<u>JUDCIAL REVIEW</u>—Immigration notes

Commencing the Claim?

Public Law Issue to litigate

This first point to note can be a matter of controversy, because in relation to the Points Based System (PBS), and indeed certain other appeals there is the right to apply for Administrative Review of the decision of the Respondent, Secretary of State. It may be arguable that a failure to engage with the Respondent's system of review, means that an alternative remedy to Judicial Review has been neglected. Of course guidance around the system of Administrative Review, shows that in essence only case working errors are likely to be corrected and the rate of success is low in "in country" appeals - 8% change in decision (see *Administrative Review inspection report by David Bolt—Independent Chief Inspector of Borders and Immigration 2015/2016).* Broadly speaking it is probably better –unless there is a fundamental challenge to use the Review system.

Secondly the reduction in appeal rights affects the matters which can be challenged. As is well know *section 82* of the *2002 Act,* limits appeals to protection and human rights claim. However the point is, for a right of appeal the person must have made a human rights claim before the decision to remove (see **R (Waqar) v SSHD (statutory appeals; para. 353) IJR [2015] UKUT 169**). If in fact a claim is made afterward there is no right of appeal; JR will not obtain such a remedy. If it is argued that it is a fresh claim within paragraph 353 then the decision is merely that of the SSHD—see **R (Robinson) v SSHD (para. 353 –*Waqar* applied) IJR [2016] UKUT 133 (IAC)**. [It is added that a One Stop Notice under *section 120* could lead to a human rights claim; but if of no merit it will be certified under *section 96 of the 2002 Act.*

The Pre Action Protocol

Now required in all proceedings. Before the commencement of proceedings the proposed Defendant should be served---note normally should be given 14 days to respond. The letter should contain details of the nature of the challenge, the decision taken and when it was made, a clear summary of the facts, and details of why the act

or omission is wrong in law. An interested party should be served at the same time. If not followed the Claim Form (N461) should indicate why not (time?), and in any event should indicate it has been followed (**Practice Statement (Administrative Court; Listing and Urgent Cases) [2002] 1WLR 810**). A Defendant may be entitled to claim the costs of the action if the procedure is not followed—claiming they were brought to the Administrative Court unnecessarily, even if they concede the challenge made---see **R (Tesfay + Others) v SSHD [2016] EWCA Civ 415** .

Time Limits

Probably the best place to discuss this as linked to the Pre Action Protocol. Claims should be brought promptly, and within three months of the date when the grounds of the claim *first arose* (*CPR Part 54.5*). Note not when the Claimant first found out about the action taken---might be a ground for the extension of time (see **R v Stratford-upon-Avon District Council ex parte Jackson [1985] 1WLR 1319**). However shows the need to move quickly, as an extension of time might not be granted if indeed it is judged there was sufficient to time to lodge the claim but dilatory behaviour prevented this. It is also seems to me that the trick of attempting to get the Defendant to make another decision, in order to come within the time limits, has problems due to the concept of litigation commencing when the decision taken first arose. *It is noted though that in respect of Administrative Review it is certainly arguable that the decision arose at the time of the Review—whatever the SSHD currently claims.*

Basis of Court Intervention

It is not proposed to discus the matter in great detail although the following is a guide. Error of fact by a Tribunal or public body will not lead to Court intervention unless the finding that the necessary facts which existed was a finding that no public body, properly instructed could have come to—**"Wednesbury" unreasonableness** or **irrationality**. Error of law will be found by the failure to take into account, the relevant law, admissible evidence, policy statements and the like—however the Claimant will have to show it could have affected the outcome of the decision making. Self evidently most decision making is a mixture of law and fact—and so are the challenges.

Relevant considerations need to be taken into account, and not irrelevant ones---depending on context (policy by the SSHD for example would have to be followed; discretion has to be considered to be exercised). In essence this is a bit like a "reasons" challenge generalised. **Procedural fairness** and **legitimate expectation** in essence two different aspects of fairness can also provide grounds for challenge. However please note there is no such thing as "general fairness" in relation to JR (see for example **Marghia (procedural fairness) [2014] UKUT 366 (IAC).**

One further point is of importance is whether **success is a temporary remedy** as quite often it is open for the Secretary of State to go away and correct the mistake made, and still refuse the person what they want; advisors have to make sure their clients are under no illusions as to what can be achieved through JR.

Remedies

Quashing orders---makes a nullity of the decision taken under challenge (the decision maker will have to decide again)
Prohibiting Orders—directs that the Secretary of State cannot act in a certain way
Mandatory Orders – directs the public body under challenge to do a specific act which under public law they are compelled to do (rarely obtained).
Declarations –the Court may as well /instead of an order make a declaration as to the legality of a proposed course of action, or on action previously taken
Interim Injunctions --- typically in immigration matters are used to stop removals pending trial of the action.

<u>The Position of the Secretary of State.</u>

Popular Defences

If a question of **delay** is going to be alleged then ***it must*** be mentioned in the summary grounds because the allegation will need to be dealt with at the permission stage (see **R v Criminal Injuries Compensation Board ex parte A [1999] 2AC 330**). There are two other points worth observing;

* the claim should be made "*as soon as possible"* and in any event within three months from when the action accrued. It may argued in some cases that the Claimant

has lingered about setting out his action and as a result good administration is prejudiced by the delay and therefore permission ought to be refused.
* there can quite often be a dispute as to when the decision/action complained of by the Claimant took place. Sometimes after decision making further representations are invited on the decision taken. However if there is no appeal ***right*** (see below) and there is apparent ***finality*** to the decision/action complained of-then the clock starts.

Again in passing the Claimant may need to adduce evidence either in his grounds (or the Reply) if there have been public funding difficulties.
There is an **alternative remedy.** In essence that the Claimant has not exhausted her appeal rights before seeking to commence an action in the Administrative Court. The legal question is whether in fact the alternative remedy is an appropriate course of action—legally a true course of action (the Ombudsman anybody?). Of course the actual factors are rather more sophisticated as to;
* whether the alternative course is capable of settling the challenge made
* quicker or slower than JR?
* questions of technical matters which the other forum has expert knowledge
* is the Claimant trying to get round a statutory framework (e.g., the FTT)
* is there a multiplicity of proceedings?

On **the facts and relevant law** the challenge that there is an *arguable* case for Judicial Review on Administrative Law principles is unsustainable.

Permission

No claim for Judicial Review may proceed to a full hearing without the permission of the Court (*CPR Part 54.4.*). The purpose of permission is to weed out "hopeless" claims (see for example **Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [1982] AC 617**). The criteria for permission must be born in mind when contemplating the proceedings in the first place.
The test for the grant of permission is of course conversely, whether the Court considers that there is an arguable case that there is a ground for seeking judicial reviews which merits consideration at a full hearing.

Now in theory the matter is first considered only on the papers by the Court however if;

* there is an application for a stay on a particular course of action (for example removal from the jurisdiction) either applied for, or temporarily in place, then it is likely that an inter parties oral hearing will be called for by the Court
* the judge is uncertain as to the merits of the claim made then s/he may direct that the Claimant applies to the Court orally on notice to the Defendant/Interested Party and that they are directed to attend so that argument can be heard
* a rarer variant of the later is for an inter parties application for permission to be called, and for notice to be issued that if the Court is minded to grant permission, then the full hearing will immediately follow (only likely in cases of immediate public interest)

It should be noted that a Defendant can apply to have permission granted set aside by setting out reasons why permission should not have been granted---e.g., disputes as to the factual situation.

Further the Upper Tribunal can characterise the claim made as totally without merit which prohibits any further action including the renewal of the claim at an oral hearing.

Oral Renewal of the Claim

If the application is refused on the papers the Court will serve an order to that effect. In summary form the reasons for the decision made will be given by the judge. The Claimant then has seven days from the service of the order (*CPR Part 54.12 (4)*) to notify the Court whether she wishes the application for permission to be reconsidered at an oral hearing. It is important to note when the renewed application is made the Claimant must specify the grounds for renewal in *light of the comments of the first judge refusing the paper permission case* (see **Practice Statement (Administrative Court; Listing and Urgent Cases) [2002] 1 WLR 810**). The usual position will be the Defendant will be expected to attend any such renewed application for permission (so the Claimant better have made her attentions clear and served the order already made (as a defensive precautionary move).

In this situation the best practice is for Counsel for the Claimant to serve a skeleton argument *prior* to the hearing on the Court and the parties so that the issues (taking into account the negative order of the first judge) can be placed in focus before the

Court. Likewise particularly because there would only be summary grounds filed of the Defendant's position Counsel for the Defendant needs to address the issues by way of a skeleton.

Responsibility to extend time past the normal 1 hour of oral argument as to the merits of granting permission will normally lie with the Claimant.

It would of course be necessary to present a standard paginated bundle both for the papers hearing and the oral hearing—although the Defendant might well rely on the Claimant's bundle. Again relevant statute and reported case law should be enclosed in the back of the bundle.

Procedure from Grant of Permission onwards

After the grant of permission the Defendant and any interested party must file and serve the detailed grounds on which the claim is opposed or supported ; and any written evidence (statements etc,) which will be relied upon at the full hearing of the claim within 35 days after service of the order granting permission (*CPR Part 54.13*).

The importance of the documentation is that the Claimant will know exactly how the Defence is to be put; it should of course be in harmony with full skeleton argument for the hearing. There is no express provision for the Claimant to serve further evidence because it is presumed she has laid out her case in the permission hearing; however there is an obligation for the Claimant to reconsider the merits of the claim after the full service of the grounds of opposition---which I may say is rarely honoured (although the Defendant might well draw attention to the fact that of course costs follow the event and the responsibilities of the Claimant in the proceedings). It may be though that the Claimant has to lodge further evidence as a result of matters coming to light during the actual course of proceedings.

The parties should then agree a joint bundle for the full hearing so that the Court is not over burdened with paperwork. Full and frank disclosure will be expected by both parties by the Court.

The Court will expect realistic time estimates and amended skeleton arguments (as of course the Claimant will have to consider and respond to the full grounds of the Defendant).

The hearing should if all parties have done their preparation properly be dominated by submissions made by reference to the papers before the judge.

Consent Orders

These are possible at all stages of the Judicial Review claim. As illustrated by the example in the annexes they are available to agree to stay a particular course of action as an interim measure (*CPR Part 54.10*), as an alternative to a contest and subsequent order of the Court (or indeed supplemental to a decision of the Court).

However the key question to be asked is;

* does the drafted written order faithfully represent the oral agreement between the parties?

* in turn is the Claimant and Defendant sure about the scope of the agreement made?

Common situations during the proceedings where Consent Orders are applicable;

- where on an emergency application the parties agree on the immediate action to be taken, with expedited trial of the action to follow (see above)
- after a claim is lodged on Form N461, following discussion by the parties
- before or after an oral application for permission in the Court
- before the substantive hearing of the action

The problem of Costs

This is obviously quite a problem in compromising actions through a Consent Order often both parties consider the other side should pay for the costs of the action. However it should be stressed that the withdrawal of the decision, or indeed any part of it by the SSHD should be considered a success for the Applicant (see **R (Tesfay) (*supra)***. If the Claimant is publicly funded there is an obligation to attempt to recuperate the funds spent to the Legal Services Commission—although if the Defendant is a government department the public purse is affected in any event. One supposes if the merits of the claim are clear, or indeed the summary defence exposes a misplaced claim, then costs as to where they fall, will be clear. [In reality though, most Defendant's will not press strongly for costs save for frivolous claims in a compromise settlement, because of the risk of incurring further costs, and time spent in essentially pointless litigation].

Ethics and Professional Conduct—the Duty of Disclosure and duties to the Court

As the nature of Judicial Review is in essence a supervisory jurisdiction by the Administrative Court over the proceedings and decisions of inferior tribunals, and those charged with performance of public acts and duties, then the jurisprudential basis of the Court's intervention is different from adversarial litigation . As such the Claimant in particular has a duty to disclose all relevant detail in relation to the claim put forward. [Indeed as can seen by *Practice Direction 54A section 2* in cases involving removal from the UK the Claimant is obliged to include on the claim form the Removal Directions, the decision taken, and the Borders' Agency summary of the reasons for the decision to remove]. Here please note **R (Khan) v SSHD [2016] EWCA Civ 416** which endorses **Bilal Mahmood [2014] UKUT 439 (IAC)** as to the professional duty or full disclosure.

Again inconvenient facts which arise during the process of litigation should be revealed both in relation to the Claimant and Defendant. Both parties have to consider whether they can realistically continue in the matter. This is particularly relevant in immigration and asylum cases where often the Claimant's advisors do not have the full necessary information on the case (unless they are fortunate to have always represented their client), and claims are made which are found to be more complicated and complex when disclosure of the whole history of the matter is achieved.

Negotiations for settlement should be carried out in good faith.

There is also the obligation on the part of a legally funded Claimant to keep the Legal Services Commission appraised of the case and of continuing prospects for success.

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