

# Judicial Review Step-by-step



DGLEGAL

28 May 2021

# Agenda

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- Welcome and Introduction
- Summary of Judicial Review and Outcomes
- Initial Steps
- Practical Steps
- Hamid issues

# Summary

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- A means of forcing the state to act in accordance with the law.
- A means of last resort.
- Requires arguments to be made to the public law standard.
- Requires materiality of outcome.
- Expensive.
- Risky.
- Exciting and disappointing.

# Summary

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 N461

 T480

# Outcomes

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- Thousands successful each year.
- 1/3 withdrawn following settlement,  $\frac{3}{4}$  of which in A's favour.
- 1/3 get permission at permission stage.
- $\frac{1}{2}$  of those that get permission settle before hearing,  $\frac{3}{4}$  of which in A's favour.
- At full hearing, 40% successful.

# Where does it come from?

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- Common law.
- Civil Procedure Rules (Part 54)
- Upper Tribunal Procedure Rules
- Senior Courts Act 1981, s.31

# Initial Steps

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- Identify the decision (or action, or failure to act)
- Determine sufficiency of interest
- Identify the time limit (CPR 54.5)
- Identify grounds
- Act “promptly”
- Consider remedies
- Consider whether outcome would have been different
- Take pre-action

# Identify the decision

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- Is there an issue, now, that you wish to challenge?
- What is the duty, or power, that the state (or public body) has used (or failed to use) in making its decision?
- Was this issue an exercise of public power?
- Do you have standing? (Not overly litigious, generous application)
- Is there any legislation which governs this?
- Is there any guidance which governs this?

# Time Limits

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- ❁ CPR 54.5 – “promptly and in any event not later than 3 months after grounds to make claim first arose”
- ❁ Defendant cannot extend for you. Defendant agreeing not to take the point against you doesn’t stop the court doing so.
- ❁ More flexible where the unlawfulness is continuous, but be careful. When did it first become unlawful? Why have you waited since then?

# Consider Remedies

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- Are there alternative remedies to JR? If so, JR fails.
- JR Remedies
  - quashing orders
  - mandatory orders
  - prohibiting orders
  - declarations
  - injunctions
  - damages.

# Quashing

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- Most common.
- Sets aside decision.
- Requires remaking of decision.
- Consider whether further evidence can be submitted before remaking.

# Other Remedies

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- ❁ Prohibiting Orders prevent an action from being taken in the future.
- ❁ Mandatory Orders require an action to be taken.
- ❁ Injunctions relate to acts, requiring or preventing.
- ❁ Declarations are rulings on the law, without a requirement to do something specific.
- ❁ Damages are available where there is a separate head of claim for damages – consider immigration detention.

# Interim Orders / Remedies

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- Used where, without one, there would be a loss to a party.
- Consider unlawful removal cases.
- Often required on an urgent basis – beware Hamid.
- Provide a draft order for interim relief.

# Outcome Difference - Materiality

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- Post April 2015.

- S.31 of the Senior Courts Act 1981

*highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.*

- s.16(3E) of the Tribunals, Courts and Enforcement Act 2007

*it appears to the tribunal to be highly likely that the outcome for the applicant would not have been substantially different, the tribunal must refuse to grant permission.*

# Initial Steps

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- ~~• Identify the decision (or action, or failure to act)~~
- ~~• Determine sufficiency of interest~~
- ~~• Identify the time limit (CPR 54.5)~~
- ~~• Identify grounds~~
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- ~~• Consider remedies~~
- ~~• Consider whether outcome would have been different~~
- Take pre-action

# Pre-Action

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- Doesn't apply in urgent cases, but do it anyway, with a reduced timescale.
- Beware costs impact, or adjournments, of non-compliance with protocol.
- Standard form (Annex A)
- SSHD standard form.

# Pre-Action Letter Requirements

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- Proposed claim for judicial review
- To (Insert the name and address of the proposed defendant – see details in section 2.)
- The claimant (Insert the title, first and last name and the address of the claimant.)
- The defendant's reference details (When dealing with large organisations it is important to understand that the information relating to any particular individual's previous dealings with it may not be immediately available, therefore it is important to set out the relevant reference numbers for the matter in dispute and/or the identity of those within the public body who have been handling the particular matter in dispute – see details in section 3.)
- The details of the claimants' legal advisers, if any, dealing with this claim (Set out the name, address and reference details of any legal advisers dealing with the claim.)
- The details of the matter being challenged (Set out clearly the matter being challenged, particularly if there has been more than one decision.)
- The details of any Interested Parties (Set out the details of any Interested Parties and confirm that they have been sent a copy of this letter.)

# Pre-Action Letter Requirements

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- The issue (Set out a brief summary of the facts and relevant legal principles, the date and details of the decision, or act or omission being challenged, and why it is contended to be wrong.)
- The details of the action that the defendant is expected to take (Set out the details of the remedy sought, including whether a review or any interim remedy are being requested.)
- ADR proposals (Set out any proposals the claimant is making to resolve or narrow the dispute by ADR.)
- The details of any information sought (Set out the details of any information that is sought which is related to identifiable issues in dispute so as to enable the parties to resolve or reduce those issues. This may include a request for a fuller explanation of the reasons for the decision that is being challenged.)
- The details of any documents that are considered relevant and necessary (Set out the details of any documentation or policy in respect of which the disclosure is sought and explain why these are relevant.)
- The address for reply and service of court documents (Insert the address for the reply.)
- Proposed reply date (The precise time will depend upon the circumstances of the individual case. However, although a shorter or longer time may be appropriate in a particular case, 14 days is a reasonable time to allow in most circumstances.)

# Pre-Action Letter Destinations

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- Immigration, Asylum or Nationality - [UKVIPAP@homeoffice.gsi.gov.uk](mailto:UKVIPAP@homeoffice.gsi.gov.uk)
- The Home Office reference number; The Port reference number;
- The Asylum and Immigration Tribunal reference number;
- The National Asylum Support Service reference number; or, if these are unavailable: The full name, nationality and date of birth of the claimant.
- If LAA (Certificate No.), LA, Tsol case, HMRC, check Annex A
- If not listed in Annex A – use address on letter notifying of decision.

# Pre-Action Letter Destinations

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# Pre-Action Strategy

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- Set out as you would a statement of facts and grounds. Include as much as you intend to include in the claim. Failure to do so can impact costs or expedition.
- Think laterally in seeking disclosure as part of protocol. Request reasons for non-disclosure.
- Consider also D's failure to reply to pre-action, properly or at all, in costs.

# Pre-Action Non-Compliance Outcomes

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- ❁ R (William Kemp) v Denbighshire Local Health Board [2006] EWHC 181 (Admin) – failure to comply with PAP, couldn't prove needed to have JR'ed, so no costs.
- ❁ Aegis Group Plc v Inland Revenue Commissioners [2005] EWHC 1468 (Ch) - C dropped JR, achieved nothing, but still got 85% costs because of D's failure to respond to PAP for 2 months.
- ❁ Comply, and seek compliance.

# Prepare the Bundle

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- Index
- Urgent consideration application (N463, T483), if applicable
- Grounds in support of urgent consideration
- Claim form (N461, T480)
- Grounds
- Witness statements, if applicable
- Evidence, correspondence
- Legislation, guidance, caselaw.
- Funding?

# Where to issue?

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- Administrative Court at RCJ
- Regional Administrative Court Offices
- PD54C – 2.5, exceptions 3.1

*The general expectation is that proceedings will be administered and determined in the region with which the claim has the closest connection. This will be determined having regard to the subject matter of the claim, the region in which the claimant resides and the region in which the defendant or any relevant office or department of the defendant is based.*

# Service of Proceedings

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- Serve Claim Form within 7 days. Don't need to, but do serve the bundle at the same time.
- Lodge certificate of service within 7 days of service.
- AOS due to be lodged within 21 days, then served within 7.
- Consider responding to AOS, particularly if:
  - It raises a new reason;
  - It relies upon new evidence;
  - It arguably constitutes a new decision.

Timing is key, as permission decision could be made any day.

# Consider Breaches

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- Has D filed AOS?
- Has D served AOS?
- Did they do so in time?
- If not, did they apply to extend?
- Did they have good reasons?
- Did they misbehave?

# Urgency - Hamid

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- R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin)
- Applications to stay removal, made on urgent basis
- Allegedly used as a “device”

*“late, meritless applications by people who face removal or deportation are an intolerable waste of public money, a great strain on the resources of this court and an abuse of a service this court offers”*

*Coming to your jurisdiction!*

# Urgency - Hamid

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- A Divisional Court hearing will follow – “show cause letter”.
- Penalty varies, from taking remedial action *R (Butt) v SSHD [2014] EWHC 264 (Admin)*, to name and shame *Awuku (No 2) v SSHD [2012] EWHC 3690 (Admin)*, to accepting apologies *R (B & J) v SSHD [2012] EWHC 3770 (Admin)*.
- SRA referral can happen, or SRA can review on their own volition.
- Can simply refer to SRA without a show cause hearing.
- Also, can call in OISC.

# Urgency - Hamid

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- *The Hamid Jurisdiction traditionally dealt with immigration cases but the PQBD [President of the Queen's Bench Division, Sir Brian Leveson] has directed that the jurisdiction will now be extended to all types of cases that are dealt with at the Administrative Court Office.*

*November, 2018 minutes of the Admin Court User Groups meeting*

# Urgency – Hamid – How to Avoid

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- Ensure urgency actually exists. Have developments reduced urgency?
- Comply with duty of candour. Are there any factors which reduce urgency?
- Completion of all aspects of N463 or T483
- Failure to provide all info WILL lead to attendance in open court, para 7 and 8 *Hamid*.

# Urgency – Hamid – Example

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- *DVP & Ors, R (On the Application Of) v The Secretary of State for the Home Department [2021] EWHC 606*
- *Reasons for Urgency – See application for interim relief.*
- *Abridgment of time for AOS – Not ticked*
- *Reasons for delay in making application – N/A*
- *Efforts to put D on notice – See 236 page tab in bundle*
- *Draft order – Attached, but page number not provided. 83.*

# What went wrong?

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- Date of claimed urgency was 3 weeks after urgency arose.
- No reasons for urgency given, either on form or on application for relief.
- No explanation for delay – reference to massive bundle instead.
- Breach of duty of candour.
  
- Sufficient apology.

# The Permission Stage

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- Intended to filter “weak and vexatious claims”: per *Lord Bingham in R v. SSTI, ex parte Eastway* [2000] 1 WLR 2222
- Test is (supposed to be) “realistic prospect of success” – arguability
- In reality, it’s way higher than this.
- If permission refused on paper, apply for oral reconsideration within 7 days. (Form 86b should be sent to you). File and serve with anyone that sent you an AOS.
- Explain why paper refusal is wrong. Can’t just reassert old grounds.

# The Permission Stage

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- If an oral hearing is going to take more than 30 minutes, let the Administrative Court know.
- In practice, these hearings last for an hour or more. The test is more substantial than agreeability, in practice.
- Success upon oral renewal, especially where argument has been extensive, often results in D's concession and a consent order.
- If refused as totally without merit, consider appeal to Court of Appeal.

# Following Permission

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- Defendant to file and serve “detailed grounds for contesting the application, and any written evidence” within 35 days
- Reply and application to adduce further evidence within a further 14 days (not in CPR but standard-ish practice)
- Claimant to file and serve skeleton 21 days before hearing
- Defendant to file and serve skeleton 14 days before hearing
- Agree bundle 3 days before hearing

# Settlement

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- Inform the court promptly. Wasted costs orders await.
- Seek consent of the court (PD54, paragraph 17)
- If there has been an injunction or undertaking, permission is required for Claimant to discontinue (CPR part 38.2 (2))
- Usually:
  1. Claimant be allowed to withdraw claim for judicial review
  2. A fresh decision shall be made by ...
  3. No order for costs save that costs be subject to detailed assessment.

# Skeletons

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- PD54A, paragraph 15
- On the first page (a) a time estimate for the complete hearing, including delivery of judgment, and the judge's pre-reading; and (b) a list of essential documents for the advance reading of the Court (with page references to the passages relied on);
- List of persons
- Chronology
- Issues, including legal points, reference to authorities.
- 12 point, 1,.5 or double spacing, numbered paragraphs, numbered pages. 20 pages or less. Word documents (not PDF)

# Any Questions?

## Thanks for watching!

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