



**THE FUNDAMENTALS OF JUDICIAL REVIEW IN THE UPPER TRIBUNAL – INCLUDING
DRAFTING GROUNDS**

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This is a course about immigration judicial review. We are concentrating on judicial review proceedings brought in the Upper Tribunal, as these proceedings are most relevant to most immigration practitioners, whose clients are often confronted with a decision that does not attract a right of appeal.

The course is useful for any immigration practitioner wishing to master the principles of judicial review. We hope it will be particularly useful to practitioners regulated by the OISC who have obtained authorisation to conduct judicial review proceedings when working alongside a barrister working under the public access scheme and who is authorised to conduct litigation.

We will be offering two immigration judicial review courses:

- (1) This course covers the fundamentals and the key procedures
- (2) Our course *Common kinds of judicial review in the Upper Tribunal* addresses examples of common judicial review applications brought in that forum, in particular challenges to:
 - delays in decision making,
 - certification of human rights claims and non-suspensive appeals,
 - decisions based on the general refusal reasons
 - refusals of administrative review based on common issues arising under the Immigration Rules including a refusal to exercise “evidential flexibility”
- (3) Our course *Judicial review in the Administrative Court* covers the main kinds of judicial review brought in the High Court:
 - Unlawful detention
 - Revocation and suspension of sponsor licence decisions
 - Nationality refusals and revocations
 - Challenges to UT permission refusals (“*Cart*” JRs)

The Fundamentals

Introduction

Judicial review is the means by which government decisions are challenged where there is no alternative remedy available to the affected person. It is a very important remedy in the UK's system of constitutional law.

Key features of judicial review are that

- Grounds are pleaded formally at the outset of the process, and there is only a limited ability to vary them afterwards; the government has the opportunity to respond by providing grounds of defence
- Judicial review requires the grant of *permission* – you get two chances, as firstly the case is considered by a judge on the papers, secondly there is usually an opportunity to renew a refusal on the papers to an oral hearing (s16(2) TCEA 2007)
- The court or tribunal has limited powers, comprised in various Orders which it can make: these may suspend the effect of government decisions pending its lawfulness, and strike down decisions, but in general the result of a successful judicial review challenge is likely to be that the government must reconsider its thinking, rather than demanding that the person bringing the challenge has their application to the Home Office granted outright. Government defendants often make the most of this feature of judicial review to replace initial decisions, which may well be inadequate, with better reasoned refusals
- The challenge is, in most cases, limited to the evidence that was before the original decision maker. Sometimes a new decision responds to the provision of further evidence, and then it may be appropriate to amend grounds to challenge that new decision

The procedural law of the Upper Tribunal

There are a number of sources of law in judicial review proceedings. In the High Court judicial review powers arise from the Senior Courts Act 1981, although in so far as immigration judicial reviews proceed in the Upper Tribunal Immigration and Asylum Chamber (“UT”), they arise from the Tribunals, Courts and Enforcement Act 2007.

The relevant procedures are governed by

- The Upper Tribunal Procedure Rules 2008 (“UTRs”)
- The Upper Tribunal judicial review [Practice Directions](#) (“UT JRPDs”)
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- The Upper Tribunal judicial review [Practice Statement](#) (“UT JRPS”)

In the Administrative Court, the relevant procedures arise from the Civil Procedure Rules (CPR) as glossed in the “White Book” (and their associated Practice Directions, which we denote by prefix “CPR-PD”). Although most of the relevant Rules are found in the judicial review Chapter of the CPR, there are other parts of those Rules which also apply in judicial review proceedings. In this course we are focussing on judicial review in the Upper Tribunal.

Orders available in judicial review proceedings

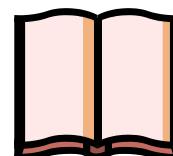
An application for judicial review is not a merits appeal. In a merits appeal a judge is able to reconsider the decision of the Home Office, often taking account of evidence that was not before the original decision maker, and come to conclusions for themselves. The result of the appeal, in the vast majority of cases, effectively binds the parties, so that a successful migrant appellant will be granted the leave they originally sought.

Judicial review, on the other hand, is in truth an application for one of the Orders or other remedies set out in the relevant legislation (the Senior Courts Act 1981 for high court challenges, the TCEA 2007 for Tribunal ones).

There are a number of Orders that might be sought –

- (a) A Quashing Order which annuls (ie cancels) the decision challenged;
- (b) A Mandatory Order which requires the Defendant to take a particular action;
- (c) A Prohibiting Order which prevents a particular step being taken;
- (d) A Declaration that a state of affairs is unlawful, or that a person possess a particular status;
- (e) Disclosure;
- (f) An Injunction against an action being taken.

All these originate in section 15 of the Tribunal Courts and Enforcement Act 2007.



Examples

- A Mandatory Order requires the Secretary of State to do something – “the Secretary of State is to consider the outstanding representations by”;
- A Prohibiting Order prevents certain steps – “the Secretary of State is not to remove the Claimant from the jurisdiction without further Order of the Court” and is often accompanied by an Injunction which is interim relief to the same effect;
- A Quashing Order strikes down an extant decision – “the decision of the Secretary of State of is quashed as unlawful”;
- A Declaration declares the state of the law and its outcome on the facts of the case: it is rather hard to see much applicability for Declarations in the UT given that detention and nationality challenges, the most obvious avenues for such a challenge, are heard in the Administrative Court. A sample from that jurisdiction would be “A Declaration that the Defendant unlawfully detained the Claimant from until”. An example in

the UT context is the declaration granted in SS (IJR) [2015] UKUT 462 (IAC) that the important duty to safeguard child welfare had not been discharged

Often two or more the orders might be sought together: eg

- An order quashing a decision to refuse an application and a mandatory order to reconsider the application
- An order quashing removal directions and a prohibiting order against further removal directions being set pending a decision on outstanding representations

Allocation of responsibility between the Upper Tribunal and Administrative Court

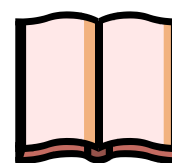
From 17 October 2011, a specific category of judicial review challenge was moved to the jurisdiction of the UT by virtue of a Direction under the Constitutional Reform Act 2005:

- those in relation to refusals to recognise further representations as amounting to fresh asylum or human rights claims including where there was a failure to make such a decision, or
- to make removal directions associated with those representations' failure.

However, under the [Direction](#) of the Lord Chief Justice of 21 August 2013, from 1 November 2013, a much broader range of judicial reviews are to be initiated in the UT as designated by Practice Directions, namely all those questioning:

- decisions made pursuant to the Immigration Acts
- decisions made pursuant to instruments made under them, and
- decisions made outside the Rules, and decisions of the FTT made where there is no appeal to the UT (even a decision to extend time for a UT appeal can be challenged, successfully: [Onuwu](#) IJR [2016] UKUT 185 (IAC))
- including “an omission or failure to make a decision” (ie challenges based on a delay in deciding an application)

So you can see that the general objective is to ensure that all judicial review applications involving challenges to routine immigration decisions are brought in the specialist jurisdiction, the Immigration and Asylum Chamber of the UT.



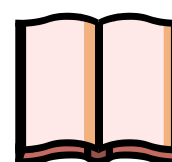
Examples

Challenges against these decisions are all brought in the UT:

- “clearly unfounded” certificates (section 94 NIA 2002)
- non-suspensive appeals certificates (section 94B NIA 2002)
- decisions to refuse to recognise further representations as fresh claims
- immigration decisions with no right of appeal or administrative review (eg in-country curtailment of leave or refusals of visit visas)
- refusals to recognise EEA residence rights where there is no right of appeal
- adverse administrative review decisions (ie most immigration decisions that do not carry the right of appeal)
- decisions of the FTT that do not carry the right of appeal to the UT – ie procedural and ancillary decisions, regarding adjournment and case management, and some decisions such as refusal to recognise a right of appeal where made without a hearing

However there are exceptions to this general rule which require an application to nevertheless be brought in the Administrative Court, namely, challenges to:

- the *vires* of statute, statutory instrument or Immigration Rule,
- the compatibility of such provisions with HRA 1998,
- decisions of the Special Immigration Appeals Commission,
- decisions of the UT,
- the lawfulness of detention (though an application will not necessarily amount to such a challenge merely because it challenges a decision in relation to bail)
- decisions as to inclusion on the register of licensed sponsors, or any authorisation of such sponsors;
- decisions determining entitlement to British nationality or citizenship
- decisions determining entitlement to welfare support (ie under or by virtue of the Immigration and Asylum Act 1999, s 4 or Pt VI, or by virtue of NIAA 2002, Pts II or III (other support and assistance)).



Examples

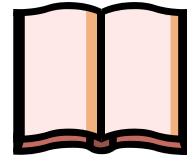
Challenges brought in the Administrative Court will include

- Refusals of nationality on good character grounds
- Challenges to the detention of an EEA national arguably exercising Treaty rights
- Challenges to detention
- Challenges to the strictness of the adult dependent relative Immigration Rule as it operates generally (ie not simply to an individual decision made under the Rule)
- *Cart* JRs – named after the Supreme Court case that recognised the possibility of judicial review of a refusal by the UT to grant permission to appeal against a decision of the FTT

Note that

- Challenges to a Home Office policy (but not a Rule) may be brought before the UT (given that it is only challenges to primary legislation and Rules that are expressly allocated to the Admin Court) see eg [MS](#) (IJR) [2015] UKUT 539 (IAC)
- Challenges to FTT decisions on case management are made to the UT (eg a refusal of an application to make arrangements for a witness to give evidence via Skype)
- There are rather dense transfer procedures for cases to be transferred between the UT and the Administrative Court (s18 TCEA 2007)
- The Administrative Court commented in [Ashraf](#) [2013] EWHC 4028 (Admin) that it sometimes saw very weak unlawful detention claims before it, and warned that in future it might view the lodging of judicial review claims with an unmeritorious

detention dimension in its jurisdiction as an abuse of process, given the desirability of preserving its scarce resources



Example

Daniel is a citizen of Nigeria. He has overstayed his visit visa for many years. He is living with his partner who has indefinite leave to remain and her British citizen child. He has not made any application on the basis of these relationships to the Home Office. He is detained in a raid by the immigration service and removal directions are set.

Although Daniel may make representations on human rights grounds to the Home Office which need to be considered before he is removed, it is very difficult to see how he could have any claim for unlawful detention: he has chosen not to put a claim to the Home Office in circumstances where he has no leave to remain and so his detention is unsurprising.

Procedural overview

These are key aspects of the procedure:

- In the UT the parties are Applicant and Respondent (they are Claimant and Defendant as in the Administrative Court)
- Applications must be made promptly or at least not later than 3 months after the decision impugned: s16(4) TCEA 2007, r28(2) UTRs
- The remedy is a discretionary one (s16(5) TCEA 2007): unmeritorious applicants may be refused relief notwithstanding that they may have established a technical error of law or procedure. Taylor LJ said in *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435:

The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:

- (1) *The nature and importance of the flaw in the challenged decision.*
- (2) *The conduct of the applicant.*
- (3) *The effect on administration of granting relief.*

- As we mentioned above, the UT only rarely finally determines issues for itself: the default position is that the original decision is overturned (quashed) and accordingly the application is left outstanding before them for reconsideration. An exception to this scenario is where the JR is brought against the FTT and where there was only one decision that could have been made had an error of law not been made (s17(2) TCEA 2007). As stated in [Sultana](#) (IJR) [2015] UKUT 226 (IAC):

The remedy of a mandatory order is rarely granted. It is appropriate only in cases where it is clear to the court that the respondent is legally obliged to take a certain course of action, normally involving the conferral of some

*benefit or advantage on the challenging party, with no choice or discretion.
The course that the respondent is ordered by the court to take in a mandatory order must be “the sole result that is legally permissible”.*

- The Upper Tribunal (Procedure) Rules 2008 (UTRs) are the governing Rules, not the Civil Procedure Rules (“CPR”)

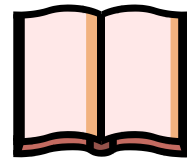
The Time Limit

The three-month period is a “long stop” not a time limit, as judges like to recite from time to time.

If a claim is being brought late, a reasoned request for an extension must be made, backed by evidence (UT JRPS para 2.4). Examples of good reasons for bringing a claim late may include

- not having had notice of the decision previously
- pursuit of an alternative remedy
- BUT NOT necessarily a lack of legal representation or the unavailability of legal aid, see for example [Kigen](#) [2015] EWCA Civ 1286

It is especially important to lodge a claim for judicial review in timely fashion where a client is susceptible to removal. The experience of counsel who deal with judges during injunction telephone calls and who read a lot of Orders on paper applications is that, in cases where a long opportunity for making timely representations has passed, lateness is itself seen as a reason for refusing interim relief (and sometimes permission too).



Example

Henry, a Tier 4 student, is susceptible for removal as his college’s Sponsor licence was revoked some time ago and his attempts to find a new Sponsor have failed; his last application for an extension of leave for a last-ditch effort to find another college was refused ten weeks ago, and he was provided with a Red Notice warning him he was entering a removal window.

Henry needs to challenge the decision to refuse his last period of leave without delay, if he has arguable grounds to do so. Alternatively, if he cannot dispute the legality of that decision, then he should either make arrangements to leave the country, or urgently put together a human rights application based on his connections here, effectively giving up on challenging the student decision. Otherwise it is very unlikely that a judge will be impressed with his failure to pursue a potential judicial review claim.

Jane is present in the UK as an overstayer. Her application for indefinite leave to remain in the UK based on being a victim of domestic violence was refused fourteen weeks ago. She now comes to your office for advice. You think she has good grounds for judicial review of the decision.

You would need to take instructions as to the reasons for the delay in challenging the decision. Relevant factors may be her ability to find legal advice, any advice she has received informally in the community or from

friends, and her financial, practical and emotional ability to take her case forwards (eg if she has limited funds, is homeless or has been traumatised by her experiences). Whatever the explanation, it must be clearly set out and evidenced in the application for an extension of time that forms part of the application notice.

Alternative remedy

In [R \(Cowl\) v Plymouth City Council](#) [2001] EWCA Civ 1935 the Court of Appeal made it clear that alternative remedies had to be pursued before the scarce resources available for judicial review claims were called upon. The two most obvious alternative remedies in immigration cases will be the complaints procedure laid down by the Home Office, and the possibility of an appeal.

The complaints procedure will be the appropriate route where financial compensation is sought for maladministration: see the case of [Dong](#) (Tracey J; CO/1348/2009).

An appeal will sometimes be available as an alternative remedy. Some appeals may be brought from within the UK, others only from abroad.

As to in-country appeals:

- Sometimes an in-country appeal right may have been expressly notified to the client, who may have overlooked its existence or significance, in which case it should almost certainly be exercised – it is likely to be more appropriate to bring an appeal, even if late, than it is to bring a judicial review claim
- There may be a right of appeal in truth even if the Home Office has failed to appreciate/acknowledge its existence: and it is then the appeal, not judicial review, which is the appropriate route for testing that thesis, see [Khan](#) IJR [2015] UKUT 353 (IAC)

Although each case must be determined on its own facts, in cases where a person seeks to dispute the Secretary of State's assertions as to the availability of an appeal to the First-tier Tribunal, the appropriate course is for such person to lodge a notice of appeal with the First-tier Tribunal requesting that it determine this issue. Given the existence of this suitable alternative remedy, it will only be in exceptional circumstances that the Upper Tribunal will exercise its discretion and grant relief to a person who seeks to raise this same issue before it in judicial review proceedings brought against the Secretary of State.

- Note that time for appealing does not run until the existence of the right of appeal is properly notified
 - So where an individual lodges a notice of appeal notwithstanding the decision maker's failure to notify them of their appeal rights, they are essentially waiving their right to a properly notified decision

- Beware: the fact that the Tribunal then accepts there is a right of appeal and lists it does not necessarily mean that the judge who hears the appeal will also accept the proceedings are valid if the Home Office argue to the contrary.

Then there are out-of-country (sometimes called “non-suspensive”) appeals, which may be treated as an alternative remedy to judicial review in some cases. This is particularly likely to be the case in cases that do not involve fundamental rights, ie those that involve allegations of dishonesty in regular immigration work, outside of asylum and human rights. For example

- Before April 2015, appeals against decisions to set removal directions following the curtailment or cancellation of leave were normally out-of-country, the exception being where a human rights claim was made prior to the decision.
 - These kinds of decision would generally come “out of the blue” from the individual’s perspective, only at the moment they were picked up by the immigration authorities for allegedly working in breach of conditions or when the Home Office received notification from an English language test provider that a review of results suggests the individual passed their test dishonestly: and a post-decision human rights claim would not render the appeal “in-country” (s92(4) NIAA 2002)
 - A series of decisions (see generally [Lim](#) [2007] EWCA Civ 733, in [Mehmood](#) [2015] EWCA Civ 744 and [Sood](#) [2015] EWCA Civ 831) all hold that to permit “in-country” judicial review would frustrate the intention of Parliament to only permit such decisions to be challenged from abroad by way of out-of-country appeal
 - In [Qadir](#) at [104] the President flagged up the need to determine whether out-of-country appeals were an effective remedy where the case turned on a person’s credibility
- That difficulty does not arise with modern decisions to curtail and cancel leave, because of course these days the right of appeal only ever arises in the context of a refusal of a human rights or international protection claim: so hostile decisions that do not respond to an immigration application will not involve an appeal of any kind, in-country or out-of-country. Thus the possibility of “in-country” judicial review is not defeated by the availability of an out-of-country appeal.

Fundamental rights cases are rather different. Here the nature of the protected rights are such that exclusively out-of-country remedies are usually unacceptable.

- Out-of-country appeals are available where a human rights claim has been certified as “clearly unfounded” under s94 NIAA 2002 - however a judicial review claim may be made against those certificates pre-removal, challenging the decision that the claim is weak
- Appeals may be non-suspensive because the Home Office thinks that demanding departure pre-appeal would not cause serious irreversible harm to a person’s private and family life, applying under s94B NIAA 2002 – here the conclusion as to whether or not such harm *would indeed* result from the period abroad pending an appeal, whether it ultimately succeeded or not, may be challenged by judicial review pre-removal

- Out-of-country appeals are unlikely to protect an asylum seeker facing return to the very territory where they fear persecution, and so in-country judicial review of decisions to certify an asylum claim as “clearly unfounded” are always capable of challenge, once again focussing on the conclusion leading to certification rather than the underlying claim (ie the challenge concentrates on whether the claim is so weak as to warrant certification, rather than upon whether it is sufficiently strong to warrant the grant of international protection)

High duty of candour

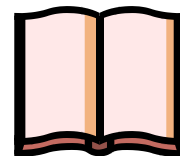
There is a high duty of candour on those applying for judicial review: they must come to the court “with clean hands”. There is a real risk of wasted costs orders if there is a lack of full and frank disclosure (regarding immigration history, criminal offending, prior judicial review challenges to removal, the results of administrative and Tribunal decision making on a case). Additionally, questions of delay, alternative remedy, and case law or statutory material that runs counter to the Applicant’s case must be put forward (and, obviously, an argument must be constructed as to why they are not fatal to the claim).

In [Mahmood](#) IJR [2014] UKUT 439 (IAC) the President of the UT emphasised the importance of candour at all stages of the process, from the inception of the claim to receipt of the Acknowledgment of Service, and onwards. He was particularly concerned about a failure to subsequently provide documents that were, at the time of lodging the claim, not available to the Applicant (in that case, because he was in detention): it appeared these documents did not exist given that they were never disclosed by the Respondent and never provided by the Applicant.

There is also a high duty of candour on public authorities to disclose all relevant material (‘to cooperate and to make candid disclosure’) as, at least once permission is granted, they are under a duty of candour to lay before the court all the relevant facts and reasoning underlying the decision under challenge. Judicial review was said by the Chamber President (quoting Lord Donaldson MR) in [Mahmood](#) IJR [2014] UKUT 439 (IAC) to be a:

process which falls to be conducted with all the cards face upwards on the table and [where] the vast majority of the cards will start in the authority’s hands.

So it is always possible to consider what additional information might be in the possession of the Home Office – you could ask for disclosure of such material as one of the orders sought in the judicial review application.



Example

Bilal is subject to immigration control. He has a long negative immigration history in the UK including overstaying his visit visa and working unlawfully. His cousin contacted you when Bilal was recently detained because removal directions had been set against him, and, having taken instructions in which he informed you that he had strong private life links with this country which the Home Office have not so far considered, a judicial review was lodged on the basis that he should be given an opportunity to put representations to the Home Office; an accompanying application for interim relief by way of suspension of those removal directions was granted by a judge on the papers.

You have now studied the Acknowledgment of Service and summary grounds of defence which has revealed that Bilal sought judicial review of removal directions requiring his return to Pakistan five months ago. Those removal directions were in consequence deferred, though the judicial review application was subsequently dismissed as totally without merit because no detailed grounds were supplied.

Bilal is in real difficulties now. Your judicial review claim has proceeded without knowledge of the earlier application having been brought and dismissed as without merit. Any judge who reviews this matter will be very unsympathetic, thinking that he had sufficient opportunity to put any case he had against removal during the last judicial review proceedings. Bilal has breached his duty of candour in not revealing this part of his history. The judicial review claim could be refused simply for this failing, given that judicial review is a discretionary remedy which takes account of the conduct of an applicant.

Drafting the judicial review grounds

Introduction to drafting the grounds

Judicial review is a public law remedy. One implication of this is that the application is not an appeal against the merits of the decision: there is no right to provide fresh evidence, the judge is limited in the kinds of error that permit them to intervene in an Applicant's favour, and they will very rarely have the opportunity to hear oral evidence from the Applicant. The relevant grounds must be identified at the outset of the claim: there is only a very limited opportunity to vary them later on.

Accordingly judicial review grounds must identify failings in the decision challenged which are true errors of law, such as unfairness or unlawfulness or overlooking relevant evidence: they should not simply make arguments disagreeing with the decision. Generally speaking arguments that simply challenge the "weight" that was given to one consideration or another are doomed to fail.

In general the grounds fall into three categories: illegality, irrationality and procedural impropriety, though this is not especially revealing. So we now set out the main forms of challenge we are likely to come across.

Illegality

This involves a failure to correctly apply the law. There are a great many possibilities, for the possible errors arising in the world of immigration law are as extensive as the law itself. Some involve a failure to have regard to a statutory duty or constitutional principle, such as one emanating from the Human Rights Act 1998, Equality Act 2010, or fundamental principle of the common law; others arise from within the complex body of rules and principles that form part of UK immigration law. Here are some examples:

- (a) Misstating the burden of proof in a case which turns on an allegation of dishonesty by the Home Office
- (b) A misunderstanding of legal powers (eg trying to issue removal directions under section 10 of the 1999 Act against a person who is not an overstayer, leave breacher or maker of false representations); or

- (c) Failing to adhere to the correct approach to a statutory duty (eg failing to properly consider section 55 Borders, Citizenship and Immigration Act 2009 regarding the duty to safeguard and promote the welfare of minors); or
- (d) Misapplying a test in the immigration rules such as the definition of fresh claims for asylum (eg asking whether a claim is “convincing” rather than whether there is a real chance of its success); or
- (e) Misdirecting oneself as to the right interpretation of the Human Rights Convention (eg failing to take account of “third party” human rights, such as those of a child; requiring exceptionality in the sense of *unusual* rather than *compelling* circumstances)
- (f) Failing to consider the exercise of discretion within the Rules: eg refusing an application under the Points Based System because a document is imperfect, whilst failing to appreciate that in reality a specified document had been provided which omitted some relevant material and thus that the discretion under Rule 245AA might have been exercised in the applicant’s favour
- (g) Failing to consider the exercise of discretion outside the Rules in response to a cogently argued application asking for such discretion to be exercised
- (h) Undue delay in determining an application for leave to remain, contrary to the general principle that administrative actions must take place within a reasonable time frame

Failures in the substance of the decision making

In any case where a significant amount of evidence was provided and where the decision maker has given detailed reasons responding to that evidence, then it may well be appropriate to consider whether public law errors are to be found within the decision .

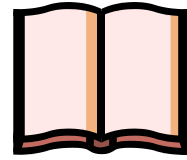
R (Iran) [2005] EWCA Civ 982 gives us the best shopping list of potential errors when attacking a decision (although that is a case that arose in the context of a statutory appeal, it is the best starting point for reminding oneself of what are the main species of challenge possible on a judicial review too).

- ii) Failing to give reasons or any adequate reasons for findings on material matters;*
- iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;*
- iv) Giving weight to immaterial matters;*
- vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.*

In practice, these might be pleaded thus:

- **Failing to give adequate reasons:** “The Respondent erred in law in failing to give reasons for rejecting the detailed explanation provided by the Applicant for the alleged dishonesty”
- **Failing to take account of relevant considerations/evidence:** “The Respondent erred in law in failing to take account the medical evidence provided with the application” or “The Respondent erred in law in failing to take account of the fact that the medical evidence dealt with the Applicant’s mental state, and not just her physical impairment”

- **Material error of fact for which Applicant not responsible:** “The Respondent erred in law in treating the Applicant as having overstayed for more than 28 days in August 2015 when in fact the stamps in her passport, which were legible and summarised in the covering letter to the application, clearly showed a period of less than 28 days between the expiry of her last period of leave and the next grant of leave”



Example

James is subject to immigration control. He is present as a Tier 1 Entrepreneur. He makes an application for extension of leave. Having read the requirements for maintaining a certain amount of employees throughout the period leading up to an extension application, he realises that he does not technically qualify under the detailed requirements of Appendix A. However, in his application he explained that the reason why he did not qualify was because, due to two of his key employees leaving due to compassionate reasons, he had not managed to replace them within the relevant period.

At the time he made his application he was employing several more British citizens than necessary to meet the extension route, all working on contracts that were demonstrably going to last for at least three years, meeting complex orders in the information technology business; his business was turning over hundreds of thousands of pounds. He accordingly asked for discretion to be exercised outside the Rules.

The decision letter ignores this request and simply states that his application is refused because “the jobs must have existed for at least 12 months during the most recent grant of leave”. An administrative review decision repeats this summary reasoning.

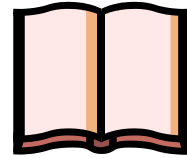
An application for judicial review may well succeed here: a strong case was made for departing for the Immigration Rules, because their essential objectives of job creation though not their letter was met; and no consideration has been given to the request.

Irrationality/perversity

If none of the public law errors so far set out can be identified, then the grounds may have to target the substance of the decision, expressly alleging irrationality. This is likely to be the case where no relevant evidence has been overlooked and where the client’s case has been met head-on by a decision maker.

Alleging irrationality is really the last recourse of advocates in judicial review proceedings, because it requires showing that the decision maker acted perversely, which is a very high test: Brooke LJ in *R (Iran)*, at §11:

It is well known that "perversity" represents a very high hurdle. ... a demanding concept. ... decisions that were irrational or unreasonable in the Wednesbury sense (even if there was no wilful or conscious departure from the rational) ...



Example

Jemima, an overstayer, makes an application for leave on private and family life grounds based on her relationship with her British citizen boyfriend. She argued that he could not be expected to give up his job in the UK. The application is refused on the basis that she formed the relationship whilst her stay was precarious and there are no insurmountable obstacles to their relocation together to Ghana, her country of nationality, and where her boyfriend was brought up: the decision letter recognises there will be significant inconvenience involved in uprooting from the UK to Ghana, but states that no evidence has been supplied showing that conditions abroad would be unduly harsh.

Presuming no evidence has been overlooked, it is necessary to show that the decision is perverse. This will be very difficult where there are no family connections in the UK that are especially strong. A very generous decision maker might have accepted the loss of the Sponsor's UK job as representing "insurmountable obstacles" (though that would have been to contrary to the Home Office guidance, and to the ECtHR case law); but it is hard to see that this response to her case is beyond the range of reasonable responses, which must necessarily be recognised as varying from rather generous to somewhat mean.

Priti's application for an entrepreneur visa made from abroad is refused on the basis that the application is not a credible one, because he lacks experience of his planned area of business, management consultancy, an area in which he has studied but never worked.

If the Home Office have overlooked evidence that he has worked in the management consultancy field, then they would have failed to take account of a relevant consideration: that would be a decent ground for judicial review, as set out above. However, if they are right about his lack of practical experience, then a challenge to their conclusion will be based on an allegation of perversity/irrationality. It is very hard to see it succeeding, because it has to be recognised that whilst this might be a mean-spirited decision, it is very hard to argue that it is outside the range of possible responses that a decision maker might make with respect to an application of this kind.

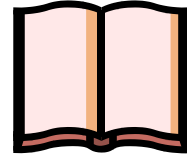
Proportionality

There is one exception to the irrationality threshold for judicial intervention in government decision making. Where it is accepted that family and private life are in play and that a decision will seriously interfere with those rights, then as we all know, the remaining question is whether the interference is disproportionate to the Article 8 right in question.

The courts have held that questions of proportionality are to be determined by the reviewing judge themselves on a judicial review application.

In [Caroopen & Myrie](#) [2016] EWCA Civ 1307 the Court of Appeal look carefully at the authorities applicable when a judicial review claim turns on an assessment of proportionality, and note that Lord Neuberger at §67 of the case of *Lord Carlile of Berriew* [2014] UKSC 60 stated:

where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision.



Example

Jabeen, an overstayer, has been refused leave to remain as the spouse of her British citizen partner Ali. In her application they argued that there would be insurmountable obstacles to life in Pakistan because Ali had never lived there and worked in the security industry in the UK which they feared would put him at risk if it came to the attention of the wrong people.

Whilst accepting the relationship is genuine, the Home Office does not accept there would be insurmountable obstacles to their relocation to Pakistan.

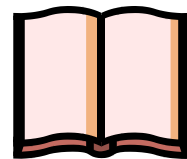
On judicial review a judge would have to assess proportionality for themselves: so a ground for judicial review might read

“The Secretary of State was wrong to consider that there were no insurmountable obstacles to relocation to Pakistan: Ali’s work history was clearly a significant barrier to relocation abroad, given the country evidence (provided with the application and expressly cited in the covering representations) that clearly identified security risks to a person with his kind of background.”

Failing to follow policies

There is a legitimate expectation that when government sets out a policy in published documents, its contents will be followed in practice. See eg Laws LJ in the Court of Appeal in [Abdi and Nadarajah](#) [2005] EWCA Civ 1363:

68 ... Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.



Example

Ahmed is a citizen of Pakistan present as a Tier 4 student. His Sponsor college loses their licence following an audit by the Home Office compliance team. He learns of its loss of licence only when he receives a refusal of his Tier 4 extension application: the refusal letter says that he has no valid Certificate of

Acceptance for Studies (CAS) as his Sponsor does not appear on the Sponsor register at the time his application was considered.

The Home Office in fact has a policy to notify students who lose their Sponsors in this situation and to give them 60 days to find a new Sponsor. This was not done in Ahmed's case.

Ahmed could argue that the failure to follow the policy in his case is unlawful. It was a published policy and there is no reason why he was not given the benefit of it. For example the ground might be pleaded thus:

“The Applicant was in no way involved with his Sponsor's loss of licence and was indeed unaware of that fact until his application was refused. The Respondent accordingly erred in law in refusing the application outright rather than providing a 60 day grace period before making a final decision on the application.”

He might be able to run a similar argument, even if the Home Office believes that the policy was followed, if he did not receive the letter giving him the additional sixty days and there is no evidence to show that such a letter was served on him.

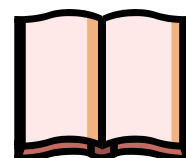
Legitimate expectation

Sometimes an allegation is made that the Secretary of State has gone back on a promise made to an individual in the course of dealing with their case. The legal test summarised in [Mehmood](#) [2014] UKUT 469 (IAC) is whether

the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification

The Applicant in [Mehmood](#) had been granted limited leave for a certain period under Tier 2, having previously been present as work permit holder. There had been a significant break in his leave before the Tier 2 leave was granted. He enquired why his Tier 2 leave expired well before the end date of his Certificate of Sponsorship, and he was then told that the grant had been given in line with the usual policy of providing a second grant of leave to an applicant to give them up to five years of residence within “worker” immigration routes. He interpreted this as an indication that he would qualify for indefinite leave to remain at the end of the second period. However when he made a settlement application it was refused because the break between his two periods of leave was held as an impermissible gap in his “continuous residence”.

His judicial review application turned on whether or not the Home Office had committed themselves to grant indefinite leave to remain to him. The UT found that he had no legitimate expectation to such effect, firstly because the Home Office communication had not been unequivocally to that effect, and secondly because their letter had to be read in line with the Immigration Rules and surrounding policies, all of which made it perfectly clear that there was a strict continuous residence requirement.



Example

Sirena is the wife of a refugee from Sri Lanka. She arrived in the UK sometime after him and was treated as his dependent. However, when his asylum claim was granted, she was only given Discretionary Leave to Remain rather than

refugee status. She challenged this decision by way of written representations, arguing that she should have received the appropriate leave as the partner of a refugee. The Home Office write back that the error was just a technical one and she will be treated as if she was a refugee's partner as to the period and conditions of her leave; she need not worry.

When Sirena applies for indefinite leave to remain, her application is refused because she has applied before the DLR policy permits settlement.

Sirena could argue that the Home Office letter amounts to a representation upon which she could reasonably rely to her detriment that she would get indefinite leave to remain on the same basis as a refugee's spouse. She did indeed act to her detriment by not, for example, pursuing a judicial review challenge to the kind of leave she was given originally.

Procedural fairness

Decision making must always be fair: so for example if individuals are to be interviewed about the genuineness of an application, the interview should put all issues to them arising from their application which have raised doubts in the mind of the decision maker.

Thus the UT in [Miah](#) [2014] UKUT 515 (IAC) concludes:

... the affected person must be alerted to the essential elements of the case against him. This places the spotlight firmly on the pre-decision interview which, it would appear, is an established part of the process in cases of this nature. The interview is the vehicle through which this discrete duty of disclosure will, in practice, be typically, though not invariably or exclusively, discharged. In this forum, the suspicions relating to the genuineness of the marriage must be fully ventilated. This will entail putting to the subject the essential elements of any evidence upon which such suspicions are based.

See [Mushtaq](#) IJR [2015] UKUT 224 (IAC) applying this principle in a challenge to an ECO refusal where suspicions about the genuineness of a student's application raised in the refusal letter were not raised with them at the interview.



Top Tip

Where judicial review represents your client's only remedy against a refusal, post-decision evidence is not usually admissible. Accordingly where the Home Office have refused a person on genuineness grounds, be they student or entrepreneur, make sure you obtain, and then carefully check, the interview record against the actual reasons for refusal.

Remember

- a failure to put the reasons that ultimately concerned the decision maker to the interviewee may well be unfair
- it may be necessary to seek and obtain disclosure of any interview record in order to establish that particular matters were not raised

Substantive fairness

There will be times when someone is put in an impossible position by bureaucratic obstacles or changes in the Rules. Ultimately the courts may step in and supplement a statutory/policy-based scheme with judicial safeguards to protect an innocent victim of unfair Home Office decision making.

However, it needs to be appreciated that this is very rare in practice. The Judges have in general upheld decisions made, particularly under the Points Based System, even when they result in harsh outcomes following relatively small imperfections in applications.

For example, in [Philipson](#) the UT found that it had been disproportionate and unfair for a person to lose the opportunity of settlement following changes in the Immigration Rules which they could not have reasonably anticipated.

However once again this principle does not have universal application: it is a strict exception to the general principle in [Odelola](#) that applications are to be determined on the basis of the Immigration Rules in force at the date of decision.

The Judicial Review Process

Pre Action Protocol letter

It is very advisable indeed to follow the [Pre-Action Protocol for Judicial Review](#). Its objective is to give a government decision maker the opportunity to reconsider their decision in the knowledge of the potential challenge that might be brought against it.

Whilst it is a “code of good practice” which should be “generally” followed (para 5 of Protocol), to all intents and purposes it is compulsory in all but exceptional cases: partly because so doing may impress a judge when they come to consider some failing of the Applicant or Respondent in the subsequent course of judicial review proceedings, and also because it can be very important when costs come to be calculated.

Note that “This protocol will not be appropriate where the defendant does not have the legal power to change the decision being challenged, for example decisions issued by tribunals”: one cannot negotiate with a statutory tribunal which has made its decision and is now *functus officio*. So there is no need for a Pre Action Protocol letter before bringing a *Cart* judicial review, ie a challenge to a refusal of permission to appeal to the UT from the FTT, made by the UT on the papers.

The Protocol states at para 7 that “even in emergency cases, it is good practice to fax to the defendant the draft Claim Form which the claimant intends to issue. A claimant is also normally required to notify a defendant when an interim mandatory order is being sought.”

There is a standard format letter available online which should be used as the basis for one’s own correspondence. Key components are:

- (a) The date and details of the decision, act or omission being challenged;
- (b) A clear summary of the facts on which the claim is based;

- (c) Details of any relevant information that the applicant is seeking and an explanation of why this is considered relevant.
- (d) The details of any interested parties (who should receive the letter too);
- (e) A reply date for the Defendant to have taken action, which must be reasonable in all the circumstances taking account of the urgency of the situation. 21 days is routine, or 14 days where there is some justification for shortening that period, although obviously the advent of a removal window or impending removal directions, or the fact that a client is detained, may require that a shorter period be proposed.

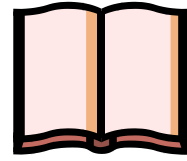
The Respondent has certain duties once they receive a Pre Action Protocol letter:

- Failure to respond may be a serious matter. Para 13 of the Protocol states “Failure to do so will be taken into account by the court and sanctions may be imposed unless there are good reasons” (see Costs, below).
- Where a timely response is not possible, the Respondent should write asking for a reasonable extension and providing an interim reply, providing reasons and asking for any further information required from the Applicant (para 14).
- A concession of the claim should be made in clear and unambiguous terms (para 15).
- Where the claim is being contested in whole or part, this too should be set out in clear and unambiguous terms. A new decision should be provided, or a timescale for the same be given, a fuller explanation of the decision may be given, points of dispute should be clarified, and confirmation provided as to the stance taken on an application for interim relief (para 16): information sought by the Applicant should be given, or an explanation for a failure so to do.

Some other points to note about Pre Action Protocol (“PAP”) letters:

- It is very desirable to keep these letters reasonably brief and to the point. If citing legal authority and Home Office policies, try and restrict citations to the minimum text necessary, and ensure that you closely apply this to the facts of the case
- It is probably better to bring a claim in time than it is to lodge late merely in order to comply with the Protocol (as late bringing of a claim could lead to its dismissal, whereas failure to comply with the Protocol is not necessarily fatal to its progress). Obviously it is best to meet both targets
- It is a very good idea to bring counsel on board at an early stage, because if the Pre Action Protocol letter ends up making different arguments to those subsequently relied upon in the judicial review grounds, even a successful Applicant may not recover their costs
- Sometimes you may have seen counsel’s draft grounds before sending a Pre Action Protocol letter. If so, beware of simply copying them into a Pre Action Protocol letter format, as you will effectively be inviting the other side to simply state that they have considered all these issues, which may damage the ability to pursue those points on a judicial review. Ideally the PAP letter should be written in plain English without recourse to legal jargon.

- It is now possible to issue the Pre Action Protocol letter by email: to UKVIPAP@homeoffice.gsi.gov.uk



Example

Winston is a citizen of Jamaica who is present in the UK as an illegal entry. He has received an adverse decision on a human rights application which has been certified as clearly unfounded. If he has received no notice of an intention to remove him, he should give the Home Office at least 14 days to reply. However if he has received a notice giving him notice that he will soon be entering a removal window within which he can be removed without further ado, then he should give a response deadline that allows him to lodge his judicial review before the removal window begins.

Permission applications

The first step in judicial review proceedings, once the claim is lodged, is the permission application

- Permission applications are to be made in writing (UTR28(1))
- Applications must identify the various items of information set out in Rule 28(4), including the outcome sought on the application (ie reconsideration, right of appeal) (UTR28(4))
- Any interested party must be identified (eg the Secretary of State on a judicial review of the FTIAC, sometimes the Secretary of State as well as an Entry Clearance Officer where the challenge is brought to the permission refusal) (UTR28(4)(a))
- The impugned decision must always be clearly identified and provided (UTR28(6))
- It is for the Applicant to file the judicial review application and supporting documents, and, these having been stamped and issued by the Upper Tribunal, to serve them on the Respondent(s) (UTR28A(2))
- A request must be made for an application to be considered if it is brought late (UTR28(7))
- The fee must be paid - in urgent cases where an injunction against removal is being sought so urgently that it precedes the lodging of the application, an undertaking to pay may be made in lieu of the fee (UTR28A(1))
- The UT has the power to award costs and its practice is to do so against the losing party
- The grounds may be varied without permission prior to the AofS being lodged: [Spahiu](#) (IJR) [2016] UKUT 230 (IAC): such applications must be made formally, paying the appropriate fee, on notice to the other side

Completing the application form and lodging the claim

The [T480 Claim Form](#) requires a

- Detailed Statement of Grounds (at Section 5);
- Statement of Facts (at Section 8).

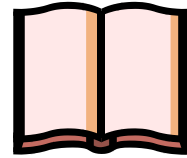
Many advocates will deal with both in a single document, which can be incorporated by a reference to it in the claim form.

The Claim Form should be verified by a statement of truth (UT JRPD para 4.2). This is particularly important where assertions of fact are being made in an accompanying statement. It may well be useful for the solicitor to draw the facts and history of the case together in a case where it is not realistic to do so in the central grounds for judicial review. Remember, just as in an appeal, there is a difference between evidence and submissions: there is much to be said for reserving the Statement of Facts as an opportunity to efficiently summarise the evidence set out elsewhere rather than the exclusive source of evidence in the case.

Written evidence in support of the application must be provided (UT JRPD para 4.1). Only relevant documents need to be supplied. So historic applications do not need to be supplied where they are no longer relevant, and any application which was refused and any appeal later determined judicially will presumably be sufficiently summarised by the record of its final determination.

- Two copies of the bundle are required (UT JRPD para 5.1)
- The essential reading list (UT JRPD para 4.1) should be identified and should be minimal, equating to the documents that the advocate would actually take the judge to in court
- In any case where the facts do not speak for themselves, a witness statement from the Applicant or their solicitor is likely to be important, see eg [Mahmood](#) IJR [2014] UKUT 439 (IAC):

I consider the present case to be a clear illustration of one in which the Upper Tribunal should have received a comprehensive witness statement from the Applicant at the permission or interim relief stage or, if genuinely not feasible, as soon thereafter as possible. I would have expected the Applicant, at the permission or interim relief stage, to have addressed comprehensively in a witness statement two key factual issues which the papers lodged do not address. The first relates to the taking of the English language test. The second concerns the important documents allegedly in his custody which, it was said, could not be included with the interim relief/ permission papers as the Applicant, being in detention, could not access them. In the abstract, there was much to be said on both of these issues and the only mechanism for doing so was a thorough witness statement.



Example

Rizwan is present as a Tier 4 student. On a return to the UK from a trip to his home country he discovers that his leave was curtailed some time earlier following the revocation of his Sponsor's licence. He brings judicial review proceedings to prevent his removal home. He argues that he had not received notice of the curtailment or of the revocation of the licence.

This is a case where a witness statement from Rizwan is likely to be very important. The Home Office are likely to set out, in their immigration factual summary, or later in their summary grounds of defence, that their records indicate that he was provided with this information by a letter delivered to his home address. So if a case is to be put to the contrary, backed by evidence, it needs to be made via a witness statement now.

If Rizwan is detained, then practically putting together such a statement may be difficult: however it would be possible for his advisor to draft the statement, based on the information provided by Rizwan, in the format "I am told that ..."

There are other cases where the papers pretty well speak for themselves: eg in a judicial review of a refusal to recognise a fresh claim, it is probable that the further representations backed by evidence, plus the original outcome of the case on application/appeal, and the current Home Office refusal letter, will tell the whole story, without any need for further information.

The application may be lodged at Field House, London, or in Birmingham, Civil Justice Centre, Priory Courts, 5th Floor, 33 Bull Street, Birmingham, B4 6DS; Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET; Leeds Combined Court, 1 Oxford Row, Leeds, LS1 3BG; Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M60 9DJ (UT JRPS para 2.1).

The UT may consider a judicial review application notwithstanding that the Applicant is presently residing in Scotland, though it has a discretion either way: [Kashif](#) IJR [2016] UKUT 375 (IAC).

Reviewing the judicial review grounds

Those instructing counsel to prepare JR grounds should always allow time to review those carefully to check them for factual accuracy and make any appropriate input into them. It would be surprising if there is not some correction or addition to be made, particularly in urgent cases where counsel may not have spent much time with the papers.

The Acknowledgment of Service

The Acknowledgment of Service (AoS) gives the Respondent an opportunity to indicate that they are either

- Defending the proceedings, or
- Willing to accept the errors alleged, in whole or part (with the implication that a reconsideration of the decision will follow).

The AoS consists of a Form, together with Summary Grounds of Defence. If there is a full or partial settlement of the claim being offered, then there will be a draft Consent Order

provided. In defended claims, there will be an application for costs against the Applicant. The figures claimed seem to vary greatly: at one time they were usually within a range of around £480-£720, but much larger sums are occasionally claimed.

The AofS should be supplied within 21 days of notification that the judicial review has been lodged.

Delay in Filing an Acknowledgment of Service

At times it seems as if the Secretary of State, who doubtless receives a great deal of judicial review applications against her officials' decisions, routinely requests more time than is permitted for providing the AofS. Things have got much better since the following decisions were made, but they may nevertheless be relevant to how cases are processed and so it is worth drawing attention to them.

Hickinbottom J in the Administrative Court considered this institutional tendency in [Singh](#) [2013] EWHC 2873 (Admin). He noted that

- It is crucial that the Court is put in a properly informed position to decide the issue of arguability: thus these documents served a vital purpose
- Only a few cases could justify an extension of time beyond 21 days for lodging, and there should be very few cases indeed which required more than six weeks in which to lodge a summary response - there needed to be some very compelling reason demonstrated for the requirement for additional time
- The Secretary of State simply cannot pray in aid a lack of resources or foresight to justify an extension of time that, even in standard cases, more than doubles the time allowed by the rules
- Given that (at that time) the Secretary of State had identified positive measures that were being taken to improve response times, these should be assessed, and so for a while, unless a claimant identified some good reason why such an extension would be particularly prejudicial, the first application in any claim for an extension of time of up to three weeks need not be supported by any detailed evidence or grounds, and such an application should be treated generously by the court
- Subsequent applications for more time, though, had to be supported by a full explanation for the delay in compliance and a firm promise to the court as to when the acknowledgement of service and summary grounds will be filed
- Repeat applications with "barely aspirational" dates are to be deprecated
- On second and subsequent applications, the court should scrutinise the reasons for the delay rigorously; and the Secretary of State should be prepared for such applications to fail unless she has produced compelling reasons specific to the case as to why further time is needed.

With the transfer of most immigration judicial reviews to the UT's jurisdiction, the issue soon required treatment within the UT. In the light of ongoing failures to meet deadlines, the UT ruled in [Kumar](#) (IJR) [2014] UKUT 104 (IAC) that:

- The UT will hold off making a decision in judicial reviews for 6 weeks after they are lodged, unless

- it is appropriate in the light of an application for urgent consideration filed by the applicant (on Form T483, complying with the Practice Directions and paying the necessary fee);
 - notice in writing has otherwise been given by the applicant, copied to the Secretary of State, which states the need for urgency and the proposed timescale for considering the application
 - in response to a request by the Secretary of State for expedition, pursuant to an arrangement between her and the UT President (see further UT JRPS para 2.2)
- Given this starting point of waiting 42 days to determine a claim, the UT will not require the Secretary of State to apply for an extension of the 21 day time limit in rule 29(1), unless she considers she is unable to file an AoS and summary grounds before the expiry of the longer six-week period
 - In a case where the Secretary of State cannot meet this longer deadline, she should make an application for more time, providing *compelling reasons* specific to the case as to why further time is needed, together with a *firm promise* as to when the AoS and summary grounds will arrive – the view of the Applicant should have been sought before the application is made, and any response from them should also be provided with the extension application
 - No application for an extension should be made which cannot meet these standards
 - In every case, not later than the end of the six week period, the Secretary of State will be expected to file (on the UT) and serve (on the Applicant) either
 - a copy of the written response of the Secretary of State to the applicant's pre-action protocol letter or
 - written confirmation that no such written response was sent.

Providing the response to the PAP letter does not absolve the Secretary of State from filing an AoS and summary grounds, where she wishes to take part in the proceedings

- The UT will determine the permission application on the papers at any time from the expiry of the six week period, regardless of whether an AofS has been filed, unless there are particular reasons (eg a need for input from the Secretary of State regarding potentially significant factual matters) why an AofS is considered essential
- In general, costs are likely to be awarded against the Secretary of State, where no AofS was provided at the paper decision stage, and an unsuccessful oral renewal hearing ensues, if it is likely that the application would have been certified as Totally Without Merit, had an AofS been supplied (a TWM decision would have prevented an oral renewal)
- Where permission is granted without the benefit of an AofS, the Secretary of State will ordinarily be liable to pay the applicant's costs, up to the point when the Secretary of State's detailed grounds are filed, whether the judicial review application ultimately wins or loses

Remember, a permission application may be determined at any time once the AofS has been received by the UT (or if 42 days have passed from the claim being lodged). Accordingly it is important to advise a client of the impact of the AofS on their claim, and take their instructions on what to do next.

Developments brought about by further decisions by the Home Office, which are often communicated via the AofS, will have to be given careful consideration. We address them in more detail in the section *Fresh decisions and amending grounds*.

An academic challenge is one which has been left behind by events, eg where an offer is made to remake a decision where the claim sought no more than a reconsideration of said decision. The UT will not want to hear an academic challenge except in very rare circumstances, for example where there is an important point of principle involved which it is in the public interest to resolve (in which case even an attempt to withdraw a decision by the Respondent will not necessarily prevent the UT from going on to determine the substance of the judicial review application: [Bhudia](#) (IJR) [2016] UKUT 25 (IAC)).

The AofS may include factual assertions or information that require the merits of the claim to be revisited, or it may provide legal argument which requires a re-assessment of the grounds so far lodged.

The UTRs do not provide for any reply to the AofS. Nevertheless, short written submissions can always be made if this is considered necessary. Given that an informal “reply” of this nature is not part of the specified procedure, anything supplied should be very concise, and reserved for those cases where the AofS genuinely makes arguments or alleges facts that are unexpected: there is no need to respond to summary grounds of defence which themselves simply answer the pleaded grounds. Hard-pressed judges faced with piles of permission applications will not thank the parties for unnecessarily piling up the paperwork they have to read.

The permission decision

The permission decision will give the UT’s decision on the application for judicial review.

- Any application for an extension of time for lodging the claim will now be considered (UT JRPS para 2.3)
- The decision may be adjourned into open court for oral argument (UT JRPS para 2.6). It is possible that permission will only be granted on limited grounds (UT JRPS para 2.6)
- A written decision will be sent to the parties including any interested party and this will indicate whether the grant of permission is limited in any way (UTR30(1))
- There is a “totally without merit” (TWM) procedure that reflects that introduced under the CPR (UTR30(4A); (UT JRPD para 13.1))
 - If the case is considered to be **totally without merit**, then the judge can certify it as such, in which case there can be no renewal to an oral hearing
 - Thus the only remedy is an appeal to the Court of Appeal, the time limit being seven days from the date on which a party was sent the decision (UTR44(4C))

- In Wasif [2016] EWCA Civ 82 the Court of Appeal looked at TWMs, ruling that such certification should of course not be automatic when refusing permission: the test was essentially whether the judge could be confident after careful consideration that the case **truly is bound to fail** such that an oral hearing was pointless
 - Wasif also explained that TWMs should not be issued where a claim was convoluted and unclear (particularly where the Applicant was not represented) and where there was any suspicion that improved argument might reveal a better case
 - Furthermore Wasif ruled that TWMs should not be made based on points raised in the Acknowledgment of Service that had not been anticipated in the Applicant's grounds
- The Judge if refusing permission may, if unimpressed by the claim but not minded to make a “totally without merit” order, indicate that renewal of the application **should not represent a bar to removal absent further order** (effectively requiring that an injunction is expressly obtained in the event removal directions are set pending the ensuing oral hearing) (UT JRPS para 2.7)

Renewing to an oral hearing if permission is refused on the papers

There is a right to oral renewal (UTR30(4); (UT JRPS para 2.9)). Normally a renewal notice must be filed within 9 days of being sent the decision (UTR30(5)) though this routinely abridged to 7 days (UT JRPS para 2.7).

The renewal notice must explain (UT JRPS para 2.10):-

- The grounds and basis upon which permission is being renewed;
- The response the applicant makes to any reasons given by the judge in refusing permission.

Summary grounds for renewal should be supplied alongside the form requesting an oral hearing: presuming there are already fully pleaded grounds lodged with the original JR application, these can now be very concise, summarising the arguments that are maintained in the light of the AofS and permission refusal.

Unless the original grounds foresaw every aspect of the case, a skeleton argument should be supplied for the renewal hearing. It need not repeat the facts and other material already provided with the grounds, all of which tends to disrupt the flow of argument. Ideally it would be a very concise and closely argued statement of the case that does not unnecessarily repeat what has previously been said.

It may be necessary to obtain counsel's opinion on the merits of renewing, both in order to update the client on the ongoing merits of the case and to consider funding arrangements going forwards. It will be necessary to consider the reasons for the paper permission refusal, especially from the perspective of those instructing counsel for the Applicant, if these raise questions of conduct or evidence as opposed to pure issues of law.

Renewal hearings (UT JRPS para 2.11-2.13)

- Will be listed promptly

- May include arrangements for video hearings, following a reasoned application
- Will receive a default 45 minute time slot absent reasoned argument to the contrary

If permission is refused, the judge will give an oral summary judgment on the spot, consider any application for permission to appeal (or adjourn it to a further hearing) and consider any application for a stay on removal, arrange for written reasons to follow, and consider costs (UT JRPS para 2.14).

If permission is granted, a judgment giving the reasons for this will be given orally, with a written version to follow. Sometimes the judge may indicate that some refinement of the grounds is appropriate: where this happens at the oral renewal hearing it is possible for the formalities of lodging an fee-paid application notice to be bypassed: [Spahiu](#) (IJR) [2016] UKUT 230 (IAC).

The substantive hearing

Once permission for the judicial review is granted, the application will be set down for a full hearing.

If any further grounds are to be relied upon (including renewal of grounds on which permission has been refused, and further grounds that are driven because of subsequent decision making or other developments) then permission is required (UTR32) – and they must be provided not later than 7 days before the hearing (UT JRPD para 6.1).

The parties may submit evidence at the substantive hearing (however given that judicial review is a remedy limited to reviewing the material that was before the original decision maker, this cannot be taken to be a green light to put in fresh evidence) and make oral representations, or written representations if there is to be no oral hearing (UTR33).

- Respondents must, following the grant of permission, supply Detailed Grounds of Defence; and Interested Parties have liberty to put in “Responses” - within 35 days of the grant of permission (UTR31(1))
- Skeleton arguments must be provided by the Applicant (UT JRPD para 7.1-7.2) 14 days before the hearing and by the Respondent 7 days before. Amongst other things they must include a time estimate, to which careful and realistic consideration should be given. Relevant considerations to address in the written argument will include the reasons for the permission grant, any post-decision developments in the facts or law, and refinement of the legal argument in the light of the detailed grounds of defence
- A paginated and indexed bundle must be served on the Tribunal and other parties at that time, including those documents relied upon by both sides – accordingly it will be necessary to agree the bundle contents with the other side

A hearing must be held when giving a decision disposing of judicial review proceedings: UTR34(3). This means that where a decision is not given at the time of the hearing of the substantive application, a further hearing must be convened to hand down (possibly to read out) the judgment, and to address issues such as costs and permission to appeal to the Court of Appeal. The only exception is where the UT considers itself able to endorse a consent order withdrawing or disposing of the matter (UTR40(1B)).



Casework Tip

The standard *case management directions* made with the grant of permission are as follows.

Action	Date	Relevant considerations
Respondent and participating interested parties to file detailed grounds of defence	35 days from permission decision	Make sure you engage with the detailed grounds: are points raised that are different to those originally made in the summary grounds? Ensure your advocate see these grounds in good time
Reply from Applicant with any further evidence if appropriate application made	21 days from detailed grounds being provided	It is probably only necessary to reply to the detailed grounds of defence where some new issue is raised. If the Home Office makes factual assertions, it may be necessary to provide further evidence in order to establish an accurate picture
Applicant to file comprehensive hearing bundle , indexed and paginated: this should include <ul style="list-style-type: none"> - Skeleton argument: if relying on one drafted already, it must nevertheless be re-served - Authorities for and against the Applicant's case: case law, statutory and immigration rule provisions, policy guidance 	21 days before the hearing	<p>Note that para 7 permits an earlier version of the bundle, in practice presumably the claim bundle, to be supplied. So it appears that a new composite bundle is required – it may be possible to rely on the claim bundle though you would need to agree this with the Upper Tribunal administration.</p> <p>In any event, the advocates and judge must be working from precisely the same pagination. Essentially you need the</p> <ul style="list-style-type: none"> (a) Claim bundle (b) Any and all Orders made in the course of the proceedings including permission decisions (c) Any further decision letters or relevant correspondence relevant to the proceedings that is not written on a confidential basis (d) The Respondent's detailed grounds of defence
Respondent to provide skeleton argument	7 days before the hearing	Make sure advocate sees this in good time, in case further research is required

Any interlocutory order	21 days before the hearing	Eg requests for relief

General procedural issues

Complying with the Rules – “Hamid” hearings

The Rules and directions made under them must be complied with. In [SN](#) IJR [2015] UKUT 227(IAC) the UT looks at the notorious case of [Mitchell](#) (where a failure to agree a costs schedule within the directed time limit was heavily penalised, on the basis that lawyers should all by now be aware that the CPR had to be taken seriously to avoid judicial time being wasted). The UT summarises

the Mitchell principles, which are fourfold:

(i) If the failure to comply with the relevant rule, practice direction or court order can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly.

(ii) If the failure is not trivial, the burden is on the defaulting party to persuade the Court to grant relief.

(iii) The reasons why the default occurred should be considered. Where good reason is demonstrated, the prospects of the court granting relief will be favourable. Merely overlooking a deadline is unlikely to be considered a good reason.

(iv) While all the circumstances of the case must be considered, particular weight is to be given to the factors listed in rule 3.9 [the interests of the administration and justice, promptness of application, failure being accidental and its explanation, general compliance with the Rules and directions in the proceedings, and the effect of granting/refusing relief]

Notably, the Court of Appeal emphasised that greater weight should be given to the twin considerations that it is necessary for litigation to be conducted efficiently and at appropriate cost and for compliance with the rules to be enforced. While a debilitating accident or illness might provide a good reason for a default, excessive pressure of work, much less mere oversight, would not.

The UT goes on to say that lack of representation is not necessarily a good reason for failing to comply with the appropriate procedures, and that the same standards must apply to government lawyers and private practitioners. In cases where directions are not complied with:

- The UT will consider its power to strike out proceedings under UTR8 where a party has failed to co-operate with directions such that the proceedings cannot be dealt with fairly and justly
- Having regard to the need for a proportionate response: so an order for costs against a misbehaving Applicant may be considered more appropriate than striking out a claim (or allowing it outright where the Defendant defaults).

In [SN](#) an earlier hearing had been adjourned because of a series of failings ranging from ongoing failure to provide material that appeared to have been available for some time to the provision of unsigned reports and statements from experts and solicitors. At a later

hearing the problems identified were still not rectified, and it was in that context that the UT decided to make an example of the representatives.

In [Hamid](#) [2012] EWHC 3070 (Admin) the Court sets out extracts from a Court of Appeal judgment, *Madan* [2007] 1 WLR 2891, where Buxton LJ identified a number of principles that must be taken into account by legal advisers on attempts to obtain judicial review of removal decisions:

i) CPR PD 54.18 makes provision for the hearing of judicial review applications in the Administrative Court against removal from the jurisdiction. Such applications must be made promptly on the intimation of a deportation decision, and not await the actual fixing of removal arrangements.

ii) The detailed statement required by PD 18.2(c) must include a statement of all previous applications made in respect of the applicant's immigration status, and indicate how the present state of the case differs from previous applications.

iii) Counsel or solicitors attending ex parte before the judge in the Administrative Court are under professional obligations

(a) to draw the judge's attention to any matter adverse to their clients' case, including in particular any previous adverse decisions; and

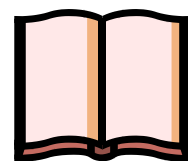
(b) to take a full note of the judge's judgment or reasons, which should then be submitted to the judge for approval.

...

viii) Counsel will remember that where the application is made ex parte there is a particular obligation to draw the court's attention to relevant authority, including in particular Country Guidance cases."

The President of the Queens Bench Division then explains, in the context of a failure to adequately engage with the urgent procedures forms and procedures:

10. These late, meritless applications by people who face removal or deportation are an intolerable waste of public money, a great strain on the resources of this court and an abuse of a service this court offers. The court therefore intends to take the most vigorous action against any legal representatives who fail to comply with its rules. If people persist in failing to follow the procedural requirements, they must realise that this court will not hesitate to refer those concerned to the Solicitors Regulation Authority.



Example

These were the facts in *Okondu*. The Applicant had made representations to the Home Office based on their ill-health which they argued meant that return to their country of origin would amount to inhuman and degrading treatment.

This was rejected by the Home Office. A Pre Action Protocol letter made very bold assertions as to the severity of the medical conditions which went rather beyond what the actual medical evidence in support actually stated. The judicial review grounds relied on these statements.

The summary grounds of defence from the Respondent sought wasted costs because the judicial review claim was simply exaggerated.

The Applicant at this point sought to withdraw their judicial review claim. However in UT proceedings a party needs permission to withdraw their application. The UT declined to consent to such a withdrawal, and instead convened a hearing at which they made stringent criticisms of the representatives.

When are wasted costs likely to be ordered?

You can read the guidance from the UT in [Okondu](#) IJR [2014] UKUT 377 (IAC) at paras (1)-(4) of the Headnote. Essentially the UT decides that

- Wasted costs are those incurred by a party due to improper, unreasonable or negligent acts or omissions of the other side's lawyers and their employees, which it would be considered unreasonable to expect them to pay
- They can be ordered regardless of which side ultimately wins the case
- The responsibility on Applicants was to ensure that the UT was provided with a fair and comprehensive account of all relevant facts, whether those facts are for or against the legal representative's client: allowance might be made for time pressure where an application was lodged urgently, but in such a case the representative was under a duty to complete the fact finding and verification exercise, and then seek to amend the application accordingly to update the UT of developments
- Where necessary a "Hamid" hearing might be convened for the failings of representatives to be examined in detail
- Whilst applicants with weak cases are entitled to seek to advance their case and have it adjudicated upon, as part of the right of access to a court, there was a real difference between
 - advancing a case that is held to be unarguable in a fair, professional and proper manner, and
 - advancing unarguable cases in a professionally improper manner

Imminent Removal Cases

It is self-evident that the prospect of imminent removal does not give rise to any application for judicial review in its own right. Hopefully a person's applications to remain in the UK succeed. But if they do not, then they should expect to leave the country at the end of the consideration of their applications to remain here.

So in the vast majority of cases, there will only be a viable challenge to removal where

- There are strong representations on human rights, asylum or some other relevant grounds that are awaiting decision or

- For some reason, such representations have not yet been made at the time removal is initiated, but are in the process of being prepared

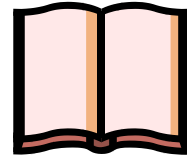
The bare fact that removal is now imminent is a major impediment to the success of such applications: if a challenge has been left late, many judges will view it as abusive. Where there have been recent unsuccessful appeal proceedings, a case will face a very serious additional hurdle, in that judges may take the view that there cannot be any further circumstances that have not so far been considered. Indeed, such a case may well be seen by judges as a disguised *Cart* challenge (ie an attempt to circumvent the high threshold required to bring a judicial review against the refusal of permission to appeal to the UT that terminated the last set of proceedings).

It will be necessary to complete Form [T483](#) where removal is imminent. The form requires that

- Reasons for urgency be stated including a detailed explanation for why immediate consideration is required, explaining any delay and efforts made to put the Respondent on notice of the planned challenge
- A timetable be proposed for expediting consideration: having regard to interim relief, consideration of the permission application found in the T480 form, the provision of an AofS, and for the substantive hearing if permission is granted
- The required interim relief must be explained: here it will be urgent relief by way of suspension of removal directions
- A draft order must be supplied

The UT JRPD at Part 4 expressly addresses urgent removals and sets out that (11.1 onwards)

- The fact that Part 4 applies must be specified in the application
- The removal directions and any factual summary provided by the Respondent must be provided with the application
- Detailed grounds must be supplied with the application, or a reason for their absence
- If these steps cannot be complied with, but reasons are given, then the matter will be put before a judge as soon as practicable (UT JRPD para 12.1)
- The UT will only consider urgent applications where the judicial review claim has been issued. So where the application has not been issued by the end of the working day (as defined by the Tribunal opening hours), the application must go to the Administrative Court (UT JRPS para 3.1)
- An application will be considered by the UT in the working day if lodged between 9:30am and 4:15pm (UT JRPS para 3.3). It will then be considered on the papers unless adjourned to an oral hearing with both sides present (UT JRPS para 3.5). The Judge may telephone the Respondent for further information, keeping a note of whatever information is given (UT JRPS para 3.7)
- An oral renewal of an urgent application may be sought and will be listed as soon as practicable (UT JRPS para 3.10)



Example

Ken is a citizen of Uganda. He has recently been detained having been encountered as an overstayer by an immigration enforcement raid, at which point the Home Office issued removal directions against him. He wishes to lodge a judicial review to stop his removal.

If Ken has a powerful human rights claim to make based on having very strong ties in the UK (which is, of course, not suggested by the facts so far available) then he should make the appropriate application: as he is detained he need not use the fee paid route. The Home Office would have to consider the claim and then decide, if refusing it, whether or not to certify it as “clearly unfounded”. If they did so, that certificate would be challengeable if they overlooked material evidence.

However, Ken needs to obtain an injunction against his removal. It is unlikely a judge will be sympathetic to his circumstances unless there is some very strong explanation for only putting the claim now.

Maria is a citizen of Angola who is an illegal entrant to the UK. She is detained having been working illegally in a beauty salon and removal directions have been set for her return to her country of origin in two days time. Upon taking instructions from her you think that she may have been trafficked to this country and was forced to work in the salon by gangmasters who controlled her movements and kept her passport.

Given her circumstances, Maria has a very strong argument that she has not had an opportunity to make an application to regularise her status in the UK.

Home Office Enforcement Guidance

The Home Office have a lengthy policy dealing with the notice to be given persons facing removal and the Secretary of State’s likely reaction to various kinds of claim: [Chapter 60](#) of the Enforcement Instructions and Guidance on Judicial reviews and injunctions. It is complicated and there is no substitute for reading it against the facts of one’s own case every time that an imminent removal creates a need for urgency: not least because by the Home Office to follow its precise terms may itself require removal directions to be cancelled.

Chapter 60 addresses *Notice of removal*. What follows is an outline of the arrangements, but this can only be a summary:

- There is a notice period which begins when the notice is given in person, or if sent by post, on its receipt which is deemed two working days after posting (unless otherwise shown) (2.1)
 - 7 calendar days where the person is not detained (unless they have been refused entry at the port: 3.1.1; or are a family under the *Ensured Return* process 3.1.2; or are non-suspensive appeal cases where a judicial review has already failed or where a prior removal effort has miscarried 3.1.3)
 - otherwise 72 hours including at least two working days unless they are a third country case (five working days) (2.4)

- Once the notice period ends, a removal window begins: normally for three months, within which no further notice of removability needs to be given, a period which may be extended for a further 28 days during its currency (2.1)
- These provisions do not apply
 - to cases where a family is facing removal together, or
 - where there is a pending protection or human rights claim or appeal pending, or
 - where the individual falls within the *Adults at risk* detention guidance
 - nor do they apply where the *Limited notice of removal* proviso applies, where there has been past disruption/non-compliance with a removal attempt

Once a prospective judicial review application is notified or lodged, the Chapter 60 Guidance sets out:

- Removal will be deferred upon the application being properly lodged, but not automatically if the person is being removed by a charter flight or other special arrangements, or where the individual is within a removal window, or where there has been an appeal or judicial review within the previous six months (4.1) (on the same issues/evidence subject to evaluating the merits of the judicial review grounds as unarguable/very weak, or whether a fresh claim has been made in those grounds: 6.3.1)
- Removal will be deferred if the Practice Direction on urgent removal has not been complied with and a statement of reasons for so doing has been provided, and the matter is pending before a judge who has not yet considered it, or a judge looks at the statement of reasons and considers it well founded (4.1)
- Out-of-hours claims where the Home Office is provided with the detailed grounds and subject to various exceptions: the Applicant must file the claim the next working day (4.1)

In certain cases, removal will proceed notwithstanding the lodging of a judicial review claim:

- Usually, where removal is by charter flight, in which case five days notice will be given of the removal directions in order to avoid last minute challenges

Chapter 60 (at section 18) explains the contents of the Immigration Factual Summary and the information that it must provide (including various aspects of the removee's immigration history provided within it.

Interim Relief

Interim relief is a form of remedy which assists an Applicant before their substantive judicial review is heard. The most obvious form is a suspension of removal directions, which may be essential to render the proceedings effective. But there are other types too: for example it may be important to ameliorate some side effect of the Home Office decision which is being challenged and which would otherwise cause real prejudice to the Applicant pending their full hearing: eg a decision to curtail a family's leave may leave the children unable to continue their studies.

Sometimes the UT will be very creative regarding interim relief: see eg [SA & AA](#) IJR [2016] UKUT 507 (IAC), the case of the Calais children, where an Order was given to bring very vulnerable children to the UK before the substance of their judicial review was finally determined.

The key principles are set out in the landmark case of [American Cyanamid Co v Ethicon Ltd](#) [1975] AC 396. Essentially they are that:

- (1) There is a serious issue to be tried;
- (2) Where the balance of convenience between the parties then lies: ie who would lose out the most if the court enforces, or suspends the effect, of the governmental decision

When considering whether there is a **serious issue to be tried**, the court will not want to investigate the evidence in any detail. It will just look at how the case appears on the papers before it, without starting to try the issues for itself.

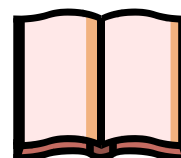
When considering **the balance of convenience**, the court will consider whether the Applicant could be adequately compensated, without interim relief now, if their action succeeds in the future. Of course by the time they win their case in the future, presuming the interim relief was not granted, they would have suffered a lengthy period of being subjected to an unlawful decision.

In civil proceedings generally, the judge will consider whether an applicant can be adequately compensated by the payment of damages (and the civil cases go on to consider the same question of whether the applicant could compensate the defendant by undertaking to pay damages if the interim relief gives them a temporary benefit to which the final trial finds they were never entitled). Of course, this will often not be very relevant in immigration cases: outside of unlawful detention, certain kinds of EU law matters, and claims for malfeasance in public office, damages are simply not available for wrongful administrative decisions.

So in immigration cases the government interest is more likely to be the need to enforce immigration control on the presumption that decisions that its officials are empowered to make are generally lawful.

Of course, those subject to immigration control also have legitimate interests: to work and study, and they may have children whose education will be interrupted if the family faces a lengthy spell without leave (or of course the family unit may even have to leave the country pending the final decision on the judicial review application). The claim of a migrant to interim relief is likely to be greater when they have had a hostile decision taken against them, such as the cancellation or curtailment of their leave, than when they have merely had an application refused.

Generally speaking, the closer the remedy sought by way of interim relief is to the remedy sought on the judicial review overall, the more difficult it will be to sustain an argument for it.



Example

Plum College is an educational establishment which has a Sponsor licence allowing it to offer places to migrant students with appropriate visas. The Home Office conducts a site visit to its premises and conclude that the college is not following the published guidance. Having considered the representations made regarding their preliminary view, the Home Office notifies the college that they will be suspending its licence.

Presuming Plum College has viable grounds for judicial review against the substance of the decision, eg because relevant evidence was overlooked showing that in fact its procedures were very solid and did indeed comply with the Sponsor Guidance, then it could apply for interim relief.

The college would argue that its grounds were sufficiently strong as to represent a *triable issue*; and then that the *balance of convenience* was in favour of putting a hold on the suspension of the licence, because the college was completely dependent on migrant students in order to stay in business.

The Home Office would probably reply that even if the judicial review grounds were arguable, the importance of maintaining the integrity of the system of sponsoring colleges required their decision to be implemented.

And the judge would have to weigh up the competing arguments.

The various members of the Aboaba family, father, mother and two children, are citizens of Nigeria present as a Tier 2 worker and his dependents. Their leave is curtailed because information comes to light which, to the mind of the Home Office, indicates that false representations were made in the application leading to their present visas. One child is in sixth form college and another has just started university. The former is sitting important exams in two months time. However the Home Office letter says that the children must stop attending college or university, as they, along with the rest of the family, have entered the hostile environment designed to make life unpleasant for people who have received adverse decisions.

The family comes to see you in the office, with strong evidence that the alleged false representations in fact arise out of a misunderstanding of a document they had supplied.

The Aboaba family appear to have a prima facie case for judicial review of the curtailment decisions. They may also have an arguable case for interim relief, given that irreversible harm may be done to the childrens' studies if the Home Office decisions are implemented.

Interim Relief: Injunctions

It is self-evident that in removal cases where fundamental rights are involved, it will be essential to prevent removal to avoid a catastrophic change in the status quo that will most likely render the migrant's challenge sterile by returning them abroad. Hence these may well be a frequent aspect of the immigration lawyer's work. See Muboyayi [1992] QB 244:

The court should not permit a would-be immigrant to be compulsorily removed from the jurisdiction if he has sought the protection and assistance of the court and the result would be to render any subsequent order quashing [the removal] less effective.

Sometimes the UT will feel able to determine the permission application (presumably adversely to the Applicant) at the same time as refusing interim relief: UT JRPS para 2.2.

Just because a claim is important to the individual does not mean that it will be favourably received. Judges are likely to be especially cynical where a claim is brought late and immediately before removal, see eg MD (Afghanistan) [2012] EWCA Civ 194 §13:

Clearly, the Secretary of State is entitled to scrutinise last-minute submissions of what is contended to amount to a fresh claim critically and with a high degree of scepticism, at least where there is no good reason put forward for the delay in their

submission, and the same must apply to the courts if judicial review of her decision is sought. Particular care is required, and strong scepticism may well be appropriate, if relevant documents, such as a Tribunal determination, have not been made available.

Refusal of Interim Relief: Remedy

There was at one time confusion as to the appropriate remedy against the refusal of interim relief: was the answer to (a) renew the application for judicial review from a paper application to an oral one; (b) apply for permission to appeal to the Court of Appeal.

This was addressed in [MD \(Afghanistan\)](#) [2012] EWCA Civ 194. The Court of Appeal found that it would have jurisdiction to consider an application for permission to appeal the refusal of interim relief made on the papers, but that this should be exercised only very exceptionally:

- The general rule in civil proceedings was that a person refused an order on the papers could renew the application to an oral hearing at the same judicial level
- In a case of extreme urgency, where removal might take place before an oral hearing might take place, out-of-hours judges were of course available to hear an emergency application: however it would be unsurprising if a judge in such a case, who might well be unable to read the relevant papers for themselves, declined to depart from the decision of a judge who had had time to consider everything in the normal working day
- If an appeal was brought to the Court of Appeal against a decision made on the papers where no oral renewal had been made, then it could be expected to be refused simply for failing to follow the proper procedure.

Fresh Decisions and Amending Grounds

Where the Secretary of State makes a fresh decision in response to an application for judicial review in the course of the proceedings, the question arises as to what to do next. The options are:

- Varying the original judicial review application to take on this new decision or
- Withdrawing the present judicial review application and lodging a new one against the new decision.

The starting point is that judicial review aims to review decision making where all the relevant evidence has been before the primary decision maker. The UT will be very unreceptive to taking account of post-decision evidence. The phenomenon of “rolling judicial review”, whereby consecutive sets of representations, new decisions, and amended grounds, enter the proceedings in a confusing way, is strongly discouraged: [HN](#) IJR [2015] UKUT 437 (IAC). In general, the closer the circumstances and reasoning of the new decision to the old one, the greater is the argument for maintaining the present claim rather than beginning a new one.

In [Hussain](#) [2016] EWCA Civ 1111 the Court of Appeal looked at the situation where a further refusal letter was provided with the AofS addressing further evidence that had been

filed with the judicial review claim. Their view was that in these cases “*It will in general be convenient to substitute the second decision for the first decision as being the decision challenged in the proceedings*”. Relevant considerations in determining whether this generally convenient approach should be taken would be:

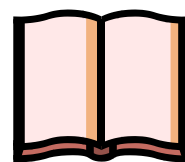
- Whether sufficient notice of amended grounds had been provided where a new AofS might be required given the issues now raised
- Whether new facts are being alleged in the amended grounds such that a statement of truth is required to accompany them (this consideration will be more relevant in a case where the underlying facts are disputed)
- Whether the amended grounds amount to an attempt to circumvent time limits for bringing a judicial review challenge

In [Caroopen & Myrie](#) [2016] EWCA Civ 1307 the Court of Appeal looked at the issue of supplementary rather than replacement letters, noting that they arose in three scenarios:

- (1) Where they amplified the reasoning in the original decision: in such a case, any attempt by a public authority to provide justification for an earlier decision after the event should be treated with caution
- (2) Where they aimed to show that, regardless of any defect in an earlier decision, granting the judicial review application would be pointless because the decision with respect to the underlying application would inevitably be the same
- (3) Where they responded to further evidence that had come to the attention of the decision maker (which appears to be the issue addressed in *Hussain*)

The Court concluded that in these cases

- The original decision might well be recognised as unlawful. It would therefore be quashed, and the Applicant would be able to recover their legal costs incurred in challenging it, up to the date of the new refusal letter and a reasonable period thereafter to consider its impact
- Normally, of course, where a decision is struck down, it is appropriate to order a reconsideration of the case. However if the new decision lawfully disposes of the JR challenge, it might not be appropriate to order reconsideration
 - A decision to refuse an order for reconsideration would be an efficient and sensible course of action that preserved judicial resources, by avoiding the need for a further judicial review application that would inevitably fail
 - In this scenario, any further challenge would be doomed to fail because of “issue estoppel”: ie because it had essentially been already judicially determined on the first judicial review application



Examples

Anita is a citizen of the Philippines. She has brought a JR application against a refusal of her application for leave to remain on human rights grounds, based

upon the private and family life she has established in this country whilst working lawfully, prior to her sponsor losing their Tier 2 licence. Her two young children live with her. Her application was refused, and certified as clearly unfounded, because the Home Office did not accept that there was sufficient evidence of the children's existence.

A new refusal letter now comes, stating that it replaces the earlier one, and considering the situation of the children in detail. However the clearly unfounded certification is maintained.

The Home Office may argue that the new decision letter means that a judge considering the JR application must be aware that upon a reconsideration, her application will inevitably be refused, and accordingly, even if the original refusal letter is found to be unlawful, further relief by way of an order for reconsideration should not be granted.

Anita's representatives need to consider whether to maintain the JR claim. If there are grounds to argue that the new decision is unlawful, then they should apply to amend the original application to raise the new points, initially seeking to agree this possibility with the Home Office. Absent agreement it will be necessary to request an Order from the UT permitting an amendment; it is reasonably likely to be granted given the claim continues to raise essentially the same issues.

If there are no grounds to challenge the new decision, then Anita should recover her costs up to the new refusal letter and a reasonable period thereafter to consider her position.

Albert is detained for removal having been encountered by the immigration authorities as an overstayer. Upon taking instructions when he comes to your office today you learn that he has a British citizen child in the UK regarding whom he has recently established access rights following a family court order. However the removal directions are due to take effect tonight, and he has not notified the Home Office of this matter.

You lodge an application for judicial review simply asserting that he has a case to put regarding which you are assembling evidence, and arguing that the removal directions would contravene his family life rights if enforced without the issue being considered; you seek interim relief by way of an injunction against removal. The UT grants the injunction. You make representations on his behalf on human rights grounds. The Home Office refuse the application and certify it as clearly unfounded. You consider there are good grounds to challenge this substantive decision on his case.

It will be necessary to try and agree an amendment of the claim with the Home Office. However, as the original claim was simply about removal rather than the substance of his family life, it may be difficult to persuade either the Home Office or the UT that the claim should be amended (rather than a new one commenced), given this development represents a complete change in the challenge brought. Nevertheless amendments are known to be permitted in this scenario so it may well be worth a try.

Assertions made by Defendant

The case of [McVey](#) [2010] EWHC Admin 437 addressed the approach to be taken by the court on factual disputes, which is very much in favour of the Defendant.

- (i) *The basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct;*
- (ii) *An exception to this rule arises where the documents show that the defendant's evidence cannot be correct; and that*
- (iii) *The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies.*

Judges differ in the rigour with which they apply these principles. The McVey principles will not apply

- where the Court has to make a decision on a precedent fact, or
- on the lawfulness of detention, or
- in a challenge in a fundamental rights case such as asylum or private and family life, where both parties have provided documents and the Court has to make findings and draw inferences from those documents, as might be the case in a “third country” test case on conditions for asylum seekers abroad.

Whilst the Defendant may get the benefit of the doubt on factual disputes where there is no clear answer in the paperwork, this is not to say that the Defendant can get away with assertion rather than evidence: so always check carefully that claims made by the Defendant have some evidential foundation, and are not simply empty assertion or assumptions made in written advocacy. See eg S [2006] EWHC 1111 (Admin):

“97. In setting out the factual background and the history of the judicial review proceedings, I have already drawn attention to the lack of any explanation from the defendant for the delay in reaching a decision.

.....

98. I indicated that in the absence of supporting evidence, including full disclosure of contemporaneous records, I would not be prepared to accept that belated explanation, put forward, as it was, by way of counsel's submissions in a skeleton argument that had been filed shortly before the beginning of the hearing.”

Orders, including Consent Orders

Any step in judicial review proceedings needs to be agreed between the parties and then endorsed by the UT; or, if not agreed, the UT will have to make a ruling by way of Order.

Where the parties are agreed with a particular course of action, then an Order may be lodged with the Court by consent. Styles of drafting vary, but one indication of the appropriate contents can be found in the Practice Direction (Administrative Court:

Uncontested proceedings) Queen’s Bench Division (Collins J; published July 17, 2008 in the Times), which sets out, at paragraph 1, that

“[final orders]

they should lodge with the Administrative Court Office a document (with one copy thereof) signed by the parties setting out the terms of the proposed agreed order and a short statement of the matters relied on as justifying the making of the order, authorities and statutory provisions relied on being quoted.

The Administrative Court Office would then submit the document to the Master or Deputy Master of the Crown Office and, if the court was satisfied that the order should be made, the order would be made without the need for attendance by the parties or their representatives.”

Furthermore at paragraph 2 a similar process is set out for interim orders:

a document (with one copy thereof) signed by the parties setting out the terms of the proposed agreed order and a short statement of the matters relied on as justifying the making of the order, and, where appropriate, citing authorities and statutory provisions relied on.



Casework Tip

It is desirable to achieve as much as possible by way of Consent Order. It can represent a moment when something may be conceded by the other side perhaps without giving the matter the fullest thought. For example, if a “fresh claim” judicial review is conceded by way of agreement that the Applicant will withdraw the judicial review whilst the Defendant will agree to reconsider, it may be possible to argue that the Defendant will recognise a right of appeal subsequently (whereas strictly speaking, without such a concession, the decision maker would otherwise have a choice to (a) accept the claim and confer the relevant immigration status; (b) refuse the claim without a right of appeal; (c) refuse the claim and recognise a right of appeal).

This is a list of issues to be considered in consent orders:

- (a) Opening details – state this is a draft document initially, leave space for the judge’s details to be added when they authorise the agreement of the parties;
- (b) Introduce the scenario by a single paragraph which (i) refers to what papers have been read by the endorsing judge (ii) whether they heard orally from the parties (iii) states the premise of the Order eg “upon the Defendant undertaking to reconsider the claim”;
- (c) List the actions that are necessary for the Order to address, eg (i) adjournment/vacation of hearing (ii) stay/withdrawal of the judicial review

proceedings (iii) event which triggers next action for the Court (iv) timetable for exchange of decisions, amended grounds and further detailed defence (v) treatment of costs (eg it may be agreed that one party is at fault for late action/inaction and therefore costs should be borne by them regardless of the outcome of the overall proceedings; (vi) if the judicial review is withdrawn an order for final assessment of the Applicant's costs, or that costs be assessed by a judge on the papers by written submissions if not agreed; (vii) where the claim continues, some general provision for the case to return back to the Court on application of a party on notice eg of 48 hours to the other side.
(d) Closing details – identity, address, telephone email and fax contact details, reference number, of Applicant's and Defendant's Solicitors

Costs

It is very important to always request costs in the original JR application form and for any hearing. The general principle is that the successful party should recover their costs. Where a claim succeeds on only one out of several grounds, it can be expected that only a portion of costs will be recovered.

Standard costs orders made in the course of a case include these:

- Costs reserved and to be awarded **in the cause** (ie the costs will follow the result of the overall claim)
- Costs **in any event** (likely when a party's conduct has required a hearing that the judge considers was unnecessary, or where a party has been granted an adjournment when the other side had prepared for, and/or been represented at, the hearing)

There is Costs Guidance for JRs in both the UT and the Administrative Court. It is always a good idea to write letters proposing sensible steps including settlement of a case whenever the opportunity arises: these may be taken into account by a judge when making decisions on costs (though take care not to submit a "without prejudice" letter to the court without the author's consent).

The UTRs address costs. Salient points are that:

- It is a good idea to have a schedule of costs available at any hearing where the issue may arise, because the UT may make a summary decision on costs (UTR 10(5))
- Costs applications may be made up until a month after the date the UT sends out its final decision (UTR 10(6))
- A costs order may not be made against a party without them having an opportunity to make submissions on the issue (UTR 10(7))

The judiciary are discomfited by the volume of cases where costs cannot be agreed between the parties and so have produced Guidance which emphasises the duty on litigants to be efficient and co-operative, so that no more than a proportionate amount of judicial resources was expended on resolving disputed cases. Where costs cannot be agreed it will be necessary to produce short written submissions.

- Submissions should be focussed on the points in dispute and should confirm that reasonable endeavours have been used to agree costs, and be no more than two pages in length
- Claims for costs should be made within fourteen days of the Court's Order, with fourteen days allowed for a reply resisting costs, with a further seven days available for responding to replies

Where liability or quantum of costs is disputed, a judge will consider the competing submissions on the papers.

It is important to ensure that as the case proceeds you have fully justified work claimed in attendance notes. It is relatively easy to justify modest amounts of time for writing letters, but the more time that is claimed for drafting longer documents and reading legal materials, the harder it may be to recover everything sought. Additionally, the more concise and focussed the materials provided on the judicial review application, the harder it is for the other side to dispute the time claimed; conversely, the more irrelevant and repetitive the documents, and the more lengthy and convoluted the Pre Action Protocol letter and any legal drafting such as the grounds for judicial review and skeleton argument(s), the more likely it will be that a judge declines to order all costs even to a successful litigant.

The parties are expected to take all reasonable steps to agree costs without the need for judicial intervention, and for this reason it is common to accept a percentage reduction across the board (probably of up to 20%) to avoid the chance of recovering lesser amounts following time-consuming costs proceedings.

Where the case has settled following an offer from the government side, costs will be assessed on the basis of the guidance in [M v Croydon](#) [2012] EWCA Civ 595:

- It will be relevant to determine on what issues a party has prevailed (ie if numerous points have been pleaded, and the settlement is tangibly only because one ground is accepted) or whether settlement may have been for some reason unrelated to the merit of the grounds
- It will be necessary to show that it is tolerably clear that this was the ground of settlement
- A series of standard submissions made by the government when settling cases are addressed in [M v Croydon](#):
 - Lumbering the government with costs after they have taken the reasonable step to settle may seem unfair: but the objective of the whole Pre Action Protocol process is to ensure that decisions to concede cases should be made sooner rather than later [53];
 - Claims that a concession was realistic and proportionate notwithstanding the legal merits of the challenge, in the sense the defence of the decision was "not worth the candle", should also be made sooner rather than later [55];
 - Heavy governmental workloads making it difficult to respond within the time limit for bringing a judicial review claim may well limit the time for a Defendant to consider their position: however this would be an argument for resisting costs only where the Pre Action Protocol letter was sent very late [54];
 - The law might change adversely to the Defendant (eg with a reversal of the position in the Court of Appeal by the Supreme Court) and in some cases this will make it

unfair to penalise them for a change which was not predictable: this might be a valid and reasonable argument against recovery of some of the Applicant's costs in some cases [69], but nevertheless the Applicant could raise all the normal reasons in favour of recovering costs [56];

- Failings by the Applicant to fully set out their case in the Pre Action Protocol letter, adding to the evidence, or pursuing the proceedings in an unreasonable manner: these were valid reasons for resisting recovery of costs by Applicant who ultimately succeeded, given the general principle that "a claimant who succeeds is only entitled to his costs in the absence of good reason to the contrary" [57]

General points on costs

- Where the Respondent successfully defends a judicial review claim, they may recover all relevant costs, not simply those of the Government Legal Department: [Bakhtiyar](#) IJR [2015] UKUT 519 (IAC) - this may include a specified and particularised apportionment of the general work done in defending test case proceedings: [Khan](#) (IJR) [2015] UKUT 684 (IAC)
- Decisions on costs may be the subject of an appeal to the Court of Appeal: [Soreefan](#) [2015] UKUT 594 (IAC).

Appeal to Court of Appeal

If you receive an adverse decision following either a permission refusal or a full hearing of the substantive judicial review challenge, it is possible to lodge an appeal to the Court of Appeal. In this course we do not aim to deal with this area in any detail as it is highly specialist.

Key procedural points are that:

- The UT must consider whether to grant permission to appeal to the Court of Appeal, whether or not permission is actually sought, at the final hearing which disposes of the judicial review application: r44(4B) UTRs
- A party actively wishing to appeal further may make that application at such a final hearing r44(4A))
- If a written application for permission to appeal is being made to the Court of Appeal via the UT, then the time limit is 12/7/38 days from the date the decision was sent to the parties, depending on whether the applicant is in the UK at liberty, detained here, or abroad (r44(1), (3A)-(3B))

If the application is granted, then a notice of appeal must be filed with the Court of Appeal. The overall approach on JR appeals is set out in the Civil Procedure Rules, Part 52.

Judicial review appeals from the Upper Tribunal

52.9

(1) Where permission to bring judicial review proceedings has been refused by the Upper Tribunal at a hearing and permission to appeal has been refused by the Upper Tribunal, an application for permission to appeal may be made to the Court of Appeal.

(2) Where an application for permission to bring judicial review proceedings has been determined by the Upper Tribunal on the papers and recorded as being totally without merit and permission to appeal has been refused by the Upper Tribunal, an application for permission to appeal may be made to the Court of Appeal.

(3) An application under this rule to the Court of Appeal must be made within 7 days of—

(a) the decision of the Upper Tribunal refusing permission to appeal to the Court of Appeal, where that decision was made at a hearing; or

(b) service of the order of the Upper Tribunal refusing permission to appeal to the Court of Appeal, where the decision to refuse permission was made on the papers.”

So, in short:

- An application must be made direct to the Court of Appeal (this will require production of a skeleton argument and grounds of appeal: the latter should be very short and focussed, the former may be longer and should provide a chronology and factual background to the case, but must still be concise and without repetition)
- The time limit is seven (calendar) days from the decision
- An appeal may be brought against a “totally without merit” decision (which will of course have precluded an oral renewal hearing before the UT)
- Although the CPR does not specify as much, generally speaking the Court of Appeal may well, in an appeal against a permission refusal, grant permission for judicial review and remit the matter for substantive hearing in the UT (this is the suggested position in CPR 52.8 for judicial review appeals from the Administrative Court, though it is not expressly carried over to UT appeals)

Conclusion

We hope that you have enjoyed reading this HJT resource and found it useful. The Directors of HJT Training include barristers with litigation licences who are available to assist OISC firms with helping their clients to pursue JR proceedings. Feel free to contact our office if you want to take this possibility further.