

Streamlining Judicial Review in a Manner Consistent with the Rule of Law

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Bingham Centre Report 2014/01, February 2014
www.binghamcentre.biicl.org

Citation: This report should be cited as: M Fordham, M Chamberlain, I Steele & Z Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre Report 2014/01)*, Bingham Centre for the Rule of Law, BIICL, London, February 2014.

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1. Judicial review is the mechanism by which the courts hold public authorities to account for the legality of their conduct. It is the reason we can be confident that Ministers and other public bodies will do what Parliament has authorised and required them to do, and act in accordance with their common law duties. It is the mechanism by which individuals and businesses are protected from official or regulatory action that is unreasonable or unfair, arbitrary or abusive, unjustified or disproportionate. It ensures that the officials and bureaucrats who exercise public power are subject to the law, rather than being a law unto themselves. An effectively functioning system of judicial review is central to the rule of law.
2. Judicial review has undergone rapid and profound development. The grounds on which the courts will intervene in public decision-making have changed. The number of claims has increased. A perception has grown up in some quarters that judicial review has given rise to an unnecessary and unwieldy bureaucracy of its own. When the modern judicial review procedure was introduced in 1977, it was intended that it would be efficient and suitably quick. The requirement for leave (later renamed permission) for judicial review was designed to weed out unmeritorious cases. The time limits were designed to ensure that cases would be brought promptly. It was intended that claims would be resolved speedily and efficiently. However, claims can take well over a year (and, with appeals, sometimes several years) to be resolved. Delay is bad for successful claimants, who have to wait to secure the relief to which they are entitled; and bad for public decision-makers and others who are affected by the legal challenge. It has also been suggested that it is bad for economic development and growth, because it allows major public projects to become mired in long, costly and uncertain legal battles.
3. Over the years, many suggestions have been made for possible streamlining reforms. The present Government introduced a set of reforms in 2013. These reduced the time limits for judicial review in planning cases and reduced the number of oral hearings available in cases certified by a judge as “totally without merit”. In late 2013, most immigration claims were transferred to the Upper Tribunal, very substantially reducing the workload of the Administrative Court (Admin Court). It is still too early properly to gauge the effect of this change. But just as it was about to come into effect, the Government proposed a further set of very far-reaching and far more contentious reforms. In February 2014 it was announced that Government would not be proceeding with some of them, while others were to be promoted through a draft Criminal Justice and Courts Bill.
4. The purpose of our review was to consider practical ways of streamlining the process of judicial review without impairing its chief function of vindicating the rule of law. Some of the ideas we discuss here would involve high-level change; others are practical matters involving administrative change. Some have been suggested before; some are completely new. We discuss some ideas even where we conclude that they are not justified. We have included the Government’s own ideas and proposals for the purposes of discussion, even though we believe that some of them have the potential to make the process more – not less – cumbersome, as well as shutting out meritorious cases.

5. We have set out to write a concise and focused report, intended to be readily digested. This is not a text-book, nor an empirically-based research study. The steps and sequence in our process are described on the Bingham Centre's relevant web-page.¹ Our review was announced on 2 October 2013, with the aim to report in early 2014. Comments were welcomed at the outset in October 2013, and again in December 2013 when we published a list of 69 ideas under consideration. We benefited from responses submitted throughout the process, and from a public seminar jointly hosted by the Administrative Law Bar Association (ALBA) and the Bingham Centre for the Rule of Law, and held at Brick Court Chambers on 11 December 2013. We are grateful to everyone who responded and made suggestions.
6. In the report we identify recommendations which, we think, *could* be introduced in order to make judicial review a more streamlined, speedy or cost-effective process, in a manner consistent with the rule of law. We make clear that we are not advocating that these recommendations necessarily *should* be implemented. Those charged with promoting change may prefer to leave things as they are. Our central purpose is to examine whether – and demonstrate that – there are streamlining measures which could be introduced. When proposed reform is in the air, it is understandable that responses will react to what is being said and will point out what may be wrong with it. Our report is a further contribution which is intended to be constructive, and positive.
7. Any consideration of judicial review must recognise the constitutional significance of judicial review for the rule of law. In short, judicial review is the exercise of the courts' "*constitutional function ... to ensure, so far as they can, that public authorities respect the rule of law*".² "*The principles of judicial review give effect to the rule of law*"³, because "*The rule of law requires that those exercising public power should do so lawfully*".⁴ "*The rule of law requires that the laws enacted by Parliament, together with the principles of the common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive*".⁵ This "*function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law*".⁶ Parliament recognises the rule of law as an "*existing constitutional principle*".⁷ As the courts have explained: "*there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review*".⁸
8. Courts recognise the "*public interest in bringing judicial scrutiny and remedies to bear on improper acts and decisions of public bodies*".⁹ When Government argues in court for judicial review to be restricted on public policy grounds, the courts' response is to identify what is "*justified by the demands of the rule of law*", and "*required by the rule of law*", so that: "*the scope of judicial review should be no more (as well as no less) than is proportionate and*

¹ See www.biicl.org/binhamcentre/JRinquiry (Last viewed 17 February 2014).

² *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868 at §142 (Lord Reed).

³ *R (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23 [2003] 2 AC 295 at §73 (Lord Hoffmann).

⁴ *Bobb v Manning* [2006] UKPC 22 [2006] 4 LRC 735 at §14 (Lord Bingham for the Judicial Committee of the Privy Council).

⁵ *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 at §64 (Lord Phillips).

⁶ *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68 at §42 (Lord Bingham).

⁷ Constitutional Reform Act 2005, section 1.

⁸ *Cart* at §122 (Lord Dyson).

⁹ *Land Securities Plc v Fladgate Fielder* [2009] EWCA Civ 1402 [2010] Ch 467 at §70 (Etherton LJ).

necessary for the maintaining of the rule of law..."¹⁰ When Government argues for procedural restrictions to be more narrowly delineated, the courts' response is informed by "the importance of vindicating the rule of law".¹¹ When public authorities argue that judicial review should be refused because 'the decision would have been the same', the analysis is based on recognition that "the court should be astute to perform its constitutional role as guardian of the rule of law".¹²

9. The ideas we discuss in the report are grouped into six chapters:

- Chapter 1 deals with the *allocation of cases and judges*. It identifies a set of reforms to the way that cases are handled by the Admin Court.
- Chapter 2 suggests reforms to the court's rules and practices designed to streamline the procedure for *commencing proceedings*.
- Chapter 3 identifies reforms to the current practice on *pleadings and court papers*.
- Chapter 4 considers reforms to the *permission stage* of the judicial review procedure.
- Chapter 5 considers reforms to the *substantive stage* of the judicial review procedure.
- Chapter 6 considers various proposals to reform the rule and practice on *costs*.

¹⁰ *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 at §89 (Lord Phillips), §51 (Baroness Hale), §122 (Lord Dyson).

¹¹ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, 395G-H (Rose LJ).

¹² *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 at §§42-44 (Lord Dyson MR).

Recommendations

We think that the following steps could be pursued, in the interests of streamlining judicial review and saving public funds, in a manner consistent with the rule of law:

Chapter 1: Allocation of cases and judges

- R1. Admin Court judges could be asked to sit 4+ weeks per term in the Admin Court.
- R2. Deputies could be bookable in single-day slots, and could be used for paper-substantive decisions under CPR 54.18.
- R3. The Admin Court Office (ACO) lawyers could allocate cases with similar subject-matter or raising similar issues for the same judge.
- R4. There could be published target time-frames for (a) paper permission decisions (b) oral permission hearings and (c) substantive hearings.
- R5. Cases could be allocated to regional Admin Court centres, to secure earlier hearings.
- R6. Substantive hearings could be listed before the judge who granted permission.

Chapter 2: Commencing proceedings

- R7. Consideration could be given to combining all Admin Court procedures into a single composite set of rules.
- R8. CPR 54 could be amended to allow all parties to agree an extension of time for issuing a judicial review claim.
- R9. On lodging N461 and N462 with the court, service on the other parties could be required to be as soon as practicable with the expectation being service on the same day as lodging.
- R10. The online system currently used for tracking the progress of Court of Appeal cases could be extended to include judicial review cases.

Chapter 3: Pleadings and court papers

- R11. The following procedural changes could be made: (1) summary grounds of resistance renamed the "Permission Points Document". (2) N462 warning that only permission stage points should be made. (3) N461 and N462 and grant of permission indicating whether the case is a "Composite Pleading Case". (4) Claimant permitted to submit a brief reply within 7 days of receipt of N462. (5) Standard skeleton front-sheet identifying (a) bundles (b) pre-reading and (c) hearing timetable. (6) The time frame for skeletons being 21 days and 14 days.

R12. The following bundling practices could be adopted: (1) an agreed core bundle (retaining the pagination from the main bundles) wherever there are already 3 or more lever-arch files. Also: (2) all bundles copied double-sided in full-width lever-arch files with spare tabs if spare capacity; (3) all papers to be lodged once only, paginated (except for authorities) sequentially to continue on from the documents previously lodged; (4) claimant's essential permission reading to be in the first permission bundle.

R13. At all hearings, it could be the responsibility of represented parties to note the Judge's order, draft the order and submit it promptly to the court.

Chapter 4: The permission stage

R14. Form N462 could include prompt-boxes: (a) "I do not oppose permission"; (b) "If permission is granted the following directions are sought".

R15. The ACO could immediately and administratively grant permission where no party resists it.

R16. Form N462 could require the defendant's or interested party's legal representative to certify that the duty of candour has been complied with.

R17. Form N462 could contain a note reminding defendants and interested parties that they should identify any need for an extended time-frame (beyond 35 days) for Detailed Grounds and evidence, if permission is granted.

R18. At the oral permission stage: (a) parties could be required to email (or phone) an acknowledgment of notification of an oral permission hearing; (b) the ACO could routinely give time markings; (c) a taping-only system could be used for ex tempore judgments.

R19. Directions made when permission is granted could include a direction requiring the parties to lodge an agreed time estimate and hearing timetable.

Chapter 5: The substantive stage

R20. As to paper substantive determination (CPR 54.18): (a) Forms N461 and N462 could prompt an indication of suitability; (b) the grant of permission could indicate suitability.

R21. "Leapfrog" appeal to the Supreme Court could be made easier in accordance with the Government's 2013/2014 proposals.

R22. Claimants could be permitted to invite the Admin Court to grant permission, dismiss the substantive application, and grant permission to appeal to the Court of Appeal.

R23. Where a junior representative has been involved and deserves recognition, but is absent on cost-saving grounds, the lead advocate could record their name on the attendance slip.

Chapter 6: Costs

R24. A judge granting permission could ordinarily order “claimant’s costs in the case”.

R25. Costs of permission hearings could even-handedly follow the event, being recoverable by whoever succeeds as to whether permission should be granted.

Single judges in place of Divisional Courts

- 1.1. Certain judicial review claims are heard by a two-judge 'Divisional Court' (DC), normally comprising one Lord Justice of Appeal (or sometimes the Lord Chief Justice or President of the Queen's Bench Division) and a High Court judge. The Senior Courts Act 1981 permits any jurisdiction of the High Court to be exercised by a single judge, except insofar as statute or rules of court require a DC (ss.19(3), 66). In practice, DCs are used to good effect for judicial reviews with a criminal flavour and certain other high-profile cases.
- 1.2. DCs have a distinguished history. Formerly, all judicial review (prerogative writ) claims were heard by 3-judge DCs, including applications for permission (leave). 1990 reforms allowed non-criminal cases to be heard by a specialist single High Court judge, and reduced DCs from 3 to 2 judges, *"to release judicial review from the stifling effect of being confined to an overburdened Divisional Court ... but without losing the benefits of the great experience and consistency of approach which that confinement achieved"*.¹³ Criminal cases were regarded as distinct because of restricted appeal rights to the Court of Appeal in a *"criminal cause or matter"*. However, the Access to Justice Act 1999 extended the same approach to criminal cases, *"to ensure that the most appropriate use could be made of judicial resources"*,¹⁴ after Lord Woolf's recommendation that *"all cases of judicial review should be heard by a single judge unless there are exceptional circumstances"*.¹⁵
- 1.3. We are not at all against DCs or their retention. A multiple-judge court can allow a case to be decided more effectively, and speedily, no doubt with a division of labour in judgment-writing. However, if there is a desire for streamlining and cost-saving, we think that, consistently with the rule of law, many cases previously heard by DCs could be heard instead by a single judge. We also think it makes sense to use a single Lord Justice (Court of Appeal judge, sitting in the Admin Court) where DCs have been used, securing appropriate seniority whilst liberating the single High Court judge who would also have sat in the case to deal with another hearing. We do not support scrapping DCs altogether, but we do think they can be used sparingly, and that the use of a single Lord Justice is an idea worth promoting.

Recommendations

R1. Admin Court judges could be asked to sit 4+ weeks per term in the Admin Court.

R2. Deputies could be bookable in single-day slots, and could be used for paper-substantive decisions under CPR 54.18.

R3. The Admin Court Office (ACO) lawyers could allocate cases with similar subject-matter or raising similar issues for the same judge.

R4. There could be published target time-frames for (a) paper permission decisions (b) oral permission hearings and (c) substantive hearings.

R5. Cases could be allocated to regional Admin Court centres, to secure earlier hearings.

R6. Substantive hearings could be listed before the judge who granted permission.

¹³ Lord Woolf, "Judicial review: a possible programme for reform" [1992] PL 221 at p. 224.

¹⁴ Explanatory Notes to the Act, §212.

¹⁵ "Access to Justice – Final Report", 1996, Ch 18, §24.

Longer periods of sitting in the Admin Court

- 1.4. The Bowman reforms of 2000 saw the Crown Office List of the Queen's Bench Division replaced by a new specialist Admin Court, with dedicated judicial resources to hear public law cases and a dedicated office to administer them, to bring greater consistency, efficiency and speed by using expert judges in a specialised area of law.¹⁶ Bowman saw the Admin Court becoming a specialised court like the Commercial Court, with judges sitting for longer periods in the jurisdiction.¹⁷ Bowman recommended that existing nominated judges willing to do so should sit in the Admin Court for at least half a term at a time, and future nominated judges should be selected on the basis that they would spend half their time on Admin Court work. In the longer term, it was suggested that nominated judges might spend two thirds of the year in the court. If anything, however, the practice has gone the other way. There is a large body of nominated judges, who tend to sit in short stints. Perhaps the relentless volume of immigration and asylum work (now transferred to the Upper Tribunal) affected what was considered manageable. High Court judges are, of course, needed for other work and in other places. Moreover, we can see that exposing them to some Admin Court work ensures that judges later promoted to the Court of Appeal have sufficient public law experience. There is undoubtedly a balance to be struck. We think Bowman was right to see the virtues of specialism and longer stints in the Admin Court. Judges sitting for longer periods can bring greater consistency and efficiency. There is also the prospect of greater continuity (see §1.9): case-management may involve a judge retaining a case and fixing a date to deal with its next steps. If it is intended to streamline judicial review and save costs, we think longer stints could be pursued. We see no rule of law impediment. Admin Court judges could sit 4+ weeks per term in the Admin Court.

Use of Deputy High Court judges

- 1.5. The use of Deputy judges (appointed under section 9(1) and (4) of the Senior Courts Act 1981) in the Admin Court allows for valuable participation in the administration of public law justice by experienced senior practitioners and full-time judges sitting in other jurisdictions, easing the caseload burden on the full-time Admin Court judges and providing judicial and Admin Court experience. The Bowman Review recognised the contribution made by Deputy judges and recommended that the present practice for their deployment should be continued.¹⁸ A judicial working group said in 2007: *"For constitutional reasons, some claims for judicial review should be heard by full High Court judges, for example if the defendant is a central government department. It is, however, we think, questionable whether this principle needs to extend to every routine claim where the nominal defendant is a Secretary of State and no point of general principle is raised"*.¹⁹ The general practice involves booking Deputies for a week at a time sitting in rooms at the Royal Courts of Justice. We think there could be greater use of booking Deputies in single-day slots. We also think that if paper-substantive decisions (in contested cases) under CPR 54.18 were to become more popular (see §§5.1-5.2), these could readily be allocated to Deputies. This would streamline judicial review, reducing the case-load burden and helping with urgent cases. It would fit with the working patterns of many practitioners who sit as Deputies and who are used to being booked for days at a time or working in their offices on papers.

¹⁶ "Review of the Crown Office List", March 2000, p. 18.

¹⁷ Ibid. pp. 51-55.

¹⁸ Ibid. p. 56.

¹⁹ "Justice Outside London", 2007, §43.

Allocation by subject-matter or issue

- 1.6. We think the Admin Court Office (ACO) lawyers rightly recognise that they can, consistently with the rule of law, allocate cases involving the same or a similar subject-matter or issue to the same judge. Familiarity with the relevant body of authority reduces pre-reading time. Experience with the issues promotes consistency and protects against points being overlooked. We think this is a practice which could be promoted further.

Adoption of target time-frames

- 1.7. The judicial review process may be undermined if it involves an unduly long wait, lack of certainty as to what to expect, and wide variability in the length of time taken. We think it could enhance the process and allow informed resource-allocation decisions if there were realistic, published targets (a) for the determination of paper permission decisions and (b) for the listing of oral hearings following a notice of renewal and (c) for the listing of non-expedited oral substantive hearings following the filing of the Detailed Grounds of Resistance.

Listing at regional centres for an earlier hearing

- 1.8. Until 2009, all judicial review claims were issued, and the vast majority heard, in the Royal Courts of Justice in London. After a 2007 judicial working group proposed that the Admin Court be 'regionalised', cases are now increasingly administered and determined regionally where appropriate. By securing regional hearings based on local connection, costs-savings can be made, especially if local lawyers are instructed. The research appears positive.²⁰ One practice which could be extended for greater streamlining and speed is transfer to a regional centre able to offer an earlier hearing date. We are aware of cases where this has happened. There may be a trade-off between additional costs and expense and an earlier resolution, and we think the onus should be on the parties and not the court to consider and canvas this option.

Same-judge substantive hearings

- 1.9. The two-stage procedure in judicial review can lead to a considerable duplication of judicial effort, where the judge who grants permission is at present generally not the judge who then conducts the substantive hearing. We think that, to streamline judicial review and save public money, substantive hearings could be listed before the judge who granted permission, where that judge is available. This already happens in some cases. Robust case-management directions, from a permission judge, are always helpful in securing streamlined proceedings. They do not depend on judicial continuity. We think a permission judge can properly address whether she or he is going to deal with the substantive hearing. A permission judge who is going to hear the substantive hearing will be able to give even more robust case-management directions, with hands-on directions as to what evidence and further written cases or submissions are needed by the Court, and with a streamlined time estimate for the substantive hearing. Even where it is not confirmed until later that the permission judge will be dealing with the substantive hearing, we think such continuity could produce savings on pre-reading and re-reading, could reduce the further materials that need to be produced, and could slim down the time estimate for the substantive hearing itself. That is especially so in an

²⁰ E.g. Sarah Nason and Maurice Sunkin, "The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law" (2013) 76 MLR 223.

expedited case. We can see no principled objection. The grant of permission indicates that the judge considers the claim to be arguable, without prejudging the matter or prejudicing the position of the defendant or any interested party that opposes the claim. We recognise that there are practical obstacles. The current approach to allocation and sitting periods means that it may not be clear when the judge who grants permission will next be sitting in the Admin Court and be available to conduct the substantive hearing. This proposal therefore ties in with our proposal regarding longer periods of sitting in the Admin Court (see §1.4). We do not suggest a rigid rule, as with the 'docket system'. That would not be appropriate, unless there were a full-time Admin Court with judges who are invariably able to see a case through from start to finish, as in the Commercial Court. We also recognise that such continuity is especially hard to achieve where Deputy judges are deployed. Our suggestion involves a working recognition that it is proper for the same judge to hear the substantive case as granted permission.

Same-judge renewal hearings

- 1.10. We have also considered the related suggestion of listing oral renewal hearings in front of the judge who refused permission on the papers.²¹ Again, this could in principle save on pre-reading / re-reading and shorten oral hearings, and it is possible that it might disincentivise inapt renewals. Our own view is that there are good reasons for the current practice. We do not consider that the savings of judicial time would justify a departure from the present position, in which claimants can appear in front of a second judge before their claim is knocked out at the permission stage.

Judicial review away from the Administrative Court

- 1.11. The Admin Court is not the only court or tribunal with a 'review' function. It is well-established that any appeal from a public authority 'on a point of law' introduces the grounds for judicial review. By creating such an appeal, Parliament was able successfully to reallocate most homelessness judicial review challenges to the county court.²² Since alternative remedies never exclude the Admin Court's jurisdiction, the courts are always able to regulate the extent to which the rule of law requires judicial review to be made available.²³ There are statutory arrangements under which the High Court's judicial review jurisdiction is itself treated as being transferred to the Upper Tribunal (UT), a specialist public law tribunal. We think the work that has recently been completed to transfer immigration and asylum judicial reviews to the UT, in order to reduce the Admin Court's workload, is not incompatible with the rule of law. However, we think any transfer of judicial review, to take the place of the High Court's jurisdiction, raises rule of law issues.
- 1.12. Judicial review is conducted in the High Court for very good reason. Although there is a place for 'tribunal review' and statutory appeals 'on a point of law', the preservation of the High Court and its judges as the forum for judicial review is a matter of constitutional importance. In principle, judicial review belongs in the High Court. We think the Government was right to recognise, having previously proposed that planning judicial reviews and statutory challenges

²¹ Cf. the position considered by the Court of Appeal in *Sengupta v Holmes* [2002] EWCA Civ 1104.

²² *Begum v Tower Hamlets LBC* [2003] UKHL 5 [2003] 2 AC 430 at §7 (Lord Bingham), §17 (Lord Hoffmann), §98 (Lord Millett).

²³ *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 at §51 (Baroness Hale), §89 (Lord Phillips), §122 (Lord Dyson).

would be transferred to a specialist planning court or tribunal²⁴ that these cases should in principle stay within the High Court.²⁵

- 1.13. As to another Government suggestion,²⁶ we doubt whether claims alleging breach of the public sector equality duty (PSED) under section 149 of the Equality Act 2010 could in any event sensibly be transferable to a specialist court or tribunal. That is because PSED breaches are *issues* that arise in a host of different public law contexts. We think it would be inefficient and cumbersome to ‘carve out’ particular *issues* for transfer to a specialist court or tribunal. As with a tribunal to deal with EU law issues, or HRA/ECHR issues, or procedural fairness issues, parallel proceedings on particular issues would we think lead to wasteful duplication of effort, with increased delay and cost.

²⁴ “Judicial Review – proposals for further reform”, September 2013, Chapter 3.

²⁵ “Judicial Review – proposals for further reform: the Government response”, February 2014, at §21.

²⁶ “Judicial Review – proposals for further reform”, September 2013, Chapter 6.

Unified procedural rules

- 2.1. The Admin Court hears many types of cases alongside judicial review, including statutory appeals, appeals by way of case stated, and applications for habeas corpus. It seems that the different sets of procedural rules dealing with these types of cases are a legacy of their historical development. The perpetuation of disparate rules does not, in principle, appear to be necessary. The Bowman Review of the Crown Office List considered a paper by Lord Justice Simon Brown²⁷ and concluded that habeas corpus should become an order available on an application for judicial review, though it considered that certain aspects of judicial review (permission, time limits and discretionary remedies) ought not to apply where habeas corpus is sought.²⁸ Unified rules are a big undertaking which may be felt to be an unnecessary drain on resources. However, in a review of streamlining and the Admin Court we think it important to record that consideration could be given to unifying the procedural rules relating to cases being heard by the Admin Court. In any event, we cannot see why the Admin Court rules should not at least be gathered together as one set of rules.

Standing to bring a claim

- 2.2. The ability to challenge the legality of the actions of public authorities is a fundamental component of the rule of law.²⁹ Judicial review is a construct of the common law and it is from the decisions of the courts that the key features of judicial review have emerged and evolved. The heritage of the common law had accommodated what Blackburn J described in *R v Surrey Justices* as the claimant who “comes forward as one of the general public having no particular interest in the matter”.³⁰ When Parliament gave judicial review a statutory overlay in section 31 of the Senior Courts Act 1981 (then the Supreme Court Act 1981), it provided that the High Court shall not grant leave to make an application for judicial review “unless it considers that the applicant has a sufficient interest in the matter to which the application relates”. Parliament did not require any particular interest, and recognised that it was the courts' function to calibrate the sufficiency of the interest.

Recommendations

R7. Consideration could be given to combining all Admin Court procedures into a single composite set of rules.

R8. CPR 54 could be amended to allow all parties to agree an extension of time for issuing a judicial review claim.

R9. On lodging N461 and N462 with the court, service on the other parties could be required to be as soon as practicable with the expectation being service on the same day as lodging.

R10. The online system currently used for tracking the progress of Court of Appeal cases could be extended to include judicial review cases.

²⁷ “Habeas corpus – a new chapter” [2000] PL 31.

²⁸ “Review of the Crown Office List”, March 2000, pp. 24-25.

²⁹ See the Introduction §§7-8.

³⁰ (1870) LR 5 QB 466, 473.

- 2.3. This was deliberate, as the history shows. The Law Commission, which had acknowledged in a 1971 working paper that in judicial review *“the remedies’ primary objective is not to assert private rights, but to have illegal public action and orders controlled by the court”*,³¹ explained in its 1976 report that *“the standing necessary to make an application for judicial review should be such interest as the Court considers sufficient in the matter to which the application relates”*.³² For a time, it was subsequently suggested that the test may need expansion. The JUSTICE-All Souls 1988 report recommended that section 31 should be amended so as to expressly allow for judicial review claims that are *“justifiable in the public interest in the circumstances of the case”*.³³ The Law Commission’s 1994 report suggested two criteria that *“the applicant has been or would be adversely affected, or the High Court considers that it is in the public interest for the applicant to make the application”*.³⁴ Lord Woolf’s 1996 report *“Access to Justice”* agreed.³⁵ The Bowman Review of the Crown Office List concluded that the approach to *“sufficient interest”* had already developed to achieve this, that *“a substantial change in wording might result in unnecessary litigation”*, but there should be a presumption in favour of standing.³⁶
- 2.4. In its 2013 consultation, the Government consulted on a modified test of standing, so as to exclude those not having a direct interest, and guard against what were described as publicity-seeking uses of judicial review.³⁷ But as the senior judiciary noted in their response: *“Any consideration of a new test of standing must address head-on the effect this may have on the rule of law. The consultation paper fails to do so.”*³⁸ As at February 2014, the Government had withdrawn the proposals on standing.³⁹
- 2.5. In our view, the courts’ approach to sufficient interest reflects the rule of law, and the rule of law requires that the courts are able to regulate the sufficiency of the interest which a claimant for judicial review needs. The courts have acknowledged that *“protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court”*.⁴⁰ The test of *“sufficient interest”* reflects the necessary flexibility to enable the courts to vindicate the rule of law while enabling them to guard against mere ‘busybodies’ or individuals or groups abusing the process of judicial review. We think new restrictions on the test for standing, or curtailment of the courts’ ability to calibrate the appropriate sufficiency of interest, would be inconsistent with the rule of law. They would inevitably mean, in some cases where no directly affected party is willing or able to challenge an unlawful decision, and in others where the unlawful decision affects everyone equally but no-one *“directly”*, that unlawful decisions would become immune from scrutiny in the courts.

³¹ *“Working Paper No 40: Remedies in Administrative Law”*, 11 October 1971, §74.

³² *“Report on Remedies in Administrative Law”* (Law Com No 73), March 1976, §48.

³³ *“Administrative Justice: Some Necessary Reforms”*, §8.62.

³⁴ *“Administrative Law: Judicial Review and Statutory Appeals”* (Law Com No 226), §5.22

³⁵ *“Access to Justice – Final Report”*, 1996, Ch 18, §20.

³⁶ *“Review of the Crown Office List”*, March 2000, pp. 72-73.

³⁷ *“Judicial Review – proposals for further reform”*, September 2013, Chapter 4.

³⁸ *“Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’*, 1 November 2013, at §16. The response is available at

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf> (last viewed 17 February 2014).

³⁹ *“Judicial Review – proposals for further reform: the Government response”*, February 2014, at §35.

⁴⁰ *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [2012] 1 AC 868 at §170 (Lord Reed).

Agreed extension of time for filing a claim

- 2.6. CPR 54.5(2) provides that an extension of time for filing a claim for judicial review *cannot* be agreed between the parties. This rule reflects the idea that it is the Court who has and retains control of the proceedings, and not the parties. That is appropriate in public law, given the wider public interest and the effect on third parties. We would not disagree with any of that. However, the inability to agree that time should be extended has led to a practice in which potential defendants and interested parties ‘agree not to take a time point’. That will reassure some claimants some of the time. Others will issue claims protectively, to guard against the risk of the court (in controlling the proceedings) refusing to extend time. This can involve unnecessary costs being incurred, in circumstances where some step is awaited that could obviate the need for the proceedings. We think the informal practice of ‘agreeing not to take a time point’ could be regularised by following the logic through, and allowing the relevant parties to agree that they will consent to an extension of time, should judicial review later become necessary. We recognise that parties would need to be careful, as at present with ‘agreement not to take a time point’, to identify those who are “directly affected” by the claim.⁴¹ But we do not think it would be incompatible with the rule of law if all parties to proposed judicial review proceedings, including defendants and interested parties, were permitted to agree that an extension of time is appropriate.

Immediate service

- 2.7. The current rule is that the claim form must be served on the defendant and any interested party within 7 days after the date of issue (CPR 54.7). A similar time-frame applies to service of the acknowledgment of service (CPR 54.8). We think these rules could be amended so as to require service as soon as practicable after the claim is issued, with the expectation being for service on the same day wherever possible. In most cases, the claimant will have been in email correspondence with the defendant prior to the issue of proceedings. Where this is the position, there is no practical reason why the claim cannot be served by email on the same day as it is issued. The advantage would be that the defendant would receive the claim up to 7 days earlier than at present, and so the whole timetable of the proceedings could be brought forward by a week, resulting in cases being determined more quickly. The same would apply to the service of the Acknowledgement of Service (AOS).

Online case monitoring system

- 2.8. We think it would be beneficial if the online system currently used for tracking the progress of Court of Appeal cases were extended to include judicial review cases. This would enable litigants to check progress without the need to call the often over-burdened Admin Court Office (ACO). It would be particularly useful for those who have to defend a substantial volume of cases, all of which are at different stages in the court process and often in different courts. Such a development could also form the basis of a platform for greater automation of the file-handling processes in the ACO, and possible integration with case management systems through use of internet technologies such as RSS.

⁴¹ *R v Rent Officer Service, ex p Muldoon* [1996] 1 WLR 1103.

Permission Points Document

- 3.1. The Acknowledgement of Service (AOS) is intended to ensure that the permission judge is in a “properly informed position to decide the issue of arguability”⁴² and other permission-stage issues. We think it is wasteful and inefficient when defendants and interested parties wrongly (a) think they should summarise (in detail or at all) the case they will advance if permission were granted, or (b) fail to deal with matters like expedition and case-management directions. We think it would be better if the “Summary Grounds of Resistance” were renamed a “Permission Points Document”, and that the AOS form should contain a note: “The sole function of N462 (and the PPD) is to make such points as will assist the court in considering (a) whether, and on what grounds, to grant permission and (b) what directions to make if it does so.”

Composite Pleading Cases

- 3.2. We think there are cases in which a streamlined approach could be adopted, whereby (a) the Claimant lodges a single “grounds for judicial review” document to stand as their skeleton argument and (b) a defendant (or interested party) lodges a single “Detailed Grounds” to stand as their skeleton argument. The parties or the permission judge could take the initiative in having the case recognised as a “Composite Pleading Case”. This could save time and costs in urgent or straightforward cases. If any new or reply point arises, it could be included in a brief supplementary skeleton lodged in accordance with an identified timetable.

Recommendations

R11. The following procedural changes could be made: (1) summary grounds of resistance renamed the “Permission Points Document”. (2) N462 warning that only permission stage points should be made. (3) N461 and N462 and grant of permission indicating whether the case is a “Composite Pleading Case”. (4) Claimant permitted to submit a brief reply within 7 days of receipt of N462. (5) Standard skeleton front-sheet identifying (a) bundles (b) pre-reading and (c) hearing timetable. (6) The time frame for skeletons being 21 days and 14 days.

R12. The following bundling practices could be adopted: (1) an agreed core bundle (retaining the pagination from the main bundles) wherever there are already 3 or more lever-arch files. Also: (2) all bundles copied double-sided in full-width lever-arch files with spare tabs if spare capacity; (3) all papers to be lodged once only, paginated (except for authorities) sequentially to continue on from the documents previously lodged; (4) claimant’s essential permission reading to be in the first permission bundle.

R13. At all hearings, it could be the responsibility of represented parties to note the Judge’s order, draft the order and submit it promptly to the court.

⁴² R (Jasbir Singh) v SSHD [2013] EWHC 2873 (Admin) at §6 (Hickinbottom J).

Permission reply

- 3.3. At present the procedural rules are silent on whether the claimant is entitled to lodge a reply to the AOS and Summary Grounds. The same is true, post-permission, regarding a reply to the Detailed Grounds of Resistance, though many permission judges give a direction for this. It is not uncommon for claimants to lodge permission-stage replies, to respond to particular arguments put forward by the defendant/interested party. Often points will have been raised against the claimant in the Summary Grounds which he has not had the opportunity to address in the claim form, such as a suggestion that the claim has been brought out of time or is academic. Such a reply can assist the permission judge in knowing whether the claimant has a crisp answer in the light of what the defendant/interested party has said (or not said). Generally, a permission reply if lodged will be included with the papers for the paper permission judge, and judges will read and consider what has been submitted. We think that it could provide helpful clarity for all parties if the procedural position were regularised, by formally giving the claimant an opportunity to submit a short reply within 7 days of receiving the AOS, to be placed with the papers for the permission judge.

Skeleton front sheets

- 3.4. We think the Admin Court could use a standard form front sheet for skeletons,⁴³ to promote efficiency of presentation. Using a front sheet would assist the court to prepare efficiently and more speedily, prompting: (a) identified sections of the claimant's Statement of Facts and Grounds / defendant's Detailed Grounds of Resistance incorporated by reference; (b) what bundles the court should have; (c) essential reading; and (d) timetabled time-estimates for the hearing.

Clarified skeleton timings

- 3.5. The time limits for substantive hearing skeletons are stipulated in CPR 54PD as 21 "working" days and 14 "working" days. We suspect that this was accidental. Frequently, judges who grant permission will direct instead "21 days" and "14 days". We suggest that the time-frame for skeletons could be clarified to 21 days (i.e. 15 working days) for the claimant and 14 days (i.e. 10 working days) for defendants and interested parties.

Core bundles

- 3.6. We think the most helpful universal practice which could be introduced as regards bundles concerns the use of agreed core bundles. Wherever there are 3 or more lever-arch files (including authorities), we think the parties should liaise and agree a core bundle to include the most important items. Original pagination should be retained, and the index should clearly indicate the origin of materials. If, therefore, a skeleton argument has been drafted with cross-references to pages within a bundle, the court can readily see from the index whether that item is found within the core bundle. Core bundles lead to much more efficient judicial pre-reading and less time being spent at the hearing moving back and forth between bundles.

⁴³ A draft template is annexed to this report as Annex C.

Other bundling issues

- 3.7. We think there are other practice rules which could be used in the Admin Court to reduce the volume and duplication of paperwork, make judicial pre-reading easier and improve the efficient conduct of hearings. We recognise that nobody will ever agree on the best format, which means pleasing everyone all the time is quite impossible. On the other hand, since there is no universally-favoured way, no practice and no bundle can make every recipient happy. We will identify our favoured suggestions. *Double-sided copying* (used in the Supreme Court) halves the volume of papers, the number of files and the number of times one has to put down one bundle and pick up another. It should now be standard. *Use of full-width lever-arch files* (not used in the Supreme Court) means more materials per file and allows spare space to be used for subsequent materials, avoiding the need for yet another file. *Sequentially-paginated, non-duplicative bundling* would mean all papers being lodged once only, paginated sequentially to continue on from the documents previously lodged. So, if the claimant's permission bundle runs from pp.1-500, the defendant's Form N462 would begin as p.501. Then a grant of permission might be p.525 and the defendant's Detailed Grounds and evidence would begin as p.526, and so on. Papers would have a master pagination from the start which can be retained, and to which witness statements, grounds and skeletons can refer (with references which make sense when read for the substantive hearing). Papers need not wastefully be recopied and replaced. Authorities bundles need not be separately paginated. A claim lodged with more than one lever-arch file, should so far as possible have the essential reading in the first bundle ("Bundle A"). We also think consideration could usefully be given to setting up an electronic facility for uploading skeleton arguments to a website, accessible by case number, so that a judge can check what skeleton arguments may have gone astray.

Responsibility for drafting the order

- 3.8. We think the time has come to recognise that, where parties are represented, the court and court staff should be able to rely on the representatives in court to note the Judge's order, raise any query at the time with the Judge, then leave court and promptly draft the order, agreeing its contents and emailing it back to the court. Judges often ask the parties to have conduct of the drafting of the order in this way. A new and clearly understood practice would place this practice on a secure footing, avoiding the problems which can arise after the event where queries arise about the precise terms of the order, by which time memories have faded.

Conceding permission

- 4.1. Some defendants and interested parties use the Acknowledgment of Service (AOS) to concede permission in an appropriate case, accepting that there is an arguable case and no procedural bar. This is good practice and is to be encouraged. It saves time and public money, allows permission to be dealt with more promptly and efficiently, allowing earlier substantive resolution. One of the functions of the AOS is to acknowledge that permission is appropriate, and invite directions. Too frequently, however, this is overlooked. Where permission is resisted for good reason, its refusal weeds out non-viable claims and saves time and public money overall. But permission is routinely resisted when defendants and interested parties – familiar with the claim – are well able to see that there is no knock-out blow. It is perceived that there is little to lose, in effectively taking a ‘free shot’ at striking the case out. Inappropriate routine resistance of permission leads to additional cost and delay, the drafting of unsuccessful grounds of resistance, unnecessary court time in assessing permission, inapt paper refusals and unnecessary oral renewal hearings. We think more could be done (see R14) to prompt and focus the minds of defendants and interested parties on resisting permission only where they it is appropriate, to speed up the process, and to incentivise good practice with appropriate costs orders (see R25).

Administrative permission grant

- 4.2. As explained above, an important function of the AOS is for defendants and interested parties to act sensibly and acknowledge that permission should be granted, because a judicial review claim is properly arguable and there is no discretionary bar to permission. We have said we think the AOS form could include a prompting box for this. In a case where all parties who have been served accept that permission should be granted, we think the Admin Court Office (ACO) could be permitted to grant permission administratively. This would speed up the process, start time running for post-permission steps, and save time taken waiting for an available judge and in a judge considering the papers. In 1971, the Law Commission noted that where the defendant consents to permission being granted, “it seems something of a waste of time and money ... to have a

Recommendations

R14. Form N462 could include prompt-boxes: (a) “I do not oppose permission”; (b) “If permission is granted the following directions are sought”.

R15. The ACO could immediately and administratively grant permission where no party resists it.

R16. Form N462 could require the defendant’s or interested party’s legal representative to certify that the duty of candour has been complied with.

R17. Form N462 could contain a note reminding defendants and interested parties that they should identify any need for an extended time-frame (beyond 35 days) for Detailed Grounds and evidence, if permission is granted.

R18. At the oral permission stage: (a) parties could be required to email (or phone) an acknowledgment of notification of an oral permission hearing; (b) the ACO could routinely give time markings; (c) a taping-only system could be used for ex tempore judgments.

R19. Directions made when permission is granted could include a direction requiring the parties to lodge an agreed time estimate and hearing timetable.

formal hearing to obtain [permission]".⁴⁴ The Law Commission returned to the topic in 1994, noting that a majority of consultees were in favour of dispensing with the permission stage in such circumstances. However, the Law Commission agreed with the nominated judges that the court should always be satisfied that there is an appropriate issue for consideration by judicial review, and that the defendant's position should merely be a material factor to be taken into account by the court in this regard.⁴⁵ We think a more streamlined and speedier approach could properly be adopted, consistently with the rule of law. Administratively-granted permission could always be the subject of liberty to apply: for example if some person who was not served wishes to contend that there are reasons why permission was inapt and should be set aside. Where the parties are agreed as to directions, these could also be made administratively. Disagreements as to appropriate directions could be dealt with by putting the papers to a judge for that limited purpose.

Disclosure at permission stage

- 4.3. As Sir John Donaldson MR famously explained, judicial review is "*a process which falls to be conducted with all the cards facing upwards on the table.*"⁴⁶ The TSol Guidance describes that the duty of candour entails a duty of due diligence in searching for relevant documents.⁴⁷ Early candid disclosure of relevant documents respects the integrity of the legal process, allows an informed assessment of legal merits, promotes settlement, and avoids unnecessary costs. We think Form N462 could require legal representatives of defendants and interested parties – wherever resisting permission for judicial review – to certify compliance with the duty of candour, including the duty of due diligence. Where it is the case that the AOS is identifying some 'knock-out blow' which does not engage with questions of fact, so that evidential matters are not relevant, this could be explained in the summary grounds (permission points document) so that the basis for certification (or declining to provide it) is understood. Moreover, where evidence is disclosed with the Form N462 but could and should have been disclosed at the pre-action stage, courts could in an appropriate case in the exercise of their discretion and judgment disallow the costs of Form N462 even though permission is refused.

Detailed Grounds deadline

- 4.4. We understand that defendants and interested parties frequently encounter difficulties in complying with the 35 day post-permission time limit for filing their Detailed Grounds of Resistance and evidence (CPR 54.14), leading to the delay and cost of applications for extensions of time. Many cases settle immediately post-permission,⁴⁸ and it may be that allowing further time can be conducive to settlement. We think the answer is that defendants and interested parties could be expected to say in their Form N462 whether a longer time-frame is needed, so that a permission judge can address that question, after which the expectation should be that the timetable will be adhered to.

⁴⁴ "Remedies in Administrative Law", Working Paper No 40, 11 October 1971, at §100.

⁴⁵ "Administrative Law: Judicial Review and Statutory Appeals", Law Com No. 226, HC 669, 26 October 1994, at §5.37.

⁴⁶ *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 at 945.

⁴⁷ "Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings", 2010, at section 3.

⁴⁸ Varda Bondy and Maurice Sunkin, "The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing", available at <http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf> (last viewed on 17 February 2014).

Attendance at oral permission hearings

- 4.5. Oral permission hearings are intended to be brief, to enable the claimant to demonstrate the viability of the claim and see whether the defendant (or interested party) has a 'clean knock-out blow'. One way to keep hearings short and focused is to minimise the involvement of defendants and interested parties. We recognise that the Admin Court could, for example, mirror the Court of Appeal's practice where respondents attend and speak at oral permission to appeal hearings only at the court's invitation. However, we think the right of defendants and interested parties (who serve an AOS in time) to ensure an informed permission-stage court is valuable, as the Bowman Review recognised,⁴⁹ and can save costs and delay overall. Presence allows reaction to any evolving shape of the claim or concern raised by the judge, and may be conducive to settlement or an agreed way forward. We think robust case-management by the judge and appropriate costs orders are the way to ensure responsible and non-wasteful action.

Improving the efficiency of oral permission lists

- 4.6. **Verifiable oral permission hearing notification:** Oral permission hearings can be abortive if there is non-appearance by a party and it is difficult to confirm that they have received notification. To minimise the delay and cost of adjournments and applications to set aside orders made in a party's absence, we think there could be arrangements devised which require the parties to email (or phone-in) a verifiable acknowledgment of the oral permission hearing, within 48 hours of receipt, which could be checked by the ACO when papers are prepared for the judge and followed up by email to the email addresses given in Forms N461 and N462. We recognise this would place an additional administrative burden on the ACO, and would need to be resourced, so an assessment would be needed of the overall balance of cost and benefit.
- 4.7. **Oral permission time markings:** The general (but not universal) Admin Court practice is for all cases in an oral permission list to be listed at "not before 1030". This means everyone is expected to attend court at 1030 and await their turn. We appreciate why this is the practice. It ensures that the court and court staff are used efficiently, if the list collapses or speeds up (through withdrawals, consent orders or non-attendance). We understand the importance, from the court's point of view, of ensuring that there is always a case ready to be heard next. However, from the perspective of the parties, this practice can mean significant delay and costs for parties spending most of a day waiting for their case to be heard. Sometimes the court gives a time marking (e.g. "not before 2pm"). Some judges will give time markings the afternoon before the hearing, or release representatives on the day itself (though by then the costs of turning up at that time have been incurred). Our view is that time-markings are a good idea. We think, by way of illustration – a 9-case oral permission list could be marked "not before" (a) 1030 (cases 1-4), (b) 1200 (cases 5-6), and (c) 1400 (cases 7-9). Viewed in terms of costs, that would save some costs of attendance for a majority of listed cases, and halve the waiting costs of one-third of the cases.
- 4.8. **Use tapes, not shorthand writer:** At present, a shorthand writer is always in court for an oral permission list, ready to transcribe the judge's ex tempore ruling and reasons. We think a cost-saving option would be to consider using a taped system instead, as we understand is the practice in some regional Admin Courts. The taping system would need to be of sufficiently high quality, as it presumably is in those other courts. Parties would still apply, as at present, for

⁴⁹ "Review of the Crown Office List", March 2000, pp. 68-72.

their transcript to be typed up and approved on request. The same point applies to ex tempore judgments after a substantive hearing.

Timetabling directions

- 4.9. The Order granting permission will often (and in the case of paper permission almost invariably) include case management directions and listing directions. We think there is much to be said for using the permission-grant template for oral permissions, as for paper permissions, as it focuses attention on the question of case-management directions. Listing directions typically include a direction that the claim be listed for a certain length of hearing (say “1 day”) together with an indication that the parties should provide a written time estimate promptly, if they disagree with this direction. We think a ‘time estimate’ direction given by an informed permission judge is invaluable. We also think it is important that the parties have a continuing responsibility to alert the court promptly if the time estimate changes. We would add this. We think a timetabling direction could be given, so that 28 days prior to the hearing the parties must lodge an “agreed time estimate and hearing timetable”.⁵⁰ That would introduce discipline and focus, so that advocates think clearly about what time is really needed for oral submissions, and hearings are no longer than is truly necessary. Thus, instead of “2 days”, a time estimate might be revised to: “Overall: 1.5 days”. For a 1.5 day hearing, the timetable might be: “Claimant: 120 mins; Defendant: 120 mins; Reply: 45 mins”. Timetables focus the mind, and could save on court days and consequential lawyer/public authority employee expense. Advocates should be asking themselves: how long do I really need for my oral submissions? With the added discipline of timetabling, we think hearings can be more disciplined, easier to manage, and shorter: some 3 day cases will become 2 day cases, some 1.5 day cases will become 1 day cases, and so on. The hearing timetable should be revisited by the parties when lodging their skeleton arguments (see §3.4 and Annex C), so that the time-estimate and timetable is kept under ongoing review. A final agreed hearing timetable could be required to be lodged a few days before the hearing.

⁵⁰ See the template for a paper permission decision attached to this Report as Annex D.

Paper substantive determination

- 5.1. CPR 54.18 provides that the court may decide the substantive claim for judicial review without a hearing, where all the parties agree. Use of this mechanism could save considerable costs, securing a judgment on written submissions. We can think of many situations where this could be used to good effect, for example: (a) where public authorities (e.g. local authorities) are arguing about which of them has responsibility; (b) where the point is a short one and not conducive to elaborate argument; (c) where an appeal is inevitable but a view from the High Court would assist the appellate courts. However, CPR 54.18 is in practice rarely used.
- 5.2. We think much greater use could be made of this provision. This could be achieved by (1) prompting the parties by the Forms N461 and N462⁵¹ to address whether CPR 54.18 disposal is apt and giving a reason why not and (2) prompting the paper permission judge to indicate suitability of the case for paper disposal, and direct it subject to a party notifying the court of insistence on an oral hearing.⁵² We would not go so far as to suggest that the court ought to be able to impose paper determination on an unwilling party. However, as with issues such as ADR and time estimates, we think they could take a strong lead, without dictating. Moreover, unreasonable refusal to agree could in principle be a basis for refusing a costs order in favour of (or even making of a costs order against) a party who insisted on an oral hearing, even where they succeeded.

Speedier appeals

- 5.3. Situations can arise where a judicial review claim is bound to fail on the state of the law as it stands, but the issue raised merits consideration at a higher judicial level; or where, although there is no binding precedent for or against the claim, the case is plainly destined to reach the appellate courts. We recognise that appellate courts are assisted by judgments delivered by the courts below. However, that is not always essential, which is why the Court of Appeal not infrequently reserves to itself a substantive judicial review claim after allowing a permission appeal. We think that court time at the lower level can properly be saved, and the case more speedily and efficiently determined, by allowing cases to proceed straight to a higher level.

Recommendations

R20. *As to paper substantive determination (CPR 54.18): (a) Forms N461 and N462 could prompt an indication of suitability; (b) the grant of permission could indicate suitability.*

R21. *“Leapfrog” appeal to the Supreme Court could be made easier in accordance with the Government’s 2013/2014 proposals.*

R22. *Claimants could be permitted to invite the Admin Court to grant permission, dismiss the substantive application, and grant permission to appeal to the Court of Appeal.*

R23. *Where a junior representative has been involved and deserves recognition, but is absent on cost-saving grounds, the lead advocate could record their name on the attendance slip.*

⁵¹ New templates for Forms N461 and Form N462 are attached to this Report as Annexes A and B.

⁵² A new template for a paper permission decision is attached to this Report as Annex D.

- 5.4. **Leapfrog to the Supreme Court:** The Government made proposals in 2013 for widening the circumstances in which a “leapfrog” appeal can be made direct to the Supreme Court from the High Court, namely: (a) extending the conditions which must be met for an application to leapfrog to be allowed, so that any appeal which is of national importance or raises significant issues is eligible to leapfrog; (b) removing the requirement for all parties to consent to a leapfrog appeal; and (c) allowing a leapfrog appeal to be initiated in the Upper Tribunal, the Employment Appeals Tribunal and the Special Immigration Appeals Commission.⁵³ The Government confirmed in February 2014 its intention to proceed with these proposals.⁵⁴ We think these are sensible streamlining proposals, and that they are not inconsistent with the rule of law.
- 5.5. **Peremptory dismissal with PTA to the Court of Appeal:** We think another type of fast-tracking could be adopted in appropriate cases, by which the claimant could properly invite the Admin Court to grant permission and dismiss the substantive application, and grant permission to appeal, on grounds that (a) the case is plainly apt for the Court of Appeal and (b) the assistance to that court in having a judgment below is outweighed by the avoidable expense to the public purse. We see nothing in the rules or practice directions to prevent this course. The Court of Appeal may similarly grant permission to appeal but dismiss the substantive appeal so that the case can proceed on appeal.⁵⁵ Were peremptory dismissal entertained in the High Court for fast-tracking reasons, no doubt the views of the defendant and any interested party would be relevant; and no doubt brief reasons would be given. In principle, in some situations, the Admin Court could it seems to us raise of the judge’s own motion the possibility of peremptory-dismissal with PTA.

Modified ‘materiality’ test

- 5.6. Claims for judicial review often succeed on the basis of an error of approach, constituting unlawfulness at public law. This may be a procedural defect, or misdirection, or may be because something relevant has been left out of account, or something irrelevant taken into account. In these cases, the usual consequence is an order quashing the challenged decision and remitting the matter to the decision-maker for reconsideration. When the decision-maker reconsiders, there is generally nothing to prevent him or her from reaching the same decision again, this time after a proper procedure and legally correct approach. Under established principles of public law, the courts consider whether an error of procedure or approach was “material” in the sense that it could have affected the outcome. The courts apply carefully delineated principles to “materiality”. Among the leading cases on this topic was the judgment of Bingham LJ in *R v Chief Constable of Thames Valley, ex p Cotton*.⁵⁶ As with the other common law principles which calibrate the availability of judicial review, these are parameters which are carefully thought through by the courts, with the benefit of submissions on both sides, including public authority defendants. In general, the position is that, once it has found a decision to be flawed, a court will not refuse relief unless it is inevitable that the decision would have been the same even without the flaw. If, at the permission stage, it is already clear the flaw is immaterial in this sense, then permission can be refused.

⁵³ “Judicial Review – proposals for further reform”, September 2013, Chapter 8.

⁵⁴ “Judicial Review – proposals for further reform: the Government response”, February 2014, at §72, and the Criminal Justice and Courts Bill, clauses 32-35.

⁵⁵ *R v Director of Public Prosecutions, ex p Camelot Group Plc* (1998) 10 Admin LR 93 at 105E-F (Simon Brown LJ).

⁵⁶ [1990] IRLR 344

- 5.7. In its 2013 consultation, the Government consulted on options for modifying the ‘materiality’ test so that permission for judicial review would not be available where a procedural flaw was “highly unlikely” to have made a difference to the outcome.⁵⁷ The Government has recently announced that it intends to proceed with these reforms. If they are enacted, the court will have to refuse relief if it considers it “highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”.⁵⁸ Moreover, the court would be entitled, and on a request by the defendant required, to consider the matter at the permission stage.⁵⁹ We think these proposals are objectionable in principle. In our view, there are constitutional objections in dictating to courts that they should condone what they assess to be a material public law unlawfulness. The courts’ careful calibration of the ‘materiality’ principle involves asking whether “the decision would inevitably have been the same”, and there are reasons of principle why “the court should be wary of refusing relief on the grounds that the decision-making body would reach the same decision if it were to act lawfully”, remembering always the importance of “the maintenance of the rule of law itself and the constitutional protection afforded by judicial review”.⁶⁰ Further, judicial review is a supervisory jurisdiction, and the court does not step into the shoes of the decision-maker and assess the merits, still less speculate as to how the merits would be ‘likely’ – or ‘very likely’ – to be assessed. Nor would a court receive evidence from a decision-maker as to what they ‘would do if the decision were reconsidered’. It is always open to a decision-maker to reconsider afresh, but nothing less will do.
- 5.8. As to the practicalities, as the senior judiciary noted in their response to the consultation, the new permission-stage obligation envisaged by the Government regarding a “no difference” test “would necessarily entail greater consideration of the facts, greater (early) work for defendants, and the prospect of dress rehearsal permission hearings”.⁶¹ The proposal thus stands to elongate and complicate the permission stage, by encouraging defendants to file lengthy and detailed evidence, with consequent delay and increased cost to all parties. We agree, and note that the Government provided no answer to this point in its February 2014 response.

Recognising a non-attending advocate

- 5.9. We think there are occasions where advocates can be in an awkward and rather invidious position where (a) a junior advocate deserves recognition for their work on the case but (b) their absence for all or part of the hearing would be a sensible saving of public funds which should be encouraged. We think there is a ready solution. A lead advocate should be able to write on the court ‘attendance slip’ the name of the junior advocate: “X (but not present)”. By doing so, the lead advocate is to understand that they are certifying that the junior has played a very significant role and is absent for the purposes of saving costs. In such circumstances, the named junior should appear on the judgment notwithstanding their absence.

⁵⁷ “Judicial Review – proposals for further reform”, September 2013, Chapter 5.

⁵⁸ Clause 50(1) of the Criminal Justice and Courts Bill.

⁵⁹ Clause 50(2).

⁶⁰ *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 at §§42-44 (Lord Dyson MR).

⁶¹ “Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’”, 1 November 2013, at §21.

Costs at the permission stage

- 6.1. The threat of an adverse costs order is capable of providing a powerful incentive to claimants. At present, the threat of a costs order of unknown quantum is present in all cases, apart from those in which the claimant benefits from public funding with a nil contribution and those where there is a protective costs order. Special considerations apply in environmental (Aarhus Convention) claims. In general, a major part of the justification for costs sanctions against unsuccessful claimants is that they deter claimants from bringing claims in whose merits they are not confident. This helps to reduce the number of cases in the Admin Court's list, thereby reducing the time taken to deal with other cases.
- 6.2. It is striking, however, that the same logic has not been applied to the incentives operating on defendants. Experience suggests that defendants frequently give no real thought to the question whether to resist permission (see §4.1). There is at present no real reason not to resist permission. There is always a chance (even if only a small one) that the judge may refuse permission; and, even if permission is granted, the defendant will not have lost anything by "having a go". So defendants regularly resist permission even in cases where a sober assessment would suggest it is likely to be granted. The consequences of this are twofold: first, these cases take longer to proceed to a substantive hearing than they need to; secondly, court time is taken considering and rejecting the defendant's arguments against permission, leading to unnecessary delays in other cases. We consider that courts would be justified in looking again at the practice regarding costs orders and defendants (and interested parties), to ensure that the approach to costs properly concentrates the minds of defendants' (and interested parties') lawyers and discourage them from reflexively resisting permission.
- 6.3. We think that, in a case where a defendant or interested party unsuccessfully resists permission, the permission judge could make an order which disqualifies the defendant or interested party from recovering their permission-stage costs – in practice, the costs of preparing the Acknowledgement of Service (AOS) and Summary Grounds – even if the claim ultimately fails, rather than leaving that issues to the judge at the substantive hearing.⁶² In our view, is difficult to argue against the permission judge making such an order. If the defendant or interested party chooses to argue that permission should be refused, and the court nonetheless grants permission, we see no good reason why its costs of resisting permission should later be paid by the claimant. This would not require any rule change, and should be left to be addressed by the courts. Some judges already reflect this practice, by ordering that permission-stage costs are "claimant's costs in the case". That would, we think, suitably incentivize an approach to litigation which promotes streamlining and cost-saving. We would not go further and suggest that claimants ought to recover a portion of the costs of lodging the claim, wherever permission

Recommendations

R24. A judge granting permission could ordinarily order "claimant's costs in the case".

R25. Costs of permission hearings could even-handedly follow the event, being recoverable by whoever succeeds as to whether permission should be granted.

⁶² R (Davey) v Aylesbury Vale District Council [2007] EWCA Civ 1166 [2008] 1 WLR 878 at §5 (Sedley LJ).

is unsuccessfully resisted, and irrespective of success at the end of the claim. That would involve a defendant or interested party paying costs in respect of the issuing of a claim which was not well-founded.

- 6.4. Different considerations apply to the costs of an oral permission hearing. An oral permission hearing normally follows a refusal of permission on paper, or an adjournment into open court by a paper judge. The fact that permission is refused on paper or adjourned into open court does not, in our view, of itself justify the ongoing resistance of permission. The defendant or interested party is responsible for their decision whether to resist, and maintain their resistance. We do not think that a defendant or interested party who unsuccessfully contests an oral permission hearing should be in any better position than one who applies unsuccessfully for summary judgment: both have caused the court to hold a hearing which has turned out to be unnecessary. The costs of the hearing are the direct consequence of the defendant/ interested party choosing to resist permission. The sanction in both cases should in principle be the same: the defendant should normally pay the claimant's costs of the hearing. This would not in our view require any rule change. It is a course which the courts would be entitled to adopt, as being correct in principle.
- 6.5. However, if our logic about the oral hearing costs is correct in principle, then we think that the corollary is also right. Claimants must bear equivalent responsibility for continuing to maintain that their claim is properly arguable. We think it can properly be said, on an even playing-field basis, that claimants should also generally pay the costs of an unsuccessful permission hearing. This would require a change to the present practice, under which costs orders against unsuccessful claimants do not normally include the costs of attending a permission hearing (as distinct from the costs of the AOS and Summary Grounds).⁶³ In short, we think the courts would be entitled – consistently with the rule of law – to exercise their costs powers to avoid permission and permission hearings being a 'free ride'. By deterring the over-enthusiastic resistance, and pursuit, of permission, judicial review could be streamlined, with an overall saving of time and cost.
- 6.6. The Government has recognised the good sense of *half* of what we suggest above (§6.5). Strikingly, it is the half which would serve the interests of defendant public authorities. In its 2013 consultation, Government proposed that an unsuccessful claimant should usually be ordered to pay the defendant's costs of preparation for and representation at the renewal hearing, but that a successful claimant should only get an order of "costs in the cause".⁶⁴ That position has been maintained.⁶⁵ The Government's failure to accept the overall logic (i.e. §6.4) is disappointing. We think even-handedness is essential. We agree with the senior judiciary's consultation response: "*To the extent that the government intends to discourage the bringing of weak claims by the readier grant of costs against unsuccessful claimants, discouragement of defendants from delaying the progression of hearings by unsuccessfully opposing the grant of permission should be an equal consideration*".⁶⁶

⁶³ Practice Direction 54A, §8.6.

⁶⁴ "Judicial Review – proposals for further reform", September 2013, at §§139-140.

⁶⁵ "Judicial Review – proposals for further reform: the Government response", February 2014, at §§49-50.

⁶⁶ "Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'", 1 November 2013, at §29.

Protective costs orders (PCOs)

- 6.7. Parliament has enacted broad statutory provisions in relation to costs. The courts approach questions of costs in public law having regard to the interests of justice and the public interest. Skilled Government lawyers are always on hand to assist the court with submissions as to why and how the approach to costs should strike a principled balance. PCOs in public law cases make an important contribution to the rule of law by improving access to justice in circumstances where a legally meritorious claim would otherwise be stifled by the risk of exposure to uncertain and potentially large costs. This is recognised by the courts, which have developed and delineated the governing principles, by reference to what is necessary and appropriate in the public interest.
- 6.8. A prohibition or curtailment of PCOs would doubtless reduce the number of claims for judicial review, though statistics suggest only a small number of PCOs is granted (especially outside environmental law where international law obligations require them).⁶⁷ Prohibition or curtailment could save some public money and could speed up the resolution of other claims. That is because PCOs are designed to be available only where, without them, a claim could not and would not proceed. In our view, however, such a prohibition or curtailment could not be consistent with the rule of law. That is because the conditions for PCOs identified by the Court of Appeal in *Corner House* include that (a) the issues raised in the case are of general public importance; and (b) the public interest requires that those issues should be resolved.⁶⁸ For such claims to be stifled where a PCO would enable them to be heard would be contrary to the courts' view of what the rule of law requires.
- 6.9. Certainly, it is appropriate for the governing principles for PCOs to be developed and refined, and for the Government to assist in that enterprise. But the proper forum for that, under the rule of law, is in the courts. It could not be consistent with the rule of law for the Government to insulate itself from effective challenge by promoting restrictive rules which it has failed to persuade the courts to adopt. The position is well illustrated by the condition suggested by the Government's 2013 consultation, that the PCO claimant should have 'no private interest in the outcome'.⁶⁹ That factor has been recognised as a flexible element of PCOs: see *Wilkinson v Kitzinger*⁷⁰ and the Working Group on Facilitating Public Interest Litigation (chaired by Sir Maurice Kay).⁷¹ The same is true for questions relating to cost caps and their reciprocity. Such matters are for the courts to resolve, under the rule of law.
- 6.10. As the senior judiciary put it in their response to the consultation: *"To the extent that PCOs are made, they function to protect access to justice. A body of rules and guidance on their application has been developed by the judiciary seeking to strike a balance between fairness to the defendant, the potential costs to the taxpayer, and the public interest in cases being brought. We would be concerned if this careful balance were to be undermined by rule change."*⁷² The

⁶⁷ Varda Bondy and Maurice Sunkin, "How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform'" (26 October 2013) (available at <http://ukconstitutionallaw.org/2013/10/25/var-da-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-propos-als-for-further-reform/> - last viewed 16 February 2014) which provides that out of 502 cases surveyed overall, only 3 PCOs were granted in a non-environmental context.

⁶⁸ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [2005] 1 WLR 2600 at §74 (Lord Phillips MR giving the judgment of the Court of Appeal).

⁶⁹ "Judicial Review – proposals for further reform", September 2013, at §162.

⁷⁰ [2006] EWHC 835 (Fam) [2007] 1 FLR 295.

⁷¹ "Litigating the Public Interest", July 2006, at §§77-85.

⁷² "Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial review: Proposals for Further Reform'", 1 November 2013, at §33.

Government's current intention to ossify the PCO rules in primary legislation⁷³ is unnecessary and unwelcome, as it stands to prevent further development and refinement by the courts on a case by case basis, in accordance with the rule of law.

- 6.11. The specific proposal that PCOs should be available *only after the grant of permission*⁷⁴ represents, in our view, a serious threat to the rule of law. The whole point of a PCO is that it is needed where a cost-deterrent will prevent a claimant from *commencing* a claim which it is in the interests of justice and the public interest should be entertained. In the case-law on PCOs, the courts have recognized this. Once it is recognized that PCOs have an important role to play in the public interest, it cannot be right in principle then to undermine their practical utility.

Wasted costs

- 6.12. The courts have powers to make wasted costs orders where the conduct of the legal representatives, whether barristers or solicitors, justifies a costs penalty against them. In empowering the courts to make such orders, Parliament by section 51(7) of the Senior Courts Act 1981 required "improper, unreasonable or negligent" acts or omissions. The courts have explained the principled approach, as to substance and process. We find it impossible to envisage that wasted costs orders could be considered appropriate in respect of "proper", "reasonable" and "non-negligent" acts or omissions, or to envisage justifiable interference with the courts' approach to applicable standards of procedural fairness. We think the room for judicial latitude and judgment is necessary for a principled approach under the rule of law, and we welcome the Government's decision not to amend the existing test for wasted costs.⁷⁵

Interveners and costs

- 6.13. The judicial review court has (CPR 54.17) "power to hear any person". The position of interveners was examined by JUSTICE in its report "To Assist the Court", and is well recognised,⁷⁶ as is the need for interveners to act in a disciplined way: see Supreme Court Practice Direction §8.8.2. The courts plainly regard it as being of great value to the rule of law that they can accept, and regulate the receipt of, submissions and materials provided by a person who is not a principal party. If interveners are deterred from being able to assist, the rule of law is undermined. It is no surprise that the senior judiciary have urged that "[c]aution should be adopted in relation to any change which may discourage interventions which are of benefit to the court".⁷⁷ The rules and principles which govern interventions – including the principle that interveners normally bear their own costs and are not liable for other parties' costs unless they behave unreasonably – strike a careful and informed balance, in the public interest. The Government subsequently acknowledged that interveners "can add value", yet maintained that it was right to promote primary legislation to require the court, absent "exceptional circumstances", to order an intervener who has applied for permission to intervene

⁷³ "Judicial Review – proposals for further reform: the Government response", February 2014, at §58; Criminal Justice and Courts Bill, clauses 54-56.

⁷⁴ Criminal Justice and Courts Bill, clause 54(3).

⁷⁵ "Judicial Review – proposals for further reform: the Government response", February 2014, at §53.

⁷⁶ See for example, Lady Hale's speech "Who Guards the Guardians", delivered at the Public Law Project Conference, Judicial Review Trends and Forecasts, 14 October 2013 and may be accessed at <http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians> (Last viewed 17th February 2014).

⁷⁷ "Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'", 1 November 2013, at §37.

(as distinct from being requested to intervene by the court) to pay any costs incurred by a party as a result of the intervener's involvement.⁷⁸

- 6.14. It appears from the 2014 draft Bill that an intervener (e.g. a small charity with particular expertise in the subject under consideration by the court) would end up ordinarily having to pay the costs incurred by a central government department in responding to its submission. That is true, moreover, even where the court accepts the submissions of the charity intervener and rejects those of the government department. We think that such a rule would have the effect of deterring very many – indeed most – interventions, including those that the courts would themselves have permitted because in their view the intervener had something useful to add. Most interveners are charities or other bodies with very limited funds. Many are represented by lawyers acting free of charge. Most would be simply unable to assist the court at all if there were a rule or presumption that costs would be awarded against them. More generally, we think that rules which impose a straitjacket on the court, as the currently proposed statutory amendments do, are contrary to the public interest and inconsistent with the rule of law.

⁷⁸ "Judicial Review – proposals for further reform: the Government response", February 2014, at §62; Criminal Justice and Courts Bill, clause 53. Clause 53 does not as presently drafted appear to reflect the Government's stated intention to exclude from these costs rules interveners who are requested to intervene by the court.

ANNEX A: FORM N461 TEMPLATE

Judicial Review Claim Form

In the High Court of Justice
Administrative Court

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

<i>For Court use only</i>	
Administrative Court Reference No.	
Date filed	



SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name

address

Telephone no. **Fax no.**

E-mail address

Claimant's or claimant's solicitors' address to which documents should be sent.

name

address

Telephone no. **Fax no.**

E-mail address

Claimant's Counsel's details

name

address

Telephone no. **Fax no.**

E-mail address

1st Defendant

name

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name

address

Telephone no. **Fax no.**

E-mail address

2nd Defendant

name

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name

address

Telephone no. **Fax no.**

E-mail address

SECTION 2 Details of other interested parties

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name	name
address	address
Telephone no.	Telephone no.
Fax no.	Fax no.
E-mail address	E-mail address

SECTION 3 Details of the decision to be judicially reviewed

Decision:

Date of decision:

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name	address
-------------	----------------

SECTION 4 Permission to proceed with a claim for judicial review

I am seeking permission to proceed with my claim for Judicial Review.

Is this application being made under the terms of Section 18 Practice Direction 54 (Challenging removal)? Yes No

Are you making any other applications? If Yes, complete Section 8. Yes No

Is the claimant in receipt of a Community Legal Service Fund (CLSF) certificate? Yes No

Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application. Yes No

Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the box below. Yes No

[Empty box for reasons for non-compliance]

Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below. Yes No

[Empty box for reasons for regional connection]

Does the claim include any issues arising from the Human Rights Act 1998?

If Yes, state the articles which you contend have been breached in the box below.

Yes No

SECTION 5 Detailed statement of grounds (and facts, if not under SECTION 10)

set out below attached

Is it appropriate for this statement to stand as your skeleton argument?

Yes No

SECTION 6 Aarhus Convention claim

I contend that this claim is an Aarhus Convention claim

Yes No

If Yes, indicate in the following box if you do not wish the costs limits under CPR 45.43 to apply.

If you have indicated that the claim is an Aarhus claim set out the grounds below

SECTION 7 Details of remedy (including any interim remedy) being sought

SECTION 8 Other applications

I wish to make an application for:-

SECTION 9 Paper Determination (CPR 54.18)

I consider that this claim is suitable for determination without a hearing

Yes No

If No, indicate the reasons below

SECTION 10 Statement of facts relied on (if not supplied under SECTION 5)

Statement of Truth

I believe (The claimant believes) that the facts stated in this claim form are true.

Full name _____

Name of claimant's solicitor's firm _____

Signed _____ Position or office held _____

Claimant ('s solicitor)

(if signing on behalf of firm or company)

SECTION 11 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

Statement of grounds included attached

Statement of the facts relied on included attached

Application to extend the time limit for filing the claim form included attached

Application for directions included attached

Any written evidence in support of the claim or application to extend time

Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision

Copies of any documents on which the claimant proposes to rely

A copy of the legal aid or CSLF certificate *(if legally represented)*

Copies of any relevant statutory material

A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

a copy of the removal directions and the decision to which the application relates included attached

a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case included attached

a detailed statement of the grounds included attached

Reasons why you have not supplied a document and date when you expect it to be available:-

Signed _____ Claimant ('s Solicitor) _____

ANNEX B: FORM N462 TEMPLATE

Judicial Review Acknowledgment of Service

Name and address of person filing

name _____

address _____

SECTION A

Tick the appropriate box(es)

1. I do not oppose permission
2. I oppose permission on part of the claim
3. I oppose permission on the whole claim
4. I intend to contest the claim
5. I do not intend to contest the claim
6. The defendant (interested party) is a court or tribunal and **intends** to make a submission.
7. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.
8. The applicant has indicated that this is a claim to which the Aarhus Convention applies.

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name _____

address _____

Telephone no. _____

Fax no. _____

E-mail address _____

In the High Court of Justice Administrative Court	
Claim No.	_____
Claimant(s) <i>(including ref.)</i>	_____
Defendant(s)	_____
Interested Parties	_____

name _____

address _____

Telephone no. _____

Fax no. _____

E-mail address _____

SECTION C: PERMISSION POINTS

Set out permission points here or in an attached "Permission points document" (PPD).

If you are opposing the grant of permission in relation to all or part of the claim, set out your grounds for doing so.

If you are a court or tribunal filing a submission, please indicate that this is the case.

** Note: The sole function of N462 (and the PPD) is to make such points as will assist the court in considering (a) whether, and on what grounds, to grant permission and (b) what directions to make if it does so.*

A large, empty rectangular box with a thin black border, occupying the central portion of the page. It is intended for the user to enter their permission points or grounds for opposing a grant of permission.

SECTION D – SPECIAL DIRECTIONS

Is this claim suitable for determination without a hearing (CPR54.18)?

Yes No

If No, indicate the reasons below

If not addressed in an attached PDD, give details of any directions you will be asking the court to make, including any timetable for Detailed Grounds of Resistance and evidence.

If permission is granted, the following directions are sought:-

Note: You should identify any need for an extended time-frame (beyond 35 days) for Detailed Grounds, and evidence, if permission is granted, giving reasons. If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

Is it appropriate for your detailed grounds to stand as your skeleton argument?

Yes No

SECTION E

Response to the claimant’s contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim?

Yes No

If Yes, please set out your grounds for denial in the box below.

SECTION F - Certifications

Duty of Candour (if permission is resisted)

I certify that I have satisfied myself that – save for any documents lodged with this Acknowledgment of Service – there is no further document which is favourable to the claimant and whose disclosure at a substantive hearing would be necessary for a full and accurate explanation of the relevant facts and a true and comprehensive account of the way relevant decisions were arrived at.

Signed:
Name:
Position/office held:

Note: in cases where the duty of candour certification is not supplied, the reasons why not should be explained in the permission points document.

Truth
*(I believe)(The defendant believes) that the facts stated in this form are true.
* I am duly authorised by the defendant to sign this statement

(if signing on behalf of firm or company, court or

Position or office held

Signed

Date

Give an address to which notices about this case can be sent to you

If you have instructed counsel, please give their name address and contact details below.

name

name

address

address

Telephone no.

Fax no.

Telephone no.

Fax no.

E-mail address

E-mail address

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, over the page), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties on the same day as the date of lodgment with the Court.

ANNEX C: SKELETON ARGUMENT FRONT SHEET TEMPLATE

Case Reference	CO/ /		
Case Name	R () v		
Skeleton filed on behalf of			
Date when filed			
Bundles	The Court should have:		
	Bundle	Colour	Ref
Date of hearing			
Type of hearing			
Time estimate			
Hearing timetable	Suggested/agreed timetable:		
	Claimant		mins
	Defendant		mins
	Other		mins
	Reply		mins
Incorporated by reference	Pleading	Paras	Bundle ref
Suggested pre-reading	Description	Bundle ref	
Contact email			

ANNEX D: PERMISSION GRANT TEMPLATE

In the High Court of Justice Queen's Bench Division Administrative Court

CO Ref/ /2014

In the matter of an application for Judicial Review

The Queen on the application of [claimant] v. [defendant]

NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant [and the Acknowledgement(s) of Service filed by the Defendant and/or Interested Party]

Order by [name of Judge]

1. Permission is hereby granted [limited to ground(s)].
2. Claimant's costs in the case.

Observations:

[Judge's brief observations]

Case management directions

[Delete/revise as appropriate]

- The Defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve detailed grounds for contesting the claim or supporting it on additional grounds and any written evidence, within [35 days] of service of this order. Any reply and any application by the Claimant to lodge further evidence must be lodged within [21 days] of the service of detailed grounds for contesting the claim.
- The Claimant's Statement of Facts and Grounds and the Defendant's Detailed Grounds of Resistance [shall/may] stand as their respective skeleton arguments. In that case, any new or reply point should be addressed in a brief supplementary skeleton argument, to be filed not less than [14 days] (claimant) and [7 days] (Defendant/ Interested Party) before the hearing.
- The claim appears suitable to be determined without a hearing in accordance with CPR 54.18 and shall be so decided unless within [7 days] of service of this order any party notifies the Court of its insistence that the claim be decided at a hearing. If being determined without a hearing, the parties shall lodge agreed directions for written submissions or apply jointly in writing for the Court to resolve any dispute as to suitable directions.
- The claim shall be decided at a hearing pursuant to the following timetable. (1) The parties must agree a provisional hearing timetable, not less than [28] days before the date of the hearing, include/update it in their skeleton argument front-sheets, and file a final agreed hearing timetable not less than [7] days before the hearing. (2) The Claimant must file and serve a trial bundle, a skeleton argument and copies of any authorities relied on not less than [21 days] before the date of the hearing. (3) The Defendant and any interested party must file

and serve a skeleton argument and any further authorities relied on not less than [14 days] before the date of the hearing. (4) If 3 or more lever arch files are to be used for the hearing, the parties must file an agreed core bundle [7 days] before the hearing.

- Substantive determination of the claim [is/ is if possible/ is not] to be reserved to the Judge granting permission.
- The claim is [suitable/ not suitable] for a Deputy High Court Judge.

Listing directions

If proceeding to an oral hearing, the claim is to be listed for [X] mins/days; the parties to provide a written time estimate within 7 days of the service of this order if they disagree with this direction.

Signed [*Judge's signature*]

Notes for the Claimant

- To continue the proceedings a further fee of £215.00, or a certified Application for Fee Remission if appropriate, must be lodged within 7 days of the service of this order. Failure to pay the fee or lodge a certificate within that period may result in the claim being struck out.
- You are reminded of your obligation to reconsider the merits of your claim on receipt of the Defendant's evidence.

About the authors

The authors are barristers at Blackstone and Brick Court Chambers.

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