JUDICIAL REVIEW UPDATE

INTERIM RELIEF IN JUDICIAL REVIEW[1]

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Introduction

1. Litigation in the Administrative Court can be a relatively slow process. Even in straightforward judicial review cases it can take between six and eighteen months before a final decision is reached. Interim relief is therefore an important weapon for claimants to ensure that their claim is not rendered academic by the passage of time.

2. This paper examines interim remedies, but also looks at ways of achieving expedition and the imperative of acting promptly.

Interim injunctions

3. By way of background, the jurisdiction to grant interim injunctions is provided for by s.37(1) and (2) of the Senior Courts Act 1981, which states that relief may be granted where it appears to the court to be "just and convenient to do so". The private law principles applicable to applications for interim relief in the ***American Cyanamid*** test (is there a serious issue to be tried, and would damages be an adequate remedy for the claimant) are modified in the judicial review context: ***R v MAAF, ex p. Monsanto*** [1999] Q.B. 1161. In ***Monsanto***, the court emphasised that there is a strong presumption against interim relief in public law matters because it is in the public interest that decisions of public bodies are respected unless, and until, they are set aside. In relation to whether there is a serious issue to be tried, the grant of permission is a starting point but it is by no means the case that interim relief will be appropriate just because permission has been granted. The adequacy of damages in unlikely to be a key issue in public law cases because breach of public law does not of itself give rise to a claim in damages. Given these factors, the balance of convenience is likely to be the key factor for the Administrative Court when deciding whether or not to grant an interim injunction.

4. The application of the *American Cyanamid* principles, with a necessary degree of flexibility, to public law cases has been confirmed in ***BACONGO v Department of the Environment of Belize (Practice Note)*** [2003] UKPC 63, [2003] 1 W.L.R. 2839, *per* Lord Walker, delivering the advice of the Board, at 2849A-B, paragraph 35:

> "Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of

[1] Thanks to Richard Moules for assisting with the drafting of this paper.

> Lords in *American Cyanamid* […], but with modifications appropriate to the public law element of the case. The public law element is one of the possible "special factors" referred to by Lord Diplock in that case, at p409. Another special factor might be if the grant of refusal of interim relief were likely to be, in practical terms, decisive of the whole case; but neither side suggested that the present case is in that category."

5. Further, at 2850D, paragraph 39, he held that:

> "Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result."

6. Lord Walker considered that the court had a wide discretion as regards whether to seek a cross-undertaking in damages. He also had regard to the decision of the House of Lords in ***R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)*** (Case C-213/89) [1991] 1 A.C. 603. Lord Goff in that case recognised that Lord Diplock in ***American Cyanamid*** had approached the question of whether to grant an injunction in two stages: first the availability of an adequate remedy in damages and, secondly, where that stage did not provide the answer, the balance of convenience. *Per* Lord Goff at 673A-674D:

> "It follows that, as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience.
> Turning to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" […] I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from this speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put in to the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law. […]
> I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

7. The decision in ***ex p. Factortame (No 2)*** was considered by the Court of Appeal in ***R v Secretary of State for Trade and Industry, ex parte Trades Union Congress*** [2001] 1 C.M.L.R. 8, *per* Buxton LJ at paragraph 27:

> "I draw from Lord Goff's speech the following propositions:
> (A) The decision whether to grant an interim injunction, and thus in the case before us whether to grant a declaration on an interim basis, is a matter of discretion on the part of the trial court. The Court of Appeal in this instance, as in all others, will not interfere with the decision made by the trial court unless that decision reveals either an error of law or a plain error of fact or assessment.
> (B) In approaching the question of whether an injunction should be granted in such cases, the court should have regard to what I describe as the threshold condition that Lord Goff identified, as a particular requirement that ought to be fulfilled in all but the most exceptional cases before an otherwise apparently valid law is struck down or disapplied.
> (C) In thereafter considering, as the court is obliged to in an interim application, the balance of convenience, the concurrent elements that the court has to take into account in a case such as the present are firstly, the strength of the case asserted by the Claimants in the sense of its prospect of success in the European Court of Justice; and, secondly, the respective loss to the parties should the declaration sought either be granted or not be granted, and in due time either one or other of them is successful in the European Court of Justice. Having said that, though, I revert to the point that, as with any other issue of the balance of convenience, that balance is to be struck in the first instance by the court of trial."

8. The decision in ***ex p. Factortame (No 2)*** was also considered by the Divisional Court in *R v Secretary of State for Health, ex parte Scotia Pharmaceuticals International Ltd (No 1)* [1997] Eu. L.R. 626, *per* Evans LJ at 635G-636A:

> "Mr Goudie […] submits that the Department as a public authority should receive special consideration when any such interim application is made against it. That proposition is derived from the authority of the speeches in *Factortame (No 2)*, in particular at pp674, 679 and 683, and also from the judgments, in particular the speech of Lord Templeman in the *Smith Kline* case. Mr Goudie, therefore, on that basis, which I for my part would unhesitatingly accept, invites the court to consider the strength of the applicants' case, for those passages indicate that, having regard to the special status of a public authority respondent, it may be reasonable to expect the applicants to demonstrate more than an arguable case, rather, a strong prima facie case."

9. In addition, at 644H, Evans LJ held that:

> "Factors in favour of making an order seem to me to be these: for reasons already given, the applicants in my view have a strong prima facie case. I would add this, that an order will not affect the public administration in any way. As has been asserted, the Department, having granted the licence, in practical terms will not be directly affected if an order has the effect of preventing Norgine from operating under it."

10. Support for the need for a strong case for the grant of a stay in certain public law proceedings is found in ***R (H) v Ashworth Hospital Authority*** [2003] 1 W.L.R. 127. The Court of Appeal was considering in that case the jurisdiction to grant a stay after a decision of a Mental Health Review Tribunal had been fully implemented: *per* Dyson LJ at 141A, paragraph 48:

> "To summarise, I consider that there is jurisdiction to grant a stay even after the decision of the tribunal has been fully implemented. But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay."

11. From the defendant's point of view, a key issue will be whether or not to file evidence in response to an application for an interim injunction in judicial review proceedings. The procedural rules do not require the defendant to file detailed grounds and evidence until after permission has been granted, but it will often be wise to file evidence in response to an application for interim relief in order to counter the claimant's arguments. However, there is a balance to be struck between providing sufficient material to knock out the application for interim relief and too much material which may lead the court to conclude that there is a point worth investigating at a substantive hearing.

12. The decision of Nichol J in ***Leeds Unique Education Ltd (t/a Leeds Professional College) v Secretary of State for the Home Department*** [2010] EWHC 1030 (Admin) is an example of a case where the defendant's decision not to file evidence in response to an application for interim relief contributed to the granting of interim relief and permission for judicial review. The case concerned two colleges specialising in education fro overseas students –Leeds Unique Education Limited ("Leeds") and AA Hamilton College Limited ("Hamilton").

13. Historically, applications from overseas students applying to study in the UK were considered by Entry Clearance Officers to assess whether the application met the requirements of the Immigration Rules. In March 2009, the Home Secretary changed the rules so that approved colleges could carry out their own checks and issue visa letters. This ability of colleges to approve students was vital to their businesses.

14. Leeds and Hamilton were initially approved to issue visa letters, but on 18 January 2010, due to concerns about their having issued visa letters to persons who subsequently failed to attend lectures, the Home Secretary suspended their licences and then revoked them. Leeds and Hamilton sought judicial review of the revocation and interim relief in the form of a mandatory injunction restoring their licences pending determination of the judicial review.

15. Nichol J granted permission for judicial review and considered that the key issue in relation to interim relief was the balance of convenience. The Home Secretary resisted interim relief on the basis that it would be contrary to the public interest to allow the claimants to issue visa letters to applicants who were not genuine students. However, no evidence was filed in support of that contention and the defendant did not challenge any of the claimants' evidence concerning the hardship of revocation. Given the significant detriment to the claimants' businesses and taking into account the delay before the substantive hearing would take place, Nichol J granted the interim relief.

16. An important issue to consider when applying for an interim injunction is that usually the claimant will be required to give a cross-undertaking in damages as the *quid pro quo* for interim relief. The consequences of a claimant not being able to afford a cross-undertaking are well-illustrated by the case of ***R v Secretary of State for the Environment, ex p. RSPB*** [1997] Env L.R. 431, in which the claimant sought an interim injunction to restrain the Sheerness Port Authority from proceeding with development on an internationally important wet land habitat. Because the RSBP could not agree to a cross-undertaking in damages the House of Lords refused interim relief. Two years later the ECJ gave judgment ruling in favour of the RSPB on the substantive merits, but it was too late for the protected habitat which had by then become car park.

17. Different considerations now apply in environmental challenges and the Courts have made clear that a cross-undertaking is not essential for the grant of an interim injunction in environmental judicial review cases: see e.g. ***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize*** [2003] 1 W.L.R. 2839 where the Privy Council recognised that the Court had a wide discretion in this regard. There have been a number of recent high profile environmental cases where injunctions have been granted despite no cross-undertaking in damages being offered: ***Save Britain's Heritage v Secretary of State for Communities*** [2011] Env. L.R. 6 ([2011] EWCA Civ 334); ***R. (Save Britain's Heritage) v Gateshead MBC*** [2010] EWHC 2919 (Admin) ([2010] EWCA Civ 1500); and ***R. (Pascoe) v Liverpool City Council*** [2007] EWHC 1024 (Admin).

18. Nonetheless the decision of the Aarhus Compliance Committee in the ***Port of Tyne*** case was critical of the UK's practice in relation to cross-undertakings in damages. It said:

> "Cross-undertakings for damages regarding interim injunctions
> 69. The communicants contend that courts in England and Wales generally require claimants seeking an interim injunction to protect the relevant environmental interest pending the substantive trial to provide a "cross-undertaking" in damages before an injunction will be granted. The communicants and CAJE submit that the potential requirement to give a cross-undertaking for damages means that injunctive relief may not be available without risking prohibitive expense to claimants as required under article 9, paragraph 4, of the Convention.
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> 70. The Party concerned submits that the manner in which its courts approach the granting of interim relief does not give rise to non-compliance with article 9, paragraph 4, of the Convention. It submits that there are very good reasons why, in general, a crossundertaking in damages is required. It points to the fact that granting interim relief can have severely adverse consequences for individuals and other private parties who have the benefit of the measure under challenge. Moreover, it points out that there is no set rule requiring a cross-undertaking and that its courts have wide discretion to adopt the course which seems most likely to minimize the risk of an unjust result. The courts have jurisdiction to, and do, grant interim relief despite the absence of a cross-undertaking in damages, having regard to the public importance of the issues raised.
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> 71. The Party concerned also submits that in the typical case of a challenge to a planning permission, the mere bringing of proceedings (even without seeking interim relief) in the majority of cases acts as a stay on the proposed development. This is because if the developer builds in the face of a challenge to his permit, he does so at his own risk of having to later remove it

...
Cross-undertaking as to damages regarding interim injunctions
108. The general rule that the giving of a cross-undertaking for damages by the claimant is a prerequisite for the grant of an interim injunction was noted by the House of Lords in the 1975 decision of American Cyanamid Co v. Ethicon Ltd. The House of Lords recognized, however, that when deciding whether to grant an interim injunction in an individual case, there may be special factors that should be taken into account.

109. Courts in England and Wales have granted interim injunctions without a crossundertaking for damages having been given; there have also been cases in which the injunctive relief was refused due to the fact that the claimant was not in a position to provide a cross-undertaking in damages. Judges enjoy a considerable amount of discretion as to whether a cross-undertaking for damages is required for the grant of an interim injunction.
...
133. A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of England and Wales, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4."

19. The DEFRA letter to the Aarhus Compliance Committee[2] highlighted ongoing consultation work and argued that injunctions and cross-undertakings are rarely required in practice:

"Regarding the issue of cross undertakings, in our experience, for commercial reasons, it is rare for a third party to take any action while a judicial review is pending. Therefore interim injunctions and cross undertakings are rarely required. Despite requests to defendant representatives working in this area, we have not been able to identify recent examples of claims that have not been taken forward because of the financial burden that a cross undertaking in damages would pose. However we are mindful of the concerns in this area and a public consultation on the issue was launched on 24 November 2010. The consultation closes on 24 February. The consultation seeks views on the circumstances in which a court will issue an interim injunction in environmental judicial review proceedings without requiring a cross-undertaking in damages and the factors to be considered by a court when deciding if a cross-undertaking in damages should be given by an applicant seeking an interim injunction. It also seeks views on whether these factors should be set out in court rules or in guidance."

20. Reform is likely and the Ministry of Justice's consultation recommends that cross-undertakings should not be required in certain categories of case:

"Taking these into account, we suggest that the court should, if the application meets the other criteria for granting an interim injunction, grant an interim injunction in judicial review proceedings without a cross-undertaking for damages (or alternatively accept an undertaking to refrain from action from the defendant without a cross-undertaking for damages from the claimant) where:

the Environmental Impact Assessment Directive (85/337), as amended by the Public Participation Directive (2003/35), is engaged and,
if an injunction were not granted:

[2] http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm

a final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded and bringing the case on quickly for trial would not resolve the problem;
significant environmental damage would be caused; and
the claimant would probably and reasonably discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required."

21. Lord Justice Sullivan's Working Group has responded to these proposals. Disappointment was expressed that the proposals would only apply to Public Participation Directive cases. The response continued:

"• We welcome the proposal to dispense with the requirement for a cross-undertaking in damages in certain circumstances, however, we foresee significant problems with the present wording of paragraph 39, including:

(a) "A final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded and bringing the case on quickly for trial would not resolve the problem" – in our view this sets the bar very high. This would only really catch cases where the damage done would be entirely irreversible (e.g. the outright destruction of a protected area, for example) and not those cases where the damage could (but would be unlikely in practice) to be reversed by the court if the case succeeded. Thus, for example, if the challenge is to a landfill consent then, in theory, waste placed without permission in a landfill during the litigation could later be removed but the court is likely to be reluctant to order that and it is questionable whether it would cross the "impossibility" threshold.

(b) "Significant environmental damage would be caused" – the qualification "significant" would need explanation to ensure a consistency of approach; factors to be taken into account would need to include the reversibility of the damage (including, in particular, whether the court or other decision-maker would be likely to require its reversal in the event that the claim was successful), the scale of the damage, whether it relates to something (an area, a species, etc) that has special protection (e.g. under planning policies or the law).

(c) "The claimant would probably and reasonably discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required" – the issue here is how will the court decide whether a claimant is acting reasonably? Unless, as seems unlikely, the court would simply accept the claimant's statement to that effect, it is inevitable that judges will drawn into a detailed means assessment as to what a claimant can afford in each particular case. In our view, this could lead to significant uncertainty and further unhelpful satellite litigation.

• To conclude, while we welcome the MoJ's decision to consult on this issue, we do not believe these proposals address the access to justice deficits in the present judicial system. This is primarily because: (a) they will not apply to all environmental civil claims as required by EU law and the Aarhus Convention; and (b) the requirements set out in paragraph 39 create insufficient certainty to comply with the judgment of the ECJ in Case C-427/07. In our view they could also lead to costly and time-consuming satellite litigation.

• Our first report recommended that the requirement for a cross-undertaking in damages should be dispensed with in environmental cases where the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings (see paragraph 82). In this eventuality, it is incumbent on the court to ensure that the case is heard "promptly". We continue to support this approach. However, we would stress that in view of the small number of cases in which interim relief is likely to be sought (being, as it is, a sub-section of environmental cases) "promptly" means hearing the case literally within a few weeks."

Stays

22. There has been some debate about the power of the court to grant a stay as opposed to an interim injunction: see e.g. ***Ministry of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd*** [1991] 1 W.L.R. 550; ***R v Secretary of State for the Home Department, ex p. Muboyayi*** [1992] 1 Q.B. 244. But the Court of Appeal has held that the courts may suspend the operation of an administrative decision pending an expedited process for the hearing of the judicial review claim by granting a stay: ***R v Secretary of State for Education, ex p. Avon County Council*** [1991] 1 Q.B. 558. In ***Avon*** the Court of Appeal held that "proceedings" should be construed broadly so as to include any process or procedure by which a public law decision is reached. That conclusion is best explained by the fact that at the time (prior to the decision in ***M v Home Office*** [1994] 1 A.C. 377) it was not thought to be possible to obtain an interim injunction against Ministers of the Crown and so the Court of Appeal granted a stay to achieve the same purpose as an injunction.

23. Now that interim injunctions are readily available against Ministers, the better view is that an interim injunction should be sought rather than a stay, unless the decision actually involves proceedings narrowly construed. However, ultimately both remedies depend on the exercise of the court's discretion and have the same objective of preventing the operation of the impugned measure pending the substantive hearing. In recent cases the courts have effectively applied the same approach to awarding a stay as they would have done on an application for an interim injunction: see e.g. ***Cala Homes (South) Limited v Secretary of State for Communities and Local Government*** [2010] EWHC 3278 (Admin), *per* Lindblom J at paragraph 27; and ***Walshaw Moor Estate Ltd v Natural England*** [2012] EWHC 331 (Admin).

24. In ***Walshaw Moor*** Singh J continued a stay of the impugned decision and granted permission for an expedited hearing of the judicial review claim. The case concerned an attempt by Natural England to use Regulation 23 of the Habitats Regulations 2010 to impose an immediate ban on heather burning, grazing of livestock and the use of vehicles on large areas of protected blanket bog used as a driven grouse moor. The claimant had obtained urgent interim relief on the papers pending an *inter partes* hearing and it then succeed in continuing that protection until the substantive hearing on the basis of undertakings to carry out any burning in accordance only with the DEFRA Burning Code and not to burn certain of the most sensitive areas of blanket bog.

25. The ***Walshaw Moor*** case illustrates the importance of a detailed understanding of the factual context when making or resisting applications for stays. The defendant relied on the precautionary principle and asserted that its without notice service of the impugned Regulation 23 notice was urgently necessary in order to prevent further damage to a habitat protected under the Habitats Directive. Singh J, however, accepted (at [6]) that on closer scrutiny of the facts the balance of convenience favoured the claimant, rather than a precautionary approach. In particular, the defendant had allowed a long time to pass (during

which time it had full knowledge of the claimant's activities and their effects) before taking any regulatory action at all thereby undermining its claimed urgency. Furthermore, it was not apparently taking any action in respect of other similar grouse moors and indeed the evidence appeared to show "that there are other agreements in place in relation to may other sites where burning is permitted and will continue to be permitted or the time being".

Interim declarations

26. Interim declarations are a relatively recent invention. They are provided for in CPR rule 25.1(1b). Although comparatively rarely sought, interim declarations can be extremely useful in judicial review proceedings where a reference is made the CJEU. In such cases, the answer to the question posed with not come back from Luxembourg for months, sometimes not for years. An interim declaration can therefore give certainty as to how the parties should regulate their conduct pending the outcome of the reference. In ***R v Secretary of State for Trade and Industry, ex p. Trades Union Congress*** [2001] C.M.L.R. 8, the Court of Appeal made an interim declaration pending the ruling of the CJEU that certain provisions of domestic law were improper implementation of a directive and thus of no legal effect.

Appeals against refusal of permission and interim relief

27. In ***MD (Afghanistan) v Secretary of State for the Home Department*** [2012] EWCA Civ 194, the claimant (a failed asylum seeker) applied for permission to seek judicial review of removal directions. In addition, the claimant sought interim relief to prevent removal pending determination of the judicial review claim. Both the application for permission and the application for interim relief were refused by the High Court and the claimant appealed to the Court of Appeal. The issue was whether the Court of Appeal had jurisdiction to consider the refusal of permission to apply for judicial review as well as the refusal to grant interim relief.

28. The Court of Appeal held that it was generally inappropriate for it to hear both an appeal against the Administrative Court's refusal to grant interim relief and its refusal on the papers of permission for judicial review. Stanley Burnton L.J. held (at [18]-[20]) that:

> "We consider it important to maintain the distinction between a refusal of interim relief and a refusal of permission to apply for judicial review. Interim relief may be refused although the Court has not decided to refuse permission to apply for judicial review, as where no sufficient case of urgency is made out. Conversely, it may be appropriate to grant interim relief even though no decision has been made to grant permission to apply for judicial review.
>
> There are two interrelated reasons why, in our judgment, it is in general inappropriate for the Court of Appeal, in a case such as the present, to hear both an appeal against the refusal by the Administrative Court of interim relief and an appeal against its refusal on the papers

of permission to apply for judicial review. The first is that to do so converts the Court of Appeal, which is an appellate court, into a court of first instance. The Court of Appeal would have to determine the appeal without the benefit of any judgment at first instance. CPR Part 52.15(4) makes express provision for the Court of Appeal to act as a court of first instance, but even in such a case there will be a judgment of the Administrative Court on the hearing of the renewed application for permission to apply for judicial review, giving its reasons for its decision.

The second, and perhaps more important, reason is that for the Court of Appeal to act as a court of first instance effectively deprives the parties of any appeal against the first judicial decision on the substance of the case."

Expedition and rolled-up hearings

29. Usually following service of the claim form, the defendant has 21 days to file an acknowledgement of service setting out summary grounds of defence. Often that timetable will be inappropriate if the matter is particularly urgent. The Administrative Court caters for such cases by enabling a request for urgent consideration. Guidance is given in Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 W.L.R. 810 and the application is made on form N463.

30. A request for expedition should set out why there is a need for urgency, the time within which consideration of the application for permission should take place and the date by which the substantive hearing should occur. It is important to explain fully why expedition is sought and to be realistic about the proposed timetable. In immigration removal cases it is not unusual for the papers to go before a judge in a matter of hours, but in less pressing cases 1 week to 10 days would be more realistic. It is also very important not to let urgency compromise case preparation –with the best will in the world it is often not practicable to get a large judicial review claim ready for a proper hearing in less than 2-3 weeks.

31. The urgent procedure can work extremely effectively even in complex cases. For example, in ***R (Friends of the Earth & Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs*** [2001] EWCA Civ 1847, [2002] Env L.R. 24, the claimants sought judicial review of the defendant's decision that the proposed manufacture of Mixed Oxide Fuel at Sellafield was justified in accordance with Council Directive 96/29/Euratom on basic safety standards for protection against the dangers arising out of ionising radiation. The decision was announced on 3 October 2001, the claim was commenced on 5 October, a permission and substantive hearing was heard on 8-9 November, judgment was given on 15 November, the Court of Appeal heard an appeal on 28-29 November and judgment was given on 7 December, enabling British Nuclear Fuels plc to take "irreversible implementation steps" on 20 December 2001.

32. Another way to achieve some measure of expedition is to seek a rolled-up permission and substantive hearing whereby the court will list the permission and substantive hearings together to be heard at an oral hearing. Rolled-up hearings are increasingly common in important, urgent cases. For example in ***R (Westminster City Council) v Mayor of London*** [2002] EWHC 2440 (Admin) a rolled-up hearing was held to consider a judicial review claim challenging the introduction of the London congestion charge.

33. A rolled-up hearing may also be appropriate where an oral permission hearing has been adjourned thereby avoiding further delay. For example, in ***R (on the application of Midlands Co-operative Society Ltd) v Birmingham City Council*** [2012] EWHC 620 (Admin), the Co-Op challenged the decision by Birmingham City Council to sell certain strategic land interests in Stirchley to Tesco, as well as the in principle authorisation of the use of compulsory purchase powers to facilitate land assembly for Tesco's proposal for retail-led regeneration of Stirchley. The Co-Op has an existing retail store in Stirchley as well as planning permission for a different scheme. The claim was brought on a number of grounds, including in particular that the transaction, viewed in conjunction with planning obligations that Tesco had entered into relating to the relocation of a community centre and bowling facility currently located at the site, was a "public works contract" engaging the public procurement rules in the Public Contracts Directive and the PCR 2006. Beatson J heard a day's argument at the oral permission stage, but could not reach a decision. The matter was then listed before Hickinbottom J for a rolled-up hearing where, in a day and a half, he granted the Co-Op permission to proceed but dismissed the substantive claim.

Delay & urgent cases

34. Related to the question of interim relief is the issue of timing and delay. An applicant for urgent interim relief or expedition of a substantive hearing will be expected to have acted with the utmost promptness.

35. What is sufficient promptness will depend upon the facts and the subject matter of the challenge. Recent cases illustrate that challenges to important macro-economic or funding decisions must be initiated swiftly, regardless of the identity of the challenger, the challenger's resources and their expertise. For example, in ***Fawcett Society v Chancellor of the Exchequer*** [2010] EWHC 3522 (Admin) Ouseley J considered that a challenge to the entire 2010 Budget on the ground of a breach of various equalities duties had not been brought promptly. He held that:

> "18. I further take the view in relation to these proceedings that they are either very

> problematic or academic. If these proceedings are live and intended to have an effect on the current Budget, then in my judgment they give rise to very significant problems in relation to delay and problems of a significant order for the certainty which public and corporate world (individual and foreign) is entitled to have in the budgetary affairs of the United Kingdom.
>
> 19. The original proceedings taken to quash the Budget were started some five weeks after the Budget and indeed after some of the measures had been passed into law in the Finance Act 2010. The claimant knew well of the target which it was eventually to take aim at and although Miss Monaghan is right to say that the claimant is a small charity and the claimant did not in the context of judicial review litigation generally act without promptitude, in my judgment her submissions on delay omit the nature of the decision challenged and the relief sought in respect of it. It is in my judgment no answer to the problems which a challenge may bring through its delay to say that the claimant is a small charity. These were proceedings which were capable of having a very significant impact on the important issues of the Budget for a new government. They should have been brought very much more quickly and if that meant that this particular claimant could not bring them, that does not, in my judgment, alter the question of what is prompt for a decision of this nature being challenged."

36. A similarly strict approach was taken by Haddon-Cave J in ***R (on the application of Harrow Community Support Ltd) v Secretary of State for Defence***, in which the claimants challenged the decision of the Secretary of State to locate a ground-based air defence system, which included missiles, on the roof a London tower block. Haddon-Cave J held that the claimant had not acted promptly: they had known about the deployment for two months before making their claim and this delay was not, in the circumstances, excusable by the funding difficulties encountered.

Time limits

37. Finally, it is important to be aware of the latest developments concerning the judicial review time limit. Judicial review proceedings must be commenced within three months and in any event promptly: CPR 54.5(3). The issue of delay in bringing proceedings is especially important in the planning context because frequently the claimant seeks to challenge a decision that has important implications for third parties, in particular developers who have been granted planning permission. Thus considerable prejudice may be caused to third parties if proceedings are not initiated expeditiously. As Keene LJ explained in ***R (Finn-Kelcey) v Milton Keynes BC*** [2008] EWHC 1650 [2009] Env LR 4 (at [21-[22]):

> "The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker. As I put it in ***Hardy v Pembrokeshire County Council*** [2006] EWCA Civ 240, [10]:
>
> > 'It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly.'
>
> . . . The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. . . Simon Brown J (as he then was) emphasised the need to proceed 'with greatest possible celerity'. . . Once a planning permission has been

> granted, a developer is entitled to proceed to carry out the development and, since there are time limits on the validity of a permission, will normally wish to proceed to implement it without delay."

38. The obligation is to bring proceedings promptly and in any event within 3 months. But it is currently uncertain the extent to which the promptness requirement still provides protection to public bodies. The uncertainty stems from the CJEU's decision that the requirement to bring public procurement proceedings "promptly and in any event within three months" offends against the procurement legislation. The decision is in C-406/08 ***Uniplex (UK) Ltd v NHS Business Services Authority*** concerned reg.47(7)(b) of the PCR 2006 which applies the usual judicial review timescale to the bringing of proceedings by disappointed tenderers. Directive 89/66 requires effective review of procurement decisions. The decision clearly has important implications for applications for judicial review generally, at least where European Union law, is concerned. The CJEU held that: "Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly."

39. This was because: (i) the effectiveness of the public procurement regime can only be realised if the periods for bringing proceedings start to run from the date when the claimant knew, or ought to have known, of the alleged infringement; and (ii) the ability of the Court to dismiss a claim brought within 3 months on the basis that it was not brought 'promptly' was contrary to the principle of certainty, which is enshrined in EU law.

40. The CJEU's reliance on general principles of EU law (effectiveness and legal certainty) in reaching these conclusions suggested that it might well take the same approach to CPR r 54.5 in the context of environmental judicial review claims involving directly effective EU law.

41. The most recent important discussion of this issue can be found in the Court of Appeal's decision in ***R (on the application of Berky) v Newport City Council*** [2012] EWCA Civ 378. Prior to this case there were High Court decisions going either way on whether ***Uniplex*** applied to planning cases: see e.g. ***R (Pampisford Estate Farms Ltd) v Secretary of State for Communities and Local Government***;[3] ***R (Carroll) v Westminster City Council & Anr***;[4] ***R (on the application of Buglife –the Invertebrate Conservation Trust) v Medway Council,***[5] and ***R (U & Partners (East Anglia) Ltd) v The Broads Authority and the Environment Agency***.[6]

[3] [2010] EWHC 131 (Admin).
[4] [2010] EWHC 2019 (Admin).
[5] [2011] 3 C.M.L.R. 39.
[6] [2011] J.P.L. 1583.

42. In ***Berky***, all 3 Judges took a different view on the ***Uniplex*** delay issues. The whole discussion was *obiter* but is still of importance. Carnwath LJ was of the view that:

(i) ***Uniplex*** probably did apply to planning cases but considered the position sufficiently uncertain that he would have made a reference had the case turned on delay;

(ii) if ***Uniplex*** applied it would not have affected the promptness requirement in respect of the domestic law grounds in the case, only the EIA ground;

(iii) contrary to what was said by Collins J in ***U & Partners***, assuming ***Uniplex*** applied, it was concerned only with the time allowed for commencing proceedings and did not affect the Court's power to withhold remedies under s. 31(6) of the Senior Courts Act 1981.

43. Moore-Bick LJ and Sir Richard Buxton by contrast considered that assuming ***Uniplex*** applied in planning cases it did also apply to s. 31(6).

44. Sir Richard Buxton though thought that the application of ***Uniplex*** to planning cases merited reconsideration and that had delay been the determinative issue he would have made a reference.

45. Sir Richard Buxton also said that assuming ***Uniplex*** applies to planning then it disapplies the time limits in respect of all the grounds domestic and European so long as one of the grounds raised was an EU point and not "plainly unarguable".

46. Clearly ***Berky*** will not be the last word on the subject. The influence of EU law at this procedural level is highly undesirable. In the name of certainty, the CJEU ***Uniplex*** disapproved of the promptness requirement in procurement proceedings, but we are left in a state of uncertainty (likely only to be resolved by a reference to the CJEU) as to the applicability of the promptness requirement in planning cases.