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Judicial Review: Practice and Procedure
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Introduction

1. This paper covers some of the recent case law on practice and procedure in claims for judicial review, with a focus on the following topics:
   (1) The application of the *Denton* approach to relief from sanctions in the context of claims for judicial review.
   (2) The new "makes no difference" test under s 31 of the Senior Courts Act 1981.
   (3) Certification of claims as "totally without merit".
   (4) Evidence.
   (5) Costs.

(1) *Denton* and relief from sanctions

2. Under CPR 3.9, where a party applies to the court for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court is required to consider all the circumstances of the case so as to enable it to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders.

3. In *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, the Court of Appeal adopted a very strict approach to applications under CPR 3.9, but after a considerable amount of satellite litigation, this approach was softened somewhat in *Denton v TH White Ltd* [2014] 1 WLR 3926. In *Denton*, the Court of Appeal laid down a three-stage approach to applications for relief from sanctions:
   (1) Identify the seriousness and significance of the failure to comply. If the breach is neither serious nor significant, then relief from sanctions should normally be granted.
   (2) Examine why the breach occurred. If there was a good reason for the breach, then relief should ordinarily be granted.
   (3) Consider all the circumstances of the case so as to deal with the application justly. This will include consideration of any previous breaches by the party in default and whether the application for relief has been made promptly.

4. In the past, the Administrative Court had tended to adopt a fairly pragmatic approach to failures to comply with the CPR or court orders, and it often did not insist on strict compliance. Consistent with this, the early signs were that at least the strict *Mitchell* approach would not necessarily be adopted in the Administrative Court.

5. In *R (Mohammadi) v Secretary of State for the Home Department* [2014] EWHC 2251 (Admin), the Secretary of State took 10 months to file her detailed grounds of defence and evidence, a serious breach of the 35 day time limit provided for by CPR 54.14. The claimant attempted to get the claim struck out, relying on *Mitchell*, but the court refused the application. Professor Christopher Forsyth (sitting as a Deputy High Court Judge) distinguished *Mitchell* on a number of grounds, most relevantly on the basis that public law proceedings differ from private law proceedings in that they involve the important public

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interest in securing the lawful exercise of public power, that public interest transcends the interests of the particular litigants involved in the case, and therefore cases should not be allowed to succeed or fail by default.

6. Similarly, in *R (LD) v Secretary of State for Justice* [2014] EWHC 3517 (Admin), there had been serious failures by the Secretary of State to comply with court orders and the claimants sought to debar the Secretary of State from defending the claim. Although the Divisional Court did not rule out the possibility of debarring a defendant in such circumstances, it rejected the claimants' application, holding that in light of the importance of vindicating the rule of law, where a case could have wider consequences, it would be exceedingly rare to debar a defendant.

7. However, a change in approach was signalled by the decision of the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472. Three appellants had failed to file a notice of appeal within the time specified by CPR 52.4(2) and therefore they had to seek an extension of time for doing so. Although this case did not strictly involve an application for relief from sanctions, the Court held that the same rigorous approach should be adopted and that the *Denton* approach should be applied. In particular, the Court rejected the suggestion that a different approach applies simply because a case raises public law issues, with Moore-Bick LJ holding that the importance of a case to the public at large is a factor that can be taken into account at stage three of the decision-making process.

8. As a result, the *Denton* approach is now being adopted in the Administrative Court. In *R (Asif) v Secretary of State for the Home Department* [2015] EWHC 1007 (Admin), the claimant agreed to a consent order which required him to file amended grounds of challenge, failing which the claim was to be treated as withdrawn. The claimant failed to file amended grounds and therefore, in order to continue to pursue his claim, he was required to apply for relief from the sanction imposed by the consent order. His position was not helped by the fact that the amended grounds were not filed until over six months later, less than three weeks before the scheduled substantive hearing, and there was no application for an extension of time or for relief from sanctions until the Secretary of State applied for the claim to be dismissed; even then, the application was only made informally and was unsupported by any evidence. The explanation given by the claimant for his default was the fact that he was funding the litigation privately, but had insufficient funds at the relevant time. Simon Bryan QC (sitting as a Deputy High Court Judge) held that the default was significant and serious, and that shortage of funds would generally not amount to a good reason for default (pointing out that in *Hysaj* the Court of Appeal had held that the fact that a litigant was acting in person should make no difference to the approach adopted). At the third stage of the *Denton* approach, the Deputy Judge noted that the claimant's default had prevented the litigation being brought to a swift conclusion and that, in light of other failures by the claimant, it was not an appropriate case in which to grant relief from sanctions. In addition, the Deputy Judge held that the merits of the claimant's case did not weigh in favour of the grant of relief, and certainly did not amount to a "trump card" for the claimant.

9. The relevance of the availability of funding was also addressed by the Court of Appeal in *R (Kigen) v Secretary of State for the Home Department* [2016] 1 WLR 723. In that case, the claimants sought an extension of time for renewing an application for permission to apply for judicial review in the Upper Tribunal. The reason for the delay was that the

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claimants had been awaiting a funding decision from the Legal Aid Agency. The Court of Appeal held that the fact that a funding decision was being awaited from the Legal Aid Agency should not normally be regarded as a good reason for delay, as a litigant who is awaiting such a decision is in the same position as any other litigant who cannot afford legal representation; at most, it would be a factor to be taken into account. In this respect, the Court said that *R v Stratford-upon-Avon District Council, ex p Jackson* [1985] 1 WLR 1319 should no longer be followed, doubting in particular the suggestion in that case that judicial review proceedings were different from private proceedings because of the public interest involved and noting that many claims for judicial review were of little wider significance beyond the relationship between the claimant and the relevant public body. In the event, the Court held that a delay of 13 days in the context of the permitted period of nine days could not be regarded as insignificant and it called for an explanation, but that the decision to wait for a decision from the Legal Aid Agency was not a good reason. However, in light of the fact that the Court was in effect departing from the approach previously adopted in legal aid cases, it granted an extension of time (albeit with a warning that such leniency might not be forthcoming in future cases).

10. The *Denton* approach was also applied in *R (Plant) v Somerset County Council* [2016] HLR 24. In that case, the claimant brought a claim against two local authorities, challenging the decision of one to seek possession of land on which he had stationed a caravan, and in relation to the other, which had accepted that he was a homeless person in priority need, he sought a mandatory injunction requiring it to provide him with suitable accommodation. The second local authority did not file an acknowledgment of service or summary grounds, and permission was granted. The local authority then informed the claimant that it was not contesting the claim against it and the court granted a mandatory injunction requiring to it to provide suitable accommodation, with which the local authority sought to comply. Over a year later, the local authority sought the revocation of the injunction and permission to contest the claim. Cheema-Grubb J treated this as an application for relief from sanctions arising out of the local authority's failure to file an acknowledgment of service. She held that the local authority was guilty of a significant breach of the CPR and that there was no good reason for that breach: the authority's change in position appeared to have arisen out of the fact that it belatedly took a different view of the merits of the claimant's claim. As to the third stage, the Judge pointed to the fact that the local authority had made little effort to engage with the court or the claimant since its early concession, that to grant relief would significantly affect the way that the claimant had to deal with his case, and that the local authority had throughout been motivated by pragmatism and had in fact sought to comply with the injunction. Accordingly, the Judge declined to grant relief from sanctions.

(2) The new "makes no difference" test under the Senior Courts Act 1981

11. In April 2015, amendments were made to s 31 of the Senior Courts Act 1981 requiring the courts to consider whether any error of law made any difference to the decision under challenge, both at the permission stage and at the stage of deciding whether to grant a remedy.

12. At the permission stage, s 31(3A)-(3E) apply:

> "(3B) When considering whether to grant leave to make an application for judicial review, the High Court -

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(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
(b) must consider that question if the defendant asks it to do so.

(3C) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3D) The court may disregard the requirement in subsection (3C) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3E) If the court grants leave in reliance on subsection (3D), the court must certify that the condition in subsection (3D) is satisfied."

(emphasis added)

13. Amendments have been made to CPR Part 54 to reflect this. CPR 54.8(4) requires that where a defendant wishes to take the point at the permission stage, it needs to set out a summary of its grounds in its acknowledgment of service, and CPR 54.11A gives court power to direct a hearing to determine the issue.

14. At the substantive stage, s 31(2A)-(2C) apply:

"(2A) The High Court -
(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirement in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants leave in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

(emphasis added)

15. A number of issues arise out of these provisions, such as: how does the "highly likely" test compare to the previous common law test of inevitability; how relevant is the focus on the outcome for the applicant, as opposed to the outcome for others; what is meant by a "not substantially different" outcome; what will constitute "reasons of exceptional public interest"; and do different thresholds apply in different types of cases? The courts have only just begun to explore some of these issues.

16. In *R (Logan) v Havering London Borough Council* [2016] PTSR 603, the claimant challenged a local authority's decision to adopt a council tax reduction scheme on the grounds that there had been a failure to comply with the public sector equality duty and the scheme itself was unlawfully discriminatory. Blake J held that the public sector equality duty had not been complied with, because the relevant equality impact assessment had not been provided to all councillors (the relevant decision having been taken by the full council). Blake J held that any consideration of whether the outcome was highly likely to

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have been the same should be based on the material in existence at the time of the decision, and not on post-decision speculation by the decision-maker, as any other approach would risk undermining the importance of compliance with procedural duties. He also suggested that the new provisions may well be directed only at "somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made". Blake J also held that the relief to which s 31(2A) applies does not include a judgment that sets out the conclusions of the court (as opposed to a formal declaration).

17. In *R (Griffiths) v Care Quality Commission* (20 May 2016), Edis J accepted a submission from one of the defendants that permission should be refused in accordance with s 31(3C). The claimants had complained of a lack of consultation in relation to a decision to close a hospital, but the Judge accepted that, because the relevant defendant did not have responsibility for the hospital at the relevant time, nothing that could have taken place by way of consultation could have affected the outcome for the claimants (who were not part of the group in respect of whom a duty to consult was said to lie).

(3) Certification as "totally without merit"

18. Under CPR 54.12(7), where permission to apply for judicial review is refused, the court may certify the claim as totally without merit, in which case the claimant may not renew the application for permission at an oral hearing. Further, under CPR 52.16, any appeal to the Court of Appeal against the refusal of permission will be considered on the papers only; there will be no right to an oral hearing in that court either.

19. In *R (Grace) v Secretary of State for the Home Department* [2014] 1 WLR 3432, the Court of Appeal held that, in this context, the phrase "totally without merit" did not require that the application was so hopeless or misconceived that a civil restraint order would be justified if such applications were persistently made; rather, it simply required that the application was "bound to fail". In support of this conclusion, the Court noted that the purpose of CPR 54.12(7) was not just to prevent repetitive applications or the control of abusive or vexatious litigants, it was to deal with the significant number of hopeless applications for judicial review.

20. The Court of Appeal revisited the issue in the context of the equivalent provision in the Upper Tribunal Rules in *W v Secretary of State for the Home Department* [2016] EWCA Civ 82. In particular, the Court considered whether, given that the threshold for granting permission is arguability and therefore a claim that was refused permission would have been held to be unarguable, it therefore followed that a claim which was refused permission was totally without merit. The Court rejected this interpretation of CPR 54.12(7), on the basis that that could not have been the intention of the rule-maker. Instead, the Court held that a claim would be totally without merit if there was no rational basis on which it could succeed; but that it would not be totally without merit if there was a rational argument in support of the claim but the Judge was confident that the argument was wrong. In the latter type of case, it was necessary to allow for the possibility that the claimant could at an oral renewal hearing persuade the court that the claim does have a realistic chance of success; however, in the former type of case, there would be no chance of the claimant persuading the court at an oral hearing and it would be pointless and contrary to the policy underlying the rule to allow for one. In the light of this, the Court went on to give the following further guidance:

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(1) Judges should not certify applications as totally without merit as the automatic consequence of refusing permission; the criteria are different.

(2) An application should not be certified as totally without merit unless the court is confident after careful consideration that the case truly is bound to fail. The court must have in mind the seriousness of the issue and the consequences of its decision in the particular case.

(3) The potential value of an oral renewal hearing does not lie only in the power of oral advocacy. It is also an opportunity for the claimant to address the perceived weaknesses in the claim which have led the judge to refuse permission on the papers (and which should have been identified in the reasons). The points in question may not always have been anticipated or addressed in the grounds. The court should only certify the application as totally without merit if satisfied that in the circumstances of the particular case a hearing could not serve such a purpose; the claimant should get the benefit of any real doubt.

(4) Judges considering permission applications will quite commonly encounter cases (particularly where the claimant is unrepresented) in which the claim form/grounds and/or the supporting materials are too confused or inadequate to disclose a claim which justifies the grant of permission but where the judge nevertheless suspects that proper presentation might disclose an arguable basis of claim. In such cases he or she should not certify the application as totally without merit. The right course will usually be to refuse permission, with reasons which identify the nature of the problem, giving the claimant the opportunity to address it at an oral renewal hearing if he or she can; but there may sometimes be cases where the better course is to adjourn the permission application to an oral hearing, perhaps on an *inter partes* basis.

(5) The court should not certify a claim as totally without merit on the basis of points raised in the summary grounds to which the claimant might have had an answer if given the opportunity.

(6) The court should give reasons for certifying a claim as totally without merit separately from the reasons for refusing permission to apply for judicial review.

(4) Evidence

21. In *R (London College of Finance and Accounting) v Secretary of State for the Home Department* [2015] EWHC 1688 (Admin), Cobb J had to deal with a situation where the claimant sought to rely on a file of evidence that had been filed and served only two working days before a rolled-up hearing. In the event, the evidence did not prove relevant to the issues and therefore Cobb J did not need to decide whether to admit it, but he gave the following guidance on such situations:

(1) CPR 54.16, which provides that no written evidence may be relied on unless it has been served in accordance with any rule, or direction of the Court, or the court gives permission, must be faithfully and strictly observed.

(2) Orders, including interlocutory orders, for the filing and service of evidence must be obeyed and complied with to the letter and on time; there is a public interest in enforcing compliance with court orders, particularly where the breach is serious and/or significant.

(3) Any party in a judicial review claim who seeks to adduce evidence outside the parameters of CPR 54.16 is under an obligation to apply timeously to the court to

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adduce that evidence or where relevant for a variation of the order granting permission to file.

(4) If it is possible and practicable, any application for permission to rely on new evidence should be determined before the substantive hearing, so that the parties and the Court know where they stand and what they have to read.

(5) If it is not possible or practicable to make a decision on the admissibility of the new evidence before the hearing, the court may have to consider converting the substantive or rolled-up hearing to a case-management hearing, and costs orders may follow.

(6) In order to promote the efficient and proportionate conduct of litigation, parties are not merely required to comply with the rules and court orders, they are also obliged to co-operate with each other.

(7) Within the framework of the Rules, the court retains powers to manage its cases flexibly and in accordance with the overriding objective; in this regard it will ensure that no unfairness is caused to the parties.

22. The issue of expert evidence in claims for judicial review was considered by Garnham J in *R (HK) v Secretary of State for the Home Department* [2016] EWHC 857. The case concerned the lawfulness of returning to Bulgaria asylum-seekers whose first point of arrival in the EU was that country. The claimants sought to rely upon expert evidence as to the operation of the asylum system in Bulgaria from an employee of Amnesty International, but CPR Part 35 had not been complied with. Although Garnham J admitted the report, he stressed the importance of compliance with CPR Part 35 in claims for judicial review, holding that the nature of claims for judicial review, and the need for them to be considered expeditiously, makes all the more important the consistent application of the discipline provided by the Civil Procedure Rules, and that there is a real danger of injustice if the rules are disregarded. He held that, if expert evidence is to be adduced, it requires the leave of the court and it needs to be disclosed to the opposing side in sufficient time to make possible a considered response, and that if there is a failure to comply with an order or a rule of court, an application for relief from sanctions will be necessary.

23. For a detailed consideration of how the parties should approach cases that involve extensive expert evidence, see the recent judgment of Green J in *R (British American Tobacco) v Secretary of State for Health* [2016] EWHC 1109.

(5) Costs

24. Unusually, in *R (Hunt) v North Somerset Council* [2015] 1 WLR 3575, the Supreme Court considered an appeal against a costs order. The claimant had sought an order quashing a local authority's decision to reduce the funding of youth services. However, although the Court of Appeal held that the local authority had acted unlawfully, a quashing order was refused as the relevant financial year had already expired before the appeal was heard. As the claimant had not sought a declaration, no remedy was granted. On that basis, the Court of Appeal had held that the local authority was the successful party and that it should be entitled to costs. The Supreme Court took a different view, holding that although courts had a wide discretion in the matter of costs, the Court of Appeal had fallen into error in reaching its decision on costs as a matter of principle and in treating the local authority as the successful party. The local authority had been unsuccessful on the substantive issues regarding its statutory responsibilities and it had been "successful" only in the limited sense

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that the ruling of the Court of Appeal had come too late because the authority had successfully resisted the claim in the court below. If a party who had been given permission to proceed with a judicial review claim succeeded in establishing after fully contested proceedings that the defendant had acted unlawfully, some good reason would have to be shown as to why he or she should not recover his reasonable costs, and the fact that the determination of illegality had come when it was too late to consider reopening the local authority's budget did not provide a principled reason for making the claimant pay any part of the local authority's costs and therefore the claimant was in principle entitled to some form of costs order in his favour. However, since the claimant had persisted in seeking an order to quash the decision approving the budget when that was unrealistic and had raised wider issues at first instance than the ones on which he had been given permission to appeal to the Court of Appeal, the costs order in his favour should be limited, and he recovered only two thirds of his costs both at first instance and in the Court of Appeal.

25. The question of how costs should be determined where a claim has been settled was addressed by the Court of Appeal in *R (Baxter) v Lincolnshire County Council* [2015] EWCA Civ 1290. In that case, a challenge seeking a community care assessment was settled on terms that the authority would instruct an independent social worker to undertake an assessment, with the application for judicial review being withdrawn and the issue of costs being determined by way of written submissions. The Court of Appeal endorsed the Administrative Court Guidance on costs in such cases, including the guidance that submissions on costs should not exceed two pages, and indicated that any decision as to costs would inevitably be taken in a summary and proportionate manner. The Court held that, when deciding the question of costs, the starting point should be the claim form and the consent order, but that other relevant factors (such as compliance with the Pre-Action Protocol) would depend on the circumstances of the case. On the facts of the case, the Court held that the claimant had not obtained the relief that he had sought, and therefore the case did not fall within the first category of cases identified in *M v Croydon London Borough Council* [2012] 1 WLR 2607 (i.e. a case where the claimant has been wholly successful and can generally expect to recover his costs as the successful party), and it upheld the decision of the judge at first instance to make no order as to costs.

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