PART 54

JUDICIAL REVIEW AND STATUTORY REVIEW

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Editorial introduction

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Section 31 of the Senior Courts Act 1981 and Pts 8 and 54 of the Civil Procedure Rules deal with the rules applicable to judicial review. SCA 1981 s.31 provides that an application to the High Court for (a) a quashing order, a mandatory or prohibiting order (formerly known as certiorari, mandamus or prohibition respectively), (b) a declaration or injunction (in the circumstances set out in s.31(2)) and (c) an application for an injunction under s.30 restraining a person from acting in an office to which that section applies when they are not entitled to do so shall be made in accordance with rules of court by a procedure to be known as "an application for judicial review" (Vol.2, para.9A–101).

Part 8 of the CPR, as modified by Pt 54, read with SCA 1981 s.31, now contains the procedural rules governing claims for judicial review. These rules govern the way that the courts exercise their supervisory jurisdiction over the proceedings and decisions of bodies performing public law duties or functions. They replace the former RSC Ord.53, introduced in 1977, which previously set out the rules governing the making of applications for judicial review and which is now revoked.

A claim for judicial review is a two-stage process. The claimant must first seek

permission to apply for judicial review (see r.54.4). The claimant must file and serve a claim form on the defendant and interested parties who in turn must file and serve an acknowledgement of service setting out in summary the grounds for contesting the claim. The court then decides, on the basis of those documents, whether to grant permission. Then, if permission is granted, the claim can proceed, the defendant and any interested party may put in written evidence and there will be a hearing of the substantive claim for judicial review.

The changes to the judicial review procedure were introduced following a review of the Crown Office under Sir Jeffrey Bowman. The report of the review team was submitted to the Lord Chancellor in March 2000.

Section II (Statutory Review Under the Nationality, Immigration and Asylum Act 2002) (rr.54.21 to 54.27) was inserted in Pt 54 by the Civil Procedure (Amendment) Rules 2003 (SI 2003/364). With effect from April 6, 2008, that Section was removed by the Civil Procedure (Amendment No.2) Rules 2007 (SI 2007/3543) as a consequence of the repeal of the Nationality Immigration and Asylum Act 2002 s.101. Section 101 ceased to have effect from April 4, 2005, but as there were transitional provisions for applications in relation to appeals made under the section, Section II remained in effect after that date.

Section III (Applications for Statutory Review Under Section 103A of the Nationality, Immigration and Asylum Act 2002) was inserted in Pt 54 by the Civil Procedure (Amendment) Rules 2005 (SI 2005/352) and was subsequently significantly amended (rr.54.28 to 54.36). With effect from February 15, 2010, that Section was removed from Pt 54 by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390) as a consequence of the abolition of the Asylum and Immigration Tribunal. Practice Direction 54B (Applications for Statutory Review Under Section 103A of the Nationality, Immigration and Asylum Act 2002), which supplemented Section III, was also revoked. By TSO CPR Update 51, with effect from the same date, for transitional purposes the provisions of Section III and of Practice Direction 54B were transferred to Practice Direction 52 (Appeals), where they are to be found in Section IV thereof.

Entry into force and Transitional Provisions

54.0.3 Part 54 I of the CPR was introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) which came into force on October 2, 2000.

Rule 22 and Sch.1 to the rules insert Pt 54 into the CPR. Rule 23 revokes the former RSC Ord.53. Part 54, however, only applies to applications for permission (and the related application for judicial review) made on or after October 2, 2000. Where a person has filed an application for permission to make an application for judicial review before October 2, 2000 in accordance with RSC Ord.53, Pt 54 does not apply and RSC Ord.53 continues to apply to the application for permission and the related application for judicial review: see r.30 of the Civil Procedure (Amendment No.4) Rules 2000.

Practice directions

54.0.4 This Part is supplemented by three practice directions. The first is of general application and the second deals with specific types of claim. The last of them, Practice Direction 54D, was first published in TSO CPR Update 49 and came into effect on April, 6, 2009. It contains provisions dealing with the place in which a claim before the Administrative Court should be started and administered and the venue at which it will be determined. A practice direction has also been issued renaming the Crown Office List and the Crown Office as the Administrative Court and Administrative Court Office respectively: Practice Direction (Administrative Court: Establishment) [2000] 1 W.L.R. 1654. There is a practice direction on termination of proceedings: see Practice Direction (Administrative Proceedings [2008] 1 W.L.R. 1377.

Pre-action Protocol

54.0.5 A pre-action protocol has been adopted for judicial review claims with effect from March 4, 2002.

Related sources

54.0.6
- Senior Courts Act 1981 s.31 (Vol.2, para.9A–101.)
- CPR Pt 8
- CPR r.52.15 (judicial review appeals)
- Nationality, Immigration and Asylum Act 2002

- Courts, Tribunal and Enforcement Act 2007

I. Judicial Review

Scope and interpretation[1]

54.1—(1) This Section of this Part contains rules about judicial review. **54.1**

(2) In this Section—

(a) a "claim for judicial review" means a claim to review the lawfulness of-

(i) an enactment; or

(ii) a decision, action or failure to act in relation to the exercise of a public function.

(b)–(d) […]

(e) "the judicial review procedure" means the Part 8 procedure as modified by this Section;

(f) "interested party" means any person (other than the claimant and defendant) who is directly affected by the claim; and

(g) "court" means the High Court, unless otherwise stated.

(Rule 8.1(6)(b) provides that a rule or practice direction may, in relation to a specified type of proceedings, disapply or modify any of the rules set out in Part 8 as they apply to those proceedings)

Amendment—r.54.1

In r.54.1(2), sub-paras (b), (c) and (d) were omitted by Civil Procedure (Amendment No.5) Rules 2003 (SI 2003/3361), which came into force on May 1, 2004. **54.1.1A**

Introduction: scope of judicial review

Judicial review is generally understood as describing the process by which the courts exercise a supervisory jurisdiction over the acts or omissions of public bodies in the field of public law. Judicial review is available only against public bodies, that is bodies exercising a power, or performing a duty, which involves "a public element" per Sir John Donaldson M.R. in *R. v Panel on Takeover and Mergers Ex p. Datafin* [1987] Q.B. 815 at p.838E. Judicial review is also available only where an issue of public law arises; a claim for judicial review cannot be used merely to enforce private law rights against a public body: *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152 at p.162. A claim for judicial review may be brought only by a person with a sufficient interest in the matter to which the application relates: SCA 1981 s.31(3). **54.1.1**

That approach to the scope of judicial review is reflected in the definition of a claim for judicial review in r.54.1(2)(a) which provides that a claim for judicial review means a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. That definition effectively encapsulates the scope of judicial review in English public law.

In the light of the provisions of r.54.1, the provisions of SCA 1981 s.31 and previous case law, the principal questions which arise in determining whether it is appropriate to bring a claim by way of a claim for judicial review, are namely,

(1) Against what persons or bodies does judicial review lie?

(2) Is the measure, action or omission challenged one that is amenable to judicial review?

(3) On what grounds does judicial review lie?

(4) Who can apply for judicial review?

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure Rules 2003 (SI 2003/364).

Senior Courts Act 1981, s.29 was amended by the Civil Procedure Modification of Senior Courts Act 1981) Order 2004 (SI 2004/1033) and the prerogative orders were renamed quashing orders, mandatory orders and prohibiting orders. Consequently, with effect from May 1, 2004, r.54.1(2) was amended by the Civil Procedure (Amendment No.5) Rules 2003, so as to omit sub-paras (b), (c) and (d). Similar amendments were made to CPR Sch.1 RSC Ords 45, 79 and 93. Rule 54.3 was also amended by that statutory instrument (see para.54.3.9 below).

The Administrative Court in the regions (see Practice Direction 54D (54DPD.1))

54.1.1.1 The regional offices (see Practice Direction 54D para.2 "Venue—general provisions" (54DPD.2): Birmingham, Cardiff, Leeds and Manchester) opened for business on April 21, 2009 and have quickly become an established part of the Administrative Court function. They are the same as the Administrative Court Office in London sharing a common computer system, identical procedures, similar staffing and resources and, importantly, the same judiciary. High Court judges sit at the regional courts during the legal terms. Senior judges are authorised to sit regularly as judges of the High Court in their regional court and also periodically in London.

Those matters which are not handled in the regional courts, namely the "excepted classes of claim" are set out in the Practice Direction (54DPD para.3.1) to which reference should be made. It should be stressed that the regional courts can and do have Divisional Courts when the need arises; albeit not as frequently as occurs in London.

The main aim of the regionalisation was to increase access to justice. The regional courts provide for access across a much wider geographical area for claimants and legal practitioners alike. It is also a common feature that members of the public who have an interest in the outcome attend the regional court to observe the proceedings which would simply not be feasible if the case were in London.

Those issuing claims in the regional offices will find a small dedicated staff who deal with the process from start to finish, often with little or no waiting time. Once a claim is under way, matters proceed more swiftly, typically taking a third of the time, the regional courts having neither the large case load nor the backlog of applications that are a feature of the Royal Courts of Justice. For similar reasons, the lists in the regional courts are also far less congested.

The Administrative Court in the regions also has the capacity to hold hearings in courts within the regional area, particularly where a case has a strong "local" connection. It should also be noted that, in contrast with the Royal Courts, the regional courts operate at the same level throughout the entire year: there is no reduction in capacity during the High Court vacation periods. The regional courts deal with urgent applications during normal working hours, but the out of hours function is undertaken by the duty judge system operated from the Royal Courts of Justice.

Against whom does judicial review lie

54.1.2 A claim for judicial review may be brought against an inferior court or tribunal or any person or body performing public duties or functions. Persons exercising powers or performing duties derived from statute or the prerogative are generally seen as public bodies for these purposes and actions and omissions done in the exercise of their statutory functions are generally amenable to judicial review (see, e.g. on statute, *R. v Secretary of State for Trade and Industry Ex p. Vardy* [1993] 1 C.M.L.R. 721; on the prerogative, *R. v Criminal Injuries Compensation Board Ex p. Lain* [1967] 2 Q.B. 864; *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374—powers derived from the prerogative are public law powers amenable to judicial review provided they raise issues which are justiciable).

Powers which are not derived from statute or the prerogative may, however, involve a sufficient public element to render the exercise of those powers amenable to judicial review. In *R. v Panel on Take-overs and Mergers Ex p. Datafin Ltd* [1987] Q.B. 815, the Court of Appeal held that judicial review did lie against the Take-over Panel, even though it was part of the self-regulatory system operated by the City, and did not derive its authority from statute or the exercise of the prerogative. The extent to which the activities of a body are underpinned by statute or is operating under the authority of the government or is woven into the fabric of governmental regulation are both relevant considerations in determining whether a body is a public body for the purposes of judicial review (see *R. v Panel on Take-overs and Mergers Ex p. Datafin Ltd* [1987] Q.B. 815). Other examples of non-statutory and non-prerogative powers being amenable to judicial review include, *R. v Advertising Standards Authority Ex p. The Insurance Service*

plc, *The Times*, July 14, 1989 (the Advertising Standards Authority) and *R. v Code of Practice Committee of the British Pharmaceutical Ex p. Professional Counselling Aids Ltd* (1990) 10 B.M.L.R. 21. Conversely, judicial review was not available against bodies dealing with the affairs of purely religious bodies or bodies regulating horse racing, football or travel agents as there was no suggestion that those bodies were part of a system of government regulation of those activities or that the government would regulate the activities if those bodies did not exist: see, e.g. *R. v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth Ex p. Wachmann* [1992] 1 W.L.R. 1036; *R. v Disciplinary Committee of the Jockey Club Ex p. The Aga Khan* [1993] 1 W.L.R. 909; *R. v Football Association Ex p. Football League* [1993] 2 All E.R. 833. The courts have left open the position in relation to the Press Complaints Commission (*R. v Press Complaints Commission Ex p. Stewart-Brady* (1997) 9 Admin. L.R. 2742) and the BBC (*R. v BBC Ex p. Referendum Party* [1997] E.M.L.R. 605). In addition, where a public body is under a statutory duty to make arrangements to provide a particular service, and it makes arrangements by means of a contract with a company, then that company does not owe any public law duties and its actions are not amenable to judicial review. Thus, where a local authority discharged its duty to make arrangements to provide residential accommodation to vulnerable groups by means of a contract with a private company whereby the company provided residential accommodation, that private company was not subject to judicial review: the company did not owe its existence or its ability to enter into a contract to any statutory provision and there was insufficient statutory underpinning of its activities to make its functions public law functions: see *R. v Servite Houses and Wandsworth LBC Ex p. Goldsmith* [2001] L.G.R. 55. Nor do such companies exercise public functions for the purpose of s.6 of the Human Rights Act 1998: see *Johnson v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] 1 A.C. 95. Conversely, the termination of a tenancy by a housing trust did involve a public function for the purposes of the Human Rights Act 1998 and would be amenable to judicial review: *R. (Weaver) v London Quadrant Housing Trust* [2009] EWCA Civ 587; [2009] 4 All E.R. 865.

The courts have also consistently held that a body which derives its authority from contract or from a consensual submission to the jurisdiction by the parties to its jurisdiction will not normally be a public body and cannot be made the subject of a claim for judicial review: see *Law v National Greyhound Racing Club* [1983] 1 W.L.R. 1302; *R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 1 W.L.R. 909 (domestic tribunals or sporting bodies acquiring jurisdiction by contract not amenable to judicial review; quaere whether a decision which did not in fact derive from any agreement or contract between the body and the individual seeking to challenge it could be the subject of judicial review).

The current approach is conveniently summarised in the decision of the Divisional Court in *R. v Insurance Ombudsman Bureau Ex p. Aegon Life Insurance Ltd*, *The Times* January 7, 1994. The court held that judicial review would not lie against a body whose birth and constitution owed nothing to any exercise of governmental power; a body could be classed as public only if it had been woven into the fabric of public regulation or into a system of governmental control, or was integrated into a system of statutory regulation or, but for its existence, a governmental body would assume control. Judicial review did not lie against a body whose powers derived from the agreement of the parties and when private law remedies were available against the body concerned. The Insurance Ombudsman Bureau fell into the latter category because it was a body whose jurisdiction was dependent on the contractual consent of its members and its decisions were of a private law arbitrative nature. See generally, Ch.2 of Lewis, *Judicial Remedies in Public Law* (4th edn).

Judicial review is available to control the lawfulness of acts or omissions of inferior courts and tribunals. The superior courts, however, such as the High Court, Court of Appeal, and the Supreme Court, are not amenable to judicial review. The Crown Court is amenable to judicial review except in matters relating to trial on indictment (see SCA 1981 s.29(3)).

The Court of Appeal has held that the Upper Tribunal, which is created by the Tribunals, Courts and Enforcement Act 2007, is amenable to judicial review but only in cases of outright excess of jurisdiction or a denial by it of fundamental justice in proceedings before it; see *R. (Rex C) v Upper Tribunal* [2010] EWCA Civ. 859, [2010] 4 All E.R.714. The position is different in Scotland where the Court of Session has ruled there is no restriction on the scope of judicial review of the Upper Tribunal: see *Eba v Advocate General for Scotland The Times*, October 20, 2010.

Judicial review is only available as against public bodies in relation to their public functions. It is not available to enforce purely private law rights against public bodies. Thus, a claim to enforce a purely private law right, such as a contractual right, against a public body cannot be brought by way of a claim for judicial review: see, e.g. *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152. That restriction is reflected in the wording of Pt 54.1(2)(ii) which deals with claims relating to the lawfulness of decisions, actions or failures to act in relation to the exercise of a public function. That wording is not apt to encompass a claim to enforce a purely private law right.

Is the measure, action or omission challenged one that is amenable to judicial review?

54.1.3 Rule 54.1(2)(a) defines a claim for judicial review as a claim to review the lawfulness of an enactment or a decision, action or failure to act. So far as primary legislation is concerned, the courts have jurisdiction to determine whether an Act of Parliament is compatible with European Union law and, if it conflicts with any directly effective provision of European Union law, it must disapply the provisions of the Act of Parliament and give precedence to the relevant provisions of European Union law: see *R. v Secretary of State for Transport Ex p. Factortame (No.2)* [1990] 1 A.C. 603; *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 A.C. 1. Under the Human Rights Act 1998, the courts also have jurisdiction to determine whether an Act of Parliament is compatible with certain rights derived from the European Convention on Human Rights. The courts may only grant a declaration that the legislation is incompatible; they cannot set aside or disapply legislation which conflicts with a Convention right: see ss.3 and 4 of the Human Rights Act 1998. Subject to those qualifications, the constitutional position is that the courts have no jurisdiction to review the lawfulness of Acts of Parliament as the Queen-in-Parliament is sovereign and there are no restrictions on its competence: see, e.g. *Manuel v Attorney General* [1983] Ch. 77. Similarly, the courts will not investigate the internal proceedings of Parliament to determine whether or not its internal procedures were observed: see *Pickin v British Railways Board* [1974] A.C. 765. See also *R. (Jackson) v Attorney General* [2006] 1 A.C. 262 (court able to determine whether Parliament Act 1949 was within scope of the acts that could be enacted in accordance with the provisions of the Parliament Act 1911 by the Queen and Commons alone).

Enactments also include subordinate legislation. This takes a variety of forms such as Orders in Council or regulations made by statutory instruments. Judicial review is available to review the lawfulness of subordinate legislation on the usual grounds of error of law, procedural impropriety or irrationality. Exceptionally, the courts will not review subordinate legislation to determine whether it is irrational where that subordinate legislation involves the formulation or implementation of national economic policy and can only take effect once approved by the House of Commons unless there is an element of bad faith, improper purpose or manifest absurdity: see *R. v Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC* [1991] 1 A.C. 521 and see *R. (Javed) v Secretary of State for the Home Department* [2002] Q.B. 129. The courts may, exceptionally, review the lawfulness of subordinate legislation even before it is laid before Parliament: see, e.g. *R. v HM Treasury Ex p. Smedley* [1985] Q.B. 657; *R. v Boundary Commission for England Ex p. Foot* [1983] Q.B. 600.

Rule 54.1(2) also defines a claim for judicial review as including a claim to review the lawfulness of a decision, action or failure to act. This definition is a reflection of the existing scope of English public law, that is, it is intended to enable the courts to control unlawful exercises of public power or unlawful failures to perform public duties. The courts have taken a broad view of the measures that may be subject to judicial review, and the width of that jurisdiction is reflected in the words in Pt 54 which provide for review of a decision, action or failure to act. It is unlikely that Pt 54 was intended in any way to restrict the existing jurisdiction (and, if it had sought to do so, it may well have been ultra vires). The measures in respect of which judicial review lies include a wide range of decisions affecting a person's liberty or their rights, interests, or expectations or claims for benefits. They also include preliminary and procedural decisions. The courts have also granted judicial review of a number of other types of measures, such as recommendations (e.g. *R. v Hallstrom Ex p. W* [1986] Q.B. 1090), reports (e.g. *Mahon v Air New Zealand* [1984] A.C. 808), advice or guidance (e.g. *R. v Secretary of State for the Environment Ex p. London Borough of Tower Hamlets* [1993] Q.B. 632 and *R. v Secretary of State for the Environment Ex p. Lancashire CC* [1994] 4 All E.R. 165; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112)

and policies of central and local government and other public bodies (e.g. *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115; *R. v Lewisham London BC Ex p. Shell U.K.* [1988] 1 All E.R. 938). All these measures constitute "action… in relation to the exercise of a public function" and would equally be reviewable under the definition of a claim for judicial review in Pt 54.1(2)(ii).

Failure to act where there is a duty on a public body to act is also subject to judicial review. This may occur where a public body, such as an inferior court or tribunal, wrongly refuses to exercise its jurisdiction or where a public body wrongly refuses to carry out a public duty.

Where the courts consider that judicial review is inappropriate in relation to a particular type of public law power, the current trend is to regard judicial review as available in principle but likely to be granted only in exceptional circumstances (e.g. *R. v Lord Chancellor Ex p. Maxwell* [1997] 1 W.L.R. 104, judicial review of decision by Lord Chancellor as to which judges should hear a trial available in principle but, given the width of the statutory discretion, were unlikely to succeed in practice; *R. v DPP Ex p. C* (1995) 7 Admin. L.R. 385, judicial review of a decision to prosecute only likely to be reviewed in exceptional circumstances: see also *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780 at para.14(5) and cases cited there). Alternatively, the courts may refuse permission to apply for judicial review as a matter of discretion rather than holding that they have no jurisdiction to grant judicial review (e.g. *R. v Secretary of State for the Environment Ex p. Kensington and Chelsea RLBC* (1987) 19 H.L.R. 161: challenge to a decision of a planning inspector to refuse to admit evidence during a planning inquiry would normally be premature and permission for judicial review refused, as there were exceptional reasons in that case, however, permission was granted). Or the court may hold that a particular exercise of power raises issues that are not justiciable in that they raise issues which, by their nature, the courts are unable to resolve (e.g. *Council for Civil Service Unions v Minister for the Civil Service* [1984] A.C. 374, exercise of a power for reasons of national security not justiciable and *R. (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777, December 17, 2002 (questions of foreign policy and the deployment of the armed forces, and in particular whether military action against Iraq was permitted under UN Resolution 1441, were not justiciable) *R. (Gentle) v Prime Minister* [2006] EWCA Civ 1689; [2007] 2 W.L.R. 195. See generally, Ch.4 of Lewis, *Judicial Remedies in Public Law* for a description of the acts and omissions of public bodies which are subject to judicial review.

On what grounds does judicial review lie?

54.1.4 The circumstances in which judicial review can be granted is a vast topic and in a commentary of this kind is it not practicable to give more than a brief outline (for a detailed analysis of the principles and authorities see de Smith, Jowell and Woolf, *Judicial Review of Administrative Action* and Wade and Forsyth, *Administrative Law*). In general, judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the lawfulness of the decision-making process itself. The court is concerned with identifying whether or not one or more of the grounds of judicial review have been established. The court does not act as a "court of appeal" from the body concerned, nor will it interfere with the exercise of power or discretion by a public body unless that body has acted unlawfully in the sense that it has breached one of the relevant principles of public law developed by the courts to ensure that public bodies do not exceed or abuse their powers. In summary, the grounds upon which judicial review lies may be grouped under the following main headings.

Error of law

54.1.5 Judicial review will lie where an inferior court or tribunal or other public authority makes an error of law in exercising its powers or performing its duties. In the past, the courts have been troubled by the question of whether every error of law amounted to a jurisdictional error which the court was entitled to correct on judicial review or whether some questions of law were matters for the inferior court, tribunal or public authority to determine so that errors did not take them outside their jurisdiction and did not enable the courts to intervene by way of judicial review. The general approach of the courts at present is to regard almost every error of law by a public body as being amenable to judicial review (*R. v Bedwellty Justices Ex p. Williams* [1997] A.C. 225, summarising the relevant case law beginning with *Anisminic Ltd v Foreign Compensation Commission (No.2)* [1969] 2 A.C. 147 and continuing with *South East Asia Fire Bricks Sdn*

Bhd v Non Metallic Mineral Products Manufacturing Employees Union [1981] A.C. 363 and *Re Racal Communications Ltd* [1981] A.C. 374; see also *R. v Lord President of the Privy Council Ex p. Page* [1993] A.C. 682 esp. at p.701). In addition, the courts historically had jurisdiction in respect of errors of law within jurisdiction which appeared on the face of the record (*R. v Northumberland Compensation Appeal Tribunal Ex p. Shaw* [1952] 1 K.B. 338; *Baldwin & Francis Ltd v Patents Appeal Commission* [1959] A.C. 663). What constitutes the record has now been widely interpreted and is not confined to the formal order but extends to the reasoning given by the judge in their written or oral judgment (*R. v Knightsbridge Crown Court Ex p. International Sporting Club (London)* [1982] Q.B. 304). The importance of review for errors of law on the face of the record has now declined as the courts have accepted that any error of law by a public body is normally subject to judicial review.

Procedural Impropriety

54.1.6 Judicial review will lie where there has been a breach of the common law rules of natural justice or procedural fairness (*Ridge v Baldwin* [1964] A.C. 40) or where there has been a failure to comply with any statutory procedural obligation, such as an obligation to consult prior to taking action. Broadly, the rules of natural justice require that a person be given a fair hearing before a decision affecting them is taken and that the decision maker is unbiased in the sense that there is no real danger that the decision maker will unfairly favour or disfavour that person *R. v Gough* [1993] A.C. 646; *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 W.L.R. 700 and *Porter v Magill* [2002] 2 A.C. 357. Whether the rules of natural justice or procedural fairness apply to a particular decision-making process, and what the actual requirements of fairness require, depends on the circumstances of the particular case. "The rules of natural justice - or of fairness - are not cut and dried. They vary infinitely" (*R. v Secretary of State for the Home Department Ex p. Santillo* [1981] Q.B. 778 per Lord Denning M.R.). The rules of natural justice will normally apply where the decision concerned affects a person's liberty or their rights as where their property is being taken or where they are dismissed from a public office (as in *Ridge v Baldwin* [1964] A.C. 40 where a chief constable was dismissed by the police authority). A person may also have a legitimate expectation that they will be given a hearing or consulted before a decision is taken (even if the decision is not one that would normally attract the duty to observe the principles of natural justice). Such a legitimate expectation might arise either because of a promise that a person would be consulted or a past practice of consulting or, if a person has enjoyed a benefit, they may have a legitimate expectation that they will be consulted before the benefit is removed: see, generally, *Council for Civil Service Unions v Minister for the Civil Service* [1984] A.C. 374.

Irrationality and the Wednesbury principle

54.1.7 Decisions of public authorities are liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings if the court concludes that no person properly directing itself as to the relevant law could reasonably have reached that decision on the material before it or if the decision is otherwise irrational: *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223.

The heightened "super-Wednesbury" standard of review applied in fundamental rights cases has been held to be an ineffective remedy under ECHR art.13, for at least some human rights matters (see *Smith & Grady v United Kingdom* (2000) 29 E.H.R.R. 493).

Abuse of power generally

54.1.8 The courts have developed other principles of public law enforceable by way of judicial review to ensure that public bodies do not abuse their powers. Some of these principles can be seen as aspects of the grounds of judicial review already discussed; others have a separate role to play. These principles include ensuring that public bodies exercise their powers in order to further the statutory purpose for which the powers were conferred and do not act for an improper or ulterior purpose (*Padfield v Minister of Agriculture Fisheries & Food* [1968] A.C. 997). Public bodies must take into account relevant considerations, i.e. ones that are expressly or impliedly relevant to the exercise of the discretion in question or which are drawn to their attention. They must not take into account irrelevant considerations. They may adopt general policies governing the way in which they will exercise their discretion but they may not fetter their discretion by applying the policy unduly rigidly (*British Oxygen Co v Minister of*

Technology [1971] A.C. 610; *R. v North West Lancashire Health Authority Ex p. A* [2000] 1 W.L.R. 977). They may not unlawfully delegate their powers; if they propose to delegate powers to committee or officers, they must ensure that they have express or implied powers to do so and have, in fact, properly delegated the decision-making power to the committee or official in question. In exceptional circumstances, where a public body has created a legitimate expectation that a person would be entitled to a particular benefit, it may be so unfair as to amount to an abuse of power for the public body to act in a way which breached that legitimate expectation (*R. v Inland Revenue Commissioners Ex p. Unilever plc* [1996] S.T.C. 681; *R. v Inland Revenue Commissioners Ex p. Preston* [1985] A.C. 835). In such circumstances, the person concerned may use the concept of legitimate expectations to ensure that a substantive benefit is concurred (*R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213). Generally, such circumstances arise where the public body has made a clear, unambiguous and unqualified representation that it will act in a particular way, the person concerned has relied upon that representation to their detriment in some way and there is no overriding public interest justifying the decision to resile from the representation (*R. v IRC Ex p. MFK Underwriting Ltd* [1990] 1 W.L.R. 1545; *R. v Secretary of State for Education and Employment Ex p. Begbie* [2000] 1 W.L.R. 1115 and *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363).

In general, decisions on matter of fact are for the public body decision-maker. The courts may, however, review a decision where the public body has made an error of jurisdictional fact, i.e. an error as to the existence of some precedent fact which must exist before the public body acquires the power to act (*R. v Secretary of State Ex p. Khawaja* [1984] A.C. 74 and *R. (A) v London Borough of Croydon* [2009] UKSC 8; [2009] 1 W.L.R. 2557). The courts have also begun to consider whether judicial review should be allowed generally because of some mistake of fact (see *R. v Criminal Injuries Compensation Board Ex p. A* [1999] 2 A.C. 330 and *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B. 1044).

There is no general duty at common law at present to provide reasons for decisions (*R. v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531). Reasons may, however, be required in certain cases because of the importance of the interests at stake or because the decision appears to be so aberrant that some explanation is called for (*R. v Higher Education Funding Council Ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242). In addition, particular statutes frequently impose obligations on particular tribunals or bodies to give reasons for their decision. Where reasons for a decision are given, they must be proper, adequate and intelligible reasons dealing with the main points raised (*South Bucks DC v Porter (No.2)* [2004] UKHL 33; [2004] 1 W.L.R. 1593).

Human Rights Act 1998

54.1.9 This Act incorporates certain of the rights contained in the European Convention on Human Rights into domestic law. Most of the relevant provisions of the Act came into force on October 2, 2000. Challenges may be brought against public bodies by way of claims for judicial review alleging that their actions have violated a person's Convention rights. Where such a claim is made, that fact must be stated in the claim form and precise details of the Convention right relied upon and the relief sought must be given: see para.5.3 of the Practice Direction—Judicial Review.

Court's discretion

54.1.10 Even if the claimant establishes one of the grounds of judicial review, the court is not bound to grant a remedy. The remedies are discretionary and, whilst a court will usually grant an appropriate remedy if the claimant establishes that the public body has acted unlawfully, there are cases where the courts may decline to grant a remedy see *R. (Edwards) v Environment Agency* [2008] UKHL 22 at para.63.Grounds for refusing to grant a remedy include the following: where there was undue delay in making a claim but the courts have extended the time limits (see r.54.5 below), the courts may still refuse a remedy if granting a remedy would cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration (SCA 1981 s.31(6)). A remedy may, exceptionally, even be refused if the claim was filed in time if granting a remedy would cause undue prejudice to third parties or the wider public interest (*R.. v Brent LBC Ex p. O'Malley* (1998) 30 H.L.R. 328 but see cases in para.54.5). The courts may decline to grant a remedy if a remedy is no longer necessary because the issues have become academic or are no longer of practi-

cal significance (although the courts may still grant declaratory relief, particularly if the claim raises an issue which it is in the public interest to resolve and which is likely to arise in other cases in the near future (*R. v Secretary of State for the Home Department Ex p. Salem* [1999] A.C. 450)). The courts may refuse a remedy if they are satisfied that the individual has in fact suffered no prejudice by the error complained of or, if the court is satisfied that the public body would reach the same decision irrespective of the error. However, it is only in exceptional circumstances that the courts will reach such a conclusion (see *R (Smith) v NE Derbyshire Primary Care Trust* [2006] 1 W.L.R. 3315 and *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603). The courts may refuse a remedy if it transpires that there was an adequate alternative remedy available which the claimant should have used rather than bringing a claim for judicial review, see, e.g. *R. v Secretary of State for the Home Department Ex p. Swati* [1986] 1 W.L.R. 477; [1986] 1 All E.R. 717; *R. v Birmingham City Council Ex p. Ferrero* [1993] 1 All E.R. 530; (1991) 155 J.P. 721; *R. (on the application of G) v Immigration Appeal Tribunal* [2005] EWCA Civ 1731; [2005] 1 W.L.R. 1445 and *R (Sinclair Gardens Investments Kensington Ltd v Lands Tribunal* [2006] 3 All E.R. 650.

Standing: Who may apply for judicial review

54.1.11 A court may not grant permission to make an application for judicial review unless the claimant has sufficient interest in the matter to which the claim relates (SCA 1981 s.31(3)). The question of what is a sufficient interest is a mixed question of fact and law; a question of fact and degree having regard to the relationship between the claimant and the matter to which the claim relates and all the other circumstances of the case (*R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617).

If the claimant has a direct personal interest in the outcome of the claim, they will normally be regarded as having a sufficient interest in the matter. The term interest is not given a narrow construction but includes any connection, association or interrelation between the claimant and the matter to which the claim relates. If their interest is not direct or personal, but is a general or public interest, it will be for the courts to determine whether or not they have standing. The courts have recognised that a public spirited citizen may be allowed to seek judicial review where there is a serious issue of public importance to be tried (*R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Lord Rees-Mogg* [1994] Q.B. 552). Claims for judicial review are often made by public interest groups established to represent particular interests or campaign on particular issues. The courts have adopted an increasingly liberal approach to questions of standing over recent years. They consider a number of factors in deciding whether bodies have sufficient interest to bring a challenge including the merits of the challenge, the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach and the role played by the group or body in respect of the issues in question (*R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386).

The SCA 1981 s.31(3) requires the claimant to establish a "sufficient interest" at the stage of the application for permission. The House of Lords has held that the test for standing involves a two-stage process. At the permission stage, the question for the court is whether a sufficient interest has been shown to justify granting permission. Except in simple cases where it is appropriate at the earliest stage to find that the applicant has no standing, because for example, they are really no more than a "meddlesome busybody" (per Lord Donaldson M.R. in *R. v Monopolies and Mergers Commission, Ex p. Argyll Group Plc* [1986] 1 W.L.R. 763), it is generally undesirable for the courts to consider standing in detail as a preliminary issue, since the question of sufficient interest must be taken together with the legal and factual context of the claim and whether there has been a breach or failure to carry out statutory or other public duties: see *R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617. If permission is granted, standing can be considered again at the substantive hearing to consider whether the claimant has sufficient interest to maintain their claim for a particular remedy. At this stage, questions of standing frequently overlap with the discretion of the court to grant or refuse a remedy (the Court of Appeal decision in *R v Secretary of State ex p. Presvac Engineering Ltd.* (1991) 4 Admin. L. Rep. 121 at 133–134).

Prerogative remedies renamed

54.1.12 Senior Courts Act 1981, s.29 as amended by the Civil Procedure (Modification of

the Senior Courts Act 1981) Order 2004 also renames the former prerogative remedies so that an order of mandamus is now called "a mandatory order", an order of prohibition a "prohibiting order" and an order of *certiorari* a "quashing order".

Parties

54.1.13 The parties to a judicial review claim will be the claimant, the defendant and interested parties. The defendant will usually be the public body whose decision, action or failure to act is under challenge. An "interested party" is defined in r.54.1(1)(f) as any person "who is directly affected by the claim". Under the former RSC Ord.53 r.5(3), applications for judicial review had to be served on persons directly affected and it is likely that the same definition of that term will apply to Pt 54. A person is directly affected if they are affected simply by reason of the grant of a remedy (*R. v Liverpool City Council Ex p. Muldoon* [1996] 1 W.L.R. 1103). In *Ex p. Muldoon*, the Secretary of State was not directly affected by a challenge to a decision of the local housing authority refusing to pay the applicant housing benefit. He was indirectly affected, in that he would be liable to pay 95 per cent of the benefit if the refusal to pay was quashed, but he was not directly affected by the grant of a remedy. Examples of persons directly affected include the recipient of a planning permission where an individual seeks to challenge the lawfulness of the grant of planning permission. The grant of a remedy, such as the quashing of the decision to grant planning permission, would directly affect the rights of the person with the benefit of the planning permission. The courts also have power to allow any other person to file evidence or appear at a judicial review hearing (CPR r.54.17).

Meaning of judicial review procedure

54.1.14 The judicial review procedure, for the purposes of Pt 54, means the Pt 8 procedure for bringing a claim as modified by Pt 54 (CPR r.54.1(1)(e)).

When this section must be used[1]

54.2 The judicial review procedure must be used in a claim for judicial review where the claimant is seeking— **54.2**

(a) a mandatory order;

(b) a prohibiting order;

(c) a quashing order; or

(d) an injunction under section 30 of the Senior Courts Act 1981 (restraining a person from acting in any office in which he is not entitled to act).

Judicial review remedies

54.2.1 The judicial review procedure must be used when the claimant is seeking one of the prerogative orders, now known as a quashing order, a mandatory order or a prohibiting order. These remedies were developed to enable the courts to exercise its supervisory jurisdiction to review the lawfulness of the acts of inferior courts, tribunals and public bodies. These remedies can only be used challenges to public bodies which raise public law issues. All the prerogative remedies are discretionary.

A quashing order is an order which brings up into the High Court a decision of an inferior court, tribunal or other public authority for it to be quashed or set aside. Thus, where in judicial review proceedings, the court concludes that a decision of an inferior court, tribunal or other public authority should be set aside, a quashing order would normally be the appropriate order. Where the court quashes a decision, it has power to remit the matter to the decision-maker: see r.54.19.

The court has power to suspend the granting of a quashing order and this may be appropriate, particularly in cases where there is a right of appeal to a higher court or there is a reason for delaying the granting of an order to enable remedial action to be taken. In general, however, once a court has determined that action is unlawful and

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure Rules 2003 (SI 2003/364).

that the grant of a quashing order is appropriate, the usual course will be to quash the decision immediately to make it plain that the unlawful action has no legal effect. See, generally, *A v HM Treasury* [2010] UKSC 2; [2010] 2 W.L.R. 378 especially at pp.463, paras 4–8.

A mandatory order is an order requiring an inferior court, tribunal or other public body charged with a public duty to carry out its judicial or other public duty. A mandatory order may, therefore, be granted requiring an inferior court or tribunal to hear a case where it wrongly held that it has no jurisdiction to hear a case. It may also be granted where an inferior court or tribunal is obliged to state a case but is refusing to do so. In addition, there are statutory provisions under which a mandatory order, requiring a case to be stated, may be directed to the Crown Court (s.29(3) of the Senior Courts Act 1981) or a magistrates' court (s.111(6) of the Magistrates' Courts Act 1980). A mandatory order can issue to require a public body such as a minister or local authority, to carry out a specific act, if it is under a statutory duty to do that act. In practice, the courts do not generally grant a mandatory order against public bodies in such circumstances, but grant a declaration setting out the scope of the public body's duty and rely upon the public authority to comply.

A mandatory order cannot be made against the Crown (s.40 of the Crown Proceedings Act 1947) but it will lie against an officer of the Crown, including a minister, who is obliged by statute to perform a duty (see, dicta of Lord Woolf in *M v Home Office* [1994] 1 A.C. 377 at p.425).

A prohibiting order is an order restraining an inferior court, tribunal or other public body from acting outside its jurisdiction or from otherwise abusing its powers. Thus, for example, where a tribunal is proposing to adjudicate upon some matter which is not within its jurisdiction, a prohibiting order may be granted on a claim for judicial review to restrain the tribunal from acting. A prohibiting order may be granted before the inferior court, tribunal or other public authority has made any decision: *R. v Electricity Commissioners* [1924] K.B. 171; *R. v Minister of Health* (1929) 45 T.L.R. 176.

An application for an injunction under s.30 of the Senior Courts Act 1981 restraining a person from acting in a public office can also only be sought by means of a claim for judicial review.

When this section may be used[1]

54.3 **54.3—(1) The judicial review procedure may be used in a claim for judicial review where the claimant is seeking—**

(a) a declaration; or

(b) an injunction([GL]).

(Section 31(2) of the Senior Courts Act 1981 sets out the circumstances in which the court may grant a declaration or injunction in a claim for judicial review)

(Where the claimant is seeking a declaration or injunction in addition to one of the remedies listed in rule 54.2, the judicial review procedure must be used)

(2) A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone.

(Section 31(4) of the Senior Courts Act 1981 sets out the circumstances in which the court may award damages, restitution or the recovery of a sum due on a claim for judicial review)

Cases when the judicial review procedure may be used

54.3.1 The jurisdiction to grant injunctions is contained in s.37 of the Senior Courts Act 1981. Declarations and injunctions may be sought in a claim for judicial review either alongside of, or instead of, the prerogative remedies. SCA 1981 s.31(2) provides that

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure Rules 2003 (SI 2003/364).

the courts may grant a declaration or injunction instead or in addition to one of the prerogative remedies where it is just and convenient to do so, having regard to (a) the nature of the matters in respect of which relief may be granted by mandatory orders, quashing orders and prohibiting orders (b) the nature of the body against whom relief may be granted by such orders and (c) all the circumstances of the case. The prerogative orders lie against a public body where issues of public, as opposed to purely private, law arise. Similarly, declarations and injunctions may only be sought by way of the judicial review procedure in such public law cases. Thus the judicial review procedure may not be used to seek a declaration or injunction against a body which derives its jurisdiction over others from contract and which is not a public body: see, e.g. *Law v National Greyhound Racing Club* [1983] 1 W.L.R. 1302. Similarly, the judicial review procedure cannot be used to enforce purely private law rights against a public body: see, e.g. *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152.

Distinction between public law and private law

54.3.2 The judicial review procedure has special provisions designed to protect public bodies, most notably, a short time limit and the need to obtain permission. Declarations and injunctions remain available by way of an ordinary Pt 7 or Pt 8 claim where these restrictions do not apply. The courts have had to consider the extent to which a declaration or injunction may be sought by way of an ordinary claim when the claim raises public law issues that could have been brought by way of a claim for judicial review.

The House of Lords has held that, as a general rule, it is contrary to public policy and as such an abuse of process for a person seeking to establish that a decision or action of a person or body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than the judicial review procedure, thereby evading the provisions intended to protect public authorities (*O'Reilly v Mackman* [1983] 2 A.C. 237; this dealt with the provisions of the former RSC Ord.53, but the relevant provisions of Pt 54 are materially identical and there is no reason to believe that the law in relation to Pt 54 is any different from that previously applicable). If a person commences an ordinary Pt 7 claim in circumstances where they should have complied with the judicial review procedure (that is, Pt 8 as modified by Pt 54), the claim will be struck out. Thus ordinary proceedings by prisoners seeing declarations that the decisions of the Board of Visitors of a prison were unlawful on the grounds that they failed to comply with the rules of natural justice were struck out as they raised public law issues which should have been challenged by way of judicial review (*O'Reilly v Mackman* above).

The precise scope of the rule in *O'Reilly v Mackman* is still a matter of debate. Two main approaches have been canvassed in the case law. One approach is that the rule does not apply to claims which are brought to vindicate private law rights even though they involve a challenge to a public law decision or action and may involve determining questions of public law. If this approach is adopted, then the aggrieved person will only be forced to proceed by way of a claim for judicial review where private law rights are not at stake, that is in a case which only raises issues of public law. The alternative approach is that the rule in *O'Reilly v Mackman* applies to all cases where the claim involves a challenge to a public law decision or action or involves determining questions of public law (subject to certain limited exceptions) whether or not the ultimate aim of the proceedings is to vindicate a private law right. In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624, the House of Lords left open the question of which of these approaches should be adopted but indicated a preference for the first approach. There, the House held that a claim by a general medical practitioner that the Family Practitioner Committee had acted unlawfully in deciding to reduce the amount that he was paid by way of a practice allowance under the NHS regulations was a claim that could be litigated by way of an ordinary claim notwithstanding the fact that the claim involved a challenge to a public law decision said to be unlawful on public law grounds. The claimant had not therefore abused the process of the court by not making an application for judicial review and his claim would not be struck out. The House of Lords said that, even assuming that the rule in *O'Reilly v Mackman* generally required all challenges to public law decisions or actions to be brought by way of judicial review, subject to certain exceptions, this case was either not within the rule or was excepted from it because the claimant's claim was based either on a contractual or statutory private law right to be paid his remuneration in accordance with his terms of service. Accordingly, private law rights

dominated the proceedings and the order sought (payment of the full amount of the practice allowance) was one which could not be made in judicial review proceedings. In *Mercury Ltd v Telecommunications Director* [1996] 1 W.L.R. 48, the House of Lords said that it was important to retain flexibility, that the precise limits of what is called private law and public law are by no means worked out, and that private law proceedings should only be struck out if they are an abuse of the process of the court. For further discussion, see also *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] A.C. 112 and *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 1629. See generally Ch.3 in Lewis, *Judicial Remedies in Public Law*.

In *Clark v University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, the Court of Appeal again indicated that a claim based on an alleged breach of a contractual relationship between the claimant and the public authority defendant should not be struck out simply because the issues raised could have been litigated by means of a claim for judicial review. Such claims could be brought by way of an ordinary claim, but the Court of Appeal indicated that the courts could use their powers under the CPR to strike out such claims where there had been an abuse of process. One of the most significant differences between ordinary claim proceedings and judicial review is the time-limit for instituting proceedings: in ordinary claims, the time-limit is usually six years whilst in judicial review a claimant must apply for permission promptly and in any event within three months. The Court of Appeal indicated in *Clark* that, whilst commencing proceedings within the statutory limitation period for bringing ordinary private law proceedings would not of itself be an abuse, the court could have regard to the delay in commencing proceedings if in fact the claim was one that would normally have been brought by way of judicial review. The courts could, therefore, strike out a claim if, having regard to the entirety of the circumstances, including the availability of judicial review and the delay in commencing proceedings, the court's process was being misused or if it was clear that, because of the lapse of time or other circumstances, no worthwhile relief would be granted in the ordinary proceedings.

There are recognised exceptions to the rule in *O'Reilly v Mackman*, whatever its proper scope. Thus, it is permissible to litigate public law issues in ordinary private law claims where, for instance, the invalidity of a public law decision arises as a collateral issue in a claim for the infringement of a private law right or where none of the parties objects to the proceedings being continued by way of ordinary claim (*O'Reilly v Mackman*). The invalidity of a public law action or decision, which is an integral part of a public body's claim, may also be raised as a substantive defence in civil proceedings (*London Borough of Wandsworth v Winder* [1985] A.C. 461) although a challenge merely to the decision by a public body to institute civil proceedings should be brought by way of judicial review (*Avon CC v Buscott* [1988] Q.B. 656 but see dicta in *Doherty v Birmingham City Council* [2008] UKHL 57 suggesting that these issues can be raised by way of a defence to possession proceedings.). Where a person is charged with contravening a public law measure such as subordinate legislation or a byelaw, he may generally raise the invalidity of that measure as a defence to the criminal charge (*Boddington v British Transport Police* [1999] 2 A.C. 143). The exception to this rule arises only in those rare circumstances where the provisions creating the criminal offence make it an offence to comply with a particular measure, whether or not that measure is invalid (*R. v Wicks* [1998] 2 A.C. 92).

See also the decision of the Court of Appeal in *Wandsworth London BC v A.* [2000] 1 W.L.R. 1246 on the extent to which a defendant may raise the invalidity of the actions of a public body as a defence to a claim by a public authority.

Injunctions

54.3.3 It is now clear that injunctions, including interim injunctions, are available against all public bodies including ministers and Crown servants acting in their official capacity (*M. v Home Office* [1994] 1 A.C. 377).

Interim Remedies

54.3.4 At any time in the course of judicial review proceedings, the court may grant any interim remedy in accordance with Pt 25 of the CPR, in particular interim injunctions (CPR r.25.1(a)) and interim declarations (CPR r.25.1(b)). In addition, the court has inherent jurisdiction to grant a stay (see CPR r.54.10) or certain other forms of interim relief such as bail.

Procedure for claiming interim relief

54.3.5 A claim for such interim relief ought to be included in the claim for judicial review

(CPR r.54.6). Interim relief can be granted at any time, including, in urgent cases, before proceedings are started (CPR r.25.2). Thus, interim relief may be granted in urgent cases before permission to apply for judicial review is given (as was the case under RSC Ord.53: *M v Home Office* [1994] 1 A.C. 377). If a claimant seeks interim relief after the grant of permission, the procedure in CPR Pt 25 applies. Practical problems may arise if the claimant wishes to have a claim for interim relief determined before or at the same time as the grant of permission is being considered and guidance on this has now been issued: Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 W.L.R. 810: see para.54.4.1 below.

Test in considering whether to grant an interim injunction

54.3.6 The courts will consider whether the claim raises a serious issue to be tried, and if so, where the balance of convenience, including the wider public interest, lies. In considering whether there is a serious issue to be tried, the court will consider whether the claimant can demonstrate a real prospect of succeeding at trial: *R. (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin.). In considering the balance of convenience, the availability of damages is unlikely to be determinative of the grant of interim injunctions in most public law cases as damages will either not be available or will not be an adequate remedy. In considering the balance of convenience as a whole, the courts must have regard to the wider public interest (*Smith v Inner London Education Authority* [1978] 1 All E.R. 411; *Sierbein v Westminster City Council* (1987) 86 L.G.R. 431). The wider public interest includes permitting a public authority to continue to apply its policy but that interest will need to be weighed against other relevant factors; *R. (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin.).

Interim Relief to give effect to European Union law

54.3.7 In *R. v Secretary of State for Transport Ex p. Factortame (No.2)* [1991] 1 A.C. 603, the European Court of Justice held that a national court must have jurisdiction to grant interim relief in order to ensure the full and effective protection of directly effective rights derived from European Community law. Where the claim is that domestic legislation contravenes European Community law, the test for determining whether to grant relief is, it seems at present, a matter for the national courts to decide. The House of Lords held that in such cases that:

(1) the balance of convenience was likely to be the deciding factor as there was unlikely to be an adequate remedy in damages available to either side;

(2) generally, the court should not restrain a public authority from enforcing apparently authentic national legislation unless the court was satisfied, having regard to all the circumstances, that the challenge to the law is, prima facie, so firmly based as to justify so exceptional a course being taken; but it is always a matter of discretion; and

(3) on the facts of the instant case, the applicants' challenge was, prima facie, a strong one and the balance of convenience came down in favour of the grant of the interim injunction sought.

Different considerations apply where the claimant is challenging the validity of European Union legislation such as a Directive or Regulation. Only the European Court of Justice can rule on the validity of such measures. If a national court has doubts as to the validity of such a measure, the proper course is for that court to refer the question of the validity of the measure to the European Court under art.234 of the EC Treaty *Foto-frost v Hauptzollamt Lubeck-Ost (Case C-314/85)* [1987] E.C.R. 4199). The national court should only grant interim relief suspending the operation of the measure pending the preliminary ruling of the European Court if they are satisfied that there are serious doubts as to the validity of the measure and there is an urgent need for interim relief in order to avoid serious and irreparable damage to the party seeking interim relief (*Atlanta Fruchthandelsgesellschaft mbH v Bundesamt fur Ernahrung und Forstwirtschaft (C465/93)* [1996] All E.R. (E.C.) 31; [1995] E.C.R. I-3761 and see *R. (on the application of ABNA Ltd) v Secretary of State for Health* [2003] EWHC 2420; [2004] Eu. L.R. 88). The Court of Appeal has also held that a similar test applies in considering whether to grant interim relief to suspend domestic legislation intended to implement European Union legislation pending a ruling on the validity of the measure (*R. v Secretary of State for Health Ex p. Imperial Tobacco* [2001] 1 W.L.R. 127). By the time that the matter reached the House of Lords, the matter had become academic as the government had undertaken not to make any national regulations to implement a

Directive in the light of the opinion of the Advocate General that the relevant European Directive was ultra vires. Three members of the House of Lords, however, expressed the view that it was at least arguable that the appropriate test was the European Community law test set out in *Atlanta* and, if they had had to decide the issue, they would have referred the matter to the European Court under art.234 EC. Two of their Lordships considered that the appropriate test in these circumstances for determining whether to grant interim relief was the domestic law test set out in *American Cyanamid*, not the European test, and considered that the matter was acte clair so that no reference would have been necessary. See *R. v Secretary of State for Health Ex p. Imperial Tobacco Ltd* [2001] 1 W.L.R. 127.

Damages

54.3.8 A claim for damages may be included in a claim for judicial review (SCA s.31(4), CPR r.54.1(2)). Such a claim may, however, only be included in addition to a claim for one of the prerogative remedies or a declaration or injunction; a claimant may not seek damages alone in a claim for judicial review. Furthermore, damages may only be awarded if they could have been awarded in an ordinary claim, that is the claimant must be able to establish a private law cause of action or a claim under the Human Rights Act 1998 (see, e.g. *R. (Bernard) v Enfield BC* [2002] EWHC 2282; [2003] U.K.H.R.R. 148; *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; [2004] Q.B. 1124; and *R. (Greenfield) v Secretary of State for the Home Department* [2005] 1 W.L.R. 673). The judicial review procedure does not create any new right or remedy in damages; it simply provides that, if a claim for damages exists in private law, it may, in appropriate cases, be claimed in the judicial review procedure alongside the claim for a prerogative or other remedy to vindicate a public law right.

Restitution and award of liquidated sum

54.3.9 With effect from May 1, 2004, r.54.3 was amended by the Civil Procedure (Amendment No.5) Rules 2003, to allow the remedies of restitution and the award of a liquidated sum to be sought on a claim for judicial review.

Permission required[1]

54.4 54.4 The court's permission to proceed is required in a claim for judicial review whether started under this Section or transferred to the Administrative Court.

Procedure for determining applications for permission

54.4.1 Claims for judicial review may only be brought where the court has first granted the claimant permission to bring such a claim. Pt 54 introduces significant changes to the procedure for applying for permission. Before applying for permission, however, a claimant should normally comply with the pre-action protocol for judicial review. That requires the claimant to send a letter before action to the defendant. The letter should identify the decision, act or omission being challenged, set out a summary of the facts and the reasons for the challenge. A standard form letter is set out at Annex A to the pre-action protocol. The defendant should normally respond within 14 days, giving its response to the claim and indicating which parts of the claim, if any, is conceded. A standard form letter setting out the information that should be provided is set out at Annex B to the pre-action protocol. The claim should not normally be made until the 14 days for the reply has passed. However, the pre-action protocol does not affect the time-limit for filing a claim form and, if the time-limit is approaching, the safest course of action is to file and serve the claim form with an explanation of why the pre-action protocol was not followed. To make a claim, the claimant must first file a claim form in the Administrative Court Office. The claim form must contain the matters set out in CPR rr.8.3 and 54.6 (see para.54.6.1 below) together with the material required by the Practice Direction—Judicial Review. That claim form must also be served on the defendant and any interested person within seven days of being issued by the Administrative Court Office (CPR r.54.7). They must then file an acknowledgement of service (form **N462**) within 21 days and serve it as soon as reason-

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure Rules 2003 (SI 2003/364).

ably practicable and not later than seven days on the claimant and any interested person (CPR r.54.8(2)). The acknowledgement of service must set out a summary of the grounds for contesting the claim (CPR r.54.8(4)).

The rules contemplate that the court will, in the first instance, deal with the application for permission by considering the papers alone and there will not generally be an oral hearing (see also para.8.4 of the Practice Direction). In particular, the claimant no longer has a right to have the permission determined at an oral hearing, although they have a right to request that any decision to refuse or limit the grant of permission be reconsidered at an oral hearing (CPR r.54.12(3)).

Difficulties have arisen where a claimant needs to have the application for permission considered urgently. The judicial review procedure in Pt 54 contemplates that applications for permission will be dealt with on the papers and after service of the claim form and the 21 days for filing the acknowledgment of service have passed. The Administrative Court has issued a practice statement giving guidance on this matter. Where there is a need for the application to be dealt with as a matter of urgency, the claimant should complete the prescribed form stating the need for urgency, the time scale sought for the consideration of the permission application and the date by which the substantive hearing needs to take place. The claim form and the request for urgent consideration must be faxed to the defendant and the interested parties who should be advised of the application. A judge will then consider the application for permission within that time scale: see Practice Statement (Administrative Courts: Listing and Urgent Cases) [2002] 1 W.L.R. 810. The prescribed form for a Request for Urgent Consideration is form **N463**.

Difficulties may also arise where a claimant wishes to obtain interim relief or to obtain expedition. If interim relief is sought in judicial review proceedings, that application may need to be dealt with more quickly than the normal judicial review procedure allows for and would normally require an oral hearing (see, for the former practice under RSC Ord.53, *R. v Kensington & Chelsea Royal London Borough Ex p. Hammell* [1989] Q.B. 518 indicating that an oral hearing with notice to the other side would be required except in cases of urgency). The Practice Statement provides that where an interim injunction is sought then, in the Request for Urgent Consideration, the claim must, in addition to the information referred to above, provide a draft order and the grounds for seeking an injunction. The judge will then consider the application within the time requested and may make such order as they consider appropriate. The judge may also direct that an oral hearing take place within a specified time: see *Practice Statement* [2002] 1 W.L.R. 810. The preferable course of action would be to direct that the application for interim relief be listed for an oral hearing, if possible, with notice of the hearing to the defendant and interested parties so that all parties may attend and make representations. There may, of course, be situations of real urgency where this is not feasible. Here, the court could grant an interim order for a short period and direct that the matter be listed for an oral hearing before the end of that period or grant interim relief with liberty to the defendant to apply to discharge the order. See *R (Lawler) v Restormel BC* [2008] A.C.D. 3. The court may either grant permission to apply for judicial review at the time that it considers the request for urgent consideration (leaving only the application for interim relief to be dealt with at the oral hearing) or it may direct that both the application for permission and the application for interim relief be heard orally.

Test for granting permission

54.4.2 The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is required is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived" (*R. v Inland Revenue Commissioners Ex p. National Federation of Self-employed and Small Businesses Ltd* [1982] A.C. 617 at p.642 per Lord Diplock). Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exits which merits full investigation at a full oral hearing with all the parties and all the relevant evidence (*R. v Legal Aid Board Ex p. Hughes* (1992) 5 Admin. L. Rep. 623; *R. v Secretary*

of State for the Home Department Ex p. Rukshanda Begum and Angur Begum [1990] C.O.D. 107 and *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780 at para.14(4)).

Delay

54.4.3 In addition, the courts may refuse permission if there has been delay in filing a claim (CPR r.54.5 and para.54.5.1 below).

Discretion

54.4.4 The court may also refuse permission in the exercise of its discretion. In particular, the courts will not normally grant permission to apply for judicial review where an adequate alternative remedy existed which the claimant could use or could have used (*R. v Chief Constable of Merseyside Police Ex p. Calveley* [1986] Q.B. 424; *R. v Secretary of State for the Home Department Ex p. Swati* [1986] 1 W.L.R. 477 and *R. (on the application of G) v Immigration Appeal Tribunal* [2004] EWHC 588 (Admin); [2005] 1 W.L.R. 1445; *R. (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 W.L.R. 475; *R (Carnell) v Regents Park College and the Conference of Colleges Appeal Tribunal* [2008] EWHC 739 (Admin); [2008] E.L.R. 268 at paras 31–34). The courts may, however, grant permission to apply for judicial review in exceptional circumstances, or where the alternative remedy is not adequate in the circumstances or where there is some other reason which makes judicial review proceedings particularly appropriate (see, e.g. *R. v Hereford Magistrates Court Ex p. Rowlands* [1998] Q.B. 110). Permission may also be refused, for example, if the claim is academic or if the claimant has not, in fact suffered any injustice.

Limited permission

54.4.5 The claim for judicial review will, usually, set out a number of grounds upon which it said that the public body has acted unlawfully. It is now generally accepted that the court may either grant permission for all the grounds to be argued or, alternatively, may refuse permission to argue certain grounds, because, for example, a particular ground of challenge does not raise an arguable point (*R. v Staffordshire CC Education Appeals Committee Ex p. Ashworth* (1996) Admin L. Rep. 373; *R. v Advertising Standards Authority Ex p. City Trading* [1997] C.O.D. 202). Part 54 implicitly recognises the power of the court to grant permission on certain grounds only as it expressly provides for a claimant to be able to request that a decision granting limited permission only be reconsidered at a hearing (CPR r.54.12). Similarly, where more than one decision is challenged, the court may grant permission to apply for judicial review of one or more decisions but refuse permission in respect of others.

Time limit for filing claim form[1]

54.5 **54.5—(1) The claim form must be filed—**

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose.

(2) The time limit in this rule may not be extended by agreement between the parties.

(3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.

Time limits and delay

54.5.1 A claim for judicial review must be made promptly and in any event within 3 months from the date upon which grounds of the claim arose. The test is promptness and a claim will not necessarily be made promptly simply because it has been made within the three months period (*R. v Independent Television Commission Ex p. TV NI Ltd*, *The Times*, December 30, 1991; *R. v Cotswold DC Ex p. Barrington Parish Council* (1997) 75 P & C.R. 515 at pp.523–523). The House of Lords has left open the question of whether the "promptness" test satisfies the requirement of European Union law and the European Convention on Human Rights: see *R. v Hammersmith and Fulham LBC*

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

Ex. p. Burkett [2002] 1 W.L.R. 1593. Previously, the courts have held that claimants operate on the basis that the rule is compatible until declared incompatible: *R. (Young) v Oxford City Council* [2002] EWCA Civ 990, judgment June 27, 2001 and see also *R. (Hardy) v Pembrokeshire CC* [2006] EWCA Civ 240; [2006] Env. L.R. 28. However, the European Court of Justice has now considered the question of promptness and the date from which the time-limit runs in the context of challenges under the domestic procurement regulations which imposes a materially similar time-limit for bringing proceedings as exists in the judicial review procedure. The European Court has held that, in order for the time lime to be compatible with the obligation to provide an effective remedy under art.1(1) of Directive 89/665 dealing with the implementation of the rules governing procurement, the time limit must run from the date when the claimant knew, or ought to have known of the breach (not the date of the breach itself) and that the requirement to act promptly was not compatible with the effective implementation of the Directive: see *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] 2 C.M.L.R 47 The High Court has held that the appropriate course of action is to exercise the discretion to extend time on the basis that a claim brought within 3 months of the date of knowledge of the breach ought to be permitted: see *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch.), [2010] 2 C.M.L.R 48 . Although these cases dealt with the procurement regulations, the likelihood must be that the time-limits for judicial review will similarly be found to contravene the general EU principle requiring that an effective remedy be granted for a breach of a right derived from EU law. The likelihood is that, in such cases, the courts will permit such claims to be brought within three months of the date when the claimant knew, or ought to have known, of the alleged breach of EU law. See also *Lamm v United Kingdom*, Application 41671/98 ECHR, unrep., July 5, 2002. The obligation to comply with the pre-action protocol by sending a letter before action and giving the defendant 14 days to reply does not remove the obligation to bring the claim promptly and certainly if it means that the claim would be lodged outside the three month period, the sensible course of action would be to lodge the claim and to explain, in the claim form, why the need for urgency meant that it was not possible to comply with the pre-action protocol.

The time limit begins to run from the date when the grounds for the claim first arose. The time does not run from the date when the claimant first learnt of the decision or action under challenge nor from the date when the claimant considers that they had adequate information to bring the claim. Such matters may be relevant to the separate question of whether an extension of the time limit should be granted (*R. v Secretary of State for Transport Ex p. Presvac Engineering Ltd* (1991) 4 Admin L. Rep. 121 at 133–134).

If the claim is for a quashing order in respect of a judgment, order or conviction, the time-limit runs from the date of that judgment, order or conviction (Practice Direction, para.4.1). If the challenge is to a particular decision or action, the time limit will usually run from the date when the decision or action was taken. The claimant must, however, challenge the substantive decision that is the real basis of their complaint. A claimant may, for example, fail to bring a challenge to a particular decision, and may then seek to challenge some later ancillary or consequential decision or approval of the earlier decision on the ground that the later decision is unlawful as it is based on the original decision which is also unlawful. In such situations the courts may find that the time-limit begins to run from the date of the earlier decision. The High Court has held, for example, that where a local education authority published proposals to close a school and the claimant wished to claim that the local education authority had acted unlawfully in publishing proposals (as the wrong committee within the authority took the decision), the time limit ran from the date of the earlier decision, not the date of the decision of the school organisation committee approving the proposals. As the claimant was out of time to challenge the earlier decision, the validity of that decision could not found a challenge to the lawfulness of the later decision of the school organisation committee: *R. (Louden) v Bury School Organisation Committee* [2002] EWHC 2749 (Admin) judgment, December 19, 2002. Different considerations may arise where one body takes a decision which is conditional on some other event occurring. Thus, in planning a local planning authority may resolve to grant planning permission on condition that some other requirement is first met. The House of Lords has held that: the time-limit begins to run from the actual grant of planning permission, not from the date of the resolution to grant permission: *R. v Hammersmith and Fulham LBC Ex. p. Burkett* [2002] 1 W.L.R. 1593.

A court may grant an extension of time under CPR Pt 3.1(2)(a) (previously, RSC Ord.53 itself provided that the court could extend the time if there was good reason to do so). The likelihood is that the courts will continue to apply the previous case law on RSC Ord.53 on whether there was a good reason for extending the time in deciding whether or not to grant an extension of time under CPR r.3.1 in a judicial review claim. The courts have always recognised that public law claims are unlike ordinary civil litigation and require strict adherence to the time limits contained in the rules governing judicial review (*R. v Institute of Chartered Accountants in England and Wales Ex p. Andreou* (1996) 8 Admin L.R. 557). The courts are likely to require that there is a good reason or adequate explanation for the delay and that extending the time limit will not cause substantial hardship or substantial prejudice or be detrimental to good administration. Under the former provisions of RSC Ord.53 r.4 the courts refused to accept that there was good reason for extending the time for making a judicial review application where the delay was the fault of the applicant's lawyers (*R. v Secretary of State for Health Ex p. Furneaux* [1994] 2 All E.R. 652). The courts have accepted that there was good reason for the delay if the applicant was unaware of the decision provided that they applied expeditiously once they became aware of it (*R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 W.L.R. 1482; *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386 at p.402). The fact that the claim raises issues of general public importance may be a reason for extending the time-limit (*R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 W.L.R. 1482; *S (Application for Judicial Review), Re* [1998] 1 F.L.R. 790). Delay caused by factors outside the applicant's control, such as delay in obtaining legal aid, may be excusable (*R. v Stratford-upon-Avon DC Ex p. Jackson* [1985] 1 W.L.R. 1319.

SCA 1981 s.31(6), provides that:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of an application or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

The House of Lords has considered the relationship between SCA 1981 s.31(6) and the former RSC Ord.53 r.3(4). The House has held that, if an application was not made promptly or within three months, there was undue delay for the purposes of SCA 1981 s.31(6). Consequently, even if there were good reasons for granting an extension, SCA 1981 s.31(6) applied and courts could either refuse permission or refuse a remedy at the substantive hearing if there were the requisite prejudice, hardship or detriment (*R. v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell* [1990] 2 A.C. 738. The courts are likely to take the same view of the relationship between SCA 1981 s.31(6) and CPR r.3.1(2)(a) and r.54.5. The matter may not be significant in practice as the courts retain a discretion to refuse permission or a remedy even if the claim is brought within time if it considers it appropriate to do so because of the prejudice to third parties or the detriment to good administration (*R. v Brent LBC Ex p. O'Malley* (1998) 30 H.L.R. 328 at pp.293–294; *R. v Gateshead MBC Ex p. Nichol* 87 L.G.R. 435).

A finding that there was undue delay in bringing the claim but that an extension of time is appropriate is final and cannot be re-opened by the defendant at the substantive hearing (*R. v Criminal Injuries Compensation Board Ex p. A.* [1999] 2 A.C. 330 dealing with RSC Ord.53 but the same reasoning would apply to CPR r.3.1(2)(a)). A defendant who wishes to allege that delay is a bar to the claim must therefore raise that issue in the acknowledgement of service and, if appropriate, may need to file written evidence to deal with the matter. This is a situation where the courts commonly direct that a paper application be dealt with at an oral hearing with both the claimant, defendant and interested parties appearing to make representations on the delay issue.

The Court of Appeal has added a qualification to the decision of the House of Lords in *Ex p. A*. The court has held that, where a court grants permission on the basis that the claim was brought promptly, the court dealing with the substantive hearing may still consider the question of whether the claim was made without undue delay for the purpose of deciding whether the discretionary grounds for refusing a remedy set out in s.31(6) of the Senior Courts Act 1981 apply. However, the Court of Appeal held that the defendant should only be able to recanvass the question of undue delay in such circumstances where (1) the judge hearing the initial application has

expressly so indicated (2) if new and relevant material is produced at the substantive hearing (3) if, exceptionally, the issues as they have developed at the substantive hearing put a different aspect on the issue of promptness or (4) the judge has plainly overlooked a relevant matter or reached a decision per incuriam: see *R. (on the application of Lichfield Securities Ltd) v Lichfield DC* [2001] EWCA Civ 304.

Claim form[1]

54.6—(1) In addition to the matters set out in rule 8.2 (contents of the claim form) the claimant must also state— **54.6**

(a) the name and address of any person he considers to be an interested party;

(b) that he is requesting permission to proceed with a claim for judicial review; and

(c) any remedy (including any interim remedy) he is claiming.

(Part 25 sets out how to apply for an interim remedy.)

(2) The claim form must be accompanied by the documents required by Practice Direction 54A.

Procedure for bringing a claim

A claim for judicial review is to be headed "The Queen on the application of (name of applicant) Claimant, versus the public body against whom the proceedings are brought Defendant" (*Practice Direction: The Administrative Court* [2000] 1 W.L.R. 1654). The appropriate claim form is Form **N461**. The claim form must contain (1) the claimant's name and solicitors' name and address (or the claimant's address); (2) the name and address of any defendant; (3) the name of any interested parties; (3) the fact that the claimant is applying for permission to apply for judicial review; (4) the remedies sought (including any interim remedy or a stay); (5) a detailed statement of the grounds for bringing the claim; (6) a statement of the facts relied upon; (7) any application for an extension of time for filing the claim form; (8) any application for directions (e.g. that expedition and abridgment of the time for service of the detailed grounds of resistance and written evidence if permission is granted); and (9) a time estimate for the substantive hearing of the application for judicial review if permission is granted (see generally, CPR Pt 8.2 and Pt 54.6 and Practice Direction, paras 5.1 and 5.6). The claim form should indicate that the pre-action protocol has been complied with or reasons for non-compliance must be given in the form: *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 W.L.R. 810. If the claimant is raising a devolution issue, the claim form must specify that fact and contain a summary of the facts, circumstances and points of law upon which it is said that a devolution issue arises (see Practice Direction, para.5.4). If the claimant is seeking to raise an issue or claim a remedy under the Human Rights Act 1998, the claim form must specify that fact and give precise details of the Convention right alleged to have been infringed and specify the relief sought (see Practice Direction, para.5.3). **54.6.1**

The claim form must be accompanied by any written evidence in support of the claim or of any application to extend the time-limit for filing the claim form. It must also be accompanied by a copy of any order that the claimant seeks to have quashed and, if the claim relates to a decision of a court or tribunal, an approved copy of the reasons for reaching the decision. The claim form must also be accompanied by any documents upon which the claimant proposes to rely. These will usually be annexed to the witness statement and, where the claimant is seeking judicial review of a decision, will include a copy of the decision or decision letter under challenge together with the other relevant documentation. Copies of relevant statutory provisions and a list of essential reading must also be lodged with the claim form. The claimant is required to lodge two copies of a paginated and indexed bundle containing the claim form, the written evidence and accompanying documents and the relevant statutory material. See generally Practice Direction, paras 5.7–5.10.

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

The claim form should provide sufficient information to enable the defendant and interested parties to be able to provide an acknowledgement of service. Equally importantly, the claim form should enable a court, which will be dealing with the application for permission on the papers, to identify what the alleged claim is about and whether or not there is an arguable case. In practice, in describing the grounds of the claim, it is often useful to provide a brief introductory paragraph identifying the enactment, decision or action challenged or the failure to act that is complained of and a summary of the basis of the challenge. Then the claim should record the essential facts, followed by a description of the legislative framework and then set out the specific grounds of challenge, i.e. identifying the error of law made by the public body or the relevant principles of public law that the public body has breached. Questions of delay, alternative remedies, statutory provisions ousting the jurisdiction of the courts and any issues relating to standing also need to be dealt with. A non-party may obtain a copy of the Claim form from the court: *R. (Corner House Research) v Director of Serious Fraud Office* [2008] A.C.D. 63.

Duty to make full and frank disclosure

54.6.2 The claimant is under a duty to disclose all material facts. These include all material facts known to the claimant and those they would have known had they made the appropriate inquiries prior to applying for permission (*R. v Lloyd's of London, Ex p. Briggs* [1993] 1 Lloyd's Rep. 176; *R. v Secretary of State for the Home Department, Ex p. Ketowoglo The Times*, April 6, 1992; *R. v Jockey Club Licensing Committee, Ex p. Barrie Wright* [1991] C.O.D. 306). Non-disclosure is a sufficient reason for refusing the remedy sought or refusing permission (*R. v Kensington General Commissioners, ex. p. Polignac* [1917] 1 K.B. 486).

Protected Costs Orders

54.6.3 In general, costs follow the event and an unsuccessful claimant will be ordered to pay the successful defendant's costs. A claimant may, however, wish to apply for a protective costs order, that is, an order that a claimant is not liable to pay the costs of a successful defendant or that their liability is restricted to a particular amount. The court will not generally make such orders unless the public law challenges raised are ones of general public importance, the public interest requires that those issues should be resolved, the claimant has no financial interest in the outcome of the case, it is fair and just to make the order having regard to the financial resources of the claimant and the defendant and to the amount of costs that were likely to be involved and the claimant would probably discontinue proceedings and would be acting reasonably in so doing if such an order were refused; see *R. (Corner House Research) v Secretary of State for Trade and Industry*, [2005] EWHC Civ 192; [2005] 1 W.L.R. 2600; *R. (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749; [2009] 1 W.L.R. 1436; *R. v Lord Chancellor Ex p. Child Poverty Action Group* [1999] 1 W.L.R. 347. An application for a protected costs order should normally be included in the claim form and supported by the requisite evidence including a full schedule of the claimant's likely future costs. A defendant who wishes to resist such an order should do so in the acknowledgment of service. The matter would normally be dealt with on the paper by the judge who considers the application for permission. If such an order is refused, it may be renewed at an oral hearing. See generally, *R (Corner House Research) v Secretary of State for Trade and Industry*, [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600 and *R. (Buglife-the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209.

For the procedure to be followed, and for the matters to be taken into account by the court, where a party makes an application for an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made (a "costs capping order"), see rr.44.18 to 44.20, and commentary in para.43.2.1.2 above. That procedure does not apply to applications for protective costs orders (r.44.18(3)); see further paras 3.1.8 and 48.15.7 above, and note guidance on principles and procedure (both at first instance and on appeal) given by the Court of Appeal in *R. v (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600, CA, and *R. (Buglife-the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp.* [2008] EWCA Civ 1209, November 4, 2008, CA, unrep.

Service of claim form[1]

54.7 The claim form must be served on— **54.7**

(a) **the defendant; and**

(b) **unless the court otherwise directs, any person the claimant considers to be an interested party,**

within 7 days after the date of issue.

The claimant must file the claim form in the Administrative Court Office. The claimant must also serve the claim form on the defendant and, unless the court otherwise directs, on any person that the claimant considers to be an interested party within 7 days of the issue of the claim form. On the definition of the parties see para.54.1.13 above. **54.7.1**

Acknowledgment of service[2]

54.8—(1) Any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form in accordance with the following provisions of this rule. **54.8**

(2) Any acknowledgment of service must be—

(a) filed not more than 21 days after service of the claim form; and

(b) served on—

(i) the claimant; and

(ii) subject to any direction under rule 54.7(b), any other person named in the claim form,

as soon as practicable and, in any event, not later than 7 days after it is filed.

(3) The time limits under this rule may not be extended by agreement between the parties.

(4) The acknowledgment of service—

(a) must—

(i) where the person filing it intends to contest the claim, set out a summary of his grounds for doing so; and

(ii) state the name and address of any person the person filing it considers to be an interested party; and

(b) may include or be accompanied by an application for directions.

(5) Rule 10.3(2) does not apply.

Acknowledgment of service.

The defendant and any interested party wishing to take part in the judicial review must file an acknowledgment of service in the Administrative Court Office within 21 days after service on them of the claim form. The appropriate form is form **N462**. The defendant must serve the acknowledgment on the claimant and any person named in the claim form as soon as reasonably practicable after filing it and in any event within seven days. An interested party must serve an acknowledgment of service on the claimant, defendant and any other interested party named in the claim form in the same time limit. The parties cannot agree an extension of time (CPR r.54.8(3)). **54.8.1**

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).
[2] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

The requirement of service and the opportunity for the defendant to put in a response are among the most significant changes introduced by the Pt 54 of the CPR. The assumption is that the court will decide the application on the papers, those papers including both the claim and the defendant's summary response. Previously, the rules provided that the application for permission was to be made without notice to the respondent and there was no requirement that the application for permission be served on the proposed respondent (although in practice, respondents should have been informed that the applicant was considering applying for judicial review and were frequently served with a copy of the application for permission and, if an oral hearing was held, frequently attended and made representations). A non-party may obtain a copy of the acknowledgment of service from the court: *R. (Corner House Research) v Director of Serious Fraud Office* [2008] A.C.D. 63.

Content

54.8.2 The acknowledgment of service must set out a summary of the grounds upon which the claim is contested and the names and addresses of any person considered to be an interested party. It may also include an application for directions. A defendant who wishes to apply for an order for the costs of filing an acknowledgment of service if permission is refused should include this application: see para.54.12.5 below.

Neither the rules nor provisions in the practice direction supplementing Pt 54 expand on what is meant by the "summary of grounds" required by r.54.8(4) to be included in the acknowledgment of service where the person filing it intends to defend the claim. This summary must be contrasted with the necessarily more elaborate "detailed grounds for contesting the claim" and supporting "written evidence" required by r.54.14 following the grant of permission. The purpose of the r.54.8(4) summary is not to provide the basis for full argument of the substantive merits, but rather to assist the judge in deciding whether to grant permission and, if so, on what terms. Where appropriate, it may be helpful to draw attention to any points fatal to the claim or to procedural bars, and to the practical and financial consequences for other parties (if any) which may (for example) be relevant to directions for expedition. It should be possible to do what is necessary at this stage without incurring substantial expense (*Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583; [2006] 1 W.L.R. 1260 at para.37 per Carnwath L.J.). Where the defendants' resistance is successful at the permission stage they may be awarded the costs of the acknowledgment of service (*Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C.R. 22, CA), see 54.12.5 below.

Written evidence

54.8.3 There is no express provision for the defendant or interested party to file and service written evidence at this stage in the judicial review procedure but, equally, there seems no reason, in principle, why this should not be done in appropriate cases or, more usually, crucial documents may be attached to the acknowledgement of service. Previously, under the former RSC Ord.53, it was common for the proposed respondent to file evidence about delay (which was particularly important since that matter could only be dealt with at the permission stage and could not be re-argued at the substantive hearing if permission was granted: *R. v Criminal Injuries Compensation Board Ex p. A* [1999] 2 A.C. 330) to draw attention to an alternative appeal procedure, or to set out a fuller version of the facts, in an attempt to persuade the court that permission should not be granted. The court usually had regard to that evidence, provided that the claimant had had the opportunity to deal with it. The practice of admitting such evidence, in general, proved beneficial. It may, however, add to the time for consideration of the permission application (since the claimant may need time to respond) and it may result in applications for permission being adjourned to open court.

Failure to file acknowledgment of service[1]

54.9 **54.9—(1) Where a person served with the claim form has failed to file an acknowledgment of service in accordance with rule 54.8, he—**

(a) may not take part in a hearing to decide whether permis-

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

sion should be given unless the court allows him to do so; but

(b) provided he complies with rule 54.14 or any other direction of the court regarding the filing and service of—

(i) detailed grounds for contesting the claim or supporting it on additional grounds; and

(ii) any written evidence,

may take part in the hearing of the judicial review.

(2) Where that person takes part in the hearing of the judicial review, the court may take his failure to file an acknowledgment of service into account when deciding what order to make about costs.

(3) Rule 8.4 does not apply.

Consequences

54.9.1 This rule sets out the consequences for a defendant or an interested party of failing to file an acknowledgment of service in accordance with r.54.8. That person cannot take part in any hearing to consider whether permission should be granted unless the court allows them to do so. There will only be a hearing if permission has been refused and the applicant requests a reconsideration of that decision under CPR r.54.12 (or if the court adjourns the application to a hearing). If permission is granted at that hearing, then the defendant or interested party can take part in the substantive hearing of the application, provided they comply with the requirements to file detailed grounds for contesting the claim and any written evidence under CPR r.54.14.

Costs

54.9.2 If a person does take part in the substantive hearing of the judicial review application, the failure to provide a written acknowledgment of service may also be taken into account when deciding what costs order should be made. The implication is that, if the defendant could have made it clear from the outset that the claim would not succeed, then the defendant may not be able to recover their costs if they win and, conceivably, could even be made to bear the costs of the claimant (at least up to the point when detailed grounds for resistance were filed and it should have been clear that the claim could not succeed and should be withdrawn). Costs are, however, discretionary and depend on all the circumstances of the case.

Permission given[1]

54.10 **54.10—(1) Where permission to proceed is given the court may also give directions.**

(2) Directions under paragraph (1) may include—

(a) a stay(GL) of proceedings to which the claim relates;

(b) directions requiring the proceedings to be heard by a Divisional Court.

(Rule 3.7 provides a sanction for the non-payment of the fee payable when permission to proceed has been given)

Directions

54.10.1 The court may also give directions when granting permission. Amongst the most common directions are likely to be directions that that the hearing of the substantive matter be expedited and that the time limit for written evidence be abridged

Stays

54.10.2 A court may also direct that the proceedings to which the claim relates be stayed. In

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure (Amendment No.3) Rules 2010 (SI 2010/2577).

R. v Secretary of State for Education Ex p. Avon CC [1991] 1 Q.B. 558, the Court of Appeal held the power to grant a stay is not limited to cases where the judicial review application relates to judicial or quasi-judicial proceedings, but enables the court to impose a stay on the "process by which the challenged decision has been reached, including the decision itself". Thus the court could grant a stay of an administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister, or could stay the implementation of a decision by such a body (if the decision has already been taken): see *R. v Ashworth Hospital Authority, Ex p. H.* [2003] 1 W.L.R. 127. The Privy Council has, however, indicated that a stay is an order which puts a stop to further proceedings before a court or tribunal and so cannot be used to prevent the implementation of a decision made by a minister in the exercise of statutory powers (*Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 W.L.R. 550. Stays are only appropriate to restrain a public body from acting. They are not appropriate to compel a public body to act.

Procedure for applying

54.10.3 A claim for a stay ought to be included in the claim form.

Test for granting a stay

54.10.4 The criteria for granting a stay and, in particular, the relationship between stays and interim remedies, remains to be worked out. At present, given the decision in *Ex p. Avon*, the grant of a stay can, in theory, achieve much of what is usually sought to be done by way of interim injunctions in that it can be directed to stop an administrative body from continuing its decision-making process or to prevent the implementation of a decision. Where a grant of a stay against a public body will detrimentally affect a third party, the Court of Appeal has held that the proper approach is to treat the matter as an application for an interim injunction against the third party (*R. v HM Inspectorate of Pollution Ex p. Greenpeace Ltd (No.1)* [1994] 1 W.L.R. 570). In particular, the claimant will normally be expected to give a cross-undertaking in damages to the third party and there will be a reluctance to grant a stay in the absence of an appropriate cross-undertaking (see, e.g. *R. v Secretary of State for the Environment Ex p. Royal Society for the Protection of Birds* (1995) 7 Admin L. Rep. 434; *R. v HM Inspectorate of Pollution Ex p. Greenpeace Ltd (No.1)* [1994] 1 W.L.R. 570). On the procedure and test for interim relief, see paras and above).

Where the grant of a stay concerns only the claimant and the defendant, but the effect of the stay will, in substance, operate to restrain a public body from continuing an administrative process or from implementing a decision (assuming that *Ex p. Avon* is correctly decided), there is also much to be said for treating question of a stay as if it were an application for an interim injunction and applying the same procedure and the same principles as would apply to a claim for such an injunction (on the procedure and test for interim relief see paras 54.3.5–54.3.6 above).

Service of order giving or refusing permission[1]

54.11 **54.11 The court will serve—**

(a) the order giving or refusing permission; and

(b) any directions,

on—

(i) the claimant;

(ii) the defendant; and

(iii) any other person who filed an acknowledgment of service.

Notification of the decision

54.11.1 The court will serve the order giving or refusing or granting permission, and any directions, on the claimant, and any interested party who served an acknowledgement

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

of service. There is no longer any requirement for the claimant to enter and service a notice of motion following the grant of permission. The grant of permission itself triggers the next stage in the judicial review procedure, which is the filing of a detailed response and written evidence by the defendant and interested parties under r.54.13. This rule applies, it seems, both to decisions taken on the papers only or after an oral hearing.

The court will also serve on the parties its reasons for granting or refusing permission (r.54.12(2)).

Permission decision without a hearing[1]

54.12—(1) This rule applies where the court, without a hearing— 54.12

(a) refuses permission to proceed; or

(b) gives permission to proceed—

(i) subject to conditions; or

(ii) on certain grounds only.

(2) The court will serve its reasons for making the decision when it serves the order giving or refusing permission in accordance with rule 54.11.

(3) The claimant may not appeal but may request the decision to be reconsidered at a hearing.

(4) A request under paragraph (3) must be filed within 7 days after service of the reasons under paragraph (2).

(5) The claimant, defendant and any other person who has filed an acknowledgment of service will be given at least 2 days' notice of the hearing date.

(6) The court may give directions requiring the proceedings to be heard by a Divisional Court.

Reconsideration of a refusal of permission

If the judge has determined the application for permission without a hearing, and permission has been refused or granted on certain grounds only or is subject to conditions, the claimant cannot appeal against the decision but there is provision for the claimant to request that the decision be reconsidered at a hearing (CPR r.54.12(2)). The request for reconsideration must be filed in the Administrative Court Office within seven days of service of the reasons for refusal (r.54.12(4)). The claimant and any person who has filed an acknowledgement of service must be given at least two days' notice of a hearing date. The clear implication is, therefore, that there will be an oral hearing at which the claimant and the defendant and other interested persons will be able to attend and make representations. **54.12.1**

Appeals against refusal of permission to the Court of Appeal

Where permission has been refused in a civil (i.e. non-criminal) case after a hearing in the High Court, the person seeking permission may apply to the Court of Appeal within seven days of the decision of the High Court refusing permission (CPR r.52.15) The Court of Appeal may, on considering that application, grant permission to apply for judicial review and, if so, the claim will proceed in the High Court in the usual way (CPR r.52.15(3) and (4)). **54.12.2**

Appeals to the Supreme Court

In *Re Poh* [1983] 1 W.L.R. 2, the House of Lords held that there can be no appeal to the House of Lords against a decision of the Court of Appeal refusing permission to apply for judicial review. The reasoning in *Re Poh* had been doubted by the Privy Council in *Kemper Reinsurance Co v Minister of Finance* [1998] 3 W.L.R. 630. The House **54.12.3**

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure (Amendment No.3) Rules 2010 (SI 2010/2577).

of Lords has, however, upheld the decision in *Re Poh* and confirmed that the House of Lords has no jurisdiction to entertain an appeal against the refusal of permission to apply for judicial review: *R. v Secretary of State for Trade and Industry Ex p. Eastaway* [2000] 1 W.L.R. 2222. The House of Lords reasoned that the Court of Appeal only had jurisdiction to entertain an appeal against a decision of the High Court refusing permission to apply for judicial review. If the Court of Appeal refused permission to appeal, then such a decision was covered by the rule in *Lane v Esdaile* and there could not be an appeal against that refusal of permission to appeal. Where, however, the Court of Appeal grants permission to appeal, but then refuses to grant permission to apply for judicial review (because of the alleged delay in filing the claim), the House of Lords has held that it does have jurisdiction to hear an appeal against the refusal to grant permission to apply: *R. v Hammersmith and Fulham LBC Ex p. Burkett* [2002] 1 W.L.R. 1593.

Appeals in non-criminal cases

54.12.4 There can be no appeal to the Court of Appeal against the refusal by the High Court to grant permission to apply for judicial review in a criminal case (SCA 1981 s.18(1)(a)). The decision in *Re Poh* would prevent a refusal of permission by the High Court being appealed to the House of Lords (now the Supreme Court). Where the High Court considers that the possibility of an appeal to the Supreme Court should be preserved, the usual course is for the High Court to grant permission, to dismiss the substantive application and to certify that a question of general public importance arises. The claimant may then petition the Supreme Court for permission to appeal against the decision to dismiss the claim (*R. v DPP Ex p. Camelot plc* (1998) 10 Admin L.Rep. 93 at 105).

Costs at the permission stage

54.12.5 The courts have discretion under SCA 1981 s.51 to award costs on an application for permission for judicial review (*R. v Camden LBC Ex p. Martin* [1997] 1 W.L.R. 359). Where the claimant is granted permission, the costs will be costs in the case unless the judge granting permission makes a different order: *Practice Statement (QBD (Admin Ct): Judicial Review: Costs)* [2004] 1 W.L.R. 1760. Costs will usually follow the event with the unsuccessful party being ordered to pay the costs of the successful party. If the defendant successfully resists the claim, those costs will include the costs of dealing with the claim after the grant of permission and also other costs reasonably incurred by the defendant prior to the grant of permission (including the acknowledgment of service but excluding the costs of any oral permission hearing) unless the court makes an alternative order: see *R (Davey) v Aylesbury Vale DC (Practice Note)* [2008] 1 W.L.R. 878. If the claimant is refused permission, whether there has or has not been a hearing, they will generally have to bear their own costs. There may be exceptional circumstances where the defendant takes the action sought in the judicial proceedings after the claim form is served and thereby avoids the need for judicial review but where it is appropriate to award the claimant their costs to that point. Such exceptional circumstances arose in *R. v Kensington and Chelsea Royal BC Ex p. Ghebregiogis* (1994) 27 H.L.R. 602 where the claimant had sent a clear letter before action, the point of law was simple and the defendant had simply failed to pay any attention to it, thereby forcing the claimant to incur the costs of applying for permission. The principles governing the award of costs where the claim for judicial review does not proceed to a full hearing of the substantive application have been usefully summarised in *R. (Boxall) v Mayor and Burgesses of Waltham Forest LBC* (2001) 4 C.C.L. Rep. 258 and see *R (Scott) v London Borough of Hackney* [2009] EWCA Civ 217 and *DB v Worcestershire CC* [2006] EWHC 2613 (Admin). The court retains a power to make a costs order where the substantive hearing has not proceeded to a trial. It will ordinarily be irrelevant that the claimant is legally aided. The overall objective will be to do justice between the parties without unnecessarily using court time or incurring further costs. At each end of the spectrum, there will be cases where it is obvious which side would have won (and costs can be awarded accordingly). In between, the position will be less clear. The extent to which the court will be prepared to consider the unresolved substantive issues will depend on the circumstances of the case and, in particular, the amount of the costs at stake and the conduct of the parties. In the absence of a good reason to make any other order, the fallback position is that there should be no order as to costs. The court should also take care to ensure that it does not discourage parties from settling proceedings, for example by discouraging the public authority defendant from making a concession at

an early stage (because it would be concerned about the possible costs implications of such a concession). Where the defendant has taken steps to deal with the subject matter of the challenge because it has recognised that it is likely to lose, then the defendant may be ordered to pay the claimant's costs. Where, however, the challenge becomes academic because the defendant decides to short circuit the proceedings (for example, by doing what is requested) because the defendant has decided to avoid the expense, inconvenience or uncertainty of proceedings, without accepting the likelihood of their succeeding, then the defendant should not be liable for the claimant's costs and the appropriate order will generally be no order for costs.

The Court of Appeal has also reviewed the position in relation to the award of costs against a claimant who is unsuccessful at the permission stage: see *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405. A defendant who has complied with the pre-action protocol and who has filed an acknowledgment of service should, generally, be able to recover the costs of filing an acknowledgment of service from an unsuccessful claimant where permission is refused: see paragraph 76(1) of the judgment in *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405 and *Leach, Re* [2001] EWHC Admin 455; *The Times*, August 2, 2001. Defendants who wish to claim such costs should normally make an application for costs in the body of the acknowledgment of service and provide details of the amount claimed. In *R. (on the application of Mount Cook Land Ltd) v Westminster City Council*, the Court of Appeal appeared to go further and indicated that an interested party who complied with the pre-action protocol and served an acknowledgement of service ought also to be able to recover the costs of doing so against an unsuccessful claimant, although strictly, that issue did not arise in that case.

The court should not order an unsuccessful claimant to pay the costs of a defendant or an interested party attending an oral hearing and successfully resisting an application for permission except in exceptional circumstances. Such circumstances may consist in the presence of one or more of the following factors: (a) the hopelessness of the claim; (b) the persistence by the claimant in the claim after having been alerted to facts or the law demonstrating its hopelessness; (c) the extent to which the court considers that the claimant has sough to abuse the process of judicial review for collateral purposes; (d) whether, as a result of full argument and the deployment of documentary evidence, the claimant has, in effect, had the advantage of an early substantive hearing of the claim. The court may also consider the extent to which the unsuccessful claimant has substantial resources which they have used to pursue the unfounded claim and which are available to meet an order for courts. See *R. (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405 at para.76 of the judgment and para.8.6 of the Practice Direction. A court may order an oral hearing of the application for permission with the substantive hearing to follow immediately if permission is granted (commonly referred to as a "rolled-up hearing"). In such circumstances, if permission is refused, the courts will usually order the unsuccessful applicant to pay the defendant's costs as the defendant had no choice but to attend and incur the costs of preparation for a full hearing. The Court of Appeal in *Mount Cook* did not have to deal specifically with the position of an interested party and it may be that, even if there were exceptional circumstances justifying the award of costs in favour of a defendant, that the court would not, generally, order the unsuccessful claimant to pay the costs of an interested party unless there was some separate issue or some separate interest calling for the interested party to appear: see *Bolton MDC v Secretary of State for the Environment (Costs)* [1995] 1 W.L.R. 1176 and para.54.16.7 below. See above for applications for protected costs orders.

In *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583; [2006] 1 W.L.R. 1260; December 12, 2005, CA, unrep., the Court of Appeal suggested that an opportunity should be found as soon as possible to introduce a specific rule or practice direction governing the procedure for applications for costs at the permission stage, and the principles to be applied. The court said it would be helpful if, at the same time, there could be clarification of what is required to be incorporated in the acknowledgment of service by way of "summary grounds" as required by r.54.8(4) (see para.54.8.2 above) and whether it is necessary to impose the same requirement on all parties in this respect, or whether distinctions should be drawn between defendants and interested parties.

Pending any new rules or directions, the court stated that the following procedure should be followed (ibid. at para.37 per Carnwath L.J.):

1. where a proposed defendant or interested party wishes to seek costs at the permission stage, the acknowledgment of service should include an application for costs and should be accompanied by a schedule setting out the amount claimed;
2. 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;
3. the claimant should be given 14 days to respond in writing and should serve a copy on the defendant;
4. the defendant shall have seven days to reply in writing to any such response, and to the amount proposed by the judge;
5. the judge will then decide and make an award on the papers.

The court also said that, where a claimant does not follow the Pre-Action Protocol procedure, they must expect to put their opponents to greater expense in preparing the summary of grounds and this may be reflected in any order for costs against them if permission is refused (ibid. at para.54 per Brooke L.J.).

See further para.44.3.7 above.

Defendant etc. may not apply to set aside(GL)[1]

54.13 **54.13 Neither the defendant nor any other person served with the claim form may apply to set aside((GL)) an order giving permission to proceed.**

Applications to set aside

54.13.1 The court has an inherent jurisdiction to set aside orders, including orders granting permission to apply for judicial review, which have been made without notice being given to the defendant or other interested party (*R. v Secretary of State for the Home Department Ex p. Chinoy* (1992) 4 Admin L. Rep. 457). That jurisdiction continues to exist in relation to permission granted under CPR Pt 54. Where, however, the claim form has been served on the defendant or an interested party, so that they had the opportunity of filing an acknowledgment of service setting out a summary of the grounds of resistance, that defendant or interested party cannot apply to set aside the grant of permission (CPR r.54.13). As the claim form must be served on such persons, applications to set aside the grant of permission are likely now to be rare and to occur only when by oversight or some other reason a defendant or interested party was not served or where, for some reason, permission was granted before the defendant had filed their acknowledgment of service and before the time for doing so had expired see, e.g. *R. on the application of Webb v Bristol City Council* [2001] EWHC Admin 696. Even where an application to set aside can be made, the courts generally have discouraged such applications and have indicated that the jurisdiction to set aside should only be exercised sparingly and in a very plain case (*R. v Secretary of State for the Home Department Ex p. Chinoy* (1992) 4 Admin L.Rep. 457).

Response[2]

54.14 **54.14—(1) A defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve—**

(a) detailed grounds for contesting the claim or supporting it on additional grounds; and

(b) any written evidence,

within 35 days after service of the order giving permission.

(2) The following rules do not apply—

(a) rule 8.5(3) and 8.5(4) (defendant to file and serve written evidence at the same time as acknowledgment of service); and

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).
[2] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

(b) rule 8.5(5) and 8.5(6) (claimant to file and serve any reply within 14 days).

Response and written evidence

54.14.1 The defendant and any person served with the claim form who wishes to contest the claim must file and serve a response setting out their detailed grounds for contesting the claim and any written evidence within 35 days of service of the order giving permission. The defendant's evidence should be served on the claimant and all other persons known to be interested parties and the interested party's evidence served on the claimant, the defendant and any other person known to be an interested party. An interested person may wish to support the claim, rather than contest it. Such a person may support the claim on additional grounds by serving a detailed response setting out the additional grounds and any written evidence within 35 days of service. Should that occur, the defendant may need to respond to that additional evidence. The court has a discretion to allow a defendant to rely on further written evidence under CPR r.54.16.

There is an obligation of candour on the public authority to set out the relevant facts and the reasoning behind the decision-making process: see *Tweed v Parades Commission for Northern Ireland* [2007] 1 A.C. 650 at [31] and [54]. In *R. v Lancashire CC Ex p. Huddleston* [1986] 2 All E.R. 941, Sir John Donaldson M.R. described this obligation on the defendant as a "duty to make full and fair disclosure" (at p.945) while Purchas L.J. stated that the defendant "should set out fully what they did and why so far as is necessary fully and fairly to meet the challenge" made by the claimant (at p.947). In *R. (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] the Court referred the "very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issues the court must decide". Where the defendant has already given reasons for the decision or action taken, it may adduce evidence to clarify, elucidate or supplement those reasons but may not adduce evidence to contradict the reasoning in the original decision (*Re C and C* [1992] C.O.D. 29; *R. v Legal Aid Area Appeal Committee Ex p. Angell* [1990] C.O.D. 355; *R. v Westminster City Council Ex p. Ermakov* [1996] 2 All E.R. 302) and *R. (on the application of Leung) v Imperial College of Science, Technology and Medicine* [2002] EWHC 1358; [2002] E.L.R. 653.

The claimant and their legal advisers have a duty, once the defendant's evidence is received, to reconsider the claim for judicial review and to consider whether there is sufficient merit to justify continuing the judicial review procedure (*R. v Liverpool Justices Ex p. P* [1998] C.O.D. 453; *R. v Inland Revenue Commissioners Ex p. Continental Shipping* [1996] C.O.D. 335). A non-party may obtain a copy of the detailed grounds from the courts: *R. (Corner House Research) v Director of Serious Fraud Office* [2008] A.C.D. 63.

Where claimant seeks to rely on additional grounds[1]

54.15 The court's permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed. **54.15**

54.15.1 This rule allows the court to grant permission to a claimant to add additional grounds of claim to those for which the claimant was originally given permission. Paragraph 11.1 of the Practice Direction deals with the service of notice of amendments and requires notice to be served seven clear days before the hearing. The court can, in the exercise of its inherent jurisdiction, also allow the claimant to amend the claim to claim different remedies from those originally included in the claim form.

The power to permit additional grounds to be argued is particularly appropriate in respect of new grounds which did not form part of the original claim for judicial review. Where, however, permission to argue a particular ground has been expressly refused at an oral permission hearing, a claimant wishing to challenge that refusal should normally do so by appealing against the refusal to the Court of Appeal.

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

Exceptionally, however, the court hearing the substantive application of the grounds where permission was given, may exercise its discretion under CPR r.54.15 to permit the claimant to argue the specific ground where permission was refused if there has been a significant change of circumstances or the claimant has become aware of significant new facts which they could not reasonably have known or found out about at the time of the permission hearing or if a proposition of law is now maintainable which was not previously open to the claimant (for example, where the Court of Appeal has overturned a decision of the High Court) or where is some other substantial justification for allowing the point to be argued: see *R. (on the application of Opoku) v Southwark College Principal* [2002] EWHC 2092; [2003] 1 W.L.R. 234; *R. (Smith) v Parole Board* [2003] 1 W.L.R. 2548.

Evidence[1]

54.16 54.16—(1) Rule 8.6(1) does not apply.

(2) No written evidence may be relied on unless—

(a) it has been served in accordance with any—

(i) rule under this Section; or

(ii) direction of the court; or

(b) the court gives permission.

Evidence

54.16.1 No party may rely on written evidence unless it has been served in accordance with the rules or direction of the court, or the court gives permission for it to be used. It is common for additional evidence to be served in the following circumstances. A claimant may seek to serve written evidence in reply to that of the defendant or interested party. Furthermore, the factual situation may change and further relevant events may occur after the time for serving evidence but before the substantive hearing. It is common practice for the courts to allow the claimant or the defendant or interested party to file and serve additional written evidence to inform the court of subsequent events, providing that the other parties have adequate time to consider and deal with that evidence.

By Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) r.21, in para.(1) of r.54.16. "Rule 8.6(1)" is substituted for "Rule 8.6". This amendment came into effect December 2, 2002. It brings the rule into line with the construction already placed on the rule (see *R. (on the application of G) v Ealing LBC (No.2)* [2002] EWHC 250 (Admin); [2002] EWHC 250, Munby J.).

Interlocutory applications

54.16.2 Cross-examination was available under the former RSC Ord.53 judicial review procedure but was rarely ordered. The task of finding the primary facts was largely a matter for the decision-maker and the courts acted as a supervisory body ensuring that the decision-maker acted lawfully on the facts as found. There were, however, rare occasions when facts were in dispute, such as what procedure was followed before a decision was taken or what factors were taken into account by the decision-maker. Cross-examination could, exceptionally, be appropriate in such circumstances. Even here, the courts may refuse cross-examination and proceed on the basis of the written evidence and the contemporaneous documents (*R. v Chief Constable of Thames Valley Ex p. Cotton* [1990] I.R.L.R. 344). There may be occasions, particularly in relation to allegations of infringements of rights derived from the European Convention on Human Rights, where crucial issues of fact need to be determined in order to resolve the case. Cross-examination may be required in such cases: *R. (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) at [18]–[19]. CPR r.8.6(1) provides for the court to give directions requiring the attendance of a person who has given written evidence for the purposes of cross-examination. CPR r.54.16 provides, however, that r.8.6(1) does not apply to the judicial review procedure. It is unclear whether this rule was intended to restrict the availability of cross-examination. The courts will regard

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure Rules 2003 (SI 2003/364).

themselves as able to order cross-examination in the exercise of their inherent jurisdiction in any event although there will be few judicial review cases where cross-examination will be appropriate see *R (G) v Ealing LBC, The Times*, March 18, 2002.

In certain cases under the Human Rights Act 1998, the judicial review court may be required to conduct a merits review on the evidence, for which purpose cross-examination may be necessary: see *R. (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2002] 1 W.L.R. 419; *R. (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin). In some instances, it may still be possible to resolve such issues without cross-examination: see *R. (N) v M* [2006] 1 W.L.R. 562.

Disclosure

54.16.2.1 The courts may make an order for the disclosure of specific documents or for standard disclosure i.e. disclosure of documents upon which the claimant relies or ones which adversely affect their case (CPR rr.31.6 and 31.12). In principle, the question is whether disclosure of a document is necessary in order to deal fairly and justly with the case taking account of all the facts and circumstances of the particular case (see *Tweed v Parades Commission of Northern Ireland* [2006] UKHL 53; [2007] 2 W.L.R. 1 at paras 3 and 32). Disclosure is not automatic. In many judicial review cases, an order for disclosure will not be necessary as the claim will raise issues of law. Facts will be agreed or will appear from the documents that are exhibited and it will be the legal consequences of those facts that will be in issue. In such cases, disclosure is unlikely to be required: see *Tweed* at paras 2 and 32. Furthermore, the defendant public authority will frequently have exhibited the main documents as a matter of practice or in order to comply with its duty of candour. The courts will not allow "fishing expeditions" where a claimant seeks disclosure in the hope that something will emerge which may form the basis for a claim: *R. v Secretary of State for the Environment Ex p. Islington LBC and London Lesbian and Gay Centre* [1992] C.O.D. 67; *Tweed* at para.56. Even where an order for disclosure is made, it will, generally, be an order for disclosure of specific documents rather than an order for standard disclosure.

The need for disclosure is likely to be greater in cases involving claims that action taken by a public authority infringes a Convention right and is not justified because it is disproportionate. The courts may need to see the main documentation upon which the decision of the public authority concerned was based in order to assess the merits of such a claim and the courts are likely to show a "somewhat greater readiness than hitherto" to order disclosure of the main documents in such cases: see *Tweed* at paras 39 and 57. Disclosure in judicial review cases is still not automatic, however, and even in such cases the need and particularly the extent of disclosure will depend on all the circumstances of the case.

There will also be cases where there are disputed issues of fact which have to be resolved in order to fairly deal with a claim. These, too, are likely to arise most frequently in cases involving disputes relating to the application of the European Convention on Human Rights and to claims of alleged infringements of Convention Rights. Here disclosure, and possibly cross-examination, may be necessary to resolve such crucial factual issues. When it becomes clear that the outcome of a judicial review may depend on the determination of a factual issue, consideration will need to be given to whether there needs to be orders for cross-examination or disclosure: see *R. (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) at [15]–[29].

Where a public authority defendant relies on a document as significant to its decision, it will ordinarily be good practice to exhibit the document to a witness statement not merely summarise its contents in the witness statement. If the public authority does not exhibit such a document, and an application is made for disclosure, the court will need to consider whether or not disclosure of that document is necessary for dealing fairly and justly with the case. The former practice, whereby claimants were unable to obtain disclosure of documents in order to ascertain whether statements made in the written evidence were correct unless there was some evidence outside the written evidence which suggested that the statements were inaccurate, misleading or incomplete in some material respect, is no longer to be followed. Rather, a more flexible and less prescriptive principle, depending on whether disclosure is necessary for fairly and justly disposing of the case, is to be applied: see *Tweed* at paras 4–5, 32 and 56. Where objections to disclosure are made, for example, on grounds of confidentiality or the volume of the material concerned, it may be necessary for the court to consider the material first. A court may have to determine whether or not the information was imparted in confidence and, if so, whether it adds materially to the summaries given in the witness statements.

Listing of judicial review claims

54.16.3 Claims for judicial review are included in the Crown Office List (now the Administrative Court). When a case is ready to be heard, a date is found by the Administrate Court office. Expedited users take precedence. There is also a short current list of cases which are not given a fixed date but may be called on at short notice. Guidance on listing is given in the Practice Statement (Administrative Courts: Listing and Urgent Cases) [2002] 1 W.L.R. 810.

Bundles and skeletons arguments

54.16.4 The claimant must file and serve a skeleton argument not less than 21 working days before the date of hearing. The defendant and any other party wishing to make representations at the hearing must file and serve skeletons not less than 14 working days before the hearing. Skeleton arguments must include a time estimate, a list of issues, a list of legal points to be taken, a chronology of events (with page references), a list of persons referred to, and a list of essential reading (with a time estimate for the reading): see Practice Direction, para.15. The claimant must also file a paginated, indexed bundle of all relevant documents. It must include those documents required by the claimant, the defendant and any other party wishing to make representations. See Practice Direction, para.16. The bundle will usually comprise the order granting permission, the claim form, the claimant's written evidence and documents, the defendant's acknowledgement of service and detailed grounds of resistance, written evidence and documents and any interested party's acknowledgment of service, detailed grounds of resistance and written evidence and documents.

Hearing of substantive judicial review claims

54.16.5 The hearing of a claim for judicial review is normally before a single judge in open court.

Fresh evidence

54.16.6 The principles on which fresh evidence can be admitted in judicial review proceedings are: (1) the court can receive evidence to show what material was before the inferior court, tribunal or public body; (2) where the jurisdiction of the inferior court, tribunal or public depends upon a question of fact or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the question of jurisdictional fact or procedural error; and (3) where the decision-making process is tainted by misconduct on the part of a member of the inferior court, tribunal or public body, or one of the parties before such a body, fresh evidence is available to prove the particular misconduct alleged. Examples of such misconduct are bias by the decision-making body or fraud or perjury by a party. Where a party deliberately suppressed material with the intention of misleading, it would be for the court to consider whether the conduct of the party could be described as fraudulent so as to permit the fresh evidence (*R. v Secretary of State for the Environment Ex p. Powis* [1981] 1 W.L.R. 584).

Where it is sought to adduce fresh evidence before the Court of Appeal which was not before the court which considered the matter below, fresh evidence will not normally be admitted unless the three conditions laid down in *Ladd v Marshall* [1954] 1 W.L.R. 1489 are satisfied. Whilst *Ladd v Marshall* does not, strictly, apply to appeals in judicial review proceedings, and the Court of Appeal has a wider discretion to admit fresh evidence than exists in ordinary civil litigation, the Court of Appeal will adopt a similar approach to that in *Ladd v Marshall* in the interests of achieving finality in litigation (*Momin Ali v Secretary of State for the Home Department* [1984] 1 W.L.R. 663 and *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B. 1044).

The Court of Appeal has held that the principles underlying *Ladd v Marshall* continue to apply after the introduction of the CPR: *R. v Secretary of State for Education and Employment Ex p. Amraf Training plc*, *The Times*, June 28, 2001.

Costs

54.16.7 The court has a discretion in regard to costs generally (SCA 1981 s.51). Costs in judicial review generally follow the event and the unsuccessful party will generally be ordered to pay the costs of the unsuccessful party. The defendant, i.e. the public body whose action, decision, or failure to act is under challenge, will normally be ordered to pay the costs of the successful claimant. The established practice of the courts is,

however, not to exercise its discretion to order an inferior court or tribunal to pay costs to a successful claimant where the court or tribunal does not appear (except where there has been a flagrant instance of improper behaviour or it unreasonably declines or neglects to sign a consent order). Nor will the courts generally order an inferior court or tribunal to pay costs where it appears in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case and the like (although the courts may depart from this practice in appropriate cases). Where a court or tribunal makes itself an active party to the litigation and actively resists the claim, it will be liable in costs in the normal way. See *R. (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207; [2004] 1 W.L.R. 2739. The claimant will normally be ordered to pay the costs of the defendant who successfully resists the claim for judicial review. Similarly, an unsuccessful claimant will be ordered to pay the costs of the successful defendant. These costs will include the costs of dealing with the claim after permission was granted and costs reasonably incurred prior to the grant of permission, including the costs of serving the acknowledgment of service but excluding the costs of any oral permission hearing: see *R. (Davey) v Aylesbury Vale DC (Practice Note)* [2008] 1 W.L.R. 878. The courts do not, generally, order an unsuccessful claimant to pay two sets of costs, i.e. the defendant's costs and the costs of any interested party served with the claim form (*Bolton MDC v Secretary of State for the Environment* [1995] 1 W.L.R. 1176). The courts may award two sets of costs where the interested party deals with a separate issue not dealt with by the defendant or where the defendant and the interested party have separate and distinct interests which require separate representation (*Bolton MDC v Secretary of State for the Environment* [1995] 1 W.L.R. 1176).

Appeals

54.16.8 In civil cases, the unsuccessful party can seek permission to appeal against the decision to the Court of Appeal (see, generally, CPR Pt 52). There is no appeal to the Court of Appeal in criminal cases. There may be an appeal to the Supreme Court where the High Court certifies that the case raises a point of general public importance and either the High Court or the Supreme Court grants permission to appeal (Administration of Justice Act 1960 s.1).

Court's powers to hear any person[1]

54.17—(1) Any person may apply for permission— 54.17

(a) to file evidence; or

(b) make representations at the hearing of the judicial review.

(2) An application under paragraph (1) should be made promptly.

Effect of rule

54.17.1 This rule gives the court power to allow any person to apply to file evidence or make representations at the judicial review hearing, whether in support of, or in opposition to the claim. The court may give permission on terms, such as that the person bear their own costs in any event, or that the time for making oral representations be limited or that representations be limited to written representations.

Judicial review may be decided without a hearing[2]

54.18 The court may decide the claim for judicial review without a hearing where all the parties agree. 54.18

Effect of rule

54.18.1 This rule permits the court to decide the claim without a hearing where all parties agree. Parties here presumably means the claimant, the defendant and an interested party within the meaning of r.54.1(f). The rule appears to be directed towards a situation where there is a dispute between the parties but all sides agree that the matter can be determined on the papers only.

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).
[2] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).

Court's powers in respect of quashing orders[1]

54.19 **54.19—(1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.**

(2) The court may—

(a) (i) remit the matter to the decision-maker; and

(ii) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court; or

(b) in so far as any enactment permits, substitute its own decision for the decision to which the claim relates.

(Section 31 of the Senior Courts Act 1981 enables the High Court, subject to certain conditions, to substitute its own decision for the decision in question.)

Remitting

54.19.1 Where the court quashes a decision, it may also remit the matter to the decision-maker to reconsider and reach a decision in accordance with the judgment of the court.

Decision-taking

54.19.2 CPR r.54.19(2) provides that in so far as any enactment permits, the court may substitute its decision. Statute provides powers for the court to vary rather than merely quash and remit a decision, as is the case, for example, in criminal cases where the courts have power to vary the sentence imposed by an inferior court (Senior Courts Act 1981 s.43). Section 31(5A) of the Senior Courts Act 1981 as amended by the Courts, Tribunals and Enforcement Act 2007 s.141, provides powers for the court to substitute a decision but only if the decision was one of a court or tribunal, it was quashed on the grounds of error of law and, without the error, there was only one decision to which the court or tribunal could have come.

Transfer[2]

54.20 **54.20 The court may—**

(a) order a claim to continue as if it had not been started under this Section; and

(b) where it does so, give directions about the future management of the claim.

(Part 30 (transfer) applies to transfers to and from the Administrative Court)

Transfer

54.20.1 This rule empowers the court to order that a claim brought by means of the judicial review procedure (that is, is a claim for judicial review under CPR Pt 8 as modified by Pt 54) to continue as if it had been it had not been brought under this Part. The purpose of this rule is to enable claims that were brought by judicial review to continue as ordinary civil claims under CPR Pt 7. The power may be used where a claimant seeks both public law remedies and also damages, e.g. a quashing order to set aside a detention and damages for the tort of false imprisonment. The claim for damages may be stood over until the public law claim is heard and then the private law claim for damages can be dealt with. The rule is also intended to enable claims that are, in fact, private law claims but which are inadvertently brought by way of a claim for judicial

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

[2] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure Rules 2003 (SI 2003/364).

review to continue as an ordinary Pt 7 claims (*R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152 at p.166 on the predecessor to this rule under RSC Ord.53 r.9(5) and dicta of *O'Reilly v Mackman* [1983] 2 A.C. 237 at pp.283–284 but see, also, *R. v Secretary of State for the Home Office Ex p. Dew* [1987] 1 W.L.R. 881 giving a narrow scope to the rule). The court may also give directions about the future management of the claim.

PRACTICE DIRECTION 54A—JUDICIAL REVIEW

This Practice Direction supplements CPR Part 54

Section I—General provisions relating to judicial review

54APD.1 **1.1** In addition to Part 54 and this practice direction attention is drawn to:

- section 31 of the Senior Courts Act 1981; and
- the Human Rights Act 1998

The Court

54APD.2 **2.1** Part 54 claims for judicial review are dealt with in the Administrative Court.

(Practice Direction 54D contains provisions about where a claim for judicial review may be started, administered and heard.)

Judicial Review Claims in Wales

54APD.3 **3.1** [Omitted; see now Practice Direction 54D]

3.2 [Omitted]

Rule 54.5—Time Limit for Filing Claim Form

54APD.4 **4.1** Where the claim is for a quashing order in respect of a judgment, order or conviction, the date when the grounds to make the claim first arose, for the purposes of rule 54.5(1)(b), is the date of that judgment, order or conviction.

Rule 54.6—Claim Form

Interested parties

54APD.5 **5.1** Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties under rule 54.6(1)(a) (and therefore served with the claim form under rule 54.7(b)).

5.2 For example, in a claim by a defendant in a criminal case in the Magistrates or Crown Court for judicial review of a decision in that case, the prosecution must always be named as an interested party.

Human rights

5.3 Where the claimant is seeking to raise any issue under the Human Rights Act 1998, or seeks a remedy available under that Act, the claim form must include the information required by paragraph 15 of Practice Direction 16.

Devolution issues

5.4 Where the claimant intends to raise a devolution issue, the claim form must:

(1) specify that the applicant wishes to raise a devolution issue and identify the relevant provisions of the Government of Wales Act 2006, the Northern Ireland Act 1998 or the Scotland Act 1998; and

(2) contain a summary of the facts, circumstances and points of

law on the basis of which it is alleged that a devolution issue arises.

5.5 In this practice direction "devolution issue" has the same meaning as in paragraph 1, Schedule 9 to the Government of Wales Act 2006, paragraph 1, Schedule 10 to the Northern Ireland Act 1998; and paragraph 1, Schedule 6 to the Scotland Act 1998.

Claim form

5.6 The claim form must include or be accompanied by—

(1) a detailed statement of the claimant's grounds for bringing the claim for judicial review;
(2) a statement of the facts relied on;
(3) any application to extend the time limit for filing the claim form;
(4) any application for directions.

5.7 In addition, the claim form must be accompanied by—

(1) any written evidence in support of the claim or application to extend time;
(2) a copy of any order that the claimant seeks to have quashed;
(3) where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision;
(4) copies of any documents on which the claimant proposes to rely;
(5) copies of any relevant statutory material;
(6) a list of essential documents for advance reading by the court (with page references to the passages relied on).

5.8 Where it is not possible to file all the above documents, the claimant must indicate which documents have not been filed and the reasons why they are not currently available.

Bundle of documents

5.9 The claimant must file two copies of a paginated and indexed bundle containing all the documents referred to in paragraphs 5.6 and 5.7.

5.10 Attention is drawn to rules 8.5(1) and 8.5(7).

Rule 54.7—Service of Claim Form

6.1 Except as required by rules 54.11 or 54.12(2), the Administrative Court will not serve documents and service must be effected by the parties. **54APD.6**

6.2 Where the defendant or interested party to the claim for judicial review is—

(a) the Immigration and Asylum Chamber of the First-tier Tribunal, the address for service of the claim form is Official Correspondence Unit, PO Box 6987, Leicester, LE1 6ZX or fax number 0116 249 4240;
(b) the Crown, service of the claim form must be effected on the solicitor acting for the relevant government department as if the proceedings were civil proceedings as defined in the Crown Proceedings Act 1947.

(Practice Direction 66 gives the list published under section 17 of the Crown Proceedings Act 1947 of the solicitors acting in civil proceedings (as defined in that Act) for the different government departments on whom service is to be effected, and of their addresses.)
(Part 6 contains provisions about the service of claim forms.)

Rule 54.8—Acknowledgment of Service

54APD.7 **7.1** Attention is drawn to rule 8.3(2) and the relevant practice direction and to rule 10.5.

Rule 54.10—Permission Given

Directions

54APD.8 **8.1** Case management directions under rule 54.10(1) may include directions about serving the claim form and any evidence on other persons.

8.2 Where a claim is made under the Human Rights Act 1998, a direction may be made for giving notice to the Crown or joining the Crown as a party. Attention is drawn to rule 19.4A and paragraph 6 of Practice Direction 19A.

8.3 [Omitted]

Permission without a hearing

8.4 The court will generally, in the first instance, consider the question of permission without a hearing.

Permission hearing

8.5 Neither the defendant nor any other interested party need attend a hearing on the question of permission unless the court directs otherwise.

8.6 Where the defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant.

Rule 54.11—Service of Order Giving or Refusing Permission

54APD.9 **9.1** An order refusing permission or giving it subject to conditions or on certain grounds only must set out or be accompanied by the court's reasons for coming to that decision.

Rule 54.14—Response

54APD.10 **10.1** Where the party filing the detailed grounds intends to rely on documents not already filed, he must file a paginated bundle of those documents when he files the detailed grounds.

Rule 54.15—Where Claimant Seeks to Rely on Additional Grounds

54APD.11 **11.1** Where the claimant intends to apply to rely on additional grounds at the hearing of the claim for judicial review, he must give notice to the court and to any other person served with the claim form no later than 7 clear days before the hearing (or the warned date where appropriate).

Rule 54.16—Evidence

54APD.12 **12.1** Disclosure is not required unless the court orders otherwise.

Rule 54.17—Court's Powers to Hear Any Person

54APD.13

13.1 Where all the parties consent, the court may deal with an application under rule 54.17 without a hearing.

13.2 Where the court gives permission for a person to file evidence or make representations at the hearing of the claim for judicial review, it may do so on conditions and may give case management directions.

13.3 An application for permission should be made by letter to the Administrative Court office, identifying the claim, explaining who the applicant is and indicating why and in what form the applicant wants to participate in the hearing.

13.4 If the applicant is seeking a prospective order as to costs, the letter should say what kind of order and on what grounds.

13.5 Applications to intervene must be made at the earliest reasonable opportunity, since it will usually be essential not to delay the hearing.

Rule 54.20—Transfer

54APD.14

14.1 Attention is drawn to rule 30.5.

14.2 In deciding whether a claim is suitable for transfer to the Administrative Court, the court will consider whether it raises issues of public law to which Part 54 should apply.

Skeleton arguments

54APD.15

15.1 The claimant must file and serve a skeleton argument not less than 21 working days before the date of the hearing of the judicial review (or the warned date).

15.2 The defendant and any other party wishing to make representations at the hearing of the judicial review must file and serve a skeleton argument not less than 14 working days before the date of the hearing of the judicial review (or the warned date).

15.3 Skeleton arguments must contain:

(1) a time estimate for the complete hearing, including delivery of judgment;
(2) a list of issues;
(3) a list of the legal points to be taken (together with any relevant authorities with page references to the passages relied on);
(4) a chronology of events (with page references to the bundle of documents (see paragraph 16.1);
(5) a list of essential documents for the advance reading of the court (with page references to the passages relied on) (if different from that filed with the claim form) and a time estimate for that reading; and
(6) a list of persons referred to.

Bundle of documents to be filed

54APD.16

16.1 The claimant must file a paginated and indexed bundle of all relevant documents required for the hearing of the judicial review when he files his skeleton argument.

16.2 The bundle must also include those documents required by

the defendant and any other party who is to make representations at the hearing.

Agreed final order

54APD.17 **17.1** If the parties agree about the final order to be made in a claim for judicial review, the claimant must file at the court a document (with 2 copies) signed by all the parties setting out the terms of the proposed agreed order together with a short statement of the matters relied on as justifying the proposed agreed order and copies of any authorities or statutory provisions relied on.

17.2 The court will consider the documents referred to in paragraph 17.1 and will make the order if satisfied that the order should be made.

17.3 If the court is not satisfied that the order should be made, a hearing date will be set.

17.4 Where the agreement relates to an order for costs only, the parties need only file a document signed by all the parties setting out the terms of the proposed order.

Section II—Applications for permission to apply for judicial review in immigration and asylum cases—challenging removal

54APD.18 **18.1**(1) This Section applies where—

(a) a person has been served with a copy of directions for his removal from the United Kingdom by the UK Border Agency and notified that this Section applies; and

(b) that person makes an application for permission to apply for judicial review before his removal takes effect.

(2) This Section does not prevent a person from applying for judicial review after he has been removed.

(3) The requirements contained in this Section of this Practice Direction are additional to those contained elsewhere in the Practice Direction.

18.2(1) A person who makes an application for permission to apply for judicial review must file a claim form and a copy at court, and the claim form must—

(a) indicate on its face that this Section of the Practice Direction applies; and

(b) be accompanied by—

(i) a copy of the removal directions and the decision to which the application relates; and

(ii) any document served with the removal directions including any document which contains the UK Border Agency's factual summary of the case; and

(c) contain or be accompanied by the detailed statement of the claimant's grounds for bringing the claim for judicial review; or

(d) if the claimant is unable to comply with paragraph (b) or (c), contain or be accompanied by a statement of the reasons why.

(2) The claimant must, immediately upon issue of the claim,

send copies of the issued claim form and accompanying documents to the address specified by the UK Border Agency.

(Rule 54.7 also requires the defendant to be served with the claim form within 7 days of the date of issue. Rule 6.10 provides that service on a Government Department must be effected on the solicitor acting for that Department, which in the case of the UK Border Agency is the Treasury Solicitor. The address for the Treasury Solicitor may be found in the Annex to Part 66 of these Rules.)

18.3 Where the claimant has not complied with paragraph 18.2(1)(b) or (c) and has provided reasons why he is unable to comply, and the court has issued the claim form, the Administrative Court—

(a) will refer the matter to a Judge for consideration as soon as practicable; and

(b) will notify the parties that it has done so.

18.4 If, upon a refusal to grant permission to apply for judicial review, the Court indicates that the application is clearly without merit, that indication will be included in the order refusing permission.

[THE NEXT PARAGRAPH IS 54CPD.1.]

PRACTICE DIRECTION 54C—REFERENCES BY THE LEGAL SERVICES COMMISSION

54CPD.1 **1.1** This Practice Direction applies where the Legal Services Commission ("the Commission") refers to the High Court a question that arises on a review of a decision about an individual's financial eligibility for a representation order in criminal proceedings under the Criminal Defence Service (Financial Eligibility) Regulations 2006.

1.2 A reference of a question by the Legal Services Commission must be made to the Administrative Court.

1.3 Part 52 does not apply to a review under this paragraph.

1.4 The Commission must—

(a) file at the court—

(i) the individual's applications for a representation order and for a review, and any supporting documents;

(ii) a copy of the question on which the court's decision is sought; and

(iii) a statement of the Commission's observations on the question; and

(b) serve a copy of the question and the statement on the individual.

1.5 The individual may file representations on the question at the court within 7 days after service on him of the copy of the question and the statement.

1.6 The question will be decided without a hearing unless the court directs otherwise.

PRACTICE DIRECTION 54D—ADMINISTRATIVE COURT (VENUE)

This Practice Direction supplements Part 54

Scope and purpose

54DPD.1 **1.1** This Practice Direction concerns the place in which a claim before the Administrative Court should be started and administered and the venue at which it will be determined.

1.2 This Practice Direction is intended to facilitate access to justice by enabling cases to be administered and determined in the most appropriate location. To achieve this purpose it provides flexibility in relation to where claims are to be administered and enables claims to be transferred to different venues.

Venue—general provisions

54DPD.2 **2.1** The claim form in proceedings in the Administrative Court may be issued at the Administrative Court Office of the High Court at—

(1) the Royal Courts of Justice in London; or

(2) at the District Registry of the High Court at Birmingham, Cardiff, Leeds, or Manchester unless the claim is one of the excepted classes of claim set out in paragraph 3 of this Practice Direction which may only be started and determined at the Royal Courts of Justice in London.

2.2 Any claim started in Birmingham will normally be determined at a court in the Midland region (geographically covering the area of the Midland Circuit); in Cardiff in Wales; in Leeds in the North-Eastern Region (geographically covering the area of the North Eastern Circuit); in London at the Royal Courts of Justice; and in Manchester, in the North-Western Region (geographically covering the Northern Circuit).

Excepted classes of claim

54DPD.3 **3.1** The excepted classes of claim referred to in paragraph 2.1(2) are—

(1) proceedings to which Part 76 or Part 79 applies, and for the avoidance of doubt—

(a) proceedings relating to control orders (within the meaning of Part 76);

(b) financial restrictions proceedings (within the meaning of Part 79);

(c) proceedings relating to terrorism or alleged terrorists (where that is a relevant feature of the claim); and

(d) proceedings in which a special advocate is or is to be instructed;

(2) proceedings to which RSC Order 115 applies;

(3) proceedings under the Proceeds of Crime Act 2002;

(4) appeals to the Administrative Court under the Extradition Act 2003;

(5) proceedings which must be heard by a Divisional Court; and

(6) proceedings relating to the discipline of solicitors.

3.2 If a claim form is issued at an Administrative Court office other than in London and includes one of the excepted classes of claim, the proceedings will be transferred to London.

Urgent applications

54DPD.4 **4.1** During the hours when the court is open, where an urgent application needs to be made to the Administrative Court outside London, the application must be made to the judge designated to deal with such applications in the relevant District Registry.

4.2 Any urgent application to the Administrative Court during the hours when the court is closed, must be made to the duty out of hours High Court judge by telephoning 020 7947 6000.

Assignment to another venue

54DPD.5 **5.1** The proceedings may be transferred from the office at which the claim form was issued to another office. Such transfer is a judicial act.

5.2 The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, subject to the following considerations as applicable—

(1) any reason expressed by any party for preferring a particular venue;

(2) the region in which the defendant, or any relevant office or department of the defendant, is based;

(3) the region in which the claimant's legal representatives are based;

(4) the ease and cost of travel to a hearing;

(5) the availability and suitability of alternative means of attending a hearing (for example, by videolink);

(6) the extent and nature of media interest in the proceedings in any particular locality;

(7) the time within which it is appropriate for the proceedings to be determined;

(8) whether it is desirable to administer or determine the claim in another region in the light of the volume of claims issued at, and the capacity, resources and workload of, the court at which it is issued;

(9) whether the claim raises issues sufficiently similar to those in another outstanding claim to make it desirable that it should be determined together with, or immediately following, that other claim; and

(10) whether the claim raises devolution issues and for that reason whether it should more appropriately be determined in London or Cardiff.

5.3(1) When an urgent application is made under paragraph 4.1 or 4.2, this will not by itself decide the venue for the further administration or determination of the claim.

(2) The court dealing with the urgent application may direct that the case be assigned to a particular venue.

(3) When an urgent application is made under paragraph 4.2,

and the court does not make a direction under sub-paragraph (2), the claim will be assigned in the first place to London but may be reassigned to another venue at a later date.

5.4 The court may on an application by a party or of its own initiative direct that the claim be determined in a region other than that of the venue in which the claim is currently assigned. The considerations in paragraph 5.2 apply.

5.5 Once assigned to a venue, the proceedings will be both administered from that venue and determined by a judge of the Administrative Court at a suitable court within that region, or, if the venue is in London, at the Royal Courts of Justice. The choice of which court (of those within the region which are identified by the Presiding Judge of the circuit suitable for such hearing) will be decided, subject to availability, by the considerations in paragraph 5.2.

5.6 When giving directions under rule 54.10, the court may direct that proceedings be reassigned to another region for hearing (applying the considerations in paragraph 5.2). If no such direction is given, the claim will be heard in the same region as that in which the permission application was determined (whether on paper or at a hearing).

Note on paragraph 5.2

54DPD.5.1 See the decision *R. (Deepdock Ltd) v The Welsh Ministers* [2007] EWHC 3347 emphasising that challenges to decisions made in a devolved area by the Welsh Ministers should ordinarily be heard in Wales unless there is good reason for the hearing being elsewhere. The decision was given prior to the issuing of Practice Direction 54D but the principle remains good and consistent with the general tenor of the Practice Direction.