

CONFERENCE

Practical tips for bringing claims

session at

Public Law in 2025:
One Day Symposium

with Lois Lane and Jeremy Ogilvie-Harris

cornerstone
barristers



Practical tips for bringing claims

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First considerations



Initial questions

- What decision are you challenging?
- Who is the best Claimant?
- When does limitation expire?
- Can you start seeking advice on the merits before formal decision has even been made?



Key time limits

- All claims must be brought 'promptly'
- For most JRs – 3 months to file + 7 days to serve
- For s.288 TCPA 1990 statutory reviews – 6 weeks to file **and serve**
- For other planning challenges – 6 weeks to file + 7 days to serve





Pre-action letters



Don't delay!

- PAP stage does not buy you time.
- Obligation does **not** remove the obligation to bring the claim promptly.
- Ideally you need to build in time for PAP response.
- Can lodge and apply for a stay to complete the PAP correspondence



Strategic PAP use

**Test out
your
grounds**

**Force early
settlement**

**Agree
standing/
costs
caps**

**Specify
email for
service**

**Early
disclosure**

**Identify
IPs**

Costs Implications

Beware! Failure to comply with the pre- action protocol may mean no order as to costs if you win via settlement: *R (Baxter) v Lincolnshire CC* [2015] EWCA Civ 1290

Conversely a good letter can help to secure costs, especially if the Defendant does not respond properly at PAP stage and later concedes the claim: *R (Bahta) v SSHD* [2011] EWCA Civ 895



Identifying Grounds



Grounds of Review

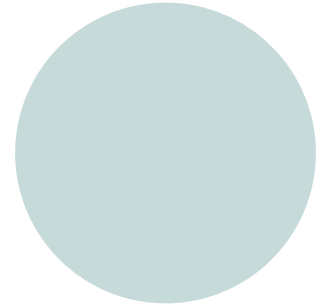
“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality,” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.”

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (GCHQ) per Lord Diplock

Illegality



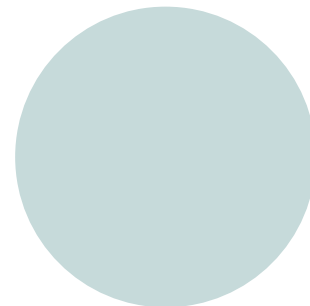
- Failing to comply with a statutory duty.
- Misdirection of law.
- Fettering of discretion.
- Failure to publish policy.
- Failure to adhere to policy without good reason.
- Failure to make reasonable inquiries.
- Unlawful delegation.



Procedural Fairness



- Right to be heard:
 - The irreducible core:
 - The right to know about the case against you: at least a gist.
 - The right to make a case: either before (consultation) or after (review/appeal) the decision.
 - “Optional extras”:
 - Oral hearing: revocation cases (*ex p. Hook*)? Article 5 cases (*Osborne v Parole Board*)?
 - Witnesses and cross examination: article 5 cases (*ex p. Germain*)?
 - Legal representation: article 5 (*Roose*)?
 - Reasons: no general common law duty but abuse of power? (*ex p. Institute of Dental Surgery*)

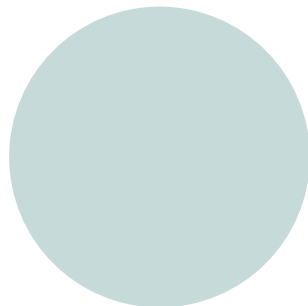


Irrationality



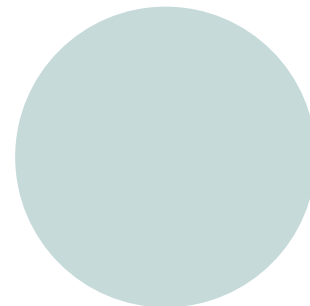
The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223



Legitimate Expectation

- Express representation: *R v North and East Devon HA ex. P. Coughlan* [2001] Q.B. 213.
- Sufficiently clear: *R v IRC ex p. MFK Underwriting Agencies Ltd* [1990] 1 W.L.R. 1545.
- Actual or ostensible authority: *South Buckinghamshire DC v Flanagan* [2002] EWCA Civ 690.
- Detrimental reliance? *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 at §62, §70, §72 .
- But can be overcome:
 - The “court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of the policy” (*Coughlan*)
 - Where there is a sound reason to change the policy, then decision maker’s discretion will not be restricted. Where change of tack involves broad policy considerations, court will only review on *Wednesbury* standard: *Begbie*.
 - *GCHQ*: where national security overcame a procedural legitimate expectation (of consulting the unions).





Bundles





Bundles



- Paginated, indexed, hyperlinked, bookmarked.
- Hard copy and electronic copy.
- Chronological order – starting with oldest document.
- Correspondence only included if relevant to issues.
- Must include:
 - Pleadings;
 - Decision/measure challenged;
 - Further documents as are essential.
- Parties to co-operate to agree bundle.
- Hearing bundle – if more than 400 pages, then must do supplementary bundle.



Witness statements





General requirements



- Headings with parties: para. 17.1 of PD 32.
- Para. 17.2 of PD 32:

17.2 At the top right hand corner of the first page there should be clearly written:

- (1) the party on whose behalf it is made,
- (2) the initials and surname of the witness,
- (3) the number of the statement in relation to that witness,
- (4) the identifying initials and number of each exhibit referred to,
- (5) the date the statement was made; and
- (6) the date of any translation.

- In intended witness's own words: para. 18.1 of PD 32.
- Include matters at para. 18.1(1) to (5) and 18.2(1)-(2) of PD32.
- Exhibits to be verified and identified: para. 18.3 of PD32.
- Verified by statement of truth: para. 20.1 of PD 32.

Inability to read or sign

- CPR r. 22.1(9):

(9) Where a document containing a statement of truth is to be signed by a person who is unable to read or sign the document other than by reason of language alone—

(a) it must contain a certificate made by an authorised person (who is able to administer oaths and take affidavits but need not be independent of the parties or their representatives); and

(b) the authorised person must certify that—

- (i) the document has been read to the person approving it;
- (ii) that person appeared to understand it and approved its content as accurate;
- (iii) the declaration of truth has been read to that person;
- (iv) that person appeared to understand the declaration and the consequences of making a false declaration;
- and
- (v) that person signed or made their mark in the presence of the authorised person.



Foreign Languages



- PD 32, para 18.1:

“18.1 The witness statement must, if practicable, be in the intended witness’s own words and must in any event be drafted in their own language, the statement should be expressed in the first person and should also state:

(5) the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter.”



Interim Relief





Interim Relief



- Included in claim form (N461) at section 8.
- Normally, interim relief considered alongside permission application.
- Test:
 - Is there a strong *prima facie* case?
 - Where does the balance of convenience lie? (harm vs public interest)

Urgent interim relief/JR

- Practice Direction 54B.
- N463: urgent judicial review form.
- Witness Statement:
 - Set out basis for urgency.
 - Disclose everything.
- Must be **very careful** using urgent process.
- “Those procedures are made available only for urgent cases where there is a genuine need for the application to be considered urgently.”
- Email to immediates.



Expert evidence





When can expert evidence help?

- Consider whether expert evidence needed early.
- CPR r.35.4(1) applies to JR. Permission of the court needed.
- Expert evidence might help to illuminate technical/factual context in which a decision was taken.





Expert reports

- **Focus on the facts!** Expert evidence on events/factual context surrounding decision may be valuable to the Court.
- Rarely appropriate to consider expert opinion not available to decision-maker: ***R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin)**.
- Experts should not make submissions on merits of the case: ***R (Gardner) v SSHSC* [2021] EWHC 2946 (Admin)**.



Legal aid



Eligibility

Scope

Means

Merits

Types of Funding

01

Legal Help

- Initial appointments.
- Taking instructions.
- Evidence gathering.
- Pre-action correspondence.

02

Investigative Representation

- Investigating merits of a claim.
- Instructing counsel.
- Protectively issuing a claim.

03

Full Representation

- Conducting litigation.
- After pre-action protocol stage.
- Instructing counsel.



Judicial Review and Legal Aid

Scope of Legal Aid

19(1) Civil legal services provided in relation to judicial review of an enactment, decision, act or omission.

(3) The services described in sub-paragraph (1) do not include services provided to an individual in relation to judicial review that does not have the potential to produce a benefit for the individual, a member of the individual's family or the environment.

(4) Sub-paragraph (3) does not exclude services provided in relation to a judicial review where the judicial review ceases to have the potential to produce such a benefit after civil legal services have been provided in relation to the judicial review under arrangements made for the purposes of this Part of this Act.

"Benefit" *R. (FF) v Director of Legal Aid Casework* [2020] EWHC 95 (Admin)

(iii) *The starting point is that "benefit" should be given its ordinary, broad meaning. It is not necessary to consider the degree or quality of the benefit provided that there is some benefit, but the benefit must have some reality, some substance, that goes beyond the "sufficient interest" [test]*

(iv) *The benefit must be real [...but does not ...] have to be financial or otherwise result in an improvement in the material conditions of the life of the applicant or of a member of their family.*

(vi) *A benefit to an applicant that is "merely" psychological and/or involves the fulfilment of a moral obligation may, in an exceptional case, be a sufficient benefit for purposes of paragraph 19(3), either alone (in a truly exceptional case) or, more likely, in combination with other factors.*



Category Definitions within Legal Aid Contracts



Overlapping Categories:

9. The Categories are drafted to ensure that the majority of cases clearly fall within one Category or another. However, there will be some cases which genuinely fall within more than one Category. For example, certain work under the Mental Capacity Act 2005 falls under both the Mental Health Category of Law and Community Care.

10. Some cases will arise as the result of a number of different underlying issues, which may either be in scope or the subject of an exceptional funding application, and in those instances classification to a Category will depend upon the overall substance or predominant issue of the case when taken as a whole.

11. The following civil legal services fall into the Category of Law that relates to the underlying substance of the case as referenced by the widest Category Definition:

(a) Public law challenges to the acts, omissions or decisions of public bodies by way of judicial review (as described in paragraph 19 of Part 1 of Schedule 1 to the Act). These cases are also covered by the Public Law Category [...]

12. For the purposes of paragraph 11, the widest Category Definition includes those services that can only be made available via exceptional funding. For example, a judicial review would fall into the Housing Category of Law where the challenge was related to issues described in either paragraph 37 or 38 of the Housing Category Definition.

Merits Criteria for Full Representation

01

Remedy

- Susceptibility to JR.
- Must not be alternative remedies.

02

Pre-action

- Must have sent a LBA and given a reasonable chance to response.

03

Proportionality

The likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.

04

Merits

- very good, good or moderate; or
- borderline or marginal, and—
 - wider public interest;
 - overwhelming importance; or
 - Convention rights.

Refusal to Grant Funding

**Internal
Review/Appeal**

**Independent
Adjudicator**

**Judicial
Review**

Navigating Legal Aid

01

No permission; no payment

- Reg. 5A Remuneration Regs.
- LAA no longer gives scope of counsel's advice in Full Representation cases as a matter of course.
- Investigative Representation and advice for cases where merits are unclear.

02

Systemic challenges

- *R. (on the application of Evans) v Lord Chancellor* [2012] 1 W.L.R. 838 (treatment of captured detainees in Afghanistan).
- Para. 19 of Schedule 1 to LASPO.
 - (4) Sub-paragraph (3) does not exclude services provided in relation to a judicial review where the judicial review ceases to have the potential to produce such a benefit after civil legal services have been provided in relation to the judicial review under arrangements made for the purposes of this Part of this Act.



Aarhus costs caps and crowdfunding



- CPR 46.25(1) – You **MUST** state in the claim form that the claim is an Aarhus Convention claim and file and serve a statement of financial resources.
- Statement of Financial Resources must be clear and detailed: significant assets, liabilities, income and expenditure.
- Consider grounds carefully if you intend to apply for Aarhus protection - *HM Treasury & Anor v Global Feedback Limited* [2025] EWCA Civ 624 may have limited scope of qualifying challenges.
- Crowdfunding





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