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Defending judicial review proceedings: Post permission

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Defending judicial review proceedings series

Today's seminar: What happens post permission.

Previous seminars:

- Pre issue/pre proceedings;
- Post issue and permission.

Future: Public law roundtable events.

Today's agenda

- Settlement following the grant of permission;
- Directions;
- Evidence and documents;
- Trial: Format, addressing remedies and costs.

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Settling the claim

First things you need to do on receipt

- Note down any deadlines.

- Consider how to move forward:
    - Fight;
    - Settle.

Settlement

- Not uncommon for Ds to fight permission but then concede because:
    - Taken the opportunity to fight at permission so not just rolling over;
    - Limits cost risk but note: Cs will want permission costs;
    - Maintains an element of control over the outcome;
    - Can render the claim academic.

Settlement documents

- Settlement documents – draft order, statement justifying it, authorities.
- Order and statement both require joint signatures.
- 3 copies filed with the ACO.
- Get it wrong and you will be called in for a hearing.

Settlement documents cont.

- Admin Court Guide suggests the order should contain:
    - The words “By Consent” in the heading;
    - The manner of determination of the claim;
    - Legal reps signatures;
    - Provision for determining costs.

- The Statement:
    - Keep it brief and to the point;
    - Brief procedural and relevant factual background;
    - Set out why settlement and the specific terms of settlement, are appropriate.

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Standard directions to trial

General Judicial Directions

- When granting permission, a judge will generally give consideration to directing the following:
    - Deadlines for details grounds of resistance and any pertinent evidence.
    - What level of Judge should hear the case (specifically whether it should be a deputy judge or two or more judges)
    - Other matters such as skeleton arguments, trial bundles or authority bundles.

If the judge does not make any directions, then the following standard directions apply (1/2)

The following is set out in the Administrative Court Guide 2022 at 10.1.4 and is important to keep in mind when planning work flow:

(1) The claimant must pay the relevant fee to continue the application for judicial review. Failure to do so within 7 days of permission being granted will result in the ACO sending the claimant a notice requiring payment within a set time frame (normally 7 more days). Further failure will result in the claim being struck out without further order (CPR 3.7(1)(d), (2), (3) & (4).)

(2) Any party who wishes to contest or support the claim must file and serve any Detailed Grounds and any written evidence or documents not already filed in a paginated and indexed bundle (in both hard copy and electronic copy) (CPR 54A PD para 9.1(3) and 9.2.) within 35 days of permission being granted (CPR 54.14(1).) Detailed Grounds should be as concise as possible and must not exceed 40 pages without the Court's permission (CPR 54A PD para 9.1(2)). The fact that the claimant's Statement of Facts and Grounds is prolix is not necessarily a good reason for the defendant's Detailed Grounds to exceed the 40-page limit (R (SSE Generation Ltd) v Competition and Markets Authority [2022] EWHC 865 (Admin)

(3) If all relevant matters have already been addressed in the Summary Grounds, a party may elect not to file separate Detailed Grounds and instead inform the court and the parties that the Summary Grounds are to stand as Detailed Grounds (CPR 54A PD para. 9.1(1)) However, before doing so, the party should consider carefully whether the material in the Summary Grounds is sufficient **to discharge the duty of candour and cooperation with the court.** In this regard, it is important to note that what is required to discharge that duty at the substantive stage may be more extensive than what is required before permission has been granted (see para 15.3.2 of this Guide).

If the judge does not make any directions, then the following standard directions apply (2/2)

(4) The claimant must file and serve a skeleton argument no less than 21 days before the substantive hearing (see para 20.2 of this Guide for the contents of the skeleton argument) (Previous versions of the PDs required skeleton arguments to be filed 21 working days before the date of the hearing. The new CPR 54A PD para 14.5 refers simply to "21 days before the date of the hearing". This means "calendar" days: see CPR 2.8.)

(5) The defendant and any other party wishing to make representations at the substantive hearing must file and serve a skeleton argument no less than 14 days before the substantive hearing (CPR 54A PD para 14.6. "14 days" means 14 calendar days.)

(6) The parties must agree the contents of a paginated and indexed bundle containing all relevant documents required for the hearing of the judicial review. This bundle must be lodged with the Court in both electronic and hard copy form by the parties not less than 21 days before the date of hearing unless judicial order provides otherwise (CPR 54A PD paras 15.1, 15.2 and 15.3.)

(7) The parties must agree the contents of a bundle containing the authorities to be referred to at the hearing. This bundle must be lodged by the parties with the Court in both electronic and hard copy form no later than 7 days before the date of hearing (1 CPR 54A PD paras 15.4 and 15.5.)

(8) In Divisional Court cases, one set of the hearing bundle and one set of the authorities bundle should be provided for each judge hearing the case (see Administrative Court Guide 2022 at 10.1.4).

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Substantive hearing: Evidence, skeleton arguments and bundles

Detailed Grounds of Resistance

- Can file Detailed Grounds of Resistance (35 days) if you want to contest the claim or contest it on different grounds to those raised at permission (cost risk) – CPR54.14.
- Alternatively, can inform the court that your SGOR will stand also as your detailed grounds (PD54A, 9.1).
- DGOR must not exceed 40 pages (PD54A, 9.1).

Evidence

- No evidence can be relied upon unless:
  - Served in accordance with the CPR or court order; or
  - Court grants permission.

  (CPR 54.16)

- Evidence usually filed alongside DGOR. Must be filed in a paginated and indexed bundle in both hard and soft copy (PD54A, 9.1(3)-9.2).

Evidence cont.

- Important: default position is that evidence in JR is written.
- Permission for live evidence/cross examination must be sought by way of application under CPR8.6(2).
- Any application must be made promptly in accordance with CPR23 and explain why live evidence is necessary for the fair determination of the claim.

Skeleton argument

- If you want to make representations at the final hearing you must file a skeleton argument.
- C must file and serve not less than 21 days before the hearing/warned date.
- D/IP – 14 days.
- Failure to comply with requirements may result (1) in its return to author (2) costs of preparing disallowed.
- If filing by email, should be in Word format.

Skeleton argument requirements

- Concise – must not exceed 25 pages without permission;
- Should define and confine the areas of controversy;
- Self contained;
- Not include extensive quotations;
- Authorities: must state the proposition of law the authority demonstrates and identify where in the authority it comes from.

Skeleton argument format

- Tend to be relatively formulaic in structure:
    - List of essential reading;
    - Introduction/summary (flag up if issues dropped asap);
    - Legal framework;
    - The facts;
    - The Issues/submissions;
    - Remedy;
    - Conclusion/Costs.

Other required documents

- 7 days before the hearing:
    - Agreed list of issues;
    - Agreed chronology with page refs;
    - List of essential reading and time estimate for reading with page refs.

- Issues and chronology must be described neutrally.

Types of bundle

- Two bundles – hearing bundle, authorities bundle.
- Core bundle: If hearing bundle over 400 pages then a core bundle must be agreed including, but not limited to, pleadings, the decision under scrutiny and any other essential documents. (PD54A, 15.1).
- Parties solicitors must certify that the hearing bundle meets the above requirements (PD54A, 15.1).

Bundles deadlines/format

- Hearing bundle: 21 days.
- Authorities bundle: 7 days.
- Soft and hard copies to be filed.
- Hard copy: Lever arch, ref and parties named on spine, legible documents, double sided.
- See Admin Court guidance for preparing soft copy.

Bundle contents

- Only relevant documents.
- Only include correspondence if it serves a particular purpose or helps define the issues.
- Must include pleadings, decision under challenge and evidence as an absolute minimum.

Authorities Bundle

- Leave to counsel and their clerk.
- Check:
    - That no more than 10 authorities are relied upon, unless a core authorities bundle/supplementary authorities bundle prepared.
    - Check correct version of authorities used: See Practice Direction: Citation of Authorities 2012 (google it).

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Substantive hearing: Format, remedies and costs

Format (discretion of Judge but usually as follows)

(1) Claimant addresses the Court

(2) Defendant addresses the Court

(3) Any interested party or intervener addresses the Court

(4) Claimant has a right of reply

(5) Judgement (ex-tempore or reserved, the latter usually includes setting another hearing to consider the precise form or order and costs)

Remedies (1/2)

- Judicial review ***must*** be used for mandatory, prohibiting or quashing orders (see section 31 of the Senior Court Act 1981).
    - Mandatory – compelling a public body to act in a particular way
    - Prohibiting – stops the public body from doing something it has indicated it will do but has not yet done (e.g the issue of a new EHCP).
    - Quashing – Sets aside a previous decision. It will generally be complimented by a direction remitting the matter to the public body decision maker and directing it to reach the decision afresh (though it may it specified circumstances replace the decision with its own – see section 31(5A) Senior Courts Act 1981). Note that in view of section 29A(2) of the Senior Courts Act 1981 quashing orders may now be conditional and not take effect until a specified date.
- *Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers* [2011] UKPC 4 per Lord Walker at [40] "***All relief granted by way of judicial review is discretionary, and the principles on which the Court's discretion must be exercised take account of the needs of good public administration*".**

Remedies (2/2)

- Judicial review ***may*** be used to obtain a declaration, injunction or a financial settlement (see section 31 of the Senior Court Act 1981).
    - CPR 54.3(2) ("*A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone*").
    - A declaration may be made or an injunction granted, per section 31(2) of the Senior Courts Act 1981 "where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to – (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders; (b) the nature of the persons and bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be".
    - A finding of illegality will generally justify the making of a declaration (per Lord Toulson at [12] in *R (Hunt) v North Somerset Council* [2015] UKSC 51 [2015] 1 WLR 3375).
- The Court must refuse to grant relief on an application for judicial review and may not include a financial settlement award if "*it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*" (see section 31(2A) Senior Courts Act 1989).

Costs (1/2)

- Section 51 of the The Senior Courts Act 1981, taken together with CPR 44 has the effect of making the award of costs at the discretion of the Court. In *R (M) v Croydon LBC* [2012] EWCA Civ 595 [2012] 1 WLR 2607 at [1] the questions of costs was described as "*highly fact-sensitive and very much a matter for the discretion of the first instance tribunal*".
- This is tempered by the general rule set out in CPR 44.2(2)(a) that "*the unsuccessful party will be ordered to pay the costs of the successful party*".
- Per the Administrative Court Guide 2022, 25.10.2 "*Costs protection means that the legally aided person is not automatically liable for the costs. If the person awarded costs wishes to require the legally aided person to pay those costs, he or she must apply for an order from the Senior Courts Costs Office or, where the costs order was made by an Administrative Court outside London, to the relevant associated District Registry.*"
- Note section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and The Civil Legal Aid (Costs) Regulations 2013 – the effect is that, when making an order for costs against legally aided parties the wording is often similar to the following "*The claimant do pay the defendant's costs to be subject to detailed assessment if not agreed. The determination of the amount of the costs payable by the Appellant is postponed and subject to assessment under s.26(1) of the Legal Aid Sentencing and Punishment of Offenders Act 2012.*"

Costs (2/2) - *M v Mayor and Burgesses of the London Borough of Croydon* [2012] EWCA Civ 595

60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. **In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary…**

62. **In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim...**I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs…However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other…

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

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Q&A session

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