

Institute of Licensing  
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25th National Training Conference

## The importance of the Pre-Action protocol in Judicial Review

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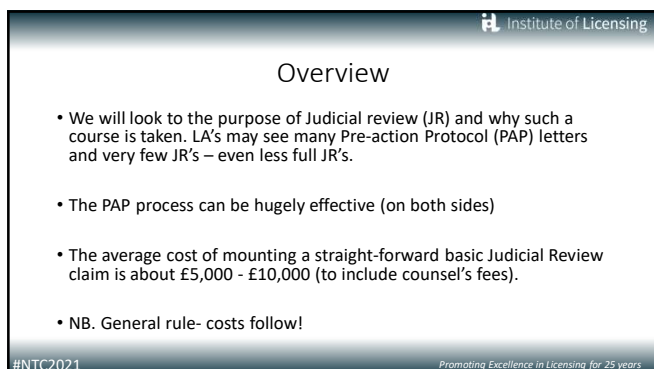
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## Overview

- We will look to the purpose of Judicial review (JR) and why such a course is taken. LA's may see many Pre-action Protocol (PAP) letters and very few JR's – even less full JR's.
- The PAP process can be hugely effective (on both sides)
- The average cost of mounting a straight-forward basic Judicial Review claim is about £5,000 - £10,000 (to include counsel's fees).
- NB. General rule- costs follow!

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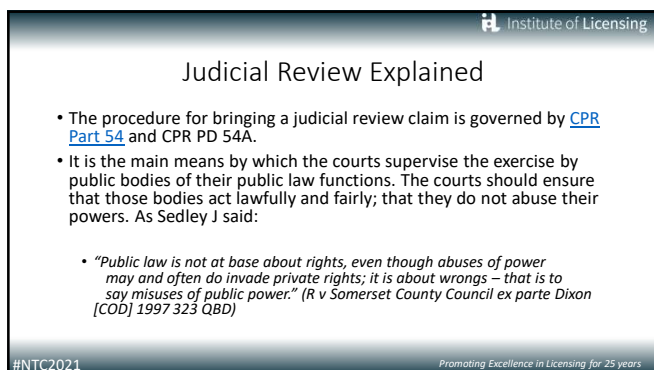
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## Judicial Review Explained

- The procedure for bringing a judicial review claim is governed by [CPR Part 54](#) and CPR PD 54A.
- It is the main means by which the courts supervise the exercise by public bodies of their public law functions. The courts should ensure that those bodies act lawfully and fairly; that they do not abuse their powers. As Sedley J said:
  - “Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.” (R v Somerset County Council ex parte Dixon [COD] 1997 323 QBD)

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### Judicial Review Explained

- It is the exercise of those functions with which the courts are concerned, not the merits of the decisions made.
- It is a last resort (exhaust all other options)
- ADR. This is built into the PAP



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- Judicial review is a two-stage process. The claimant must first obtain permission to apply for judicial review. To obtain permission, an application must be made to the court outlining the grounds on which judicial review is sought. However, in urgent cases, particularly where one party has made an application for the case to be expedited, a judge may order that both the permission stage and substantive stage be heard at the same time ('a rolled-up hearing'). In particularly complex cases a rolled-up hearing may also be ordered.

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### The Pre-action Protocol

- The conduct that the court expects both parties to undertake before commencing proceedings, as set out in the Civil Procedure Rules (CPR)
- Pre-action Protocol is very important. Has the decision-maker been sent a letter setting out the grievance, the grounds for a Judicial Review challenge and been given the opportunity to put matters right

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## The Pre-action Protocol

- Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it in good time before proceedings are issued and will take into account compliance or non-compliance when giving directions for case management of proceedings or when making orders for costs.

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## *Beware the time limits!*

Use of the PAP does not affect the time limit specified by Rule 54.5(1) CPR, which requires that any claim form in an application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose.

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## *Time limits continued...*

- Only the court has jurisdiction to grant an extension of time ([CPR 3.2\(a\)](#)). Where a shorter time-limit is provided by statute or subordinate legislation that shorter time-limit applies: [CPR 54.5\(3\)](#).)
- An extension cannot be agreed between the parties without the court's consent ([CPR 54.2](#)). However, that a defendant does not object to a claim being brought out of time may be relevant to the court exercising its discretion.)
- The time limits run from the day after the grounds for JR arose ([CPR 54.5\(1\)\(a\)](#) and *Berky v Newport City Council and ors* [2012] EWCA Civ 378 at para 48.)

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### *The Purpose – 5 aims*

- To enable parties to prospective claims to—
  - (a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;
  - (b) make informed decisions as to whether and how to proceed;
  - (c) try to settle the dispute without proceedings or reduce the issues in dispute;
  - (d) avoid unnecessary expense and keep down the costs of resolving the dispute; and
  - (e) support the efficient management of proceedings where litigation cannot be avoided.

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### *Requests for information and documents*

- Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues.

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### *The PAP letter before claim*

- Can come in a variety of formats (especially where not represented)
- It is not a reason to fail to respond if so
- A standard form of the letter is to be found in Annex A to the Protocol and should be used in normal circumstances
- Not be appropriate in very urgent cases

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*The PAP letter before claim*

- The letter should contain the date and details of the decision, act or omission being challenged, a summary of the facts and the legal basis for the claim. The letter of claim should set out the details of the actions which it is desired the defendant should take, (ie what remedy is sought)

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*The PAP letter before claim*

- If the claimant seeks particular information then the details of the information sought and an explanation of its relevance to the claim should be contained in the letter
- A copy of the letter before claim should be sent to any interested parties. An Interested Party is any person directly affected by the claim.

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*The PAP letter before claim*

- A claim should not normally be made until after the proposed reply date given in the letter before claim unless the circumstances of the case require more immediate action. The letter before claim should be sent in good time to enable proper consideration of any response unless there are good reasons why this is not possible
- The letter before claim should specify a proposed reply date, usually 14 days. Where the claimant is a litigant in person, the defendant should enclose a copy of the Protocol with its letter

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Annex A  
(information required in a letter before claim)

- 1 Proposed claim for judicial review
- 2 The claimant
- 3 The defendant's reference details
- 4 The details of the claimants' legal advisers, if any, dealing with this claim
- 5 The details of the matter being challenged
- 6 The details of any Interested Parties
- 7 The issue

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Annex A

- 8 The details of the action that the defendant is expected to take
- 9 ADR proposals
- 10 The details of any information sought
- 11 The details of any documents that are considered relevant and necessary
- 12 The address for reply and service of court documents
- 13 Proposed reply date

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*The PAP response letter*

- The reply to the letter before claim should also be made in a standard form in most cases. The reply should set out the public body's response to the claim and whether the claim will be resisted in whole or in part
- this should be made clear. For example, if the claim is being conceded in full, the reply should say so in clear and unambiguous terms. Same goes for any part concession
- Failure to respond will be taken into account by the court and sanctions may be imposed unless there are good reasons.

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### *The PAP response letter*

- Where it is not possible to reply within the proposed time limit, the defendant should send an interim reply and propose a reasonable extension, giving a date by which the defendant expects to respond substantively. Where an extension is sought, reasons should be given and, where required, additional information requested. This will not affect the time limit for making a claim for judicial review

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### *Annex B (Information required in a response to a letter)*

- The claimant
- From
- Reference details
- The details of the matter being challenged
- Response to the proposed claim
- Details of any other Interested Parties
- ADR proposals
- Response to requests for information and documents
- Address for further correspondence and service of court documents

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### *Failure to comply*

- Failure to comply with the PAP may affect prospects of recovering costs (see *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 at 59–71.)

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### Failure to comply

- In *R (Kemp) v Denbighshire Local Health Board* [2006] EWHC 181 (Admin) the claimant had succeeded in obtaining funding relating to his nursing home costs but because he failed to comply with the pre-action protocol, no order for costs was made given that there was no evidence that the defendant would not have offered a review had a pre-action protocol letter been written.
- In addition, in *R (Ewing v Office of the Deputy Prime Minister)* [2006] 1 WLR 1260, Lord Justice Brooke stated at para 54 that, 'Needless to say, if the claimant skips the pre-action protocol stage, he must expect to put his opponents to greater expense in preparing the summary of their grounds for contesting the claim, and this may be reflected in the greater order for costs that may be made against him if permission is refused ...'

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### PAP letter - Let's talk tactics

- The PAP letter before action
- Pressure
- How do we apply this?



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### Tactics

Duty of candour

- A defendant is required to satisfy the requirement of the duty of candour which applies from the outset and which applies to all information relevant to the issues of the case, not just documents.
- In *R (Hoareau and Anr) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at paras 8–24. Singh LJ summarised the relevant legal principles relating to the duty of candour and co-operation which applies in judicial review proceedings and the relationship of that duty to the concept of disclosure of documents.

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### Tactics continued...

- The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. In *Hoareau* the court observed:  
*'... It is the function of the public authority itself to draw the Court's attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify 'the good, the bad and the ugly'. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.'*

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### Tactics continued...

- This duty is a 'self-policing duty' and a particular obligation therefore falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these important duties on public authorities are fulfilled (*R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 at para 106(2)).

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### Responding - Let's talk tactics

- The PAP response (remember the time limits – a word of warning)
- How to effectively shut down the arguments? How do we do this?
- Take back control (you know the costs)



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### Promptness

- Where the court considers there has been undue delay it may refuse to grant permission or decide that it would be inappropriate to grant relief sought on the application
- A relevant factor in determining whether delay is determinative is the public interest in the case being heard (*R (Kilroy) v Parrs Wood High School* [2011] EWHC 3489 (Admin) at 30–32: the case was brought one day before the end of the three-month period.)

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### Alternative remedy

- A claim in judicial review should be a last resort
- In *R (on the application of Watch Tower Bible & Tract Society of Britain v Charity Commission* [2016] EWCA Civ 154 at [19], Lord Dyson ME said:  
*'It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. The principles apply with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal.'*

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### Alternative remedy

- The courts cannot compel an Alternative Dispute Resolution ('ADR') but a failure to provide or pursue an alternative remedy may affect the grant of permission and/or the grant of relief to an otherwise successful claim and/or the award of costs.
- Differing methods of ADR include complaints procedures, mediation, complaint to a relevant ombudsman and round table meetings

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- NB. The claim form should state whether an alternative remedy exists and whether or not the claimant is pursuing it (*R v Humberside CC, ex p Bogdal* [1992] COD 467).
- Reasons should be given as to why JR is the appropriate remedy instead of the alternative remedies (*R v SoS for the Home Dept, ex p Swati* [1986] 1 WLR 477 at 483 per Sir John Donaldson MR (as was), CA).

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### *Disclosure of material facts*

- A claimant is under a duty to disclose all material facts in the claim form (*R v Lloyds Corp, ex p Briggs* [1993] 1 Lloyd's L Rep 176; *R v Jockey Club Licensing Committee, ex p Wright (Barrie John)* [1991] COD 306 and *R (Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593 at para 50)
- So - expose the gaps!

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### *Disclosure of material facts continued...*

- All material facts include all facts known to the claimant at the time he/she applies for permission. The court may take account of those facts that he would have known had he made the proper and necessary inquiries before applying for permission (*R v Jockey Club Licensing Committee, ex p Wright (Barrie John)* [1991] COD 306.).

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*Disclosure of material facts continued...*

- The extent of inquiries the claimant should have made will depend on the circumstances of the case, including the nature of the case, the order for which the applicant is applying, the degree of legitimate urgency and the time available for making inquiries
- Non-disclosure is sufficient for the court to refuse the remedy sought (*R v Kensington General Csrss, ex p Polignac (Princess)* [\[1917\] 1 KB 486](#)).

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*Disclosure of material facts continued...*

- Non-disclosure is also sufficient to set aside permission (*R v SoS Home, ex p Sholola* [1992] Imm AR 135; *R v SoS Home, ex p Chinoy* (1991) 4 Admin LR 457, [1991] COD 381, DC; applications to set aside permission may now only be made rarely.) or refuse it entirely, and the claimant may be penalised in costs.
- It is important to note that the duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact (*R (Citizens UK) v Secretary of State for the Home Department* [\[2018\] EWCA Civ 1812](#) at para 106(5)).

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