Claimant Strategy

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Landmark Chambers

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Scope

Main strategic considerations include:

- Pre-action considerations
- Kinds of claimant – individuals, unincorporated associations; incorporated associations, companies; NGOs
- Standing
- “Promptly” and “within three months” requirements
- Grounds of Claim
- Discretion
- Evidence
- Winning for the client

Considerations Before Issuing Claim

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- What is it that the client (really) wants?
- What can judicial review achieve?
  - JR must be used (CPR 54.2) for quashing order, mandatory order; prohibiting order; injunction.
  - May be used (CPR 54.3) for declarations; damages (but not damages on their own).
- Mediation/alternative dispute resolution?
- Publicity- especially in campaigning challenges?
- Pre action protocol letter
  - 21 days or 14 days or less?
  - Second PAP letter?

Claimants (1)
Who can and should bring the claim?

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Individuals: Some funding considerations:

- **Legal Aid**-
  - Protection against paying any of the costs of the other side usually follows, but court can sometimes order payment of a reasonable amount of costs
  - Contributions from capital/income (not recovered unless opponent pays all the costs)
  - Statutory charge (e.g. in damages claims)
- **Aarhus claim**- costs protection- Part 6 of JR claim form:
  - For environmental claims, caps adverse costs liability ordinarily at £5,000 for individuals and £10,000 for businesses and other legal persons see *R (RSPB) v SSJ* [2018] Env. L.R. 13
  - Note *CPRE Surrey v Waverley Borough Council* [2018] EWHC 2969 (Admin) (Lieven QC)- costs cap varied to £20,000 for CPRE on grounds of their history of fundraising.
- **Pro Bono**
- **Conditional Fee Agreement**
- **JR Costs Capping Order** (public interest proceedings of general public importance)- application normally in, or accompanying, claim form. Decided at permission stage.

Claimants (2)
Individual Claimants- Choosing the right one

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- "Put-up Claimants"- *Edwards v The Environment Agency* [2004] Env. L.R. 43 (Keith J)- not abusive for Edwards to front claim- LSC had seen fit to allow him to stand for whole community.
- *River Thames Society v FSS* [2007] JPL 782: Lady Berkeley substituted herself for River Thames Society as Claimant.
- *R (SDR) v Bristol City Council* [2012] EWHC 859 (Admin): SDR was originally "the only person prepared to put his head above the parapet in the prevailing atmosphere of intimidation and harassment". Later he discontinued the claim, but claimant "ABC" was allowed to bring a fresh JR well out of time on substantially the same grounds.

Claimants (3) Unincorporated Associations:

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- Can they bring a claim for judicial review?

- *"No": R v Darlington BC and Darlington Transport Company ex p the Association of Darlington Taxi Drivers (*1994): Lacked legal capacity to litigate at all (Auld J)
- Yes": *R v Traffic Commissioner for the north Western Traffic Area ex p 'Brake'* [1996] (Turner J.) J.R. invokes a supervisory jurisdiction to control excess of power. Not a knock-out.
- Solution if issue is raised can be to add an individual claimant: *R (Daws Hill Neighbourhood Forum and others) v Wycombe District Council* [2013] P.T.S.R. 970
- See in context of statutory review: *Jane Sarah Williams (A representative Claimant for 20 others comprising "The Sustainable Totnes Action Group") v Devon County* Council [2015] EWHC 568 (Admin).
- Note also possibility of representative parties: CPR 19.6

Claimants (4)

- Local authorities may be claimants- e.g. *R (Luton Borough Council v Central Bedfordshire Council* [2015] EWCA Civ 537 (note Aarhus rules).
- NGOs- e.g. *R (Friends of the Earth Ltd) v Environment Agency* [2019] EWHC 25 (Admin).
  - Lord Diplock in *R v IRC ex parte National Federation for the Self Employed* 1982 AC 617

    It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

Claimants (5) Incorporated Associations:

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Residents Against Waste Site Ltd v Lancashire CC [2007] EWHC 2558

- Incorporated Associations have general capacity to litigate
- Defendant submitted claimant company lacked standing, as it was formed two days before bringing the claim for judicial review.
- In substance company represented the interests of local residents.
- Case represents the direction of travel in an "increasingly catholic view of *locus standi" (see R (On the Application Of) Plantagenet Alliance Ltd v Secretary of State for Justice* [2014] EWHC 1662 at [81])
- *R –v- Leicestershire County Council ex parte Blackfordby and Boothorpe Action Group Limited* [2001] Env LR 2 (Richards J) (formation of a company from an action group need not prevent an action for JR and security for costs could be sought. See Further *Herefordshire Waste Watchers Limited –v- Hereford Council* [2005] EWHC 191 (Admin) (Elias J).
- Real issue is security for costs.

Claimants (6) Companies

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– Commercial rivalry may factor against permission:

> “applications such as this, which may be characterised as part of a commercial struggle between rival developers, "should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review.”

See *R (Commercial Estates Group Ltd v SSCLG* [2015] J.P.L. 351 in which Stuart Smith J referred at [44] back to *R (The Noble Organisation) v Thanet District Council* [2004] EWCA Civ 782 to Auld LJ at [68]

Standing (1)

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- Tests

- “Sufficient interest” – judicial review
- “person aggrieved” – s288 Town and Country Planning Act 1990
- “victim” – Human Rights Act

Standing (2)- Classic Formulation

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R v Monopolies and Mergers Commission, ex parte Argyll Group Ltd 1986 1 WLR 763

“The first stage test which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.”

Standing (3)

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Sedley J's view in ***ex parte Dixon*** was that this test contained the following elements:

- The threshold at the point of the application for leave is set only at the height necessary to prevent abuse.
- To have "no interest whatsoever" is not the same as having no pecuniary or special personal interest. It is to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody.
- Beyond this point, the question of standing has no materiality at the leave stage.
- At the substantive hearing "the strength of the applicant's interest is *one* of the factors to be weighed in the balance" : that is to say that there may well be other factors which properly affect the evaluation of whether the application in the end has a "sufficient interest" to maintain the challenge and - what may be a distinct question - to secure relief in one form rather than another.

- *R (oao Kides) v South Cambridgeshire DC (*2003) 1 P. & C.R. 19- pretty broad conception of sufficient interest: Claimant had no interest in the arguments raised- only in the outcome.
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Standing (4): “persons aggrieved” formula

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- “Persons aggrieved" formula from s. 288 TCPA 1990 (and other legislation)
- Same as JR standing test?
  - *Norman v SSCLG* [2018] EWHC 2910 (Admin)- decision under appeal to Court of Appeal. Claimant was a county councillor who made a decision to refuse planning permission; that decision was appealed by the developer and the Secretary of State granted permission on appeal. The County Councillor wished to challenge the permission. Held that she was seeking to step into the shoes of the Council, or the local neighbour and was not a “person aggrieved” in a representative capacity.
  - Judgment considering *Ashton v Secretary of States for Communities and Local Government* [2010] EWCA Civ 600 at [59]; *Lardner v Renfrewshire Council* [1997] SCLR 454 *Walton v Scottish Ministers* [2012] UKSC 44- on question whether there is a difference in standing requirements under statutory challenges and judicial review.

Promptness

- CPR 54.5(1)(a): The primary test for timing of JR is “promptly”
- CPR 54.5(1)(b): In any event- within 3 months
- *R. (on the application of Crompton) v South Yorkshire Police and Crime Commissioner* [2018] 1 W.L.R. 131 confirms principle in *R v Department of Transport ex p. Presvac Engineering (1991) 4 Admin LR 121, 131* that where a claim is brought promptly upon a Claimant becoming aware of grounds for challenge, but outside three months, it is out of time. But lack of knowledge of decision can be relevant to whether an extension of time for bringing the claim should be granted (*Presvac 133, 134)*
- Both conditions are extendable-
- CPR Part 3.1(2)(a) provides that except where the CPR provides otherwise, the court may “extend or shorten the time for compliance with any rule, practice direction or court order” (even where time has expired) *Gordon Peters v London Borough of Haringey v Lendlease Europe Holdings Ltd* [2018] EWHC 192 (Admin)- Ouseley J refused to extend time. See also eg. Lindblom J in *Connors v SSCLG* [2018] J.P.L. 516 at [74]-[88]
- *R. (on the application of Thornton Hall Hotel Ltd) v Wirral MBC* [2018] PTSR 954 extension of time of six years to allow quashing of a planning permission granted erroneously without intended conditions creating a temporary planning permission.

Promptness (2)
R (Sustainable Development Capital LLP) v SSBEIS [2017] EWHC 771 (Admin)

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- Claim brought within three months of decision and five weeks after actual knowledge of the decision. Claim dismissed for lack of promptness.
- [31] Well-established that bringing claim within three months is not necessarily prompt: citing *Finn-Kelcey v Milton Keynes BC* [2009] Env. L.R. 17 at paragraph 21
- [32] Time begins to run on the date when the grounds of challenge first arose, usually the date on which the decision under challenge was taken. The time does not begin to run from the date when the Claimant knew of the grounds of challenge.

  Query- *R (Anufrijeva) v SSHD* [2004] 1 AC 604 at §26 and SSHD v Shehzad [2016] EWCA Civ 615 at §31
- [34] The use of the pre-action protocol procedure does not affect the time limits for bringing the claim under CPR 54.5, as the protocol itself makes clear.
- See also *Regina (Peters) v Haringey London Borough Council* [2018] P.T.S.R. 1359

Promptness (3)

- Promptness requirement now largely eliminated from cases involving EU law (because too uncertain), but continues to apply to non-EU cases: *R (Berky) v* N*ewport City Council* [2012] EWCA Civ 378
- Lawyer's delay not a good reason for extending time- see *Ex p. Furneaux* [1994] 2 All E.R. 652
- Not knowing about the decision- can theoretically be a good reason if expeditious thereafter- *World Development Movement* [1995] 1 W.L.R 386
- *Gerber v Wiltshire Council* [2016] W.L.R. 2593 inappropriate to extend time for bringing a legal challenge simply because an objector did not notice what was happening, or because of reliance on incorrect legal advice
- Delay obtaining legal aid – probably not a good reason- see *R (Kigen) v SSHD [2016] 1 W.L.R.723.*

Grounds for Judicial Review (1)

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- Where there is a hard-edged question for the court, that is likely to be stronger than *Wednesbury* review of exercise of discretion.

- One of the most effective grounds: Breach of public law duty of adherence to published policy (see *Lumba* [2012] 1 AC 245 §30 and *Tesco Stores Ltd v Dundee CC* [2012] PTSR 983 especially at [18]-[19]))
  - *Adegun* [2019] EWHC 22 (Admin): Failure to adhere to policy on detention of mentally ill detainees:
  - *R (Mevagissey P.C.) v Cornwall Council* [2013] EWHC 3684- meaning of policy on Areas of Outstanding National Beauty

Grounds for Judicial Review (2)- Precedent Fact

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Court decides an issue of a matter of fact

E.g. *R (Miah) v SSHD* [2017] EWHC 2925

The question of whether the Claimant was a British Citizen who had a “right of abode” was a precedent fact. He did have a right of abode and it followed that the Secretary of State should not have removed him to Bangladesh. Consequently, he did not have to pursue an appeal from abroad: he could judicially review the removal and he could establish the fact by evidence in the course of the judicial review hearing (applying Sedley LJ in *R (Lim) v. SSHD [2007] All ER (D) 402* (Jul) at paragraph 19)

Grounds for Judicial Review (3) – Human Rights/ Natural Justice

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- In a human rights case, *court decides* whether right is breached or not: *R (Begum) v Denbigh High School* [2007] 1 AC 100,

- Recent case: *R (Hussein) v SSHD* [2018] EWHC 213 (lock-in procedures in detention centres in violation of article 9)

Grounds (4)
Secretary of State for Employment v Tameside Metropolitan Borough Council [1977] A.C.1044

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- Decision maker must ask himself the right question, and take reasonable steps to enable him to answer it correctly (1065B)

- But “manner and intensity” of enquiry is a matter for decision maker, subject to Wednesbury review: *R (Plantagenet Alliance) v SSJ* [2014] 1662 (QB)

- Applies to the Public Sector Equality Duty *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin)at [89], affirmed recently in *Powell v Dacorum Borough Council* [2019] EWCA Civ 23

Section 149 Public Sector Equality Duty

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(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it

- Main principles: *R (Bracking) v SSWP* [2013] EWCA Civ 1345; and *R (Brown) v SSWP* [2009] P.T.S.R. 1506
  - duty is a continuing one

- "The authority must address the impacts of the measure" (per Supperstone J *R (TW, SW, EM v London Borough of Hilllingdon* [2018] EWHC 1791 (Admin) (10 year residence requirement for eligibility to social housing unlawful contrary to section 29 Equality Act 2010 for failure to confront impacts on traveller families)

Discretion
R (Gardiner) v Herefordshire Council
[2018] EWHC 3842 (Elvin Q.C.)

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- Council granted planning permission for a chicken farm. Council omitted to impose any condition or require any planning obligation controlling water supply. Claim for judicial review was brought and before the substantive hearing the Landowner entered into a unilateral obligation controlling water supply.
- Court held that in those circumstances it would be futile to quash the permission, notwithstanding that the Council had not considered for itself whether the obligation offered was adequate.
- Claim subject to appeal

Discretion
R (Cairns) v Hertfordshire CC [2019] Env L.R. 6

- EIA screening opinion overlooked the effect of the proposal on the archaeological remains. In consequence, the screening opinion was incomplete and failed to meet the statutory requirements under reg.5(4) of the EIA Regulations 2017 . If screening had been properly carried out, it would probably have led to the conclusion that the proposal was likely to have significant effects on the archaeological remains..

- However, Lang J declined to grant relief, in the exercise of inherent discretion, and applying s.31(2A) of the Senior Courts Act 1981 , as even if the proposal had been treated as EIA development, the outcome would have been the same.

Evidence

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- Can be the most important part of JR: see e.g. Parveen v SSHD [2018] EWCA Civ 932 per Underhill LJ §30

CPR 54.16

Rule 8.6(1) does not apply.

No written evidence may be relied on unless-

(a) it has been served in accordance with any-

(i) rules under this Section; or

(ii) direction of the court; or

(b) the court gives permission.

CPR 54.6(2) The claim form must be accompanied by the documents required by Practice Direction 54A.

PD 54A para 5.6 The claim form must include or be accompanied by-

(2) a statement of the facts relied on;

para 5.7 In addition, the claim form must be accompanied by-

(1) any written evidence in support of the claim…

What does the client really want?

- Does she really want to be a test or lead case?
- If she has to be a test case, secure the client's position and win the principle.
- *R (M and A) v SSHD* CO/4615 / 2018- March 2019 Challenge to policy of imposing "no recourse to public funds" on people on route to settlement.. "Disappearing" claimants, but eing fought on wider issues.
- *R (Lumba) v SSHD* [2012] 1 AC 245: some significant points: aliens are entitled to the protection not only of the law but of equal law; no causation defence to tort of false imprisonment; but client not released from detention and given nominal damages.
- *R (Francis) v SSHD* [2015] 1 W.L.R. 567 won his claim for damages and got costs in CoA. Lost an important point of principle, but no reason for client to pursue appeal. Point of principle later corrected in *R (O) v SSHD* [2017] 1 WLR 1717