CHAPTER 16

CPR PT 54 CLAIMS FOR JUDICIAL REVIEW

SCOPE

16–001 There are several procedures by which the lawfulness of a public authority's decision may be challenged in the Administrative Court.

- A claim for judicial review under CPR Pt 54.[1]
- A modified CPR Pt 54 procedure in the case of some immigration and asylum decisions.[2]
- An application for the writ of habeas corpus.[3]
- A statutory application to quash specific orders and decisions of Ministers, tribunals and other bodies made under particular statutes and statutory instruments.[4]
- By a complex array of appeals from magistrates, tribunals, Ministers and other decision-making bodies.[5]
- In addition, bodies other than the Administrative Court apply judicial review principles in determining cases—including the county courts dealing with appeals against homelessness decisions of local authorities,[6] and the Upper Tribunal in supervising the determinations of the First-tier Tribunal.[7]

16–002 This chapter describes and evaluates the first of these procedures.[8] The procedural regime is set out in a "somewhat cumbrous and confusing . . . hierarchy of rules and guidance",[9] comprising: statutory provisions;[10] the

[1] Introduced in October 2000 to replace RSC, Ord.53, dealt with in this Chapter.
[2] See 17–004.
[3] See 17–010.
[4] See 17–025.
[5] See 17–036.
[6] See 17–037.
[7] See 1–084, under Supreme Court Act (Senior Courts Act) 1981 s.31A.
[8] For practical guidance, see also: B. Lang (ed.), *Administrative Court: Practice and Procedure* (2006); C. Lewis, *Judicial Remedies in Public Law*, 3rd edn. (2004), Ch.9; M. Supperstone and L. Knapman et al (eds), *Administrative Court Practice Judicial Review* (2002); J. Halford, "Strategy in Judicial Review: Using the Procedure to the Claimant's Advantage" [2006] J.R. 153; A. Lidbetter, "Strategy in Judicial Review for Defendants" [2007] J.R. 99.
[9] *Mount Cook Ltd v Westminster City Council* [2003] EWCA Civ 1346 at [67] (Auld L.J.)
[10] Supreme Court Act (Senior Courts Act) 1981 ss.29, 31 and 43. These provisions were amended on May 1, 2004 by the Civil Procedure (Modification of the Supreme Court Act 1981) Order 2004 (SI 2004/1033), renaming the remedies of mandamus, prohibition and certiorari as mandatory, prohibition and quashing orders respectively. See Appendix D.

Civil Procedure Rules (which are statutory instruments made pursuant to ss.1 and 2 of the Civil Procedure Act 1997);[11] Practice Directions made by the Lord Chief Justice in exercise of his inherent jurisdiction;[12] various Practice Statements; a Pre-Action Protocol on Judicial Review;[13] and Administrative Court Office Notes for Guidance on Applying for Judicial Review.[14] The Practice Directions provide general guidance, but do not have binding effect, and yield to the CPR in the event of a clear conflict between them.[15]

The Administrative Court

16–003 The Administrative Court, created in October 2000 to replace the Crown Office List, is part of the Queen's Bench Division of the High Court. It has jurisdiction over a wide range of matters, several of which fall outside the scope of this book.[16] The Administrative Court sits mainly in London, where it has the regular use of six courtrooms in the Royal Courts of Justice. Most claims for judicial review are now heard by a single judge, though some (notably those in a "criminal cause or matter") continue to be heard by a divisional court of two or occasionally three judges.[17] Hearings

[11] See Appendix G.
[12] See Appendix H. *R. (on the application of Ewing) v Department for Constitutional Affairs* [2006] EWHC 504; [2006] 2 All E.R. 993 at [13].
[13] See Appendix I. This sets out "a code of good practice and contains the steps which parties should generally follow before making a claim for judicial review" (para.5). Failure to comply with the Pre-Action Protocol may result in a successful party's order for costs being reduced, see e.g. *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468; [2005] S.T.C. 989. The Pre-action Protocol is reissued from time to time; the version in force at the time of writing is October 2006.
[14] Available from HM Court Service website (*http://www.hmcourts-service.gov.uk/*).
[15] *Mount Cook Ltd* [2003] EWCA Civ 1346 at [68]; *Godwin v Swindon BC* [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997 at [11] (May L.J., "They are, in my view, at best a weak aid to the interpretation of the rules themselves"); *Re C (Legal Aid: Preparation of a Bill of Costs)* [2001] 1 F.L.R. 602 at [21] (Hale L.J.: "the Practice Directions are not made by Statutory Instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go though no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament. But there is a difference in principle between delegated legislation which may be scrutinised by Parliament and ministerial executive action. There is no ministerial responsibility for Practice Directions made for the Supreme Court by the Heads of Division. As Professor Jolowicz says 'It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate'").
[16] Including vexatious litigant proceedings, applications relating to contempt of court, extradition matters, the Proceeds of Crime Act 2002, appeals (formerly made to the Privy Council) relating to the striking off of health care professionals under the National Health Service Reform and Health Care Professions Act 2002; applications under s.13 of the Coroners Act 1988; appeals from the Law Society Disciplinary Tribunal; and applications relating to parliamentary and local government elections under the Representation of the People Acts. See further Lang (2006).
[17] Supreme Court Act (Senior Courts Act) 1981, ss.19, 66 and 151(4). See Lang (2006), para.1–04.

may also take place in major centres around England. Specific provision is made for the Administrative Court to sit in Wales where a claim for judicial review relates to a devolution issue arising out of the Government of Wales Act 2006 or an issue concerning the National Assembly for Wales, the Welsh Assembly Government, or any Welsh public body (including a Welsh local authority) whether or not it involves a devolution issue.[18] Proceedings in Wales may take place in Welsh.[19]

16–004 The judges of the Administrative Court are those Justices of the High Court nominated by the Lord Chief Justice to deal with Administrative Court business.[20] Their number has grown from four in 1981 to 37 in 2007. They are mainly judges of the Queen's Bench Division, but also include judges of the Family Division and the Chancery Division. Deputy High Court judges (experienced circuit judges and practitioners appointed to sit on a part-time basis) may also be authorised to deal with Administrative Court matters, though by convention they do not hear cases relating to central government and they have limited powers to hear cases involving the Human Rights Act 1998.[21] The Master of the Administrative Court[22] has no general jurisdiction to make orders in claims for judicial review, except for interim applications (such as orders for expedition or orders and stand out of the list pending determination of a test case).[23]

16–005 A Lead Judge of the Administrative Court is appointed by the Lord Chief Justice.The nominated judges spend only some of their time on Administrative Court business (typically there are eight single judges and one divisional court sitting, the constitutions changing after periods of three weeks); like other High Court judges they also hear other civil and criminal cases on circuit and in London.[24] These arrangements reflect a compromise: while recognising the need for expert judges in the field of public law, it maintains the English tradition that everyone, including public bodies and office-holders, ought to be subject to justice in the ordinary courts.[25]

16–006 The work of the Administrative Court is supported by the legal and administrative staff of the Administrative Court Office[26] (part of the Courts Service), under the direction of the Master of the Administrative Court

[18] Practice Direction 54, para.3. On devolution issues, see 1–113.
[19] Welsh Language Act 1993 s.22.
[20] Hence the term "nominated judges" to refer to the judges who determine judicial review claims.
[21] Practice Direction 2b para.7A. They may not hear a "claim made in respect of a judicial act" or where there is a claim for a declaration of incompatibility.
[22] An office combined with that of Registrar of Criminal Appeals: Courts and Legal Services Act 1990 s.78.
[23] Practice Direction 2b para.3.1(c).
[24] The Bowman committee reviewing judicial review procedures before the coming into force of the Human Rights Act recommended that it should become a more specialised court with the nominated judges spending a greater proportion of their time on its work (para.23).
[25] A.V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (1959), p.193: a second meaning of the "rule of law" was that "every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".
[26] Known as the Crown Office until 2000.

(formally still the Master of the Crown Office) and the Head of the Administrative Court Office. A team of 10 lawyers assist in the management of cases, each one specialising in a range of subject areas. Claims for judicial review received by the Administrative Court Office are examined by one of the lawyers. The lawyer to whom the case is assigned produces a note, summarising the issues (without expressing an opinion on the merits of the claim), drawing the court's attention to relevant authorities (especially unreported ones) and alerting the court to any similar cases that may be pending.[27]

16–007 The Administrative Court provides commendable transparency and accountability for its work though the publication of an annual statement by the Lead Judge, the existence of a "court users' group" which meets at least three times a year "for those who wish to voice their opinions on the running of, or issues relating to the Administrative Court and the Administrative Court Office", a clear system for dealing with complaints by court users about administrative failures and regular newsletters.[28]

CPR PT 54

16–008 Of the various procedures for review,[29] it is the claim for judicial review under CPR Pt 54 that is of prime importance both in terms of the number of claims made and the effect it has had as a stimulus to the development of the principles of administrative law.[30] Although some flexibility now exists, where public law issues are at the heart of a claim, claimants are expected to use the CPR Pt 54 claim form and procedure (a signficantly modified varient of the CPR Pt 8 arrangments for litigation) rather than the general procedure and form for commencing civil proceedings laid down by CPR Pt 7, or the alternative procedure in CPR Pt 8.[31]

16–009 Two main features distinguish the judicial review procedure from these other types of civil claims. First, a claimant may not pursue a claim for judicial review to a full hearing without obtaining the permission (formerly "leave") of the Administrative Court to do so.[32] Secondly, there is a requirement that permission be sought promptly, and in any event within

[27] *R. v Lord Chancellor's Department Ex p. O'Toole* [1998] C.O.D. 269 (claimants have no right at common law to disclosure of such notes, though any unreported judgment mentioned in the note should be disclosed to the claimant to avoid apparent unfairness).
[28] See *http://www.courtservice.gov.uk*.
[29] See 16–044.
[30] See 1–097.
[31] See 3–00.
[32] Since the coming into force of the CPR, the differences between CPR Pt 54 and other proceedings are less pronounced as judges in all cases now have responsibility to manage the conduct of the litigation more closely than once was the case. See 3–103 and see M. Fordham, "Judicial review: the new rules" [2001] P.L. 4 and T. Cornford and M. Sunkin, "The Bowman Report, Access and the Recent Reforms of the Judicial Review Procedure" [2001] P.L. 11.

three months from the date when grounds for the claim first arose.[33] The time periods for commencing civil claims in tort and breach of contract, laid down in the Limitation Act 1980, are typically six years from the date on which the cause of action arose.

16–010 Between 1978 (when judicial review procedures were modernised) and October 2000 (when CPR Pt 54 came into force) judicial review litigation was regulated by Order 53 of the Rules of the Supreme Court. Today, reference to cases about the RSC Ord.53 procedure must therefore be made with caution.[34] The importance now attached to the "overriding objective" of the CPR may require re-evaluation of practices and principles adopted in the past. So too with the Human Rights Act 1998: it should not be assumed that approaches adopted to the judicial review process prior to October 2000 are always complient with Convention rights. As a public authority, the Administrative Court must itself avoid acting in a way which is inconsistent with Convention rights.[35] The CPR must be read and given effect in a manner which is compatible with Convention rights so far as it is possible to do so.[36]

The overriding objective

16–011 CPR Pt 54 must be interpreted and applied in the light of the CPR's "overriding objective of enabling the court to deal with cases justly".[37] This "provides a compass to guide courts and litigants and legal advisers as to their general course".[38] More particularly[39]:

> "Dealing with a case justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate—
>
> (i) to the amount of money involved;
> (ii) to the importance of the case;

[33] See 16–050.
[34] *Biguzzi v Rank Leisure Plc* [1999] 1 W.L.R. 1926 (Lord Woolf M.R.: "The whole purpose of making the CPR a self-contained code was to send the message that it now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies"); this does not mean that in all cases the old authorities "should be completely thrown overboard" (*UCB Corporate Services Ltd (formerly UCB Bank Plc) v Halifax (SW) Ltd (Striking Out: Breach of Rules and Orders)* [1999] C.P.L.R. 691, Ward L.J.) but it does mean that pre-CPR authorities must always be re-evaluated in the light of the overriding objective.
[35] Human Rights Act 1998 s.6.
[36] Human Rights Act 1998 s.3. If it is impossible to give the CPR a compatible interpretation they will be ultra vires unless the incompatibility is specifically required by the Civil Procedure Act 1997 (*General Mediterranean Holdings SA v Patel* [2000] 1 W.L.R. 272). See generally, J. Jacob, *Civil Litigation in the Age of Human Rights* (2007).
[37] CPR r.1.1(1).
[38] *Access to Justice: Final Report*, p.275.
[39] CPR r.1.1(2).

(iii) to the complexity of the issues; and
(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot the resources to other cases.''

16–012 CPR Pt 3 confers on the court general powers of case management. Except where the CPR provide otherwise, the court may (among other things) ''extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)'',[40] ''exclude an issue from consideration'' and ''take any other step or make any other order for the purpose of managing the case and furthering the overriding objective''. Generally, purely technical breaches of the rules should not hinder access to the court,[41] though other sanctions (such as costs) may be imposed. The overriding objective requires that parties be dealt with ''on an even footing''.[42] Equality of arms is also an aspect of ECHR Art.6(1).[43]

The procedural stages

16–013 A claim for judicia review may encompass several stages, each of which will be examined below.

- The exhaustion of other remedies and use of ADR.
- Gathering of information, including use of the Freedom of Information Act 2000 and Data Protection Act 1998.

[40] See, e.g. *R. v Vale of Glamorgan Council Ex p. Clements*, *The Times*, August 22, 2000 (CA allowed a renewed application for permission for judicial review in exceptional circumstances, even though the application for permission to appeal had not been made within the prescribed seven day period and the documents normally expected to accompany the application had not been lodged with the court).
[41] See, e.g. *Cala Homes (South) Ltd v Chichester DC (Time Limits)* [2000] C.P.Rep. 28 (claimant mistakenly filed a claim form in the wrong court office and used the wrong claim form but court declined to strike out the claim); *R. v Secretary of State for the Environment, Transport and the Regions Ex p. National Farmers Union*, November 24, 1999 (unreported, Keene J.) (NFU applied for judicial review rather than made a statutory application to quash but the court allowed the claim to be amended and to proceed).
[42] See, e.g. *Maltez v Lewis* (1999) 96(21) L.S.G. 39 (the overriding objective could not interfere with a party's right to choose a legal representative, but: ''if it were to transpire, for instance, that one party could afford very experienced, large and expensive solicitors, whereas the other party could only afford a small and relatively inexperienced firm, then the court can—indeed, I suggest the court should—make orders to ensure that the level playing field envisaged by r.1(2)(a) is, so far as possible, achieved. It might be appropriate, for instance, when ordering disclosure, to give the party with the smaller firm of solicitors more time than the party with the larger firm. On preparing bundles, it might be right to direct the party instructing the larger firm to take on the duty of preparing and copying bundles'' (Neuberger J.).
[43] See, 6–048, 7–119, 10–077; see, e.g. *Dombo Beheer BV v Netherlands* (1994) 18 E.H.R.R. 213 (each party in a civil proceeding must have a reasonable opportunity to present his case under conditions which do not disadvantage him in relation to his opponent).

- The exchange of letters between the would-be claimant and defendant before starting the claim.
- The preparation of the claim form.
- The application for permission to make a claim for judicial review and any appeal against the refusal of permission.
- An interlocutory stage.
- The hearing of the substantive claim;
- Finally, any appeal against the substantive claim.

Exhaustion of other Remedies and ADR

16–014 In numerous cases in recent decades, the Administrative Court and its precursor have made plain that (in the absense of exceptional circumstances) permission to proceed with a judicial review claim will be refused where a claimant has failed to exhaust other possible remedies.[44] A claiment will not be required to resort to some other procedure if that other procedure is "less satisfactory" or otherwise inappropriate.[45] In each case the question is whether the court should exericise its discretion; "it would be both foolish and impossible to seek to anticipate" all the factors that may properly influence the court's discretion.[46]

16–015 Added impetetus to the older case law on the need to exhaust alternative remedies has been given by the growing recognition of the importance of alternative dispute resoluton (ADR) in civil litigation generally and, more recently, the Ministry of Justice's policy on "proportionate dispute resolution".[47]

Alternative (or substitute) remedies

16–016 Claimants are refused permission to proceed with judicial review where the court forms the view that some other form of legal proceedings or avenue of challenge is available and should be used. Questions as to whether a

[44] Pre-Action Protocol for Judicial Review (October 2006), para.2 ("Judicial review may be used where there is no right of appeal or where all avenues of appeal have been exhausted"); *R. (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 W.L.R. 475. For surveys of the voluminous case law, see M. Fordham, *Judicial Review Handbook*, 4th edn (2004), pp.699–720 and C. Lewis, *Judicial Remedies in Public Law*, 3rd edn (2004), paras 11–042—11–074. See also R. Moules, "The exhaustion of alternative remedies: re-emphasising the courts' discretion" [2005] J.R. 350.

[45] *R. v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] Q.B. 720; *R. v Chief Immigration Officer Ex p. Kharrazi* [1980] W.L.R. 1396 (not practicable to use the machinery under s.13 Immigration Act 1971 as claimant would have to return to Iran to exercise his right of appeal and would be caught in a war); *cf. R. (on the application of George) v General Medical Council* [2003] EWHC 1124; [2004] Lloyd's Rep. Med. 33.

[46] *R. v Hereford Magistrates Court Ex p. Rowlands* [1998] Q.B. 110.

[47] See 1–057.

claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. Once the court has heard arguments on the grounds of review, there is little purpose in requiring the parties to resort to some other remedy;[48] indeed, to do so may be contrary to the overriding objective of the CPR. But a failure to pursue other remedies may influence how the court exercises its discretion to award costs.[49]

16–017 The most obvious type of substitute remedy is an avenue of appeal or review created by statute.[50] A range of other forms of challenge have also been held to be acceptable substitutes for judicial review.[51] There are various reasons why legislation may create an avenue of redress into which the Administrative Court may seek to divert challenges, including: a desire to make access to justice available more locally; a wish to prevent the Administrative Court becoming overburdened with cases; the fact that a tribunal or other specialist body may have more expertise in the subject of the claim than the Administrative Court; and that substitutes for judicial review may be provided at lesser cost.

Avenues of appeal or review created by statute

16–018 The most straightforward substitute remedy is where legislation provides an appeal. Judicial review is essentially a mechanism to be used where there is no statutory right of appeal. In almost all cases the Administrative Court will regard a statutory appeal, whether to a court or a tribunal, as a proper substitute for judicial review,[52] though exceptional circumstances may dictate otherwise.[53]

16–019 There are numerous examples of appeal and review systems other than judicial review.[54] The new tribunal system created by the Tribunals, Courts and Enforcement Act 2007 creates one such appeal route: first to the First-tier Tribunal, from there to the Upper Tribunal, and then to the Court of Appeal.[55] There is an appeal from decisions of local authorities relating to homelessness to the county courts.[56] In many circumstances, an appeal lies from decisions of magistrates' courts either to the Crown Court or ("by

[48] *R. v Chief Constable of Merseyside Police Ex p. Calveley* [1986] 1 Q.B. 424.
[49] See 16–087.
[50] See 16–018.
[51] See 16–021.
[52] *R. v Birmingham City Council Ex p. Ferrero Ltd* [1993] 1 All E.R. 530; *Farley v Secretary of State for Work and Pensions (No.2)* [2006] UKHL 31; [2006] 1 W.L.R. 1817.
[53] *R. v Secretary of State for the Home Department Ex p. Capti-Mehmet* [1997] C.O.D. 61 (error or incompetence of the claimant's legal representatives will not of itself constitute an exceptional circumstance).
[54] It is arguable that in some contexts appeals (or indeed, judicial review) limited to issues of law are insufficient: this has been the subject of criticisms over several years by the House of Lords Constitution Committee, which has taken the view that "appeals should provide an opportunity for the regulated to have their objections reviewed on the merits of the case": *The Regulatory State: Ensuring its Accountability*. HL Paper No.68 (Session 2004/05) Ch.11.
[55] See 1–090.
[56] Housing Act 1996; see 17–045.

way of case stated") to the Administrative Court.[57] Some appeals may enable the appellate tribunal or court to reconsider the merits of the case, but often appeals are limited to "points of law", which encompasses all the grounds of judicial review.

16–020 The powers of a tribunal or court hearing an appeal will often be at least as extensive as those in judicial review (and perhaps greater). In most situations there can be no constitutional or practical objection to the Administrative Court routinely refusing permission to proceed with a judicial review claim where there is a statutory appeal to a tribunal[58] or a court.[59] To hold otherwise would risk subverting Parliament's intention in creating such appeals.[60] The one appeal system the Administrative Court was called upon to supervise frequently was refusals of permission to appeal from Immigration Adjudicators to the Immigration Appeal Tribunal; this appellate system has now been superceded.[61] The desirability of an authoritative ruling on a point of law may point towards judicial review being the appropriate remedy in some contexts, if the appeal or review procedure is incapable of making such a ruling.[62]

Other avenues of legal challenge

16–021 In addition to statutory appeals, the Administrative Court has regarded a range of other grievance redressing mechanisms as substitutes for judicial review. These include: a statutory complaints procedure;[63] an express right to give notice of objection to a government Minister proposing to impose a penalty;[64] the possibility of bringing a private prosecution,[65] remedies under the Public Supply Contracts Regulations 1995 and other public

[57] See 1–009.

[58] *R. v Secretary of State for the Home Department Ex p. Swati* [1986] 1 W.L.R. 722; *R. v Ministry of Defence Ex p. Sweeney* [1999] C.O.D. 122; R. *(on the application of M) v Bromley LBC* [2002] EWCA Civ 1113; [2002] 2 F.L.R. 802 (Care Standards Tribunal established under the Protection of Children Act 1999).

[59] *R. v Mansfield DC Ex p. Ashfield Nominees Ltd* [1999] E.H.L.R. 290 (appeal to county court against repairs notices issued under the Housing Act 1985); *R. v Merton LBC Ex p. Sembi* (2000) 32 H.L.R. 439 (appeal to county court under Housing Act 1996); *R. v Blackpool BC Ex p. Red Cab Taxis Ltd* [1994] R.T.R. 402 (private hire vehicles licensing, appeal to justices). Cf. *R. v Hereford Magistrates Court Ex p. Rowlands* [1998] Q.B. 110 (stressing that it was always a question of discretion whether to allow judicial review where a defendant in criminal proceedings had not pursued an appeal to the Crown Court).

[60] See, e.g. *R. (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1 W.L.R. 475.

[61] See 1–094; on the new system, see 17–004.

[62] *Falmouth and Truro Port HA v South West Water Ltd* [2001] Q.B. 445.

[63] *R. v East Sussex CC Ex p. W (A Minor)* [1998] 2 F.L.R. 1082 (care order and Children Act 1989).

[64] *R. (on the application of Balbo B&C Auto Transporti Internazionali) v Secretary of State for the Home Department* [2001] EWHC Admin 195; [2001] 1 W.L.R. 1556 (relating to a civil penalty issued under the Immigration and Asylum Act 1999 s.35 on lorry owner), considered in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] Q.B. 728.

[65] *R. v DPP Ex p. Camelot Group Plc* (1998) 10 Admin.L.R. 93; *cf. R. v Commissioner of Police for the Metropolis Ex p. Blackburn* [1968] 2 Q.B. 118.

procurement regulations;[66] proceedings in the Chancery Division questioning the compatibility of a statutory provision with European Community law;[67] and a request to a Secretary of State to exercise default powers (conferred under various Acts of Parliament) to intervene to prevent the unreasonable exercise of power by a public authority.[68] In this category of case, a more searching inquiry may be needed than in the case of a straightforward statutory appeal; the question ought to be whether the substitute for judicial review adequately protects the rights and interests of the claimant. The other body may for example lack the power to deal with the issue.[69] If the claimant is seeking to raise questions about the lawfulness of a broad question of policy, the Adminsitrative Court may be a more appropriate forum than a criminal court.[70] The other procedure may be less expeditious and if a matter is urgent the court may allow the application to proceed.[71] Among the factors to be considered are "the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising, and (perhaps) the apparent strength of the claimant's substantive challenge".[72] Recourse to one of the ombudsmen[73] may also, in some cases, provide a substitute for judicial review. As discussed in Chapter 1, the potential problem here is that the ombudsmen may also regard judicial review as appropriate and refuse to conduct an inquiry into what otherwise might be maladministration causing injustice.[74]

[66] *Cookson & Clegg Ltd v Ministry of Defence* [2005] EWHC 38; [2005] Eu. L.R. 517; S.H. Bailey, "Judicial Review and the Public Procurement Regulations" (2005) 6 P.P.L.R. 291. Note that each of the various public procurement regulations has their own provision for enforcement.
[67] *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468; [2005] S.T.C. 989.
[68] See, e.g. *R (on the application of Baker) v Devon County Council* [1995] 1 All E.R. 73 at 92. *cf. R. v Inner London Education Authority Ex p. Ali* (1990) 2 Admin. L.R. 822 (the fact that the Secretary of State had power to give directions under the Education Act 1944 s.99, and can do so on complaint, creates no inference that the ordinary jurisdiction of the court is ousted, though it is very relevant to the exercise of the court's discretion). For examples of default powers, see Education Act 1996 Pt 9.
[69] See, e.g. *Leech v Deputy Governor of Parkhurst Prison* [1988] A.C. 533 (at that time the Home Secretary lacked the power to remove a disciplinary finding in relation to a prisoner from his record); *Smith v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291; [2006] 1 W.L.R. 3315 (a patients' forum, a body established under the National Health Service Reform and Health Care Professions Act 2002 s.15 lacked the power to require a primary care trust to reverse a decision).
[70] *R. (on the application of A) v South Yorkshire Police* [2007] EWHC 1261 (Admin) (judicial review preferable to raising issues on an application to the Youth Court to dismiss or stay the criminal proceedings on the ground that they are an abuse of the process).
[71] *Ex p. Royco Homes Ltd* [1974] Q.B. 720.
[72] *Falmouth and Truro Port HA v South West Water Ltd* [2001] Q.B. 445.
[73] The Parliamentary Commissioner for Administration, the Commission for Local Administration, the Health Services Commissioner and (in Wales) Public Services Ombudsman for Wales: see 1–066.
[74] See 1–083.

Alternative Dispute Resolution (ADR)[75]

16–022 An important aspect of the new approach to civil litigation embraced by the CPR is that all courts must futher the overriding objective by "actively managing cases". This includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".[76] The requirement for practitioners to use—or at least consider the use of—ADR instead of resorting too early to judicial review claims was set down by the Court of Appeal in *Cowl v Plymouth CC*.[77] The Court of Appeal spoke of "the paramount importance of avoiding litigation whereever possible" in disputes with public authorities and said that the LSC should co-operate with the Administrative Court "to scrutinise extremely carefully" judicial review claims so as to ensure that parties tried "to resolve the dispute with the minimum involvement of the courts". The Pre-action Protocol on Judicial Review identifies "some of the options" as: discussion and negotiaton; ombudsmen; early neutral evaluation; and mediation.[78] To this should be added the use of internal complaints procedures and an offer of a rehearing by the original decision-maker.[79] All of these techniques are encouraged by the Ministry of Justice's policy of "proportionate dispute resolution" (which extends beyond ADR to include, among other things, steps to avoid disputes arising in the first place).[80] In encouraging ADR, it needs to be "recognised that no party can or should be forced to mediate or enter into any form of ADR"[81]—an important respect in which ADR differs from the court's approach to insisting upon the use of formal rights of appeal in place of judicial review.

16–023 In the years immediately following *Cowl* there has been relatively slow progress towards establishing a principled basis on which ADR can be used in public law disputes (clearly not all disputes are suitable for ADR),[82] establishing a suitable funding regime to pay for ADR and making practical arrangements for its delivery. A particular problem relates to timing. The

[75] See also 1–065.
[76] CPR r.1.4(2)(d).
[77] [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803; see A. Le Sueur, "How to Resolve Disputes with Public Authorities" [2002] P.L. 203; S. Boyron, "The Rise of Mediation in Administrative Law Disputes: Experiences from England, France and Germany" [2006] P.L. 320.
[78] Para 3.2 (October 2006 issue). A list of agencies offering mediation and other services can be found on the Community Legal Service Direct website (*http://www.clsdirect.org.uk*). The Public Law Project, funded by the Nuffield Foundation, is carrying out a study of mediation and judicial review in 2007.
[79] *R. v London Beth Din Ex p. Bloom* [1998] C.O.D. 131.
[80] See 1–057.
[81] Pre-action Protocol for Judicial Review (October 2006), para.34. If however a party unreasonably refuses to engage in mediation, the court may subsequently refuse to make a costs order in its favour, see e.g. *Dunnett v Railtrack Plc* [2002] EWHC 9020 (Costs), available at *http://www.bailii.org*.
[82] For example, where important legal principles are at stake or it is necessary to establish a precedent; *cf.* M. Supperstone, D. Stilitz and C. Sheldon, "ADR in Public Law" [2006] P.L. 299.

fact that a claimant has been pursing alternative remedies or using ADR does not, as the rules now stand, operate to suspend the requirement that claims for judicial review are to be made promptly and in any event within three months. It may therefore be prudent to commence a claim and then stay proceedings pending the outcome of the other remedy—a precaution that somewhat undermines the policy goal of saving cost.

ECHR Arts 6(1) and 13

16–024 In deciding whether to steer a would-be claimant away from judicial review, the court needs now to consider ECHR Art.6(1) which, in relation to "civil rights and obligations or of any criminal charge", guarantees a right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" and which implicitly protects the right of access to a court.[83] Not all claims for judicial review raise "civil rights or obligation", or a criminal charge, but where they do weight needs to be given protecting access to a court. Where other Convention rights are in issue, the court should attach important to the need for an "effective remedy".[84]

Exchange of letters before claim

16–025 As in other types of litigation, a claimant who proposes to seek permission to make a judicial review claim is generally expected to give full notice in writing to the defendant before doing so.[85] The purpose of the letter is "is to identify the issues in dispute and establish whether litigation can be avoided".[86] The public authority is exected to respond in writing within 14 days of a letter before claim, using a standard format letter. Interested parties should be sent copies of both letters.[87] Compliance with the good practices set out in the Pre-Action Protocol for Judicial Review does not affect the requirement that permission be sought promptly and in any event within three months.[88]

Gathering Evidence and Information

16–026 Although it is often said that claims for judicial review do not (or should not) deal with matters of fact, information in the hands of a public authority is often vital to establishing whether a decision is wrong in law—

[83] See 6–048, 7–119.
[84] See 13–010.
[85] Except in urgent cases: see Pre-action Protocol, para.6.
[86] PD58, para.8. A standard form letter is provided, which claimants "should normally use": Pre-action Protocol.
[87] See 2–063.
[88] See 16–050. *R. (on the application of McCallion) v Kennet DC* [2001] EWHC Admin 575; [2002] P.L.C.R. 9.

for instance: that an irrelevant consideration was taken into account or a relevant consideration was not taken into account;[89] or that reasoning processes were so illogical as to amount to irrationality.[90] Where breach of a Convention right is in issue, the court's engagement with the factual background of the case will often be even more intensive than under ordinary domestic review and the court may be required to make findings of fact (not merely assess whether the public authority made reasonable findings of fact).[91] Review on the basis of proportionality requires the court to assess evidence of impact and alternative ways of achieving the public authority's policy goals.[92] The absence in English law of a general duty under common law to give reasons for decisions does not assist the claimant.[93] Once a claim for judicial review is afoot, the defendant public authority is expected to proceed with "all the cards face upwards on the table"[94] and the court may order disclosure.[95] Before that point, claimants may consider exercising statutory rights to rights of access to information, an overview of which we provide in the following paragraphs.

Freedom of Information Act 2000

16–027 The Freedom of Information Act 2000 introduced a statutory regime for obtaining information from public authorities.[96] Section 1 provides that "Any person making a request for information to a public authority is entitled—(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him". Public authorities have a duty "to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".[97]

16–028 "Public authority" for the purposes of the 2000 Act has a somewhat different meaning than it does in relation to claims for judicial review and the Human Rights Act 1998.[98] Rather than stipulate a test, the 2000 Act simply lists those office-holders and bodies that constitute a "public authority".[99] Public authorities are required to comply with requests for information "promptly and in any event not later than the twentieth

[89] See 5–110.
[90] See 11–036.
[91] See 11–079.
[92] See 11–079.
[93] See 7–087.
[94] *R. v Lancashire CC Ex p. Huddleston* [1986] 2 All E.R. 941 at 945.
[95] See 16–065.
[96] For an assessment, see R. Austin, "The Freedom of Information Act 2000—A Sheep in Wolf's Clothes?", Ch.16 in J. Jowell and D. Oliver, *The Changing Constitution*, 6th edn (2007).
[97] Freedom of Information Act 2000 s.16.
[98] See Ch.3.
[99] Freedom of Information Act 2000 s.3 and Sch.1 (as amended by Order from time to time).

working day following the date of receipt".[100] A public authority may refuse to comply if the cost of obtaining the information would exceed a stipulated limit (at the time of writing, £600 for central government and Parliament; £450 for other public authorities.). If a request under the 2000 Act is not complied with, an application may be made to the Information Commissioner who will adjudicate on the matter. An appeal from the Information Commissioner lies to the Information Tribunal.

16–029 The right to obtain information is subject to three main kinds of exemptions. First, where a public authority is not listed in Sch.1 to the Act (such as the Security Service and the Secret Intelligence Service), any information kept by that body is wholly outside the statutory right to request information. Secondly, the 2000 Act bars access to information by exempting from disclosure whole categories of information or record, such as: information accessible to applicant by other means; information intended for future publication; information supplied by, or relating to, bodies dealing with security matters; other information required for the purpose of safeguarding national security. Thirdly, the Act creates "contents-based" exemptions in relation to which the public authority must assess each item of information requested and apply a public interest test by assessing whether disclosure "would, or would be likely to, prejudice" the specified interests in question, which include: defence; international relations; relations between any administration in the United Kingdom and any other such administration; the economy; information relating to criminal investigations and proceedings conducted by public authorities.

Environmental Information Regulations 2004

16–030 European Union Council Directive 2003/4/EC on public access to environmental information required Member States to legislate to provide rights of access in this field. In England and Wales, the relevant legislation is the Environmental Information Regulations 2004 (SI 2004/3391) (EIR). Public authorities covered by the Freedom of Information Act 2000 are subject to the EIR, but regulations also extend further to cover "any other body or other person, that carries out functions of public administration" and any other body or other person, "that is under the control" of a public authority and "(i) has public responsibilities relating to the environment; (ii) exercises functions of a public nature relating to the environment; or (iii) provides public services relating to the environment".[101] There are a number of exemptions and limits on the right to information under the EIR.

[100] Freedom of Information Act 2000 s.10.
[101] SI 2004/3391 reg.2(2).

Access requests under the Data Protection Act 1998

16–031 The Data Protection Act 1998 (which came into force in March 2000) regulates the processing of information about individuals.[102] Sections 7–9 create a right for a ''data subject'' (or his authorised agent) to request a copy of certain kinds of data held by any ''data controller'' (which may be a public or private sector body or person); the 1998 Act binds the Crown. This is known as a ''data subject access request''. A data controller may charge a fee of up to £10. A response must be made promptly and in any event within 40 working days, describing the personal data held, the purposes for which they are being processed, and those to whom they are or may be disclosed. The data subject is entitled to have communicated to him in an intelligible form the information constituting any personal data of which he is the data subject (generally as a copy of the information in permanent form) and any information available to the data controller as to the source of those data.

16–032 The data in respect of which a subject access request may be made can be a computerised record or manual data in a paper-based filing system. ''Data'' means information ''being processed by means of equipment operating automatically in response to instructions given for that purpose'' or ''is recorded with the intention that it should be processed by means of such equipment'' or ''is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system''[103] or ''forms part of an accessible record''[104] (which means a ''health record'',[105] an ''educational record'',[106] or an ''an accessible public record as defined by Schedule 12'', in relation to which the general rules governing subject access requests are modified).[107] Expressions of opinion and intention fall within the definition of data.

16–033 Certain data are party or wholly exempt from subject access requests by Pt 4 of the Act, including data processed in relation to: national security; crime and taxation; information as to the physical or mental health or condition of the data subject; certain regulatory activities; literature, journalism and art; research, history and statistics; information available to the public by or under enactment; domestic purposes; and miscellaneous matters set out in Sch.7 to the Act.

[102] The 1998 Act gives effect to EC Directive 95/46/EC; it repeals the Data Protection Act 1984. See also Access to Medical Reports Act 1988.
[103] Freedom of Information Act 2000 s.1(1).
[104] Freedom of Information Act 2000 s.68.
[105] Freedom of Information Act 2000 s.68(2); and Data Protection (Subject Access Modification)(Health) Order 2000 (SI 2000/413).
[106] Freedom of Information Act 2000 Sch.11; Data Protection (Subject Access Modification) (Education) Order 2000 (SI 2000/414).
[107] Sch.12 (which deals with housing and social services records); Data Protection (Subject Access Modification) (Social Work) Order 2000 (SI 2000/415).

16–034 If a data controller unlawfully fails to comply with a data subject access request, a court may make an order requiring compliance.[108] County courts and the High Court have jurisdiction.[109] Where the data controller is a public authority and the issue arises in a public law context, a claim for judicial review will normally be appropriate.[110]

Preparing the Claim Form

16–035 A claim for judicial review is commenced by serving claim form N461 on the defendant and any interested parties and filing it at the Administrative Court Office,[111] along with notice of issue of a Community Legal Service Order funding certificate (if appropriate), witness statements[112] and the prescribed fee. The claim form acts as both the basis for seeking permission to proceed[113] and, if permission is granted, the basis on which the claimant's case will be put at the full hearing of the claim.[114] Clearly the claim form is a document of great importance in the conduct of the litigation.

16–036 The claim form must identify and give details[115] of the decision, etc. which is challenged, set out a detailed statement of the grounds for bring the review, and a statement of the facts relied upon. There is an obligation on the claimant to set out fully and fairly all material facts as he knows them or ought to have known them following inquiries.[116] If relevant, an application to extend the time limit for filing the claim form may be made.[117] The claim form must also set out the remedies sought including

[108] Freedom of Information Act 2000 s.7(9);
[109] Freedom of Information Act 2000 s.15(1).
[110] In *R. (on the application of Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 Munby J. ordered disclosure, in full and without redactions, of reports prepared by the Prison Service in relation to a decision to refuse to reclassify the claimant from Category A to B.
[111] CPR rr.8.2, 54.6, PD 54, para.5.6. See Appendix J. On filing a document by fax, see CPR 5PD.6. The postal address is: The Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London WC2A 2LL.
[112] Witness statements must comply with CPR Pts 22 and 32. Generally the claimant and the claimant's solicitor will both make witness statements. The claimant may explain the importance and impact of the defendant's action or inaction. The solicitor's statement may explain what steps have been taken to resolve the dispute.
[113] See 16–041.
[114] See 17–072.
[115] "There is good reason why all this information is required and why, although no doubt prolixity is to be discouraged, it is important that the claimant does actually provide, properly particularised, the 'detail' called for by Form N461": *R (on the application of W) v Essex CC* [2004] EWHC 2027 (ADMIN), [2004] All ER (D) 103 (Aug), [35] (Munby J.).
[116] *R. v Lloyd's of London Ex p. Briggs* [1993] 1 Lloyd's Rep. 176. There the obligation was said to arise because (following the practice of the time) applications for leave were made ex parte. Under the CPR, defendants and interested parties now have the right through their acknowledgment of service to put to the court a summary of their reasons for opposing the grant of permission.
[117] See 16–055.

any interim remedies. It should also indicate that the pre-action protocol has been complied with or reasons for non-compliance.[118]The claim must be verified by a statement of truth.[119] If a protective costs order is sought (limiting liability to pay the defendant's legal costs in the event of the claim failing),[120] the claimant should normally do so at the permission stage.[121]

16–037 The claim form must be accompanied by: all relevant written evidence in support of the claim (and any extension of time that is sought); a copy of the order that the claimant challenges; where the decision being challenged is that of a court or tribunal, an approved copy of their reasons; copies of any documents on which the claimant proposes to rely; copies of any relevant legislation; and a list of essential documents for advance reading by the court (with page reference to the passages relied on).

16–038 If a claimant seeks to raise an issue or claim a remedy under the Human Rights Act 1998,[122] the claim form must additionally:[123] give precise details of the Convention right which it is alleged has been infringed and details of the alleged infringement; specify the relief sought; state if the relief includes a claim for a declaration of incompatibility under s.4 or damages under s.9(3) of the HRA; and precise details of the legislative provision alleged to be incompatible and details of the alleged incompatibility.

16–039 If a "devolution issue" is at stake,[124] the claim form must specify that the claimant wishes to raise such an issue and identify the relevant provisions of the Government of Wales Act 2006, the Scotland Act 1998 or the Northern Ireland Act 1998 and contain a summary of the facts, circumstances and points of law on the basis of which it is alleged that the devolution issue arises.

16–040 If circumstances change, or the basic legal arguments rethought, between the time permission is granted and the full hearing, in order to avoid "litigation creep" the claim form should be amended "promptly and properly . . . to keep pace with what may be the rapidly changing dynamics of a case".[125] The guiding principle is that the "court will normally permit such amendments as may be required to ensure that the real dispute between the parties can be adjudicated upon".[126] Permission is required to amend the claim form, and such an application should normally be accompanied by a draft of the proposed amendment. The decision, etc. under challenge must be identified with precision and if in the light of changing circumstance or evidence it changes, the claim form should reflect

[118] *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 W.L.R. 810.
[119] CPR r.22.1.
[120] On PCOs, see 16–089.
[121] *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600.
[122] See Ch.13.
[123] PD 16, para.15.
[124] See 1–113.
[125] *R (on the application of W) v Essex CC* [2004] EWHC 2027 (Admin); [2004] All E.R. (D) 103 (Aug) at [39].
[126] *W* [2004] EWHC 2027 (Admin); [2004] All E.R. (D) 103 (Aug) at [35].

this.[127] Similarly with changes to the legal basis of the challenge. While minor changes may be permitted by the court exercising its inherent jurisdiction, a claimant seeking to rely at the full hearing on a ground other than those for which he was initially given permission must seek permission to do so in advance of the hearing.[128]

PERMISSION

16–041 A requirement that a would-be litigant wishing to challenge the legality of a public authority's decision first obtain the permission (formerly called "leave") of the court has been a feature of judicial review since 1933.[129] Permission must be sought even if a claim is transferred to the Administrative Court having been commenced elsewhere.[130] Permission must also be sought subsequently if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed.[131]

16–042 The permission stage procedure was modified in significant ways in 2000. Previously permission (leave) was determined in most cases solely on the basis of the claimant's case whereas now the defendant (and any interested parties) are able to provide the court with an acknowledgment of service setting out in summary their reasons for contesting the claim before permission is granted or refused.[132] This provides defendants with an early opportuinty to reassess the strength of their case and aims to encourage early settlement of some or all issues. The "summary"required is different from the "detailed grounds for contesting the claim" and the supporting "written evidence" which are required following the grant of permission.[133] Defendants should avoid drafting an elaborate document at this stage. In most cases, all that is necessary is in effect that the defendant copies, for the benefit of the court, the gist of matters in the exchange of correspodence with the claimant.

[127] *W* [2004] EWHC 2027 (Admin); [2004] All E.R. (D) 103 (Avg) at [35].
[128] CPR r.54.15; PD 54, para.11 (notice of seven clear days before the full hearing must be given to the court and all parties).
[129] Now Supreme Court Act (Superior Courts Act) 1981 s.31(3). M. Fordham, "Permission Principles" [2006] J.R. 176.
[130] CPR r.52.4.
[131] CPR r.54.15.
[132] Within 21 days of service on them of the claim form. CPR r.54.8; if permission is granted, the defendant has an opportunity to provide more detailed grounds for resisting the claim: CPR r.54.14.
[133] CPR r.54.14. *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583; [2006] 1 W.L.R. 1260 at [43] (Carnwath L.J., offering guidance about the "summary": "If a party's position is sufficiently apparent from the Protocol response, it may be appropriate simply to refer to that letter in the Acknowledgement of Service. In other cases it will be helpful to draw attention to any 'knock-out points' or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition). As the Bowman report advised, it should be possible to do what is required without incurring 'substantial expense at this stage'").

16–043 In almost all cases permission is intially determined without a hearing.[134] Brief written reasons for granting or refusing permission are given.[135] Where an oral hearing takes place, a written judgment may be produced but there is a general prohibition on the citation of such judgments in later cases if the reported point is relates merely to whether the claim is arguable.[136]

16–044 An application for permission is a "proceeding" for the purpose of Supreme Court Act (Senior Courts Act) 1981 s.42 regulating the access to the courts by vexatious litigants, and so a person subject to a civil proceedings order under s.42 must make a separate prior application for permission to institute the proceedings.[137]

The purpose of the permission stage

16–045 The permission stage proceedings serves a number of purposes. First, it may safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for a full hearing of the matter. The requirement may also prevent administrative action being paralysed by a pending, but possibly spurious, legal challenge.[138] Secondly, for the Administrative Court, the permission procedure provides a mechanism for the efficient management of the ever growing judicial review caseload. A large proportion of claims can be disposed of at the permission stage with the minimum use of the court's limited resources.[139] By granting permission to proceed on some but not all grounds of a claim, the court is able to stop hopeless aspects of a case in their tracks. Thirdly, for the claimant the permission stage, far from being an impediment to access to justice, may actually be advantageous since it enables the litigant expeditiously and cheaply to obtain the views of a High Court judge on the merits of his application.[140]

[134] In urgent cases, claimants may contact the Admin Ct Office by telephone to seek guidance prior to filing the claim form (telephone 020 7947 6205): see PD54, para.2.4. Urgent cases include decisions of a Crown Court judge to withdraw bail (*R. (on the application of Allwin) v Snaresbrook Crown Court* [2005] All E.R. (D) 40 (Apr)). Especially where Convention rights are in issue, such as where a person's liberty (Art.5), judicial authorities must ensure that appropriate provision is made for speedy applications regardless of vacation times (*E v Norway* (1994) 17 E.H.R.R. 30). An application for urgent consideration is referred to a judge within the timeframe set out in the urgency application form—form N463.

[135] CPR r.54.12(2).

[136] *Practice Direction (Citation of Authorities)* [2001] 1 W.L.R. 1001 at [6]. A court handing down such a judgment may release it from the general prohibition where the court seeks to lay down general guidance (see, e.g. *R. (on the application of Pharis) v Secretary of State for the Home Department* [2004] EWCA Civ 654; [2004] 1 W.L.R. 2590). Judgments given at the permission stage are in any event of only persuasive authority: *Clark v University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988 at [43].

[137] *Ex p. Ewing (No.2)* [1994] 1 W.L.R. 1553; CPR rr.3.3(7), 3.11; *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583; *Bhamjee v Forsdick* [2003] EWCA Civ 1113; [2004] 1 W.L.R. 88.

[138] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] A.C. 617 at 643 (Lord Diplock).

[139] In 2003, 27% of applications were granted; in 2002, 21%.

[140] H. Woolf, *Protection of the Public—A New Challenge* (1990), p.21.

Criteria on which permission is granted or refused

16–046 No comprehensive statement of the criteria for determining applications for permission exists. During the mid-1990s, concerns were expressed that the arrangements then in place led to unacceptable disparities of approach in the ways different nominated judges dealt with applications for leave (now "permission") to commence judicial review claims.[141] In 2000, the Bowman committee recommended that there be a statutory presumption that permission should be given if the claim discloses an arguable case,[142] but this was not implemented. Supreme Court Act 1981 (Senior Courts Act 1981) s.31 and CPR Pt 54 refer expressly to only two grounds on which permission should be refused: where there has been delay in applying to the court;[143] or where the claimant does not have a sufficient interest in the matter to which the claim relates.[144] It has been held, however, that these issues of delay[145] and standing[146] should ordinarily be left to be dealt with at the full hearing; in practice, only in the clearest cases will permission be refused on either of these grounds alone.[147]

16–047 As previously discussed, the failure to use a substitute remedy (especially to exercise a right of appeal) will normally lead to the refusal of permission.[148] The most commonly given reason for refusing permission is that the claim is unarguable. The test ought to be broadly similar to that governing applications for summary judgment in other types of claim, namely that there "no real prospect of succeeding on the claim or issue".[149] If permission is granted, it may be subject to conditions or on some grounds only.[150] If a claimant at the substantive hearing seeks to rely on grounds not previously granted permission, permission must be sought from the trial judge.[151]

16–048 Permission has sometimes been refused on grounds of policy, notably that to subject certain sorts of decision to judicial review challenge would hamper decision-making in some contexts.[152] It has been suggested that it is wrong for such a broad discretion to be exercised at this preliminary stage of the litigation process, if only because important issues of principle may often emerge only late in the litigation process.[153]

[141] L. Bridges *et al.*, *Judicial Review in Perspective*, 2nd edn (1995) and Law Com. 226, p.163 (which called the then arrangements "too much of a lottery").
[142] Bowman, recommendation 33.
[143] Supreme Court Act (Senior Courts Act) 1981 s.31(6),(7) and CPR r.54.5. See 16–050.
[144] Supreme Court Act (Senior Courts Act) 1981 s.31(3). See 2–007.
[145] *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 A.C. 738; *cf. R. v Secretary of State for Trade and Industry Ex p. Greenpeace Ltd* [1998] Env. L.R. 415.
[146] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] A.C. 617; *R. v Somerset County Council Ex p. Dixon* (1998) 75 P. & C.R. 175.
[147] Le Sueur and Sunkin [1992] P.L. 102, 120–121.
[148] See 16–014.
[149] CPR r.24.2.
[150] CPR r.54.12.
[151] CPR r.54.15.
[152] See e.g. *R. v Hillingdon LBC Ex p. Puhlhofer* [1986] A.C. 484 (homeless persons); *R. v Secretary of State for the Home Department Ex p. Swati* [1986] 1 W.L.R. 772 (genuine visitor cases); *R. v Harrow LBC Ex p. D* [1990] Fam. 133 (child protection register).
[153] See Le Sueur and Sunkin [1992] P.L. 102, 125.

Permission may be granted on only some of a claimant's grounds, and refused on the others.[154] At the susequent full hearing of the claim the judge would require a "significant justification before taking a different view", but does have discretion to allow submissions on the grounds refused permission if there is a good reason to do so.[155] Permission may also be refused to pursue a particular remedy, while granting it in relation to other remedies.[156] Permission may be granted in relation to one impugned decision and refused in relation to others.[157] **16–049**

The timing of the application for permission

An application for permission may be refused if it is made tardily or if it is premature.[158] The claim form must be filed (a) "promptly" and (b) in any event not later than three months after the grounds to make the claim first arose.[159] The time limit cannot be extended by agreement between the parties,[160] but the court has a discretion to extend the time limit if there is a good reason to do so.[161] Under the Inquiries Act 2005, judicial review challenges to decisions of a Minster or member of an inquiry panel must be **16–050**

[154] CPR r.54.12(1)(ii).
[155] *Smith v Parole Board* [2003] EWCA Civ 1014; [2003] 1 W.L.R. 2548.
[156] *R. (on the application of Anufrijeva) v Southwark LBC* [2003] EWCA Civ 1406; [2004] Q.B. 1124 the CA held in relation to claims for judicial review seeking damages under the Human Rights Act 1998: ". . . (iii) Before giving permission to apply for judicial review, the Admin Ct judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the [Ombudsmen] at least in the first instance. The complaint procedures of the [Ombudsmen] are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From inquiries the court has made it is apparent that the time scale of resolving complaints compares favourably with that of litigation. (iv) If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction".
[157] *R. v Hammersmith and Fulham LBC Ex p. CPRE* [2000] Env.L.R. 534.
[158] Supreme Court Act (Senior Courts Act) 1981 s.31(6)–(7); CPR r.54.5; PD 54, para.4.1. Questions of delay may also be relevant to withholding a remedy after the full hearing: see Ch.18.
[159] CPR r.2.8 stipulates that "(2) A period of time expressed as a number of days shall be computed as clear days. (3) In this rule 'clear days' means that in computing the number of days—(a) the day on which the period begins; and (b) if the end of the period is defined by reference to an event, the day on which that event occurs are not included"—but this probably does not apply to the three *month* limit for judicial review: see *Crichton v Wellingborough BC* [2002] EWHC 2988; [2004] Env. L.R. 11 at [56]. "Where 'month' occurs in any judgment, order, direction or other document, it means a calendar month": CPR r.2.10. The Human Rights Act 1998 s.7(5) allows a year for claims in relation to s.6, "but that is subject to any rule imposing a stricter time limit in relation to the procedure in question".
[160] CPR r.54.4.
[161] CPR r.3.1; PD 54, para.5.6(3); see, e.g. *R. (on the application of Harrison) v Flintshire Magistrates Court* [2004] EWHC 2456; (2004) 168 J.P. 653 (permission granted 17 months after conviction when it came to light that the speed limit on a road was 60 mph, not 30 mph, as the police, claimant and magistrates had believed).

brought within 14 days after the day on which the applicant became aware of the decisions unless that time limit is extended by the court.[162]

16–051 Generally "grounds to make the claim" arise when the public authority does an act with legal effect, rather than something preliminary to such an act. So in the context of town and country planning, time runs from when planning permission is actually granted rather than from when a local authority adopts a resolution to grant consent.[163] Where a quashing order is sought in respect of any judgment, order, conviction or other proceedings, time begins to run from the date of that judgment, etc.[164] The subjective experience and state of knowledge of the claimant are not relevant in determining the start date,[165] though those facts may be relevant to whether time should be extended.

16–052 The primary requirement is always one of promptness and permission may be refused on the ground of undue delay even if the claim form is filed within three months.[166] The fact that a breach of a public law duty is a continuing one does not necessarily make it irrelevant to take into account the date at which the breach began in considering any question of delay.[167]

16–053 There is no general legislative formula to guide the court on issues of delay. Factors taken into account include: whether the claimant had prior warning of the decision complained of;[168] and whether there has been a period of time between the taking of the decision impugned and its communication to the claimant.[169]

[162] Inquiries Act 2005 s.38.

[163] *R. v Hammersmith and Fulham LBC Ex p. Burkett* [2002] UKHL 23; [2002] 1 W.L.R. 1593 at [36]–[51]. "In law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission". ([at 42], Lord Steyn). This is not to say that a planning resolution cannot be the subject of a judicial review claim.

[164] PD54, para.4.1.

[165] *R. v Department of Transport Ex p. Presvac Engineering Ltd* (1992) 4 Admin. L.R. 121.

[166] See, e.g. *R. v Secretary of State for Health Ex p. Alcohol Recovery Project* [1993] C.O.D. 344; *R. v Swale B. C. Ex p. Royal Society for the Protection of Birds* (1990) 2 Admin. L.R. 790. The courts have warned of the need for especial promptness in the context of challenges to planning permission; in evaluating this, regard will be had to the fact that in statutory applications to quash the time limit is fixed at six weeks: *R. (on the application of McCallion) v Kennet DC* [2001] EWHC Admin 575; [2002] P.L.C.R. 9.

[167] *R. v Essex CC Ex p. C* [1993] C.O.D. 398; and on renewed decisions, see 3–028. It was open to question whether the requirement of promptness provided sufficient legal certainty to be compatible with Convention rights and EU law: see *R. v Hammersmith and Fulham LBC Ex p. Burkett* [2002] UKHL 23; [2002] 1 W.L.R. 1593 at [53] (Lord Steyn), [59] (Lord Hope); cf. *Lam v United Kingdom* (App No.41671/89), not cited in *Burkett*, in which the ECtHR held this argument to be manifestly ill-founded. In *Hardy v Pembrokeshire CC (Permission to Appeal)* [2006] EWCA Civ 240; [2006] Env. L.R. 28 the CA dismissed the idea that there was any conflict between a requirement of promptness (a term used in the ECHR itself) and the requirements of legal certainty; *R. (on the application of Western International Campaign Group) v Hounslow LBC* [2003] EWHC 3112; [2004] B.L.G.R. 536.

[168] *R. v Secretary of State for Transport Ex p. Presvac Engineering Ltd* (1992) 4 Admin.L.R. 121.

[169] *R. v Redbridge LBC Ex p. Gurmit Ram* [1992] 1 Q.B. 384.

16–054 The following have been held to be good reasons for undue delay: time taken to obtain legal aid;[170] the importance of the point of law at stake;[171] the pursuit of alternative legal remedies.[172] The following have been held not to be good reasons: tardiness on the part of a claimant's non-legal advisor;[173] time taken pursuing avenues of political redress, such as organising a lobby of Parliament, before applying for permission.[174]

16–055 The mere fact that permission is granted does not mean that an extension of time for making the application is given; an express application for extension of time must be made.[175] If at the permission stage the court extends time under CPR 3.1(2)(a), the correctness of granting that extension cannot be raised subsequently at the full hearing.[176]

16–056 Section 31(6) SCA 1981 requires the court to consider whether the granting of relief would "be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".[177] In all but the clearest cases, the court will, however, normally postpone consideration of hardship, prejudice and detriment to good administration until the full hearing,[178] though only if the judge granting permission has indicated that this should be so, or if fresh and relevant material relating to delay has arisen in the mean time.[179]

16–057 Seeking permission prematurely is almost as common a ground for refusing permission as delay.[180] Judicial review may be premature for several reasons: the decision-taker may not yet have determined the facts;[181] or completed assessment of relevant factors[182] (though in cases involving deprivation of liberty the court will be cautious in rejecting a claim as precipitate);[183] or the impugned decision is merely preliminary to a

[170] *R. v Stratford on Avon DC Ex p. Jackson* [1985] 1 W.L.R. 1319.
[171] *R. v Secretary of State for the Home Office Ex p. Ruddock* [1987] 1 W.L.R. 1482.
[172] See e.g. *R. v Stratford on Avon DC Ex p. Jackson* [1985] 1 W.L.R. 1319; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1982] 2 All E. R. 761; *R. v Secretary of State for the Environment Ex p. West Oxfordshire DC* [1994] C.O.D. 134.
[173] *R. v Tavistock General Commissioners Ex p. Worth* [1985] S.T.C. 564.
[174] See, e.g. *R. v Secretary of State for Health Ex p. Alcohol Recovery Project* [1993] C.O.D. 344; *R. v Redbridge LBC Ex p. G* [1991] C.O.D. 398.
[175] *R. v Lloyd's of London Ex p. Briggs* [1993] 1 Lloyd's Rep. 176. This should be included in the claim form.
[176] *R. v Criminal Injuries Compensation Board Ex p. A* [1999] 2 A.C. 330.
[177] See 18–051.
[178] *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 A.C. 738. On remedies and discretion to withhold remedies, see Ch.18.
[179] *R. v Lichfield DC Ex p. Lichfield Securities Ltd* [2001] EWCA Civ 304; (2001) 3 L.G.L.R. 35.
[180] Le Sueur and Sunkin [1992] P.L. 102, 123; and J. Beatson, "Prematurity and Ripeness for Review", in C. Forsyth and I. Hare (eds), *The Golden Metwand and the Crooked Cord* (1998). On situations where the matter is "hypothetical" or "academic", see 3–025 and 18–043.
[181] See, e.g. *R. (on the application of Paul Rackham Ltd) v Swaffham Magistrates Court* [2004] EWHC 1417; [2005] J.P.L. 224; *Draper v British Optical Association* [1938] 1 All E.R. 115.
[182] See, e.g. *R. (on the application of A) v East Sussex CC (No.2)* [2003] EWHC 167; (2003) 6 C.C.L. Rep. 194.
[183] See, e.g. *R. (on the application of Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194.

final decision.[184] The court's general approach is to reject challenges made before the conclusion of a hearing in formal proceedings.[185] Importance must also be attached to the fact that judicial review is intended to be an expeditious process and that some decisions taken by public authorities need to be taken quickly.

Challenging the grant of permission

16–058 It is generally no longer possible for a defendant or interested party to seek to overturn the grant of permission to proceed with a claim for judicial review.[186] The rationale for the change is that defendants and interested parties are now routinely able to provide the court with a summary of their reasons for contesting the claim before permission is determined.[187] If through error a defendant has not been served with the claim, or the court wrongly grants permission before the time for serving the acknowledgement of service has elapsed, the court still retains jurisdiction to set aside the grant of permission.[188]

Challenging the refusal of permission

16–059 A claimant who is refused permission without an oral hearing has at that point no right of appeal, but "may request the decision to be reconsidered at a hearing".[189] Studies in the past suggest that a significant proportion of renewed applications for permission are successful.[190]

16–060 The options open to a claimant whose application for permission has been refused after renewal of an oral hearing depends on whether the claim for judicial review is "in a criminal cause or matter". The category of criminal judicial review—typically but not exclusively against magistrates' courts—consists of those proceedings "the outcome of which may be the trial of the applicant and his punishment for an alleged offence by a court claiming jurisdiction to do so".[191] The Court of Appeal has no jurisdiction

[184] See, e.g. *R. (on the application of St John) v Governor of Brixton Prison* [2001] EWHC Admin 543; [2002] Q.B. 613; *R. (on the application of The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605; [2004] 1 P. & C.R. 39.
[185] See, e.g. *R. v Association of Futures Brokers and Dealers Ltd Ex p Mordens Ltd* (1991) 3 Admin.L.R. 254 at 263; *R. (Hoar-Stevens) v Richmond-upon-Thames Magistrates' Court* [2003] EWHC 2660; [2004] Crim. L.R. 474 at [18]; *cf. R. (on the application of Widgery Soldiers) v Lord Saville of Newdigate* [2001] EWCA Civ 2048; [2002] 1 W.L.R. 1249 at [43] (CA stresses that "the concern of the courts is whether what has happened has resulted in real injustice", giving as examples the unfair refusal of an interpreter or an adjournment).
[186] CPR r.54.13.
[187] See 16–063.
[188] *R. (on the application of Webb) v Bristol City Council* [2001] EWHC Civ 696.
[189] CPR r.54.12(3)–(5).
[190] M. Sunkin, "What is happening to judicial review?" (1987) 50 M.L.R. 432, 456. In 2005 approx 18% of renewed applications were granted.
[191] Supreme Court Act (Senior Courts Act) 1981 s.18(1)(a); "matters relating to trial on indictment" are not amenable to judicial review: Supreme Court Act (Senior Courts Act) 1981 s.29(3); see 3–009.

to hear appeals in criminal judicial review, so for practical purposes the refusal of permission by the Administrative Court is final and conclusive.[192]

16–061 In other, non-criminal, cases a claimant who is unsuccessful following the renewed application has three main options. First, to give up. Secondly, to seek permission to appeal to the Court of Appeal against the refusal of permission to proceed. Permission to appeal should be sought from the Administrative Court and, if unsuccessful, thereafter to the Court of Appeal within seven days. In order to prevent unnecessary hearings, the Court of Appeal has jurisdiction to grant permission to proceed with the judicial review not merely permission to appeal.[193] The Court of Appeal may deal with an application for permission to appeal without a hearing. If refused on the papers, "the person seeking permission may request that the decision be reconsidered at a hearing".[194] If it seems likely that the claimant will be able to demonstrate that the claim for judicial review should proceed to a full hearing, the Court of Appeal may hold the hearing on notice, to allow the defendant to be represented, and then to grant permission to proceed with the claim for judicial review rather than merely permission to appeal.[195] (The full hearing of the claim will normally be directed to be heard by the Administrative Court, or the Court of Appeal itself may hear the claim).[196] The possibility of further appeals to the House of Lords against Court of Appeal's determination depends on the order that was made. If the Court of Appeal refuses only permission *to appeal* against the Administrative Court's refusal to grant permission for judicial review, there is no possibility of an appeal to the House of Lords. Such a decision of the Court of Appeal is final and conclusive.[197] If however the Court of Appeal grants permission to appeal, hears the appeal, and goes on to refuse the application for permission *to proceed* with the judicial review, the House of Lords does have jurisdiction to consider a petition for appeal against that decision.[198]

[192] The HL may have jurisdiction to receive a petition for leave to appeal from the Admin Ct's refusal of permission, but the Admin Ct would first have to certify that the case involves a point of law of general public importance ("Red Book", House of Lords Practice Directions and Standing Orders Relating to Criminal Appeals, para.2); it is difficult to image circumstances in which the Admin Ct would refuse permission to proceed with a judicial review claim when such a point of law is raised.

[193] CPR r.52.15(3). There is little point in determining permission to appeal, then hearing the substantive appeal and then remitting the claim back to the Admin Ct for it to be granted permission to proceed with the judicial review claim.

[194] CPR r.52.3(4); PD 52, para.4.13.

[195] *R. (on the application of Werner) v Inland Revenue Commissioners* [2002] EWCA Civ 979; [2002] S.T.C. 1213.

[196] CPR r.52.15(3); PD 52, para.15.3. This will be the preferable course of events were an appeal to the CA seems inevitable, for example because the Admin Ct is bound by a CA precedent that has been called into question.

[197] *R. v Secretary of State for Trade and Industry Ex p. Eastaway* [2000] 1 W.L.R. 2222. Note that *Eastaway* "is only authority for the proposition that when the Court of Appeal has refused permission to appeal in the face of a first instance refusal of permission to seek judicial review the House [of Lords] has no jurisdiction to give leave to appeal" (*R. v Hammersmith and Fulham LBC Ex p. Burkett* [2002] UKHL 23; [2002] 1 W.L.R. 1593 at [12] (Lord Steyn).

[198] *R. v Hammersmith and Fulham LBC Ex p. Burkett* [2002] UKHL 23; [2002] 1 W.L.R. 1593.

16–062 Thirdly, but only in exceptional cases, a claimant may make a fresh application to the Administrative Court for permission to proceed if there has been a significant change of circumstances, or if the claimant has become aware of significant new facts, or if a proposition of law is now maintainable which was not previously open to the claimant.[199] As the refusal of permission is an interlocutory judgment, the doctrine of *res judicata* does not preclude a fresh application, though that may constitute an abuse of process in the absence of new material or circumstances.

Interlocutory Stage

16–063 Within seven days of receiving permission to proceed, the claimant must pay the court fee.[200] The defendant and any interested parties who wish to contest the claim must file and serve detailed grounds and any relevant written evidence within 35 days.[201]

Applications by interveners

16–064 There is a growing incidence of interventions in judicial review claims, by campaign groups, public authorities and other bodies concerned about the outcome of a claim.[202] A person wishing to intervene by making written submissions or be represented at the hearing must seek permission to do so at "at the earliest reasonable opportunity".[203]

Disclosure

16–065 Until the 1978 judicial review reforms,[204] the court had no power to order disclosure of documents (formerly "discovery"). RSC, Ord.53 did not introduce an automatic right to disclosure but did allow a party to apply to the court for orders for disclosure of documents. The court was sparing in

[199] *R. (on the application of Opoku) v Southwark College Principal* [2002] EWHC 2092; [2003] 1 W.L.R. 234. Note that in *Smith v Parole Board* [2003] EWCA Civ 1014; [2003] 1 W.L.R. 2548, the CA doubted the limitations set out by Lightman J. in relation to opening up grounds, previously refused permission, at the full hearing; but those are not doubts about the jurisdiction of the court to hear fresh applications for permission when the previously the claimant has been refused permission in toto.
[200] £180 (in October 2007).
[201] For details of the other steps to be taken, reference should be made to Appendices H and I below.
[202] See 2–064.
[203] PD 54, para.13.5. The application is made by a letter to the Admin Ct Office (rather than filing an application notice) "identifying the claim, explaining who the applicant is and indicating why and in what form the applicant wants to participate in the hearing"; "If the applicant is seeking a prospective order as to costs, the letter should say what kind of order and on what grounds"; see 16–089.
[204] See Ch.15.

its use of disclosure orders. One rationale for limiting rights to disclosure is that defendant public authorities are expected, and generally do, approach judicial review litigation in an open-handed manner.[205] This general arrangement continued under CPR Pt 54, with any application for specific disclosure determined in accordance with CPR 31.

16–066 Opinion has been divided as to whether discovery should become more routinely available in judicial review proceedings or whether a strict (or stricter) approach should be maintained.[206] A new, "more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances", and having regard to the overriding objective of the CPR, was signalled by the House of Lords in December 2006.[207] Even where Convention rights and proportionality are in issue, disclosure should be limited to the issues which require it in the interests of justice and, where possible, claimants should specify particular documents or classes of documents rather than seeking an order for general disclosure. Parties should exhibit documents referred to in their witness statements.[208]

16–067 Where Convention rights are in issue, facts may be more important to the resolution of the dispute than in ordinary domestic law judicial review "since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts".[209]

16–068 In practice, unless the claimant can show a prima facie breach of public duty, disclosure will not usually be granted.[210] Where the challenge is on the ground of *Wednesbury* irrationality,[211] standard disclosure of the type which is a matter of routine in private law proceedings will seldom be ordered.[212] Applications for disclosure "in the hope that something might turn up" are regarded as an illegitimate exercise, at least in the absence of a prima facie reason to suppose that the deponent's evidence is untruthful.[213]

[205] *Huddleston* [1986] 2 All E.R. 941; this general approach is reflected today in the CPR requirement that parties co-operate with each other in the conduct of the proceedings (CPR r.1.4(2)(a)).

[206] See Law Commission Consultation Paper No.126, Administrative Law: Judicial Review and Statutory Appeals, para.8.10. In its 1994 report, the Law Commission made no recommendations for amendments of the Rules dealing with discovery: see Law Com. No.226, para.7.12.

[207] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 2 W.L.R. 1 at [32]–[33] (Lord Carswell).

[208] *Tweed* [2006] UKHL 53; [2007] 2 W.L.R. 1 at [33] (Lord Carswell).

[209] *Tweed* [2006] UKHL 53; [2007] 2 W.L.R. 1 at [3] (Lord Bingham).

[210] *R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Business Ltd* [1982] A.C. 617 at 654E (Lord Scarman).

[211] Ch.11.

[212] *R. v Secretary of State for the Environment Ex p. Smith* [1988] C.O.D. 3; *cf. R. v Secretary of State for Transport Ex p. APH Road Safety Ltd* [1993] C.O.D. 150.

[213] See, e.g. *R. v Secretary of State for the Environment Ex p. Doncaster BC* [1990] C.O.D. 441; *R. v Secretary of State for the Environment Ex p. Islington LBC and London Lesbian and Gay Centre* [1992] C.O.D. 67; *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386.

Generally, discovery to go behind the contents of a statement of truth will be ordered only if there is some material before the court which suggests that the claim form is not accurate.[214] Even reports referred to in a claim, routinely inspected in private law proceedings, will not be the subject of discovery in judicial review unless the claimant shows that the production of the documents is necessary for fairly disposing of the matter before the court.[215]

Interim remedies

16–069 Pending the full hearing of the claim, the claimant may apply to the court for one or more interim remedies.[216] These include an interim injunction, interim declaration and stay of proceedings. The term "stay of proceedings" is not confined to proceedings of a judicial nature, but encompasses the process by which any decision challenged has been reached, including the decision itself.[217] Although a stay of proceedings and an interim injunction perform the same function of preserving the status quo until the full hearing, there are conceptual and practical differences between the two forms of relief. While the injunction protects the interest of the litigant in dispute with another, the stay is not addressed to an "opposing" party but rather is directed at suspending the operation of a particular decision. The Administrative Court and Court of Appeal may order that a claimant be temporarily released.[218]

Preparation of skeleton arguments

16–070 The claimant must submit the skeleton 21 working days before the date of the hearing; the defendant and interested parties must do so 14 working days before the hearing.[219] Practice Direction 54 sets out the minimum requirements for a skeleton argument.

Discontinuing and orders by consent

16–071 A significant proportion of claims, given permission to proceed, are withdrawn before the full hearing.[220] If the parties agree about the final order to be made, the court may make the order without a hearing if it is

[214] *R. v Secretary of State for the Home Department Ex p. BH* [1990] C.O.D. 445; *Brien v Secretary of State for the Environment and Bromley LBC* [1995] J.P.L. 528; *World Development Movement Ltd* [1996] 1 W.L.R. 386. In its 1994 report, the Law Commission considered that this approach was unduly restrictive and undermined the basic test of relevance and necessity laid down in *O'Reilly v Mackman*: see Law Com. No.226, para. 7.12.
[215] *R. v Inland Revenue Commissioners Ex p. Taylor* [1989] 1 All E.R. 906.
[216] CPR r.25.1; see further Ch.18.
[217] *R. v Secretary of State for Education and Science Ex p. Avon CC* [1991] 1 Q.B. 558.
[218] PD 54, para.17.
[219] PD 54, para.15.
[220] M. Sunkin, "Withdrawing: A Problem in Judicial Review" in P. Leyland and T. Wood (eds), *Administrative Law Facing the Future* (1997), pp.221–241.

satisfied that the order should be made. Because of the public interest involved in many judicial review claims, the parties cannot determine for themselves what order should be made. The court will not make an order if it is not in the public interest to do so. In addition, if a decision of a court or tribunal is the subject of the claim, it would be wrong for that decision to be altered merely by agreement of the parties. The Court must be satisfied that this is appropriate.

The Full Hearing

16–072 Where an application for permission has been granted on the papers, a full hearing of the claim for judicial review will take place some weeks or months later (unless there is urgency and an order for expedition is made). In practice, the grant of permission often acts as a spur to negotiations between the parties and in many cases where permission is granted the claimant does not set the claim down for full hearing. Where an application for permission is to be decided at an oral hearing, the court may direct that the permission application and the full hearing be "rolled up" into a single hearing.

16–073 In a criminal cause or matter,[221] the full hearing of the claim normally takes place before a Divisional Court (of two or three judges) rather than a single judge. The rationale for this is that it is the last effective appeal.[222] In other claims, the hearing is normally before a single judge, though a claim may be listed for hearing by a Divisional Court for other reasons (for example, it raises a new point of law of wide application).

16–074 CPR r.8.6(2), which applies to claims for judicial review, provides that "The court may require or permit a party to give oral evidence at the hearing, and cross examination may be permitted". In practice oral testimony and cross examination are rare. Cross examination should take place only when justice so demands,[223] for example where there is a conflict of evidence, where the claimant alleges that a precedent fact to the making of a decision did not exist, or where the court must reach its own view on the merits.[224]

[221] See 3–090.
[222] See 16–078; the only appeal lies to the HL.
[223] *R. v Secretary of State for the Home Department Ex p. Khawaja* [1984] A.C. 74 at 125 (Lord Bridge: "oral evidence and discovery, although catered for by the rules, are not part of the ordinary stock in trade of the prerogative jurisdiction"); *Roy v Kensington and Chelsea and Westminster FPC* [1992] 1 A.C. 624 (Lord Lowry).
[224] See, e.g. *R. (on the application of Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545; [2002] 1 W.L.R. 419 (medical witnesses ordered to attend and be cross-examined so that court could reach its own view as to the merits of a medical decision and whether it infringed the patient's human rights); *R. (on the application of B) v Haddock (Responsible Medical Officer)* [2006] EWCA Civ 961; [2006] H.R.L.R. 40 (oral evidence would not have assisted the court); *R. (on the application of N) v M* [2002] EWCA Civ 1789;

16–075 Written evidence is regulated by CPR r.54.16, and may be relied upon only if it has been served in accordance with any rule in Pt 54, or a direction of the court, or the court gives permission. The court is generally wary of allowing the claimant to introduce fresh evidence which the defendant was unable to address before the claim was commenced.[225] Where the claimant's ground of challenge is that the defendant failed to give adequate reasons the court will be cautious about allowing the defendant to explain or amplify the reasons originally given to the claimant.[226]

16–076 An innovation introduced by the CPR is that in the court may decide a claim for judicial review on the basis of the papers without a hearing where all the parties agree,[227] though there has not been extensive use of this provision in practice. Where a claim turns on a discrete point of law, especially one going to the jurisdiction of the court to deal with the claim, the court may order that that be tried as a preliminary issue.[228]

Appeals after the Full Hearing

16–077 As *Access to Justice: Final Report* noted: "Appeals serve two purposes: the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law and to set precedents".[229] The appeal routes from judgments in judicial review claims vary according to whether or not the claim is in a criminal cause or matter.[230]

[2003] 1 W.L.R. 562 (it should not often be necessary to adduce oral evidence with cross-examination where there are disputed issues of fact and opinion in cases where the need for forcible medical treatment of a patient is being challenged on human rights grounds. Nor do we consider that the decision in *Wilkinson* should be regarded as a charter for routine applications to the court for oral evidence in human rights cases generally. Much will depend on the nature of the right that has allegedly been breached, and the nature of the alleged breach. Furthermore, although in some cases (such as the present) the nature of the challenge may be such that the court cannot decide the ultimate question without determining for itself the disputed facts, it should not be overlooked that the court's role is essentially one of review").

[225] *R. v Secretary of State for the Environment Ex p. Powis* [1981] 1 W.L.R. 584; *R. (on the application of Dwr Cymru Cyfyngedig) v Environment Agency of Wales* [2003] EWHC 336; (2003) 100 L.S.G. 27.

[226] *R. v Westminster City Council Ex p. Ermakov* [1996] 2 All E.R. 302.

[227] CPR r.54.18.

[228] See, e.g. *R. (on the application of Heather) v Leonard Cheshire Foundation* [2001] EWHC Admin 429; (2001) 4 C.C.L. Rep. 211 at [9].

[229] Lord Woolf, *Access to Justice: Final Report* (1996), Ch.14, para.2.

[230] On which see 3–090.

Appeals in a criminal cause or matter

16–078 If the claim for judicial review constitutes a "criminal cause or matter", the appeal route is directly to the House of Lords (the Court of Appeal having no jurisdiction).[231] The Administrative Court must first certify that the proposed appeal involves a point of law of general public importance.[232] In recent years, there has been a decline in the number of appeals in claims for judicial review from the Administrative Court to the Court of Appeal, from 109 to 60 in the five years since October 2000.[233]

Appeals in civil judicial review claims

16–079 In non-criminal claims, appeal lies to the Court of Appeal and is governed by CPR Pt 52.[234] Permission to appeal is required. Permission should first be sought orally at the hearing at which the decision to be appealed against is handed down. If permission is refused, permission may be sought from the Court of Appeal in writing. In exceptional cases, an appeal may "leapfrog" directly from the Administrative Court to the House of Lords, bypassing the Court of Appeal. For this to happen, there must be agreement from all parties and a certificate from the Administrative Court that the appeal involves a point of law of general public importance which relates "wholly or mainly to the construction of an enactment or of a statutory instrument" or is "one in respect of which the judge is bound by the decision of the Court of Appeal or the House of Lords in previous proceedings".[235]

Funding Judicial Review

16–080 The cost of bringing a claim for judicial review, the limited availability of legal aid, and the practice that "costs follow the event"[236] are all serious barriers to access to justice. In 2005, the typical cost of making a claim for

[231] Supreme Court Act (Senior Courts Act) 1981 s.18(1)(a); e.g. *R. (on the application of South West Yorkshire Mental Health NHS Trust) v Bradford Crown Court* [2003] EWCA Civ 1857; [2004] 1 W.L.R. 1664.
[232] Administration of Justice Act 1960 s.1(1)(a).
[233] Lord Justice Brooke, "Access to Justice and Judicial Review" [2006] J.R. 1, n.1.
[234] Supreme Court Act (Senior Courts Act) 1981) s.16(1); CPR r.52.3.
[235] Administration of Justice Act 1968 s.12. One such appeal was *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc* (the Alconbury case) [2001] UKHL 23; [2003] 2 A.C. 295, which decided issues of major importance about the compatibility of the planning system in England and Wales with Convention rights; see also *R. (on the application of Jones) v Ceredigion CC (Permission to Appeal)* [2005] EWCA Civ 986; [2005] 1 W.L.R. 3626 (refusal of the HL to entertain an appeal on a particular issue from the High Court under the leapfrog procedure did not preclude an appellant from appealing to the CA on that particular issue where the High Court judge had granted the appellant contingent permission to appeal to the CA in relation to that issue).
[236] See 16–087; a successful claimant will normally recover his legal costs from the defendant public authority; an unsuccessful claimant will normally be ordered to pay the legal costs of the public authority.

judicial review was in the region of £9,600.[237] Court fees in a typical claim for judicial review amount to £230.[238] In October 2004, the Court of Appeal gave the following figures as illustrative of the legal costs (excluding VAT) in one case in which there were appeals to the Court of Appeal and House of Lords.[239]

	Party	Solicitors' bill	Counsel's fees	Other disbursements	Total
High Court	Claimant	£9,482	£17,275	£969	£27,726
(Four days)	Defendant	£8–10,000	£24,300		£32–34,300
Court of Appeal	Claimant	£18,487	£5,100	£1,247	£25,834
	Defendant	£3,000	£4,000		£7,000
(One day)					
House of Lords	Claimant	£39,946	£83,450	£11,945	£135,341
(Leave hearing & two days) two days)	Defendant	£5,500	£23,800		£29,300

16–081 For most claimants, this expense is prohibitive and judicial review litigation cannot be pursued without financial assistance from the Community Legal Service (CLS) Fund[240] administered by the Legal Services Commission (LSC).[241] Public funding of judicial review, together with the court's approach to awarding costs to successful parties, seek to strike a balance between on the one hand facilitating access to the court and, on the other, discouraging unnecessary litigation.[242] Funding is available for various levels of service, including initial advice ("Legal Help") and assistance and

[237] This is the average summary assessment of costs in claims where there was a full hearing lasting half a day.
[238] Lang (2006): application for permission to apply for judicial review is £50; application for judicial review after permission is granted £180.
[239] *R. (on the application of Burkett) v Hammersmith and Fulham LBC (Costs)* [2004] EWCA Civ 1342; [2005] C.P. Rep. 11 at [10].
[240] At the time of writing, the legal aid system is undergoing radical reform: see Department of Constitutional Affairs, *A Fairer Deal for Legal Aid*, Cm. 6993 (2005); Lord Carter of Coles, *Legal Aid: a market-based approach to reform* (2006); Department for Constitutional Affairs/ Legal Services Commission, *Legal Aid Reform: the Way Ahead*, Cm. 6993 (2006); House of Commons Constitutional Affairs Committee *Implementation of the Carter Review of Legal Aid*. HC Paper No.223–I (Session 2006/07). Many involved in the provision of legal advice in public law cases have expressed concern or opposition to the proposed changes, which will introduce a system of fixed fees in October 2007 and transitional arrangements towards a system of competitive tendering for legal services by 2009.
[241] Established by the Access to Justice Act 1999 to replace the civil legal aid system, the Community Legal Service Fund is administered by the Legal Services Commission (which replaced the Legal Aid Board), an executive agency of the Ministry of Justice. Some claimants may be fortunate enough to secure pro bono legal advice and representation.
[242] On alternatives to judicial review, see 1–057 and 16–014).

for legal representation in court ("Investigative Help" or "Full Representation").[243]

16–082 The criteria applied by the LSC in deciding whether to fund legal representation are set out in a Funding Code, made under powers conferred by the Access to Justice Act 1999 and approved by the Lord Chancellor and Parliament.[244] For the large proportion of would-be claimants who cannot afford to fund a judicial review claim themselves, these criteria, and the manner in which they are applied, will for practical purposes determine whether a claim may be taken forward. Access to the court is often, in effect, regulated by public officials in the LSC rather than the Administrative Court.[245]

Funding where permission has not yet been granted

16–083 Where permission has not yet been sought by the claimant[246] and granted by the Administrative Court, applications for funding for legal representation may be refused "if the act or decision complained of in the proposed proceedings does not appear to be susceptible to challenge", "if there are administrative appeals or other procedures which should be pursued before proceedings are considered", and if the proposed defendant has not been "given a reasonable opportunity to respond to the challenge or deal with the claimant's complaint, save where this is impracticable in the circumstances".[247] Significant weight will be attached to the claimant's prospects of successfully obtaining the remedial order sought in the proceedings. Funding will be refused if prospects of success appear to be poor or unclear. Where it is borderline, funding will also be refused if the case does not appear to have significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues. A cost benefit assessment is made and funding "may be refused unless the likely benefits of the proceedings, having regard to the costs, are proportionate to the benefits of the proceedings, having regard to prospects of success and all other circumstances".[248]

16–084 In some contexts, the court has been asked to consider whether a claim for judicial review amounts to an "abuse of process" where it is brought by a person entitled to public funding in circumstances where the claim might have been made by another, perhaps more obvious, person who is not so entitled.[249] The question is one that ought to be left to the LSC, or at least

[243] See generally R. Weekes, "Public Funding", Ch.4 in Lang (2006).
[244] Published at *http://www.legalservices.gov.uk*. Revisions to the Funding Code were approved by Parliament in July 2007 and apply from October 2007.
[245] On the permission requirement for judicial review claims, see 17–00.
[246] The claimant in judicial review proceedings and the proper claimant for LSC funding will not always be the same where children are involved: see 2–151.
[247] Funding Code Criteria, Section 7.4.4 (2005).
[248] Funding Code Criteria, Section 7.4.6.
[249] This is distinct from the question of whether a person has sufficient interest in the matter to which the claim relates, on which see Ch.2.

significant respect ought to be accorded to the LSC's decision. Indeed, in the field of education the LSC has issued guidance on the situations in which it will regard claims brought in the name of a child, rather than a parent, as legitimate.[250] In other circumstances, the Administrative Court may consider whether to exercise discretion to refuse permission to proceed with a claim if there is "clear evidence" that the LSC may have decided to grant funding without being fully informed of the facts.[251]

Funding after permission has been granted

16–085 The statutory requirement to make an application for permission promptly[252] may necessitate a claim for judicial review to be commenced before the LSC has determined an application for funding. The Funding Code establishes a presumption in favour of funding after permission has been granted by the Administrative Court if the following conditions are met: (a) the case has a significant wider public interest; (b) is of overwhelming importance to the client; or (c) raises significant human rights issues. In the absence of these factors, the LSC may refuse funding if the "prospects of success are borderline or poor" or "the likely costs do not appear to be proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all the circumstances".[253]

The "wider public interest"

16–086 Guidance about the criterion of "wider public interest", relevant to funding decisions before and after the court has granted permission have been issued.[254] "Wider public interest" means, for the purposes of Section 2 of the Funding Code Criteria, the potential to produce real benefits for individuals other thab the applicant in question. Those benefits fall into four categories: (a) the protection of life or other basic human rights; (b) direct financial benefit; (c) potential financial benefit; or (d) cases concerning tangible benefits, such as health, safety or quality of life. Establishing a new legal precedent may also establish wider public interest. The Funding Code Criteria requires wider public interest to be "significant". The LSC may seek guidance from the Public Interest Advisory Panel on decisions in cases raising public interest issues.

[250] See funding Code Criteria, Decision-making Guidance—Gernal Principles.
[251] *R. (on the application of Edwards) v The Environment Agency* [2004] EWHC 736 (Admin) at [19] (Keith J.).
[252] See 16–050.
[253] Funding Code, Criteria Section 7.5.3.
[254] See funding Code Decision-making Guidance—Gernal Principles, Section 5.

Costs

16–087 For claimants who are not publicly funded, a significant disincentive to starting litigation is the prospect that if they fail in their claim, they are likely to have to pay the public authority's legal costs in defending the claim, as well as their own. Court fees are payable at various points in a claim for judicial review, unless the claimant makes an application for exemption or remission of those fees.[255] The costs of litigation are substantial and can pose a threat to the constitutional right of access to the courts.[256]

16–088 The court has a broad discretion in making orders as to costs.[257] The general rule guiding the exercise of that discretion is that "the unsuccessful party will be ordered to pay the costs of the successful party".[258] The court will decide whether to apply the general rule that costs follow the event, or award costs on an issue by issue basis.[259] In making costs awards, the court must have regard to the CPR's overriding objective[260] though, in several respects, a different costs regime is required in the context of public law proceedings compared to other civil claims.[261] In exceptional circumstances, a costs order may be made against a person who is not a party to the proceedings.[262] In many judicial review claims, the defendant is an inferior court, tribunal or coroner which (though making the decision that is challenged) has no real interest in resisting the claim. Where such a party does not participate in the proceedings, or only "in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like", the court's general approach will be to make no order for costs; costs may, however, be ordered if they appear and actively resist the claim or if there was "a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings".[263] In its discretion, the court

[255] See n.238.
[256] See, e.g. *R. v Lord Chancellor Ex p. Witham* [1998] Q.B. 575; the UNECE (Aarhus) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ratified by the UK in 2005), Art.9 includes the requirement that court procedures must fair, equitable, timely and not prohibitively expensive.
[257] Supreme Court Act 1981 (Senior Courts Act 1981) s.51 (as substituted by Courts and Legal Services Act 1990 s.4); CPR r.44.3. Although the discretion is broad, it is "by no means untrammelled" and "must be exercised in accordance with the rules of court and established principles": *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 at [8] (Lord Philips M.R.)
[258] CPR r.44.3(1). *Boxhall v Waltham Forest LBC* (2001) 4 C.C.L.R. 258 (Scott Baker J.), cited with approval in *R. (on the application of Kuzeva) v Southwark LBC* [2002] EWCA Civ 781.
[259] Z. Leventhal, "Costs Principles on Taking Judgment in a Judicial Review Case" [2005] J.R. 139.
[260] See 16–011.
[261] *Mount Cooke Land Ltd* [2003] EWCA Civ 1346 at [76].
[262] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39; [2004] 1 W.L.R. 2807.
[263] *R. (on the application of Davies) v Birmingham Deputy Coroner (Costs)* [2004] EWCA Civ 207; [2004] 1 W.L.R. 2739.

may decide to make no costs order against an unsuccessful claimant if the defendant unreasonably refuses to consider the alternative remedy of mediation following a suggestion of the judge.[264]

Protective costs orders in public interest cases

16–089 A protective costs order (PCO)[265]—"cost capping"—fixes in advance the maximum sum in costs that may be awarded to a party, or determines that whatever the outcome of the claim there should be no order as to costs (with the consequence that the claimant bears only its own costs).[266] The courts have developed this mechanism to facilitate access to justice in "pure public interest" cases, where the claimant has no private interest in the matter.[267] Claimants will typically be pressure groups or public spirited individuals.[268] The overriding purpose of a PCO is to enable a claimant to "to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made".[269] This potentially beneficial approach has so far been restricted to cases where the issues at stake involve the public interest and the court has been reluctant to make PCOs where the case involves a private interest. PCOs will most commonly benefit claimants[270]—whether a campaign group or a public spirited individual—though they may also be made in favour of an individual defendant (such as a coroner) who would otherwise have to bear the costs himself.[271]

16–090 The Court of Appeal has set out the following guidance which ought to govern the court's discretion to make a PCO:[272]

[264] *Dunnett v Railtrack Plc* [2002] EWHC 9020 (Costs), available at *http://www.bailii.org.* (not a judicial review claim); *cf.* Pre-action Protocol for Judicial Review (October 2006), para.34.

[265] *R. v Lord Chancellor Ex p. Child Poverty Action Group* [1999] 1 W.L.R. 347 (Dyson J.: "I think that the adjective 'pre-emptive' is more apt").

[266] R. Clayton, "Public Interest Litigation, Costs and the Role of Legal Aid" [2006] P.L. 429; B. Jaffey, "Protective Costs Orders in Judicial Review" [2006] J.R. 171; P. Brown, "Procedural Update" [2006] J.R. 325, 327–336.

[267] *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA Civ 1172; [2006] C.P. Rep. 6 (daughter seeking fuller coroner's inquiry into her father's death had only a private interest); cf. the more liberal approach adopted by the Scottish court in *McArthur v Lord Advocate* 2006 S.L.T. 170 (although the petitioners were relatives of the deceased victims of Hepatitis C caught from blood transfusions, they had no financial interest in pursuing the challenge to Scottish Minister's refusal to hold an inquiry and the "no private interest" test was therefore satisfied). The restriction on private interests probably has the effect of excluding most claims sought to be brought relying on Convention rights, as HRA s.7 confers standing only on those who are victims.

[268] On standing, see 2–035.

[269] *Corner House Research* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 at [74].

[270] See Ch.2.

[271] *R. (on the application of Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889, *The Times*, May 5, 2005.

[272] *Corner House Research* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 at [74].

"1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(i) The issues raised are of general public importance;
(ii) The public interest requires that those issues should be resolved;
(iii) The claimant has no private interest in the outcome of the case;[273]
(iv) Having regard to the financial resources of the claimant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
(v) If the order is not made the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.[274]

2. If those acting for the claimant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

16–091 These principles apply equally where a PCO is sought for the first time at the appeal stage[275] as they do to the more normal method for requesting a PCO, which is on the claim form at the permission stage (to which the would-be defendant may respond in its acknowledgment of service). If a PCO is refused, the claimant may request that the matter be reconsidered at an oral hearing (lasting no more than an hour), though if the renewed application is unsuccessful the claimant may have to bear not insignificant costs.[276] The precise scope of the PCO order is a matter for the court's discretion.[277]

[273] A criterion criticised in *Wilkinson v Kitzinger* [2006] EWHC 835; [2006] 2 F.L.R. 397 at [54] (in which the petitioners sought HRA declarations whether the Civil Partnership Act 2004 was compatible with Convention rights). Sir Mark Potter P. found it a "somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest"; so "in such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant's private or personal interest should disqualify him or her from the benefit of such an order. I consider that, the nature and extent of the 'private interest' and its weight or importance in the overall context should be treated as a flexible element in the court's consideration of the question whether it is fair and just to make the order". This is surely correct.

[274] In *Wilkinson* [2006] EWHC 835; [2006] 2 F.L.R. 397 at [58] a CPO was granted even though it was probable that the litigation would continue.

[275] *Goodson* [2005] EWCA Civ 1172; [2006] C.P. Rep.6.

[276] *Corner House Research* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 at [79].

[277] For example, in *Corner House* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 at [79] the claimant was protected from any adverse costs order but was permitted to recover costs if it won; in *R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister (Costs)* [2002] EWHC 2712; [2003] C.P. Rep. 28, CND's liability for adverse costs was capped at £25,000 in respect of its attempt to obtain declarations as to UN Security Council Resolution 1441 and the war in Iraq; in *R. (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (Admin) a cap of £40,000 was imposed; in *Wilkinson* [2006] EWHC 835; [2006] 2 F.L.R. 397, the cap was £25,000 (inclusive of VAT).

Costs before and at the permission stage

16–092 Where a claim for judicial review is withdrawn before the court considers whether or not to grant permission,[278] the court may make a costs order against the defendant, though only where a "plain and obvious case" was set out in the letter before action and the defendant failed to take that opportunity properly to assessed the merits of the proposed claim and avoid a unnecessary proceedings.[279] Where the response of the defendant to an unanswerable claim has been tardy, costs may be awarded to the claimant on an indemnity basis.[280]

16–093 A defendant is entitled (but not obliged) to respond to a claim for judicial review at the permission stage by filing an acknowledgement of service *summarising* the grounds on which the claim is contested.[281] The general approach is that a successful defendant who does prepare and file such an acknowledgement of service is entitled to recover the costs of doing so from the unsuccessful claimant.[282] Where, however, permission is refused after a hearing at which the defendant chose to be represented, PD 54 discourages the court from making a costs order against the unsuccessful claimant in relation to attendance at the hearing, except in exceptional circumstances.[283] The court should make a summary assessment of costs at the conclusion of the permission hearing.[284] The rationale for this approach is that to require claimants who fail at a hearing to bear the entire defendant's cost would risk discouraging claimants from seeking justice.

16–094 Where the claimant is granted permission, the costs will be costs in the case unless the judge granting permission makes a different order.[285]

[278] On permission, see 16–041.

[279] *R. v Kensington & Chelsea Royal LBC Ex p. Ghrebregiosis* (1994) 27 H.L.R. 602; *R. v Hackney LBC Ex p. Rowe* [1996] C.O.D. 155; *R. (on the application of Kemp) v Denbighshire Local Health Board* [2006] EWHC 181; [2006] 3 All E.R. 141(no order for costs because "the chance of obtaining permission to apply for judicial review would have been less than evens" (at [74]) as the claimant had not complied with the Pre-action Protocol and an alternative remedy was available).

[280] *R. (on the application of Taha) v Lambeth LBC*, unreported, February 7, 2002.

[281] See 16–063.

[282] *R. (on the application of Leach) v Commissioner for Local Administration* [2001] EWHC Admin 445, as explained in *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12.

[283] PD 54, para.8.6; in *Mount Cook Land Ltd* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12 a "non-exhaustive list" of exceptional circumstances was provided at [76]: (a) the hopelessness of the claim; (b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness; (c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends—a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and (d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application [for permission], the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.

[284] *Payne v Caerphilly CBC (Costs)* [2004] EWCA Civ 433.

[285] *Practice Statement (QBD (Admin Ct): Judicial Review: Costs)* [2004] 1 W.L.R. 1760.

16–095 The Court of Appeal has twice urged the Rules Committee to provide specific rule or practice direction governing the procedure for applications for costs at the permission stage, and the principles to be applied—and in the mean time suggested a practice to be followed.[286]

Costs when a claim is discontinued after permission

16–096 A significant number of claims are withdrawn between the grant of permission and the full hearing.[287] Where the claim has been resolved without a hearing, but the parties cannot agree about costs, the following principles apply:[288]

> "It will ordinarily be irrelevant that the claimant is legally aided. The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs. At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties. In the absence of a good reason to make any other order the fallback is to make no order as to costs. The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

In most cases, the claimant will be awarded costs only where it is "overwhelmingly probable" that the claim would have been successful.[289]

Costs after the full hearing

16–097 Costs following a full hearing of a claim for judicial review will generally be awarded to the successful party. In some circumstances, however, it may be inappropriate for the unsuccessful claimant to be ordered to meet the

[286] In *Mount Cook* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12 and *R. (on the application of Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583; [2006] 1 W.L.R. 1260 at [47] (Carnwath L.J.): "(i) Where a proposed defendant or interested party wishes to seek costs at the permission stage, the Acknowledgement of Service should include an application for costs and should be accompanied by a Schedule setting out the amount claimed; (ii) The judge refusing permission should include in the refusal a decision whether to award costs in principle, and (if so) an indication of the amount which he proposes to assess summarily; (iii) The claimant should be given 14 days to respond in writing and should serve a copy on the defendant. (iv) The defendant will have 7 days to reply in writing to any such response, and to the amount proposed by the judge; (v) The judge will then decide and make an award on the papers".

[287] See 16–071.

[288] *R. (on the application of Kuzeva) v Southwark LBC* [2002] EWCA Civ 781, approving *R. v Liverpool City Council Ex p. Newman* (1992) 5 Admin. L.R. 669 (Simon Brown J.).

[289] *R. v (on the application of DG) v Worcestershire CC* 2005 WL 2996844 at [20].

defendant's costs, where the claim was brought not with view to personal gain and there was a wider public interest involved.[290] Costs of the successful party may be limited to some of the issues argued. In claims were there is more than one defendant or interested party, an unsuccessful claimant will normally be ordered to pay only one set of costs.[291] Neither the Administrative Court nor the Court of Appeal has jurisdiction to award costs out of public funds to the successful party.[292]

[290] See, e.g. *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Challenger* [2001] Env. L.R. 12; *cf. R. (on the application of Smeaton) v Secretary of State for Health (Costs)* [2002] EWHC 886; [2002] 2 F.L.R. 146 (Society for the Protection of Unborn Children, represented by Smeaton, ordered to pay costs of challenge to legality of the "morning after pill"—this was not a matter of public concern until the proceedings were commenced by the Society).
[291] *Corner House Research* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 [24].
[292] *Holden & Co v Crown Prosecution Service (No.2)* [1994] 1 A.C. 22.