

## Judicial Review: Substantive Hearing and Remedies

SWALA Breakfast Seminar Series

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# The final hearing: Issues to consider

- Type of final hearing:
  - Substantive hearing – including expedited hearing
  - Rolled up hearing
  - Divisional court
  - Specialist list for the Planning Court.
- CPR Part 54: Directions to final hearing
- Administrative Court guide [Administrative Court Judicial Review Guide 2023 - Courts and Tribunals Judiciary](#)
- Preparation for the hearing
- Briefly, addressing permission to appeal

# Types of substantive hearing

- Final hearing before the High Court: Standard directions
- Final hearing before the High Court: Expedited directions
- Rolled up hearing: Determination of permission and final hearing in one hearing.
- Divisional Court – 2 judges (Criminal matters)
- Applications to make and directions.

# CPR 54 Preparation: Preliminaries

## Permission

- Prior to the grant of permission
- Procedural rigour and need to observe the rules (Part 2 ACG – compliance with the rules)
- Rule 54.8(1) Any person served with the claim form who wishes to take part must file an AOS in accordance with the provision in the rule, normally with 21 days of serve or by direction or agreement.
- New Rule 54.8A provides for service of a reply within 7 days of service. PD 54A length (5) pages and length 5 pages (ACG 8.5 case of *Wingfield* [2019] EWHC 1975 (Admin))
- Failure to file an AOS r 54.9 and 54.14 rescue (Participation of the Defendant or other Party): *Nur* [2020] EWHC 3526 (Admin).

# How permission may be granted

- Permission given r 54.10 this may include a stay or directions – arguable – give directions without a hearing r 54.12.
- Permission granted in part – can request reconsideration on renewal of refused grounds, may be at final hearing but court will direct.
- Permission adjourned to a hearing on notice r 54.11A.
- Permission for adjourned for a rolled up hearing. Usually sought by an interim application where permission and substantive decided together, and give a single judgment, but procedure applied is for judge at hearing. Preparing documentation should follow the same rules.

# Defendant response to permission

- CPR r 54.14
- A defendant or any other person served who wishes to contest the claim may serve detailed grounds and any written evidence within 35 days of permission. (40 page max subject to permission)
- Claimant relying on additional grounds r 54.15
- Evidence r 54.16
- Disclosure and duty of candour – Part 18 requests
- Intervenors
- Issues of anonymity

# Directions on permission

- To list the hearing as soon as reasonably practicable: Dates to avoid and time estimate (important)
- Detailed grounds of resistance
- Which kind of judge DHJ, High Court or Divisional Court
- Case management directions timetabling skeleton arguments, trial bundles and authorities bundles
- Standard directions can be superseded by judge made
- PD 54A para 15(1) requires parties to agree contents of paginated and indexed bundle with all relevant documents: Electronic version filed of hearing and any core bundle.

# Further directions

- Hearing bundle and core bundle must be filed and served 21 days before hearing. For divisional court (one set for each judge and also authorities)
- Claimant skeleton argument filed and served 21 days before the hearing PD 54A – set out what it should contain and be no more than 25 pages (permission can be obtained for more)
- Defendant and other parties 14 days.
- Agreed list of issues
- Agreed authorities bundle

# Issues which may arise

- Further evidence and expert evidence Part 35 CPR
- Requirement for interpreter.
- Production of detained persons: When represented by counsel not attend unless otherwise ordered. Video links
- Live witness evidence – evidence nearly always exclusively in writing including witness statements
- Court does have inherent power to hearing orally *R (PG) v London Borough of Ealing* [2002] EWHC 250 (Admin), [20]-[21]. If a party seeks to cross examine a witness by interim application and permission granted rarely and principles applied in a dispute of fact summarised at para 11.2.3 of the ACG
- Welsh language: s 22 of the Welsh Language Act 1993 person right to address court in Welsh in Wales. 11.3 ACG

# The hearing

- Judicial review without a hearing
  - Possible if parties agree for case to be determined on papers
  - However, on review judge may order that case be heard with oral submissions
- Hearings
  - General rule in public unless the court makes a direction under CPR r 39.2
  - Claimant sets out arguments first in support of grounds
  - Defendant(s) second arguments in support of grounds of defence
  - Interested Party and/or intervener (if given permission to make oral submissions.
  - Claimant's reply
  - Sometime supplemental written submissions on a point invited by the court
- May be an advocate to the court appointed (point of law)

# Judgment

- Threshold for relief, Claimant must show Defendant acted unlawfully
- Court's discretion as to remedy (see Joes talk)
- Judgment and orders:
- Orally if short
- Reserved
- Prior sight of judgement in draft mainly for issues of corrections and to look to agree and order or prepare for an application for permission to appeal – Highly confidential.
- Handed down usually in absence of parties but can attend if notified.

# Permission to appeal

- In a “rolled up” hearing Permission to appeal can only be made to Court of Appeal and must be filed within 7 days r 52.8
- If permission granted JR will continue in the High Court unless Court of Appeal orders otherwise see (*R(SO) v Thanet and others* [2023] EWCA Civ 398)
- Permission to appeal can be sought of the High Court judge to Court of Appeal, and to the Court of Appeal within 21 days.
- Leapfrog appeals

# Remedies

- Remedies Unique to Judicial Review (prerogative orders):
  - Quashing Order (formerly certiorari)
  - Mandatory Order (formerly mandamus)
  - Prohibiting Order (formerly prohibition)
- Other Remedies:
  - Declaration
  - Injunction
  - Damages
- All remedies in Judicial Review are at the discretion of the court.

# Quashing Order

- Results in the quashing of the decision or order that is being challenged.
- The court *may* remit the order back to the decision-making body and require it to make a decision in line with the court's findings or even substitute a decision. This is unusual and the general principle is that a decision maker's decision will not be substituted.
- More likely the decision will be quashed and left to the decision maker to re-consider. (s.31(5) Senior Courts Act 1981)
- Where a quashing order is sought, a stay or interim injunction is, in principle, likely to be available pending the full hearing.

# Mandatory Order

- A mandatory order is an order requiring the performance of a specific act or public duty. A breach of this order is punishable as contempt of court.
- This type of order is less restricted than in the past. If the court has found there to be a duty, which has been breached, and it considers a mandatory order to be appropriate relief, then such an order may be granted.
- A mandatory order is less likely to be made with regard to statutory requirements that are more directory than mandatory, this is a matter of construction of the statute and should be examined in the context of the statute as a whole.
- It is preferable for a claimant to demonstrate a demand for performance of a duty. This is often a point that is likely to be addressed at the pre-action protocol stage of proceedings.
- A striking recent example of the supreme court considering mandatory orders can be seen in *R (on the application of Imam) (Respondent) v London Borough of Croydon (Appellant)* [2023] UKSC 45

# Prohibiting Order

- A prohibiting order prohibits a public authority from acting in a specified manner.
- A breach of this order is punishable as contempt of court.
- A court may consider that a declaration to the effect that the decision maker has acted in excess of jurisdiction is adequate remedy, as opposed to a prohibiting order, unless a claimant can demonstrate that declaratory relief will not suffice.
- Prohibiting orders are often used in tandem with mandatory orders.
- The classic example of a prohibiting order being used is the case of *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299.

# Declaration

- A declaration is an authoritative judicial statement of a legal position which states the law “so as to make it clear to all the world what was [the claimant’s] position in the eyes of the law”. (*Vine v National Dock Labour Board* [1957] AC 488, per Lord Molton at 504)
- Declarative relief has a number of advantages over the other executory remedies available:
  - It is less draconian than an injunction or prohibiting order. Consequently Lord Woolf stated, in *M v Home Office* [1994] 1 AC 377, that it would be a more appropriate form of remedy against government ministers.
  - They are particularly suitable where the issue before the court is not confined to the parties involved in the proceedings.
  - It can be used to clarify the legal position before any wrong occurs. Though beware hypothetical questions of law.
  - It can be used where events have already occurred to an extent that would prevent the court from granting a prohibiting or mandatory order.

# Injunction

- Under s.31(2) of the Senior Courts Act 1981 the court has the power to grant injunctive relief where it appears just and convenient to do so having regard to:
  - The nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders;
  - The nature of the persons and bodies against whom relief may be granted by such orders; and
  - All the circumstances of the case.
- Injunctions have an elasticity of form, length and content that provides an advantage over prohibitive or mandatory orders.
- A court may be reluctant to issue a mandatory injunction to compel a series of continuing acts over which the court is incapable of superintending.
- The key practical distinction between the prerogative remedies and injunctions is that injunctions are available at the interim stage.

# Damages

- A judicial review claim may include a claim for damages but may not seek damages alone.
- The failure of a public authority to act in accordance with public law principles does not give rise to an actionable claim for damages.
- A monetary remedy may be awarded where a public authority:
  - Has committed a tort during the exercise of its public functions.
  - Is under an obligation to make restitution of money paid by the claimant.
  - Has breached a convention right, contrary to the duty under s.6 of the Human Rights Act (the duty to act in accordance with an individual's rights under the ECHR) and the court considers it appropriate to award damages under s.8 of the Human Rights Act (i.e. damages are necessary to afford just satisfaction).

# Interim Relief

- Interim relief is usually requested at the point of applying for permission to proceed with the claim.
- However, interim relief can be granted prior to permission being granted using Form N463. A practice statement “*Administrative Court: Listings and Urgent Cases*” provides guidance.
- The following interim relief is available:
  - Interim injunctions;
  - Stay of proceedings (CPR r.54.10(2))
  - Interim Declaration.