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Welcome to Landmark Chambers'

'Public Law in 2023: Quarterly Re-cap' webinar

The recording can be accessed here.

Your speakers today are…

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Overview

1. Anonymity directions

2. Witness statements and expert reports

Anonymity directions

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- **CPR 39.2(4):** “*The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.*”
- **Article 8 ECHR** entitlement to privacy v. **Article 10 ECHR** entitlement to freedom of expression.
- **HRA 1998, s. 12(4):** “*The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material … to— (a)the extent to which—*

  (i)the material has, or is about to, become available to the public; or

  (ii)it is, or would be, in the public interest for the material to be published;

Anonymity directions

- **Common law principle of open justice** remains *"in vigour"*, even where Convention rights are applicable: *A v BBC (Scotland)* [2014] UKSC 25.
- **Statutory entitlement to anonymity:**
  - **Victims of alleged sexual offences**: s. 1 Sexual Offences (Amendment) Act 1992
  - **Victims of trafficking**: s. 2(1)(db) SOAA 1992
  - **Children in family proceedings**: s. 97(2) Children Act 1989
  - **Children before Youth Courts**: s. 49 Children and Young Persons Act 1993
  - **Victims of FGM**: s. 4A & Sched 1 Female Genital Mutilation Act 2003

Anonymity directions

– **Asylum and protection claims**

- *Kambadzi v SSHD [2011] UKSC 23*: anonymity must be justified on a **case by case basis**, even in protection claims.
- However, **feared harm to an applicant, third parties** or the **operational integrity of the asylum system** more widely are factors which militate against disclosure: R v G [2019] EWHC Fam 3147 as approved by the Court of Appeal in SSHD & G v R & Anor [2020] EWCA Civ 1001.
- *Practice Guidance – Anonymisation of Parties to Asylum & Immigration cases in the Court of Appeal* (23 March 2022):

> "*The Court of Appeal will continue its long-standing practice of anonymising judgments in most appeals raising asylum or other international protection claims, provided it is satisfied that the publication of the names of appellants in such cases may create avoidable risks for them in the countries from which they have come*"

Anonymity directions

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MNL v Westminster Magistrates Court [2023] EWHC (587 (Admin)

- Warby LJ at §43:
  - Starting point is open justice. Generally, justice should be open and reportable.
  - If anonymity (or other restriction) sought, test is one of **necessity**.
    - *At common law: strictly necessary in the interests of justice. ECHR: necessary in pursuit of a legitimate aim.*
  - Interference with private and family life must attain a *'certain level of seriousness'*
  - **Balancing exercise**: is interference proportionate?
  - Has the claimant adduced "**clear and cogent evidence**"?

Anonymity directions

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Top tips on anonymity applications

- Detailed submissions likely necessary
  - Are you entitled to statutory anonymity? Is there a risk of harm if identified? If Article 8 balancing exercise – how serious is the interference? Public interest?
- Witness evidence
  - 'Clear and cogent evidence' – usually from individual seeking anonymity
  - Generalities are not relevant: must look at individual facts
    - *TT v Essex County Council*: "*the parties to proceedings should be named unless there is a very good reason not to*" (§82)
      - Starting point should always be that order has an end date (§88)
  - *AH and anor v SSHD (CO-893-2023):* "*mere assertion*" insufficient

Witness statements

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Foreign language witness statements

- PD 22 §2.4, PD32 §§18 & 20.1:
  - Witness statement and statement of truth must be in the witness' own language.
  - Therefore, if client does not speak English their WS must be **in their own language**
  - Should be filed with a **translation**, rather than an English WS confirming interpretation
  - WS must be **signed by the translator** who also **certifies the translation is accurate**
    - *R (MQ) v SSHD* [2023] EWHC 205 (Admin): admitted WS despite failures to comply with above (no dispute re admission).

Witness statements

Solicitors' witness statements

- PD 22, §§ 3.7-8
  - Legal representative may sign the statement of truth on their client's behalf
  - Where this occurs, the signature will be taken by the court as a statement that:
    - The client authorised this;
    - Before signing, the rep explained to the client that by signing they would confirm the client's believe that its contents were true; and
    - The possible consequences of not having an honest believe in the truth of the facts were explained to the client.

Witness statements

Expert reports

- CPR 35.10(2): experts must include a statement that they **understand and have complied with** their duty to the court

- PD 35 §3.3: **statement of truth** in correct form is needed.

- PD 35 §3.2(9)(b): experts must state they are **aware of CPR 35,** its **PD**, and the **Guidance for the Instruction of Experts in Civil Claims 2014.**

  – *MQ*: Expert reports did not contain the above.

    - J: "*the absence of an appropriate certification as required by CPR 35 is fatal to the admission of the report. The certification is fundamental. It provides the court with the confidence it needs to admit the evidence.*"

Charles Bishop

Overview

1. Standing and academic cases

2. Delay and promptness

3. Payment on account of costs

Standing and academic cases

- R (DM) v SSHD [2023] EWHC 740 (Admin)
  - C was a child refugee. Family were refused entry clearance to be reunited with him. C had brought a JR and was granted permission on 22 Feb 2022, but on 10 March 2022 the family's appeal against entry clearance refusal was allowed.
  - C challenged "ongoing decision that parents and siblings of refugee children will not be entitled to family reunion on the same basis as the spouses and children of adult refugees under the Immigration Rules".
  - C had medical evidence that the separation from his family, the refusal and the appeal had a significant detrimental effect on his mental health
  - C's witness statement said:

"If the way the Home Office treat cases like mine and my family's is against the law, I want that to be recognised. … I would really like to be able to use my experiences to make sure others do not go through the same"

Standing and academic cases

- C reduced scope of JR once appeal allowed. D contested standing as (1) relief could not confer a benefit on him and (2) there were or would be other better-placed challengers.
- Court held C had sufficient interest to bring the claim.
- “*He was directly affected by the matters complained of. Although his parents and siblings have now been granted leave to enter the United Kingdom, the process was longer, more difficult and more stressful than it would have been if the Immigration Rules had been amended in the manner contended for by the claimant and that appears to have contributed to the claimant's mental health issues. There is no identifiable alternative claimant who is better-placed than the claimant to bring this application*.”
- But note context: had been other challenges to same policy. SSHD counsel could not point to any identified claimant who was better placed to bring the case.

Standing and academic cases

- *R (TT) v Essex CC* [2023] EWHC 826 (Admin)
  - JR challenging various failures under Children Act 1989 incl that C had not been treated as an "eligible child" or a "relevant child". Also included an allegation of an unlawful policy.
  - TT turned 18 three week before judgment and LA said it would treat her exactly as if she had the status of "former relevant child".
  - TT argued C had not received all the practical relief which she seeks as he sought a declaration spelling out the past unlawful treatment before she turned 18.

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Standing and academic cases

- Court held that a declaration *"can be made in respect of a past wrong which has been made good, but there would have to be exceptionally good reasons for the court to exercise its discretion to do so. A wish to have a declaration is obviously not of itself a special reason."*
- Court referred to case law on declaratory judgments which required a "real and present dispute between the parties before the court as to the existence or extent of a legal right between them": *The Bank Of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) at para 21(1).
- Here, TT had received all the relief she reasonably could, and so no real and present dispute. Therefore the case was academic.

Standing and academic cases

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- Court referred to well-known decision in *R v Home Secretary ex p Salem* [1999] AC 450 at p 457 that an academic claim should not be heard unless there is a good reason in the public interest for doing so. The court gave as an example there "*when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future*"
- In this case: the claim raised a hitherto unaddressed point of statutory construction requiring consideration of UKSC cases. There were at least 75 children who could be affected. So court decided to hear academic claim.
- However, Mostyn J held *"where an academic claim is determined, it is not appropriate for the court to do anything more than to record its findings and decisions in its judgment. Plainly no positive prohibitory or mandatory orders or formal declarations should be made. Such orders or declarations would be wholly inconsistent with the claim being academic."*

Delay/promptness

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- ***R (British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero [2023] EWHC 737 (Admin)***
  - JR of transfer of the business of Bulb Energy Ltd to Octopus Energy Group Ltd.
  - Two relevant decisions taken on 27 Oct 2022 and 7 Nov 2022. The first was published on 29 Oct 2022 and the second on 9 November 2022. BGT issued on 28 Nov 2022 and the others on 29 Nov 2022, incl apps for urgent consideration, which they said they first recognised were needed on 24 Nov 2022.
  - Court refused to grant permission to bring the claims on grounds of delay.

Delay/promptness

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- Claim form must be filed <u>promptly</u> and in any event not later than 3 months after the grounds to make the claim first arose: CPR r.54.5(1)
- If court considers there has been undue delay in bringing the JR, court may refuse permission if it considers the “granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”: s.31(6) Senior Courts Act 1981
- Time runs from the legally operative decision: see e.g. *R v Hammersmith and Fulham London Borough Council, ex parte Burkett* [2002] 1 WLR 1593.
- The date upon which a claimant becomes aware that they may have grounds in law for seeking to challenge a decision is irrelevant to the question of when the grounds to make a claim first arise. It may, however, be relevant to the question of whether the claim was filed promptly or whether time should be extended to bring the claim: see *R (Braithwaite and Melton Meadows Properties Ltd) v East Suffolk Council* [2022] EWCA Civ 1716 at [50].

Delay/promptness

- Key factors:
  - BGT had applied to join Chancery Division proceedings on 11 Nov 2022. Court said these were adjourned precisely so Claimant could seek further information and consider launching a JR. Had to move "very speedily" after this (para 140).
  - Distinction between needing to be aware of "the details of the matters which might enable them to support any grounds for judicial review at that stage" and being aware of "the essential substance of the grounds that would be available to them". The latter was sufficient here, and Cs could have applied to amend once they acquired the necessary info (para 141).
  - Had been general suggestions of unlawfulness for some time (paras 142-144)
  - Claimant does not need full disclosure to launch JR proceedings; usually grant of permission is trigger for duty of candour and cooperation with the court to arise (para 145) (NB: how does this sit with *R (HM) v SSHD* [2022] EWHC 2729 (Admin) at [16]?)
  - Court did not accept delay properly caused by need to write PAP letters: para 146.
  - While generally JRs should be commenced with adequate information obtained to justify them, that depends on the context, and here it was of utmost importance that proceedings be commenced very speedily. This was the financial field, where case law already recognised delay of even a few days can be detrimental to interests of third parties and good administration: *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763, at 774-775

Costs: payment on account

- ***R (LC) v SSHD* [2023] EWHC 319 (Admin)**
  - False imprisonment claim which was conceded with D agreeing to pay C’s costs.
  - C asked court to make order including provision pursuant to CPR r.44.2(8) that D would make a payment on account of costs within 14 days of being served with a schedule of costs in the sum of 60% of the schedule
  - D however asked for court to order that D "shall make a payment on account in the sum to be agreed by the parties of the Claimant's bill of costs, within 28 days of such a bill being served"; or alternatively to make the order sought by the Claimant but substituting "40%“
  - Court made order in terms sought by C.

Costs: payment on account

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- CPR r.44.2(8) provides: "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."
- Key points in favour of C:
  - It would provide professionally drawn bill of costs as legal aid
  - Reps professionally bound to bill only what work had been done
  - Standard form of order
  - 60% of the bill did not risk overpayment and was an amount C was almost certainly going to collect: cf *Mars UK v Teknowledge Ltd* [1999] 2 Costs LR 44
- Likely key factor was well-drafted witness statement from solicitor stating court made similar order in at least 7 cases in past 6 months and confirming integrity of the billing

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Thank you for listening

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