aarhus claims” which has swept away the need for the *Corner House* principles in “environmental judicial reviews”. An “Aarhus claim” is defined as “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 [i.e. the Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.” (CPR 45.41).
2. Where a claimant indicates that the claim is an Aarhus claim in the claim form, then (subject to the defendant objecting to this, see below), the claimant’s costs liability will automatically be limited to £5,000 (where the claimant is claiming as an individual) or otherwise £10,000. A defendant’s costs liability will be capped at £35,000: CPR 45.43 and PD45. This includes protection for claimants who are local authorities (at the present time): *HS2 v SS for Transport* [2015] EWCA Civ 203. See also *Botley Action Group* [2014] EWHC 4388 (Admin).
3. The defendant can challenge the applicability of r 45.43 by objecting in the acknowledgement of service and setting out the grounds on which such an objection is made: r 45.44. The court will then determine at the earliest opportunity whether the claim is an Aarhus claim.
4. However, there is a disincentive to raising such an objection: if the court determines that it is such a claim, the defendant will be ordered to pay costs of those proceedings (i.e. the proceedings to determine the costs issue) on the indemnity basis, notwithstanding that that would take the defendant’s liability over the cap of £35,000: r 45.44.
5. What is an Aarhus claim? Article 1 of the Aarhus Convention provides that contracting parties "shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention." The phrase “environmental matters” is to be given a broad meaning, In *Venn v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 2328, the Court of Appeal recorded at [11] the government’s concession that since administrative matters likely to affect “the state of the land” are classed as “environmental” under the Aarhus Convention, the definition of “environmental” in the Convention is arguably broad enough to catch most, if not all, planning matters. The definition of “environmental information” in article 2(3) of the Convention is an indication of the intended ambit of the term “environmental”: *Venn* at [10].
6. It should be noted that CPR r.45.41-44 does not apply to statutory appeals: this was decided in *Venn*,which concerned a statutory appeal under s 288 of the Town and Country Planning Act 1990. A s 288 appeal (for the uninitiated) is a challenge to the decision of an inspector or the secretary of state of state often following a planning inquiry (or hearing or written procedure), but is otherwise akin to a judicial review. Appellants in statutory appeals can still apply for a PCO.
7. However, on 17 September 2015, the Ministry of Justice published a consultation paper entitled “Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges”. Consultation will run until 10 December 2015. In this consultation, the government proposes to widen CPR r.45.41-44 so as to apply to statutory appeals. The consultation paper is available at: <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/consult_view>. There have been no further decisions taken on any changes to date.

#### Collective and community claims: costs management alternatives

1. A local campaign or community group may form a company to protect individuals against costs liability. This is reasonably common in planning/environmental challenges. Rules on standing permit this so long as the members of the company would themselves have sufficient interest: *R. (Residents Against Waste Site Ltd) v. Lancashire CC* [2007] EWHC 2558 (Admin). Though still a risk of court taking a sceptical view of standing: see the *Coedbach* case. It is open to a Defendant to apply for security for costs. In that event security should not be fixed at a level that would make access to court effectively impossible. In theory the result should be essentially the same as if the Claimants had sought a PCO.

**(4) Identifying the decision to be reviewed**

1. The Claimant must identify the enactment, decision, action or failure to act about which complaint is made. In the majority of cases this is obvious, but difficulties can arise where there are continuing failures to act or a series of decisions.
2. Where the Defendant takes a fresh decision in response to representations made by the Claimant or the pre-action protocol, the appropriate target will usually be the most recent decision. Care needs to be taken, however, over time limits where the “fresh” decision is merely a re-statement of the first decision or a refusal to review an earlier decision. The court may conclude that for the purposes of the requirement to act promptly and in any event within three months, the earlier decision is the one that should have been challenged. In that event it is impermissible to “piggy back” the claim on the later decision: *R (Louden) v. Bury School Organisation Committee* [2002] EWHC 2749 (Admin). There is “no formulaic or straightforward answer”, and each case must to an extent turn on its own particular facts. If there has been no significant change of circumstances since the original decision, especially if the court views the request to the public authority to reconsider its earlier decision as a ploy to circumvent the time limit for commencing a judicial review claim, the court is likely to decline to hear the matter. See *R. (on the application of Lambeth LBC) v Secretary of State for Work and Pensions* [2005] EWHC 637.

**(5) Identifying the appropriate defendant(s)**

1. Identifying the appropriate defendant is rarely problematic. The Defendant will be the public body which has taken the decision complained of or has acted or failed to act in a way that is said to be unlawful.
2. Occasionally difficulties can arise where more than one public body has contributed to the decision/act/omission, or where a decision is taken by one public body on behalf of others.

**(6) Interested parties**

1. CPR 54.6(1)(a) requires the Claimant to set out in the claim form the name and address of any person he considers to be an interested party. An interested party means “any person (other than the claimant and defendant) who is directly affected by the claim”. Practice Direction 54A confirms that in a claim by a defendant in a criminal case in the Magistrates or Crown Court for judicial review of a decision in that case, the prosecution must always be named as an interested party. Other examples of persons whose interests could be directly affected by the claim are a developer in a JR of a grant of planning permission; a service user in a dispute between two local authorities as to funding responsibility for that person’s care; a body which has been awarded a licence which is now the subject of challenge. In *R (Fuller) v Chief Constable of Dorset Constabulary* [2001] EWHC 1057 (Admin) the local authority was found to be an interested party who should have been named by the claimant travellers who were challenging the powers of police to remove them from local authority land.
2. Consideration should also be given to whether government departments or public interest groups should be named as interested parties. However, resist the temptation to include a minister or department merely because a declaration of incompatibility is sought under HRA 1998 s. 4. Correct procedure is to allow court to consider whether to direct giving of notice to the Crown: see PD19A para. 6.1. May be costs consequences of involving government department unnecessarily.

**(7) Interveners**

1. Any person (including companies, government departments, NGOs, campaign groups etc) may apply for permission to make written and/or oral submissions at the hearing of the judicial review. But beware new restrictive costs rules for interveners imposed by section 87 of the Criminal Justice and Courts Act 2015.

**(8) The claim form**

1. The Claimant must use the Part 8 procedure as modified by Part 54. The relevant form is N461.
2. Points to consider when drafting the claim form:
	1. Date of decision (section 3): where there is a continuing failure to act, rather than a decision on a particular date, it may be appropriate to describe the date of decision merely as “ongoing”.
	2. It is important to explain why the pre-action protocol has not been complied with where that is the case.
	3. Where a claimant seeks to raise any issue under the Human Rights Act 1998 or seeks a remedy available under the HRA, the claim form must include the information required by paragraph 15 of the Practice Direction supplementing CPR Pt 16, namely:
		1. precise details of the Convention right which it is alleged has been infringed and details of the alleged infringement;
		2. the relief sought in respect of that infringement;
		3. if a declaration of incompatibility is sought, the precise details of the legislative provision in question and of the alleged incompatibility must be provided;
		4. where the claim is founded on a judicial act, the act complained of and the court or tribunal alleged to have made it must be identified.
	4. In all cases, specify the relief sought (section 7 of N461), including any interim relief. Ensure all forms of relief that you can anticipate are pleaded at this stage. Useful catch-all “Such declaratory or other relief as the Court thinks fit or as is necessary to give effect to the judgment of the Court.”
	5. Consider what other applications you may want to make (section 8 of the N461). E.g. reporting restrictions/anonymity; abridgement or extension of time for defendant’s acknowledgement of service; disclosure; protective costs order.
3. The claim form will usually be supported by a detailed “statement of facts and grounds”. The approach of individual practitioners varies, but it is usually helpful to include all the necessary factual description and legal argument in this single document. Be sparing with any accompanying witness statement (see below). Some tips:
	1. State what the case is about in the first paragraph
	2. Begin with summary of the facts – as concise as possible, followed by…
	3. Legal framework, then
	4. Grounds of challenge.
	5. Ensure that the issues of law are clearly identified and beware “the overloading of a case with hopeless points [which] simply operates potentially to devalue points which otherwise might be made to appear arguable”: *R (Naing) v IAT* [2003] EWHC 771 (Admin). See also *R (Brookes) v Secretary of State for Work and Pensions* [2010] 1 WRL 2448: *“An application for judicial review is an application to review one or more identifiable decisions on grounds of error of law. Both the decision and the alleged error must be identified with particularity in the claim. It is not acceptable for a claim for judicial review to consist of narrative, of unfocused complaint and of general reflections (good or bad) upon the nature of the legislation in question”.*
	6. Anticipate any delay objection (which may already be trailed in protocol correspondence) – give reasons for lapse of time and include an application to extend time if necessary.
	7. Prudent to consider dealing with ADR or alternative remedy issues in the grounds if a potential route is open or has been plausibly suggested. Explain why JR proceedings are nevertheless brought at this stage.
	8. Judicial review claimants are under an important duty to be candid and to make full and frank disclosure to the Court of material facts and known impediments to judicial review. Note the case of *R (Mohammed Shahzad Khan) v SSHD* [2016] EWCA Civ 416 at 45 regarding the importance of this for claimants and see the Administrative Court guide at chapter 14.
4. Section 31 of the Senior Court Act 1981, which concerns the granting of permission and relief in judicial review cases, was amended on 13 April 2015 by way of section 84 of the Criminal Justice and Courts Act 2015. In the new section 31(2A) and (3C)-(3F), “unless there are reasons of exceptional public interest”, the court “*must*” refuse to grant permission (or, later, relief) “if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”. The court may consider this question of its own motion, and must consider this question is asked to do so by the defendant. If this is potentially a relevant issue, applicants for permission should address it head-on in the claim form’s statement of facts and grounds, rather than wait for the defendant or the court to raise it. See: amended CPR r.54.8 and 11 (r.54.11A empowers the court to direct an oral hearing to consider the issue in isolation).
5. Once brought into force, section 85(1) of the 2015 Act will provide that no judicial review application may be made unless the claimant provides any information about the financing of the claim which is required under any rules of court. The government has recently conducted a consultation into what those rules of court may require, and the information that would need to be provided: see Consultation Paper entitled “Reform of Judicial Review: Proposals for the provision and use of financial information”. Consultation closed on 15 September 2015.
6. The Claim Form and accompanying documents (see below) must be served on the Defendant and any person the Claimant considers to be an interested party within 7 days after the date of issue (54.7).
7. There are different forms for certain specialist types of claim.

**(9) Evidence, bundle and authorities**

1. The claim form must be accompanied by a bundle which includes:
	1. Any written evidence on which the claimant relies.
	2. A copy of any order the claimant seeks to have quashed.
	3. A copy of the decision under challenge
	4. Any other documents on which the claimant seeks to rely.
	5. A copy of any relevant statutory material;
	6. A list of essential reading with page references.

See Practice Direction 54A at para. 5.7.

1. The “other documents” should include the letter before claim, the response and any other relevant correspondence. NB do not omit obviously relevant documents merely because they are unhelpful to the claim – the claimant has a duty of candour. That duty is probably less absolute under the CPR 54 on-notice permission procedure than under the former *ex parte* RSC leave procedure. The proportionality aspect of the overriding objective suggests a balanced approach, avoiding burdening the court with unnecessary detail at the outset. See *R. (McCarthy and others) v. Basildon DC* [2008] EWHC 987 (Admin), Collins J (overturned on appeal but not on this point) at [8], [emphasis added]:

*“There is a growing tendency to place far too much material before the court. A claimant must produce all clearly relevant material to the court and must in particular include any which may be considered to be possibly adverse to his claim.  Only thus can he comply with the duty of candour.  The same applies to a defendant****.****There is often material which may be relevant but need not be put to the judge until it becomes clear that it is.  Equally, parties often want to refer to particular paragraphs or excerpts from reports or other documents which mean that, although the context may need to be made clear, the whole need not be included in a bundle.  The court should only be provided initially with what is clearly relevant and material.  The balance of possibly relevant material should be brought to court and must have been made available to the other party.”*

1. The claimant must file 2 copies of the bundle in a paginated and indexed form. The Practice Direction does not require authorities to be filed, but if there are authorities on which the claimant relies to make out his claim or which obviously require to be read in order for the Judge to understand the case and consider whether permission should be granted, then it is sensible to include the authorities with the statutory material in the bundle.

1. Take note of Sir Stephen Sedley’s 11 Laws of Documents:

**FIRST LAW**

 **Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.

SECOND LAW**

 **Documents shall in no circumstances be paginated continuously.

THIRD LAW**

 **No two copies of any bundle shall have the same pagination.

FOURTH LAW**

 **Every document shall carry at least three numbers in different places.

FIFTH LAW**

 **Any important documents shall be omitted.

SIXTH LAW**

 **At least 10 per cent of the documents shall appear more than once in the bundle.

SEVENTH LAW**

 **As many photocopies as practicable shall be illegible, truncated or cropped.

EIGHTH LAW**

 **(a) At least 80 per cent of the documents shall be irrelevant.
(b) Counsel shall refer in court to no more than 10 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.

NINTH LAW**

 **Only one side of any double-sided document shall be reproduced.

TENTH LAW**

 **Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.**

 **ELEVENTH LAW**

 **Documents shall be held together, in the absolute discretion of the solicitor assembling them, by:**

 **(a) a steel pin sharp enough to injure the reader;
(b) a staple too short to penetrate the full thickness of the bundle;
(c) tape binding so stitched that the bundle cannot be fully opened; or
(d) a ring or arch binder so damaged that the two arcs do not meet.**

**(10) Where to issue**

1. There are now a number of regional Administrative Court centres: Cardiff, Birmingham, Leeds and Manchester. Claims can be issued at any Administrative Court office, and if issued in the regional offices will usually be heard locally. Proceedings may be transferred to another office by a judge, and the general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, although there are a number of potential contrary considerations listed in para 5.2 of Practice Direction 54D. If a claimant has a particular preference for the case to be heard in a region other than that in which the claim was issued, it is sensible to address that point in the claim form/grounds. Factors which the court will consider include: any reason expressed by any party for preferring a particular venue; the region in which the defendant is based; the region in which the claimant’s legal representatives are based; the ease and cost of travel to a hearing; the availability and suitability of alternative means of attending a hearing; the extent and nature of media interest in the proceedings in any particular locality; the time within which it is appropriate for the proceedings to be determined; whether it is desirable to administer or determine the claim in another region in light of the capacity, resources and workload of the court in which it is issued; whether the claim raises issues similar to those in another outstanding claim making it desirable that it should be heard together with or immediately following that other claim; whether the claim raises devolution issues.
2. “Excepted classes of claim” should be issued at the Administrative Court Office in the High Court in London (see Practice Direction 54D – Administrative Court (Venue) at para 3.1). These include cases involving control orders, terrorist cases, special advocate cases and proceedings under the Proceeds of Crime Act, and planning court claims (see below).
3. Form N464 should be completed where the claimant is applying for a direction that the matter be administered and determined at a particular venue.
4. “Planning court” claims: There is now a designated “planning court” to hear claims relating to planning permissions or other associated issues (such as village greens). This is a specialist list with specific judges assigned and there are target timescales for cases which are categorised as “significant” (e.g. within months of issue for s 288 claims): see CPR 54.21-24 and PD 54E.

**(11) Urgent consideration and interim relief**

1. Where the Claimant wishes to apply for urgent interim relief, or requires the claim to be determined within a particularly short timeframe, an application must be made on form N463: Application for urgent consideration.
2. The form requires the Claimant’s advocate to:
	1. Set out the reasons for urgency
	2. Set out a proposed timetable
	3. Set out what interim relief is sought and why
	4. Provide a separate draft order for interim relief
	5. Demonstrate that the form has been served on the defendant and interested parties.
3. Interim relief may be granted on the papers, and/or a hearing may be directed – in which case permission will usually be dealt with at the same time, with time for acknowledgement of service abridged.
4. NB the new Administrative Court Guide (July 2016) which deals in detail (Chapter 16) with the urgent procedure and repeats the warning in *Hamid v SSHD* [2012] EWHC 3070 (Admin) about inappropriate use or abuse of the procedure:

*“[7] … If any firm fails to provide the information required on the form and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first*

*appreciated, and the efforts made to notify the defendant, the Court will require the attendance in open court of the solicitor from the firm who was responsible, together with his senior*

*partner. It will list not only the name of the case but the firm concerned. …”*

**(12) Relief from sanctions**

1. Under CPR r.3.9(1), on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.
2. The question of how strictly the courts should enforce compliance was recently explored by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537. The White Book (3.9.3) summarises the court’s guidance as follows:

*“(1) If a breach is trivial, the court will usually grant relief provided that an application is made promptly. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms.*

*(2) If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason.*

*(3) Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal (and see also,* Tarn Insurance Services Ltd v Kirby *[2009] EWCA Civ 19).*

*(4) Mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason.*

*(5) Solicitors may be under pressure and have too much work. That will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all.*

*(6) Applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.*

*(7) If there is a very good reason for the failure then relief will usually be granted. The weaker the reason, the more likely the court will be to refuse to grant relief. (Adopting the approach taken in* Hashtroodi v Hancock *[2004] EWCA Civ 652, [2004] 1 WLR 3206 in the context of applications for an extension to the period of validity of a claim form under r.7.6)*

*(8) An application for relief from a sanction presupposes that the sanction has in principle been properly imposed. If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under r.3.1(7). The circumstances in which the latter discretion can be exercised were considered in* Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies) *[2012] EWCA Civ 518, [2012] 1 WLR 2591. In that case the court held that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly. This reasoning has equal validity in the context of an application under r.3.9.*

*(9) Rule 3.14 sets out a stark and simple default sanction which will usually apply unless the breach in question is trivial or there was good reason for it. The grant of partial relief from the sanction will not often be appropriate. If partial relief were to be encouraged, that would give rise to uncertainty and complexity and stimulate satellite litigation.”*

1. *Mitchell* was clarified and further explained in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R 3296. The White Book (3.9.4) summarises the guidance in *Denton* as follows: “*a judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including r.3.9 (1)(a)(b). The court also gave guidance as to the importance of penalising parties who unreasonably oppose applications for relief from sanctions”*.
2. *Mitchell* and *Denton* are essential reading for any application for relief from sanctions in judicial review proceedings. See also *R. (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 in which the Court held that an application for an extension of time to appeal from judicial review proceedings should be approached in the same way as an application for relief from sanctions and thus by reference to the *Mitchell / Denton* case law. In short:
	1. there is no special exception for public law cases (para. 41) but the importance of the issues to the public at large will be a factor to be taken into account at the third stage;
	2. nor is there a special rule for public authorities (para. 42);
	3. the nature of the proceedings (such as asylum) and the person responsible for the delay (e.g. immigration solicitor) will be taken into account at the third stage;
	4. shortage of funds is not a good reason for delay: para. 43;
	5. as to litigants in person, whether there is a good reason for delay will depend on the circumstances but generally being a litigant in person will not provide a good reason for failure to comply (44-45);
	6. in most cases, the merits will have little to do with whether to grant an extension, otherwise applications will develop into disputes about the merits of the substantive appeal. Only in cases where the merits are very strong or very weak will they have a significant part to play in stage three (46-48).
3. In *Kigen v SSHD* [2015] EWCA Civ 1286, the Court of Appeal held that delay in obtaining legal aid would not provide a good reason for delay in and of itself. Therefore there should be no expectation that an extension of time for judicial review would be granted merely because of delays in funding – litigants and their solicitors would have to consider issuing protectively and awaiting a funding decision in due course.

**ZOE LEVENTHAL**

**Landmark Chambers**

 **2 November 2016**

Appendix 1: Previous PCO examples

(1) R (Action against Medical Accidents) v General Medical Council [2009] EWHC 2522 (Admin).The Court refused to make a PCO to assist a charity bringing JR proceedings against the GMC where, if the charity was unable to continue with the claim, an individual with sufficient interest would be able to adopt and pursue it and the case did not involve matters of general public importance but involved issues unique to an interested party’s family and the doctors concerned.

(2) Morgan & Baker v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107, where the Court of Appeal affirmed that the Corner House principles were settled but should be applied “flexibly” in particular in relation to the “no private interest” criterion. Similarly in R. (on the application of England) v Tower Hamlets LBC [2006] EWCA Civ 1742 and IS v Director of Legal Aid Casework [2014] EWCA 886 (the latter on appeal to the Supreme Court at present).

(3) R (Coedbach Action Team Ltd) v Secretary of State for Energy [2010] EWHC 2312 (Admin), where the claimant was a private limited company which came into existence in response to a proposal to build a biomass power station in the Gwendraeth Valley. Wyn Williams J held that the company could not be regarded as a member of the public for the purposes of the Aarhus Convention/Directive 85/337 EEC and refused a PCO.

(4) R (Public Interest Lawyers Ltd) v Legal Service Commission [2010] EWHC 3259 (Admin), where a number of solicitors firms undertaking work of public importance sought a protective costs order in proceedings which challenged a tendering exercise conducted by the LSC. The judge found that although the claimant firms had a private interest, that was not a major factor in the balance in this case, given the strong public interest in ensuring that the public tendering process was carried out in a legally correct way.

(5) R (Young v Oxford City Council) [2012] EWCA Civ 46: PCO had been granted in the Administrative Court with a cap of £7500 on the claimant’s liability for costs and a reciprocal cap of £18,000 on the costs of the other parties. Unsuccessful claimant sought a PCO in respect of the costs of the appeal. PCO refused because the appeal did not raise issues of general public importance, there was not a strong public interest in their resolution and the claimant had a private interest in the outcome of the case.

(6) The European Court of Justice in R. (on the application of Edwards) v Environment Agency (C-260/11) [2013] 1 W.L.R. 2914 held the phrase “prohibitively expensive” in relation to the costs of proceedings for Aarhus claims must neither exceed the financial resources of the person concerned, nor appear to be objectively unreasonable. In making its assessment, the court must consider the situation of the parties; what is at stake for the claimant and the protection of the environment; whether the claimant has a reasonable prospect of success; the complexity of the relevant law and procedure; and the existence of a national legal aid scheme or costs protection scheme. The fact that a claimant has not been deterred from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

(7) R (Plantagenet Alliance) v SSJ and others [2013] EWHC B13 – PCO made to prevent the First and Second Defendants (Secretary of State and University of Leicester) from recovering their costs from the Claimant; Claimant’s costs to be capped at a level to be set by the court.

(8) R (Litvinenko) v SSHD [2013] EWHC 3135 (Admin): Unsuccessful application by widow of Alexander Litvinenko for PCO in respect of her application for JR of the SSHD’s refusal to hold a public inquiry into her husband’s death. Starting point was that a PCO would not be made unless there was a real prospect of success in the JR proceedings, the issues raised were of general public importance and there were compelling public interest reasons for them to be resolved. A private interest in the JR was not fatal to the application but was a factor to consider when balancing against the other elements of the Corner House guidance. The Applicant’s asserts outweighed the value of the SSHD’s estimated costs and she had greater means than many litigants. She had the financial means to bring the proceedings. It was not fair or just to make the PCO nor was it an exceptional case for the Corner House principles to apply.

(9) Austin v Miller Argent [2015] 1 WLR 62: in an action for private nuisance, the Court of Appeal rejected an argument that the judge below had erred in not granting a protective costs order in light of a) the limited and uncertain public benefit of the action; b) a number of other factors pointing against a PCO including the strong element of private interest, the lack of satisfactory evidence demonstrating that the claimant had adequately explored a cheaper route of drawing the alleged breaches of condition to the planning authority’s attention and the fact that the defendant was a private body using its own resources. In doing so, the Court noted that the existence of an alternative and potentially cheaper procedure, provided it affords a realistic, practical and effective remedy will be a relevant factor, unless it is clear that the public authority in question is unlikely to take any necessary action.

1. I am very grateful indeed to Jenni Richards QC from 39 Essex Street who has delivered this talk in recent years for allowing me to draw on her previous paper from 2013. I am also grateful to Matthew Fraser at Landmark for helping with recent updates. Any errors are of course my own. [↑](#footnote-ref-1)
2. In cases where the prospective claimant is publicly funded by the Legal Aid Agency, there appears to be a requirement for a pre-pre-action protocol letter: regulation 54(b)(i) of the Civil Legal Aid (Merits Criteria) Regulations 2013 and the Lord Chancellor’s guidance impose a new requirement, before funding for investigative representation will be awarded, regarding notification to the proposed defendant of the individual’s potential challenge, giving the proposed defendant a reasonable time to respond. This is distinct from the pre-action protocol and requires notification only of the potential for a challenge rather than an exposition of the legal grounds for that challenge. [↑](#footnote-ref-2)
3. NB In certain types of case, the Protocol requests that the letters before claim should be sent to specific addresses and should have specific reference details. [↑](#footnote-ref-3)
4. Where the Claimant complains of a failure of an opportunity to make representations, the court may expect the letter before claim to set out the concerns and relevant considerations that he would wish to have made and may expect the defendant to consider those matters: see *R (C) v Chief Constable of Greater Manchester* [2011] EWCA Civ 175 at [12- 13] per Toulson LJ. [↑](#footnote-ref-4)
5. In any event, there now exists a right of appeal against many tribunal decisions to the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007 – see below. Some tribunals have a power to review or recall their decisions. [↑](#footnote-ref-5)