**ADMINISTRATIVE LAW BAR ASSOCIATION: INTRODUCTION TO JUDICIAL REVIEW SERIES**

**PREPARING A CASE FOR JUDICIAL REVIEW**

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**Note re authorship:** ALBA has offered this lecture series for many years. The notes provided have been contributed to over time by a number of ALBA members (many of whom are leading members of the Bar). 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, defendants, or both.

**INTRODUCTION**

1. The topics addressed in this paper are as follows:
   1. Pre-action protocol
   2. Alternative dispute resolution
   3. Cost capping 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) and Statement of Facts & Grounds
   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.

***Procedure rules and other materials***

1. Judicial review procedure is governed by CPR 54 and the practice directions thereto (PD 54A-E). There are also now specific procedure rules governing judicial reviews in the Upper Tribunal (some immigration judicial reviews must now be commenced in the Upper Tribunal, and other cases may be transferred there (e.g. social security JRs)): see the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).
2. Note also the 2021 Administrative Court Guide available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1022369/HMCTS\_Administrative\_Court\_Guide\_2021\_Final\_Web.pdfwhich, alongside the White Book, is a good source of practice guidance.

**(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>). 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.[[1]](#footnote-1)
2. The information which should be included in the pre action letter is as follows[[2]](#footnote-2):

* 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.[[3]](#footnote-3)
* 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 (whether at the permission or the substantive stage):
   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. See also the important case of *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 decision of the Supreme Court 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” (2016): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716591/ac013-eng.pdf>
2. 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[[4]](#footnote-4), 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)). The protocol says (para 6) that “*Even in very urgent cases, it is good practice to alert the defendant by telephone and to send by email (or fax) to the defendant the draft Claim Form which the claimant intends to issue. A claimant is also normally required to notify a defendant when an interim order is being sought*.”
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). (NB - there are a number of recent Court of Appeal judgments demonstrating a strict approach to the application of the time limit: see R (*Dolan) v SSHSC* [2021] 1 WLR 2326; *Badmus v SSHD* [2020] 1 WLR 4609; *Delve v SSWP* [2020] HLRL 20; and*R (AK) v Entry Clearance Officer* [2021] EWCA Civ 1038 ).

**(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. Also a claimant is generally required to exhaust alternative remedies before bringing a judicial review, as it is a “remedy of last resort.”
2. The courts take the view (see *Cowl v Plymouth City Council* [2002] 1 WLR 803) that litigation should be a last resort, even in judicial review proceedings: see *per* Lord Wolf MR:

“*1. The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress*.”

1. The Courts have therefore warned 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.
2. 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 in the pre-action protocol (paragraphs 9-12).
3. 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.
4. 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).
5. 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.
6. The case of *Zahid & others v University of Manchester & others* [2017] EWHC 188 (Admin) is a good example of the Court encouraging the use of alternative dispute resolution procedures as an alternative to judicial review. The claimants had issued their judicial review proceedings protectively (because of the 3 month time limit) before their complaints had been resolved by the university adjudicator and then sought a stay of these proceedings. The defendants objected, contending that because the adjudication process was a suitable alternative remedy, judicial review did not run at all. The Court held that the existence of a suitable alternative remedy did not exclude a residual role for judicial review altogether; generally there was no need for the claimants to have issued judicial review proceedings at all (they could have done so if necessary following the adjudication process) but that in the circumstances the claims should be stayed, because otherwise the existence of the judicial review would preclude the adjudicator from proceeding to consider the complaint.
7. In *Glencore Energy UK Ltd v Revenue and Customs Commissioners* [2017] EWHC 1476, the claimants were refused judicial review on the basis that there was a statutory appeal review process which provided a proper alternative remedy which the claimants were required to follow. There was no utility in JR or prejudice in following the statutory process, nor would JR would not guarantee time or expense savings.

**(3) COST CAPPING ORDERS AND OTHER COSTS MANAGEMENT OPTIONS**

1. A Cost Capping order 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 CCO can also direct that there shall be no order as to costs.
2. 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 where the claim was 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 on PCOs:
   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, s 88 provides (as far as relevant):

*(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.
2. The High Court considered these provisions for the first time in *R (on the application of Hannah Beety & others) v Nursing and Midwifery Council and others* [2017] EWHC 3579 (Admin). . A group of independent midwives brought a judicial review of the NMC’s decision that they could not practice because their indemnity insurance did not meet certain requirements. The claimants sought an order that, should they lose, their liability to pay the council's costs would be limited to £20,000, with a reciprocal cap limiting their recovery to £50,000.
3. They submitted that the proceedings involved an issue of general public importance under s 88(7)(a) in that it was important to all midwives and other healthcare professionals, to self-employed midwives in terms of their modest earnings, and to the professional service they provided in relation to more than 600 births per year. The council argued that the issue affected only about 70 midwives, out of 43,000 in the country, and only a small number of pregnant women.
4. The Court held:
   1. These were “public interest proceedings” within s 88(7)(a); the decision would very significantly reduce the public's opportunity to choose the type of midwifery offered by the claimants and their colleagues. Those affected were a small proportion of all midwives but they were significantly affected. The proceedings did not involve a point of law of general public importance under s.88(8)(c). Nonetheless the case was just sufficient to pass the test in s.88(7). Judicial review proceedings were a very good way of resolving the issue, meeting s.88(7)(c);
   2. As to whether the claimants would withdraw if a CCO was granted and would act reasonably in doing so (s 88(6)(b) and (c)),this criterion was also made out given the financial difficulties that losing would create for the claimants (the potential cost liability was £250,000); and
   3. In relation to [s.89(1)(d)](https://www.lawtel.com/UK/Documents/AF0180803), it was not realistic to suppose that a costs capping order should not be made unless the lawyers were acting for nothing. It would not be fair for public law solicitors, who already faced funding difficulties, to be expected to work pro bono. Therefore it did not matter that the claimants' solicitors were being paid, albeit on a no win, discounted fee basis. Under [s.89(1)(e)](https://www.lawtel.com/UK/Documents/AF0180803), certainly the claimants were appropriate persons to bring the action, and under [s.89(1)(b)](https://www.lawtel.com/UK/Documents/AF0180803), IMUK would benefit if relief was granted. A costs capping order was warranted, even if the case was marginal on the public interest point.
   4. The offered cap of £20,000 was too low. Approximately 50 members of IMUK had not contributed; if each contributed £100 a further £5,000 could be raised, so the cap should be £25,000. The Court held the reciprocal cap should be £65,000.
5. See also *R (Hawking and others) v SS for Health and Social Care* [2018] EWHC 989 regarding the impact of significant crowdfunding; CCO made despite high level of crowd-funding to prevent unlimited cost liability; made at reasonable level (£80k liability for each claimant; £115k total liability for defendants).
6. For more recent decisions, see *R (We Love Hackney) Ltd v Hackney LBC* [2019] EWHC 1007 (Admin), the Court of Appeal’s decision in *R (Elan-Cane) v SSHD (Human Rights Watch intervening)* [2020] QB 929 (percentage reduction applied to capped costs rather than uncapped costs: [148]-[152]) and *R (Good Law Project) v Minister for the Cabinet Office* [2021] Costs LR 517).

New procedure for CCOs under CPR 46

1. 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. For a recent summary of the old law on protective costs orders (“PCOs”), which will be of relevant as far as some of the above criteria are concerned, see *The Queen on the Application of Roszkowski v Secretary of State for the Home Department* [2017] EWCA Civ 412.

**Costs rules in Aarhus claims**

1. CPR 45.41-45 contains special costs limits applying to so called “Aarhus claims”. An “Aarhus claim” is defined as *"a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) 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 (“the Aarhus Convention”).”*
2. 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].
3. Where a claimant i) indicates that the claim is an Aarhus claim in the claim form, and ii) provides financial information with the claim form (CPR 45.42(1)(b)) including any financial support s/he may be able to access from others, 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 (unless varied by the Court, 45.44 – see below). A defendant’s costs liability will be capped at £35,000: CPR 45.43 and PD45.
4. CPR 45.44 provides that the court has the power to vary or remove Aarhus Convention costs limits (CPR 45.43), subject to the question of whether the proceedings would be “prohibitively expensive for the claimant” as defined therein. However, there are limitations on these new amended CPR provisions after Dove J’s decision on 15 September 2017 set out below.
5. **In *Royal Society for the Protection of Birds, Friends of the Earth & Client Earth v. Secretary of State for Justice* [2017] EWHC 2309 (a challenge to the amendments to the CPR which allowed variation of the Aarhus costs caps) Dove J found that courts can have discretion to vary costs cap but must do so only in light of financial information available, and by ensuring that there was a process to resolve this with certainty at an early stage of the proceedings. In so doing, the court found that a request for a variation from the cost cap should be raised at the acknowledgement of service stage (following CPR PD 23.4); that all cost caps hearing should be private to both protect the confidentiality of the information and also prevent a chilling effect in terms of funders for JR. All the costs should be included in the consideration including the claimant’s own costs. Pending any appeal to this judgment, there is likely to need to be amendments to the rules and practice direction to reflect the judgment.**
6. 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 45.45. The court will then determine at the earliest opportunity whether the claim is an Aarhus claim.

#### **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). 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 CCO.

**(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.
3. For a recent decision on supplementary decision letters and “rolling” judicial review, see *R (Ali Raja) v Redbridge LBC* [2020] EWHC 1456 (Admin).

**(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. There 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: CPR 54.17. For a summary of the circumstances in which it may be appropriate to grant permission to intervene see *R (British American Tobacco UK Ltd) v SS for Health* [2014] EWHC 3515 (Admin).
2. New restrictive costs rules for interveners were imposed by section 87 of the Criminal Justice and Courts Act 2015:
   1. an intervener will not generally be able to have its costs paid by any other party (s 87(3)) unless there are exceptional circumstances s 87(4);
   2. Conversely, if an intervener becomes the principal claimant or defendant, its evidence and representations, taken as a whole, have not been of significant assistance to the court; and/or a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or the intervener has behaved unreasonably, the Court must order the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings: s 87(6). The Court is not required to do so if there are exceptional circumstances which make this inappropriate s 87(7).
3. So far no intervener has been brave enough to test these provisions out. However, they do not apply in the Supreme Court so “no costs” interventions can still be made in that forum.

**(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” (although be aware of the Court of Appeal authorities on when time begins to run: see above)
   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 8 of N461), including any interim relief. Ensure all forms of relief that you can anticipate are pleaded at this stage. Useful catch-all in addition: “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 9 of the N461). E.g. reporting restrictions/anonymity; extension of time for filing of claim form; abridgement or extension of time for defendant’s acknowledgement of service; disclosure; costs capping order.
3. The claim form should 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. As per PD54A, the statement of facts and grounds should be concise, at 40 pages at the most. A suggested structure is below:
   1. State what the case is about in the first paragraph (typically the nature and date of the decision under challenge and who is challenging it)
   2. Begin with summary of the facts (as concise as possible)
   3. Legal framework
   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 16. In short, this may include not merely furnishing the documents themselves, but drawing attention to, and explaining, documents in the claim form or evidence which are adverse to the claim.

1. The Court of Appeal has recently emphasised the importance of procedural rigour and the need for grounds to be clear and concise, with any claim for damages properly set out: see, for example, *R (Dolan) v SSHSC*  at [119] and *R (Fayad) v SSHD* [2018] EWCA Civ 54 at [44] to [56].
2. 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).
3. For cases on the application of s 31(3C)-(3D), see, most recently, R (*Gathercole) v Suffolk County Council* [2021] EWA Civ 1179; [2021] PTSR 359 at [35]-[44]; *R (Goring-on-Thames PC) v South Oxfordshire DC* [2018] EWCA Civ 860, [2018] 1 WLR 5161 at [47]; *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446 at [269]-[276]. Section 31(2A) was briefly considered by the Supreme Court in *R (Haworth) v HMRC* [2021] UKSC 25, [2021] 1 WLR 3521.
4. 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).
5. 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 (filed in hard copy and electronic copy) which includes:
   1. The Statement of Facts and Grounds
   2. Any written evidence on which the claimant relies.
   3. A copy of any order the claimant seeks to have quashed.
   4. A copy of the decision under challenge.
   5. Any other documents on which the claimant seeks to rely.
   6. A copy of any relevant statutory material.
   7. A list of essential reading with page references.

See Practice Direction 54A at paras. 4.2, 4.4 and 4.7.

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. In *Dolan,* the Court of Appeal said ([119]-[121])[[5]](#footnote-5):

*“119. We have a particular concern in this case about the length and complexity of the grounds of challenge. The amended statement of facts and grounds runs to 87 pages. This was followed by Supplementary Grounds, which were another 13 pages. It is impossible to see how such statements can be regarded as complying with the requirement in the Administrative Court Judicial Review Guide 2020, at para 6.3.1.1: that the document should be as concise as reasonably possible, while setting out the claimants arguments. The grounds must be stated shortly and numbered in sequence. That Guide was published after the present proceedings were commenced but similar guidance was given in earlier editions of that Guide: see e g the 2019 edition, at para 6.3.4.1. Furthermore, this court has, on more than one occasion, emphasised the need for a clear and succinct statement of the grounds: see e g R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841 at [68] (Singh LJ).*

*120 Despite these statements, we are concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than illuminate the essence of the case being advanced. They make the task of the court more di–cult rather than easier and they are wasteful of costs. It is for these reasons that skeleton arguments are subject to length constraints and so too, for example, the length of printed cases in the Supreme Court.*

*121 Although the Administrative Court Judicial Review Guide is clear, we consider that the time has come to invite the Civil Procedure Rule Committee to consider whether any amendments to the rules or practice direction governing judicial review claims are called for to contain the problem we have identified.”*

1. Unless one is in the Divisional Court, claimants only need to produce one bundle. If in Divisional Court, one bundle per judge is required (PD54A para 4.5). The bundles must be 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.

**(10) WHERE TO ISSUE**

1. There are now a number of regional Administrative Court centres: Cardiff, Birmingham, Leeds and Manchester.[[6]](#footnote-6) Claims can be issued at any Administrative Court office, and if issued in the regional offices will usually be heard locally.
2. 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 claim is most closely connected, having regard to the subject matter of the claim and the location of the claimant and defendant. 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.
3. Factors which the court will consider in deciding where the claim should be administered include (see PD54C para 2.5):
   * 1. Any reason expressed by any party for preferring a particular venue;
     2. The ease and cost of travel to a hearing;
     3. The availability and suitability of alternative means of attending a hearing (for example, by video-link);
     4. The extent and nature of any public interest that the proceedings be heard in any particular locality;
     5. The time within which it is appropriate for the proceedings to be determined;
     6. Whether it is desirable to administer or determine the claim in another region in the light of the volume of claims issued at, and the capacity, resources and workload of, the court at which it is issued;
     7. Whether the claim raises issues sufficiently similar to those in another outstanding claim to make it desirable that it should be determined together with, or immediately following, that other claim;
     8. Whether the claim raises devolution issues and for that reason whether it should more appropriately be determined in London or Cardiff; and
     9. The region in which the legal representatives of the parties are based.
4. “Excepted classes of claim” should be issued at the Administrative Court Office in the High Court in London (see PD54C at para 3.1). These include cases involving control orders, terrorist cases, special advocate cases and proceedings under the Proceeds of Crime Act 2002.
5. Form N464 should be completed where the claimant is applying for a direction that the matter be administered and determined at a particular venue.
6. “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 54D.
7. Upper Tribunal – immigration cases: Since the 1st November 2013 the Upper Tribunal (Immigration and Asylum Chamber) (“UT(IAC)”) has been the appropriate jurisdiction for starting a judicial review in the majority of decisions relating to immigration and asylum, not the Administrative Court.
8. The Lord Chief Justice’s Practice Direction[[7]](#footnote-7) requires filing in, or mandatory transfer to, the UT(IAC) of any application for permission to apply for judicial review and any substantive application for judicial review that calls into question the following:
   1. A decision made under the Immigration Acts 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 UK.
   2. The Immigration Acts are defined as: Immigration Act 1971, Immigration Act 1988, Asylum and Immigration Appeals Act 1993, Asylum and Immigration Act 1996, Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Immigration, Asylum and Nationality Act 2006, UK Borders Act 2007, the Immigration Act 2014; or
   3. A decision made of the Immigration and Asylum Chamber of the First-tier Tribunal, from which no appeal lies to the Upper Tribunal.
9. All other immigration and asylum matters remain within the jurisdiction of the Administrative Court. Further, even where an application comes within the classes of claim outlined at paragraph 71 above, an application which falls within any of the following classes must be brought in the Administrative Court:
   1. A challenge to the validity of primary or subordinate legislation (or of immigration rules);
   2. A challenge to the lawfulness of detention;
   3. A challenge to a decision concerning inclusion on the register of licensed Sponsors maintained by the UKBA;
   4. A challenge to a decision as which determines British citizenship;
   5. A challenge to a decision relating to asylum support or accommodation;
   6. A challenge to the decision of the Upper Tribunal;
   7. A challenge to a decision of the Special Immigration Appeals Commission; and
   8. An application for a declaration of incompatibility under the s.4 of the Human Rights Act 1998.
   9. 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.
10. Challenges to decisions made under the National Referral Mechanism for identifying victims of human trafficking or modern slavery are not immigration decisions. They fall within the jurisdiction of the Administrative Court.

**(11) URGENT CONSIDERATION AND INTERIM RELIEF**

1. Where the Claimant wishes to apply for urgent interim relief, or requires very urgent directions or determination, an application must be made on a separate form N463 (application for urgent consideration), alongside the claim form. Applications which do not need to be considered within 7 days should be made using form N244 (if there is some degree of urgency provide a covering letter which sets out the relevant time scales and be prepared to chase the court).
2. The N463 form requires the Claimant’s advocate to:
   1. Set out the reasons for urgency
   2. Explain any delay in making the application
   3. Set out the efforts that have been made to put the Defendant on notice
   4. Set out a proposed timetable
   5. Set out what interim relief is sought and why
   6. Provide a separate draft order for interim relief
   7. Demonstrate that the form has been served on the defendant and interested parties
   8. Provide a statement of truth.
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. See also PD54B on “Urgent applications and other applications for interim relief” as well as the Administrative Court Judicial Review Guide. The latter repeats the warning in *Hamid v SSHD* [2012] EWHC 3070 (Admin) about inappropriate use or abuse of the urgent applications 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. …”*

See also the cautionary tale of *R (DVP) v Secretary of State for the Home Department* [2021] EWHC 606 (Admin). Amongst other matters, this case makes clear that the justification for the urgent application must go beyond the justification for the claim itself. Further, a claimant must fill out the N463 in full – cross-references to other documents are not permitted – and must take particular care to comply with the duty of candour.

**(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 explored by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.
3. *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 (3.9.3) 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)*](https://uk.practicallaw.thomsonreuters.com/Link/Document/FullText?findType=Y&serNum=0111255283&pubNum=121175&originatingDoc=I4E6424A031A911E89FBBB4885873D0FB&refType=UL&originationContext=document&transitionType=CommentaryUKLink&contextData=(sc.Category))*. 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)*](https://uk.practicallaw.thomsonreuters.com/Link/Document/FullText?findType=Y&serNum=0111255283&pubNum=121175&originatingDoc=I4E6424A031A911E89FBBB4885873D0FB&refType=UL&originationContext=document&transitionType=CommentaryUKLink&contextData=(sc.Category))*. The court also gave guidance as to the importance of penalising parties who unreasonably oppose applications for relief from sanctions.”*

1. *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).
2. 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. The Court of Appeal considered the position again recently in *Kaur & Kaur v SSHD* [2017] EWCA Civ 821, again refusing relief from sanctions for breach of a procedural requirement (providing the relevant document required by the rules). See also *Spahiu v SSHD* [2019] 1 WLR 1297 at para 2:

*“The hearing of this appeal took place against a backdrop of increasing concern about the need for appropriate procedural rigour in judicial review cases, expressed in a trio of recent authorities, namely:* [*R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841*](https://uk.practicallaw.thomsonreuters.com/Document/I91EB63C049F811E883E2AB423DD02228/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) *from [55] onwards;* [*Hickey v Secretary of State for Work and Pensions [2018] 4 WLR 71*](https://uk.practicallaw.thomsonreuters.com/Document/IE6473AC0448F11E8A9FDD811EDF86E19/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) *, from para 69 onwards; and* [*R (Browne) v Parole Board of England and Wales [2018] EWCA Civ 2024*](https://uk.practicallaw.thomsonreuters.com/Document/IDA8F3D40BCD011E8933C82A532A70CF6/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) *. This case is another reminder that, even in proceedings where unnecessary formality is to be avoided, some formality (and the certainty which it brings) is required.”*

1. In cases where the prospective claimant is publicly funded by the Legal Aid Agency, there is 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-1)
2. 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-2)
3. 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-3)
4. In any event, there is 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-4)
5. Practice Direction 54A was subsequently amended: <https://www.justice.gov.uk/courts/procedure-rules/civil/cpr-131-pd-making-doc.pdf>. See, for example, para. 4.2(3): *“The Statements of Facts and Grounds should be as concise as possible. The two documents together (or the single document if the two are combined) shall not exceed 40 pages. In many cases the court will expect the documents to be significantly shorter than 40 pages. The court may grant permission to exceed the 40-page limit.”* See para. 6.2 for similar on summary grounds of defence. [↑](#footnote-ref-5)
6. Claims where the claimant has the closest connection to the area covered by the Western Circuit should be issued in the ACO in Cardiff Civil Justice Centre. The administration of the claim will take place in Cardiff, but all hearings will (unless there are exceptional circumstances) take place at courts on the Western Circuit (principally in Bristol). (See the Administrative Court Guide at 6.6.2). [↑](#footnote-ref-6)
7. Lord Chief Justice’s Practice Direction; 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, dated 21st August 2013 and amended on the 17th October 2014, available at: <https://www.judiciary.gov.uk/publications/lord-chief-justices-direction-regarding-the-transfer-of-immigration-and-asylum-judicial-review-cases-to-the-upper-tribunal-immigration-and-asylum-chamber/> [↑](#footnote-ref-7)