Public Law webinar mini-series

Procedure in the Admin Court – tips and tricks

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The 'No Substantial Difference' Test

s.31 Senior Courts Act 1981

When can it make a difference in your JRs?

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s.31 Senior Courts Act 1981: Relief

(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

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.

s.31 SCA 1981: Permission

(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

s.31: Relief

(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

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.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

Gathercole v Suffolk County Council [2020] EWCA Civ 1179

"It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic."

R (Public and Commercial Services Union) v Minister for the Cabinet Office [2017] EWHC 1787 (Admin), [2018] ICR 269 ("*the PCSU case*")

89. Although section 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, the threshold remains a high one: that it is highly likely that the outcome would not have been substantially different.

PCSU

91. First, these parts of Mr Jinks's witness statement are not evidence of past facts by a witness with knowledge of those facts, but an exercise in speculation about how things might have worked out if no unlawfulness had occurred. […] [S]elf-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court….

The court has not been placed in a position in which it can make a critical evaluation of the assertions made by Mr Jinks and satisfy itself that they are justified.

- *John Harvey v Mendip District Council* [2017] EWCA Civ 178; [2018] JPL 419

- *R (Durand Education Trust) v Secretary of State for Education* [2020] EWCA Civ 165; [2021] E.L.R. 213

- *Gathercole v Suffolk CC* [2020] EWCA Civ 1179; [2021] P.T.S.R. 359

- *Forward v Aldwyck Housing Group Ltd* [2019] EWCA Civ 1334; [2020] 1 W.L.R. 584

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Procedural Rigour in Judicial Review Proceedings

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Preface to *The Administrative Court Judicial Review Guide 2020*

In recent years, the Administrative Court has become one of the busiest specialist courts within the High Court. It is imperative that everyone who is a party to judicial review proceedings is aware of and follows the Civil Procedure Rules and Practice Directions so that court resources (including the time of the judges who sit in the Administrative Court) are used efficiently. That has not uniformly been the case in the past where the Court has experienced problems in relation to applications claiming unnecessary urgency, over-long written arguments, and bundles of documents, authorities and skeleton arguments being file very late (to name just a few problems). The Court has had occasion recently to restate that the CPR are there to ensure fairness to all parties. ***The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims*** *(R (AB) v Chief Constable of Hampshire & Others [2019] EWHC 3461 (Admin)). …* ***Parties may be subject to sanctions if they fail to comply****.*

R (AB) v Chief Constable of Hampshire & Ors [2019] EWHC 3461 (Admin)

108. … The rules are there to ensure fairness as between the parties, that is, the claimant, the defendant and any interested party and that the relevant issues are properly identified and the relevant evidence is produced. This enables a court to determine whether a claim is established. The timetable laid down in the rules, and in any directions made by the court, enables the issues between the parties to be identified and the relevant evidence to be produced in a coherent sequence. ***The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims. Public law cases do not fall into an exceptional category in any of these respects.*** *If the rules are not adhered to there are real consequences for the administration of justice.*

R (Talpada) v SoS Home Department [2018] EWCA Civ 841

67. … In my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. ***I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court.*** *However, both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.*

68. In the context of an appeal such as this it is important that the grounds of appeal should be clearly and succinctly set out. … The Courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.

69. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation.

Procedural rigour – some recent examples

- **Expansion of grounds of challenge**:
  - *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin)
  - *Keep Bourne End Green v. Buckinghamshire Council* [2020] EWHC 1984 (Admin)
  - *R (Dalton) v CPS* [2020] EWHC 2013 (Admin)
  - *R (Good Law Project) v SoS for Health and Social Care* [2021] EWHC 346 (Admin)
- **Making applications promptly**: *R (GA) v SoS for the Home Department* [2021] EWHC 868 (Admin).

Flexibility of public law proceedings – some examples

- **Expansion of arguments beyond pleadings**: *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin):

  *73. Though the observations made by Singh LJ in Talpada were in the context of addressing the position where a claimant relied at the hearing on a point that was not pleaded in the Claim Form, the obligation of rigour in pleading must also apply to defendants (**although the public interest considerations may not be exactly the same**).*

- **"Rolling Judicial Review"**: *R (Raja and Hussain) v Redbridge LBC* [2020] EWHC 1456 (Admin).

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Costs in Judicial Review

Tips and Tricks

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Recap on the key principles

- Judicial Review is treated like other civil litigation – CPR r. 44.3(2) applies.

- *R (M) v Croydon* [2012] 1 WLR 2607 remains the key authority.

  (1) Decision relating to costs is primarily a matter of discretion for the trial judge.

  (2) The general rule is that the unsuccessful party pays the successful party's costs

  (3) The basis of funding is not relevant (but *see ZN (Afghanistan) v SSHD* [2018] EWCA Civ 1059

Costs after settlement but before trial

- A claimant who, after complying with the PAP and issuing proceedings, obtains by consent all of the relied he seeks, should, absent good reasons, recover his cost (M at [49])

- Three categories of cases :

(i) A case where a claimant has been wholly successful;

(ii) A case where he has only succeeded in part;

(iii) A case where there has been some compromise which does not reflect the claims.

Application of *M v Croydon*: 3 examples

- *R (Naureen) v Salford CC* [2012] EWCA Civ 1795. The grant of interim relief did not mean that the claimants were entitled to the costs of the claim, which settled.

- *Speciality Produce Ltd v SS for Environment, Food and Rural Affairs* [2013] EWHC 2196 (Ch). Where it was not clear whether the claimant would have won, no order as to costs.

- *R (Johnson) v SSWP* [2019] EWHC 3631 (Admin). DC decision that the claimants could recover costs, even though they had succeeded on different bases to grounds pleaded.

Tactics to consider

(1) Think carefully - what is “success” in the case?

(2) Was the pre-action protocol complied with?

(3) Were there intervening factors or acts, which explain the outcome in the case?

(4) Are there other reasons for the Court to make a different costs’ order?

Process in determining costs

- See Administrative Court Guide 2020 and Annex 5 of the Guide.

- Written submissions are normal. D goes first, C next and D has a right of reply.

- Further submissions can be made, but generally should be avoided.

- Content of submissions is prescribed.

Costs following Refusal of Permission

- *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260. D can claim costs of AOS if stated and a schedule supplied.

- *R (Mount Cook) Westminster City Council [2004]* CP Rep 12. Exceptional for a D to obtain costs of attending a renewal hearing.

Payments on Account

- CPR r. 44.2(8)
- *See Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) for relevant principles.
- The Court must determine a reasonable sum, unless there is a good reason not to.
- Paucity of information is not a good reason not to make any order, but it will make a Judge very cautious.

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