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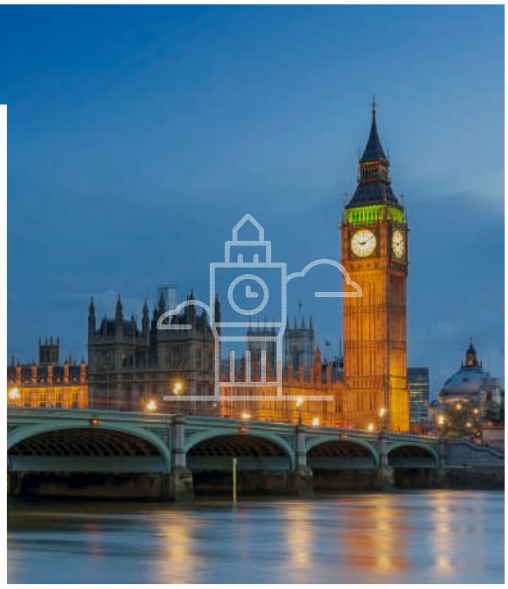
Public Law Webinar: Judicial Review Practice and Procedure Update

20 June 2023



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Speakers

Flora Curtis

Kate Olley

Horatio Waller

Brendan Brett

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Alternative Remedies

- Permission for judicial review will only be granted exceptionally where there is an adequate alternative remedy: *R (Sivasubramaniam) v Wandsworth CC* [2003] 1 WLR 465 at [43] and [46-48] *per* Lord Phillips.
- Two recent planning cases demonstrate the breadth of this principle:

1. *R (Ibrar) v SSLUHC* [2023] JPL 668 (*Ibrar)* and
2. *R (Blow Up Media UK Ltd) v SSLUHC* [2023] EWHC 1278 (Admin) (*Blow Up Media)*

- Also, JR can be an alternative remedy to a complaint to the Local Government Ombudsman (LGO), meaning the LGO should decline to investigate a complaint: *R(Piffs Elm Ltd) v Commission for Local Administration in England* [2023] EWCA Civ 486 (Piffs Elm).

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s289

1. A procedure for appealing the decision of the SoS following a s174 appeal against an enforcement notice
2. The appeal is to the High Court
3. 28 day time limit c.f 6 weeks for JR

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Background

1. Two applications for judicial review of decisions by planning inspectors lodged beyond the 28 day time limit for a s289 appeal, but within or shortly after 6 week period for JR.
2. The inspectors refused appeals under s174 of the Town and Country Planning Act 1990 (TCPA 1990) against enforcement notices (ENs).
3. The applications were joined for determination by a single judge, Eyre J, as they raised similar procedural issues.

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The issues

- "The validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."
- Said to be "rightly" common ground that s285 does not preclude an application for judicial review of an inspector's decision letter upholding an EN: para 32.
- Rather, SSCLG argued that permission for JR should be refused; as an appeal against the inspector decisions under s289 was an adequate alternative remedy.
- Both claimants argued that s289 was not an adequate remedy for their claims; alternatively, they sought permission to substitute for s289 claims.

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Whether s289 is an adequate alternative remedy

- Normally s289 will be an adequate alternative remedy and exceptions will be vanishingly rare: para 45.
- The existence of an adequate alternative remedy and its adequacy are to be determined at the time of the decision under challenge. If the time period for that remedy has lapsed that does not mean permission for JR should be granted: para 42.
- The scope of challenges amenable to s289 appeals is similar to that amenable to JR, subject to a possible "limited category of mistake of fact" that can be pleaded only within JR (para 58).
- The challenges here were clearly alleging errors of law amenable to s289 (para 70).
- Also questionable whether it would even be appropriate to grant permission for JR to consider a mistake of fact that is not amenable to s289 (para 58).

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Whether to allow JR to proceed

- Where s289 is an adequate alternative remedy, cases where it is appropriate for JR to proceed will be vanishingly rare: para 45.
- Where allowing JR to proceed would (as in these cases) subvert the stricter s289 time limit, that is a point of significance against granting permission (paras 63-64).

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Whether to substitute as a s289 claim

- At one end of the spectrum, there are cases where the JR application is filed within the 28 day time limit and the claimant is content to proceed by way of s289. Absent special cs, permission should be granted. Para 61.
- Where the application is filed beyond 28 days, the Denton v White test is to be applied (para 62), i.e. consider the seriousness of the breach, the explanation proffered and all the circumstances of the case. Even a small delay may be fatal: para 63.
- Where the Cs persist in seeking to proceed by JR, that weighs against the application, because court time and resources have been wasted determining that primary position: para 66.

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Summary

- JR should not be used to challenge an Inspector's decision letter on a s174 appeal.
- If JR is lodged against such a decision, it is appropriate to substitute the claim for a s289 claim.
- It is likely that this application will be granted if the claim was lodged within the 28 days time limit.
- JR cannot be used as a last ditch attempt to bring a challenge beyond the 28 day time limit for a s289 appeal.

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Blow up Media

Background

- Another JR following unsuccessful s174 appeal against EN.
- The EN required dismantling of advertisement board on a building.
- The building owner (Sola) submitted an appeal under gds d and e. The gd e was that the EN ought to have been served on the owner of the advertisement board (the Claimant). The C did not appeal.
- The EN was upheld. The gd e was rejected as the Inspector found C was not required to be served with the EN.
- The gd d was dismissed on the basis the Inspector found the development had not existed for more than 4 years.

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The issues

- C sought to challenge the findings made by the Inspector on the gd d appeal.
- Whether C had an adequate alternative remedy to JR raised two issues:
- First, could C have appealed the inspector's decision to the High Court under s289?
- Secondly, if it could not, could C have appealed the EN under s174 in order to run its own gd d case?

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Issue 1

- The Judge (Timothy Mould KC) indicated that C probably had an "interest" in the land to which the EN related for the purposes of s289 such that it had a right to appeal the inspector's decision under that procedure.
- However, the Inspector determined that C did not have an interest in dismissing the gd E argument that C ought to have been served with the EN.
- The Judge decided not to refuse permission on this basis.

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Issue 2

- C for the purposes of s174 was a "relevant occupier" of the land and therefore had a right to appeal the EN.
- Although the EN was not served on C, it was aware of it.
- C had an opportunity to avail itself of s174 to challenge the notice but it had failed to do so.
- Further, in a s174 appeal C could have advanced a gd d appeal.
- If it lost the appeal, C would have had a right to appeal the decision to the High Court under s289.
- Therefore, C had an adequate alternative remedy to JR.
- Permission was refused.

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Summary

- Anyone with an interest in the property affected by an EN has a right to appeal an inspector's decision to uphold the notice under s289, even if they were not served with the notice and they did not appeal the notice.
- Anyone with an interest in the property, or who is a relevant occupier of it, has a right to appeal the EN under s174.
- An application for judicial review of an EN will be refused where these alternative ways of attacking the notice are not taken by the applicant.

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Piffs Elm

Background

- Complaints made to the LGO by Piffs Elm Ltd (PEL) about the handling of a planning application by Tewkesbury BC.
- Complaints concerned the decision to decline to determine the planning application under s70A of the TCPA 1990 and then a refusal to repay the planning fee that PEL had paid.
- The LGO issued an initial final report upholding the complaint.
- It subsequently purported to withdraw that report and issue a further report dismissing the complaint.
- Judicial review applications were made against the reports by both PEL and the LPA.
- The court proceedings concerned numerous issues; only one is relevant here.

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Piffs Elm

The LGO's jurisdiction

- The LGO argued before the courts that, upon reflection, it lacked jurisdiction to even consider the complaints, so its first final report (upholding the complaint) was legally flawed.
- It argued the complaint was premised upon a contentious legal proposition (that LPAs have a general discretion to refund planning fees) which was appropriate for JR.
- Section 26(6) of the Local Government Act 1974 states that the LGO shall not conduct an investigation in respect of (amongst other things) "any action in respect of which the person affected has or had a remedy by way of proceedings in any court of law", but that the LGO may conduct such an investigation "if satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or to have resorted to it".

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The Judgment of the CoA

- The argument of the LGO was upheld on this issue.
- The CoA found that s26(6) applies throughout the LGO's investigation as it is fundamental to jurisdiction.
- If at any point it becomes clear to the LGO that there is an alternative remedy and that it was not, or would not, be unreasonable for the complainant to resort to it, the LGO must decline jurisdiction.
- The LGO should have determined he had no jurisdiction to investigate these complaints, because their resolution required a decision on pure points of law for which PEL had an alternative remedy (judicial review) that it was reasonable for it to use.

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Judicial Review Practice and Procedure- Standing

Kate Olley
20 June 2023

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1. Standing- all about who

1. Does the claimant have a sufficient interest in the matter to which the application relates? s31(2A)(3)SCA 1981
2. Jurisdictional issue- cannot be agreed between the parties
3. Flexible interpretation by courts- relatively unlikely to be knocked at permission
4. May still be relevant at substantive stage- relief- may also not be decided till then- may need factual and legal elements of case before answer becomes clear
5. Eg *Zamran Zafar* [2022] EWHC 2154 "10. Although the merit of the substance of the grounds of claim is not in itself before me, any consideration of the sufficiency of the claimant's interest to bring the claim must necessarily involve regard to the nature of the grounds on which it is advanced: without looking at the nature of the complaint, one cannot know whether the claimant could have a sufficient interest."
6. Claimant can be a surrogate- well established- see eg Lord Carnwath in *R (Edwards) v Environment Agency No.2* [2013] UKSC 78 para 28- "…the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest" (following AG Kokott)
7. Environmental groups obvious example in public interest cases (planning decisions?) Or suitably expert organisations which may be better placed to present arguments about the impact of policy on the affected class as a whole, rather than one individual in particular. CPAG, JCWI, Howard League for Penal Reform- NB those represented not necessarily even identified.
8. Though are there any 'better-placed challengers'…?

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2. contd

1. ***R (AAA Syria) and others v SSHD (UNHCR intervening)* [2022] EWHC 3230**:
2. **Did the charities and the trade union have standing to pursue the generic complaints?** (Detention Action, Care4Calais, Public and Commercial Services Union- the civil servants who had to take the decisions)
3. They did not. The union's members were not directly affected by the policy in any sense relevant for the purposes of seeking judicial review, and it could not be said that any person working for a public authority had sufficient interest to challenge any decision taken by that authority. The charities claimed that they had surrogate standing in that they represented the interests of those who were not well-placed to bring an action themselves. However, that submission was undermined by the presence of the asylum-seeker claimants, who were better placed to bring the claim.

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3. contd

1. 432. "…PCSU's submission on standing amounts to the submission that any person working for a public authority has sufficient interest to challenge any decision taken by that public authority if she had some role in taking the decision. This would provide the PCSU (or any other trade union representing persons employed by a public authority) a **roving mandate** to commence judicial review proceedings directed to any decision of which at least some of its members disapproved. The submission was put in terms of the "well-being" of the PCSU's members, but the **substance** of the matter is **disagreement** with the Home Secretary's policy. It would not be uncommon for those who work in the public sector to disagree with one or more of their employer's policies; the stranger thing would be if no such disagreement existed. However, the PCSU's members do not, by reason of their place of work or duties, have any greater standing, in the legal sense of the words, than any other member of the public. As their representative body, the PCSU can be no better-placed."

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4. Further recent examples

- *R (McCourt) v Parole Board* [2020] EWHC 2320 (Admin)
- Mother of daughter murdered by S- S to be released- S contended mother did not have standing to challenge PB decision
- Permission for underlying claim refused
- Standing- (see paras 43-46) Macur LJ, Chamberlain J

- Sufficiency of interest will vary according to what the rule of law requires in the particular context of the challenged decision.
- It might not be possible to identify any class of persons more affected than the public at large.
- In PB cases, there was likely to be a small class of persons much more directly affected than the public at large.
- Does include: the SoS, the offender; but *not* elected politicians.
- Would also include the victim, or where deceased, their close relatives.

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5. *McCourt contd*

- Decided- the claimant was directly affected by the decision to release S. Not only had he killed her daughter; one issue before the Board- whether his refusal to reveal the whereabouts of her remains was motivated by a desire to exert psychological control over the remaining family members. In those circumstances, it would be inappropriate to make the possibility of a challenge to the Board's decision dependent on a decision of the Secretary of State to bring judicial review proceedings.
- Problem- the decision of the Secretary of State as to whether to bring such a challenge would itself, in principle, be amenable to judicial review at the instance of a victim or relative.
- Prospect of that sort of satellite litigation unattractive- could lead to complexity- release decision delayed or quashed long after it had been given effect?
- Better course: to recognise that in an appropriate case a victim (or relative, where victim deceased) would have standing to challenge the Board's decision *directly*.
- The procedural rights accorded to victims and relatives in Parole Board proceedings were a reflection of the victim's interests in the *outcome* of the proceedings (although that interest would subsist even if the procedural rights were absent).

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6. *McCourt contd*

- Sentencing decisions, in which the public interest was properly represented by the Crown (*R. (on the application of Bulger) v Secretary of State for the Home Department* [2001] EWHC Admin 119), were **distinguishable**- role of Crown in criminal proceedings and Secretary of State in Parole Board proceedings not same.
- In *criminal proceedings*, the public interest is properly represented by and channelled through the Crown- that reflects the established role of the Crown in criminal proceedings as guardian of the public interest. Decisions in that role taken independently of the Executive.
- The decision under challenge in *McCourt* was not part of the *sentencing process* (public interest represented by the Crown). The position of the Secretary of State for Justice was quite different- performing their functions relating to Parole Board proceedings as a member of the Executive.
- Permitting victims or relatives to challenge Parole Board decisions was unlikely to burden it with a flood of judicial review challenges. The recently introduced right for victims or relatives to invite the Secretary of State to seek an independent review, together with the requirement for permission to apply for judicial review, represented significant protection for the Parole Board. Permission was unlikely to be granted if the victim had not sought an independent review (paras 47-54).

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7. R (Good Law Project), Every Doctor v SS Health and Social Care, Crisp Websites Ltd, Clandeboye Agencies Ltd, Ayanda Capital Ltd

1. Procurement process for award of contracts for supply of PPE during the pandemic.
2. Claimants sought judicial review of decisions by the Secretary of State to make direct awards of contracts for the supply of personal protective equipment (PPE) to the interested parties pursuant to the Public Contracts Regulations 2015 Pt2(2), Reg 32(2)(c).
3. Alleged- breach of EU principles of equal treatment and transparency by failing to put in place procedures that identified the selection criteria or evaluation guidance to be applied in deciding whether to contract with any supplier. Further- no fair competition between suppliers for any contract because the defendant had operated a *high priority lane*, whereby suppliers who had been referred by ministers, MPs and senior officials were afforded more favourable treatment, significantly increasing their prospects of being awarded a contract or contracts. Also lack of reasoning and irrationality.
4. Held- the operation of a high priority lane, whereby suppliers of PPE who had been referred by ministers, MPs and senior officials were afforded more favourable treatment, was in breach of the obligation of equal treatment under the 2015 Regulations and therefore unlawful. However, even if two such suppliers had *not* been allocated to the high priority lane, it was highly likely that they still would have been awarded contracts because of the substantial volumes of PPE they could supply to meet an urgent need.

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8. *Good Law Project contd*

- **Standing** - Claimants had the necessary standing to bring a challenge based on breach of the principles of equal treatment and transparency or insufficient reasons for the awards brought under the Regulations
- Note (para 502)- records that when granting permission, Jefford J expressly reserved the question of standing to be determined at the substantive hearing.
- D argued (para 503) Claimants did *not* have standing to bring their challenge under ground of equal treatment and transparency or in relation to the reasoning, under the PC Regs. But accepted that they had standing to bring the challenge in respect of the public law elements of the grounds.
- Court was satisfied (para 505) that the Claimants have sufficient interest to bring the challenge on each ground…

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9. *Good Law Project contd*

- 1- Good Law Project is a not-for-profit company which aims to use the law to protect the interests of the public. "It has a sincere interest, and some expertise, in scrutinising government conduct in this area."
- 2- EveryDoctor's interest in the challenge arose from its concerns regarding good governance and lawful procurement of PPE for the NHS.
- 3- it is not realistic to expect economic operators to mount a challenge to the award of the contracts at issue in the proceedings, particularly in circumstances where been no competition and therefore, *no obviously identifiable disappointed bidders* who might reasonably be in a position to identify causation and loss.
- 4- the gravity of the alleged breaches, concerning issues as to the lawfulness of the awards of public contracts- supported a finding of standing so as to enable review by the courts.

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10. *R. (on the application of Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin)

- Making of appointments to senior positions which were critical to the Government's response to the COVID-19 pandemic. Claimants sought judicial review of decisions taken by the defendant Prime Minister and SoS to appoint two individuals- Chair of NHS Test and Trace and interim chair of National Institute of Health Protection, and director of testing at NHSTT.
- Held Secretary of State for Health and Social Care had not (as alleged) adopted a policy or practice whereby appointments had to be made without open competition, where only persons with some relevant personal or political connection to the decision-maker/politician could be appointed, and that positions were unremunerated. (Claimants also challenged an appointment on the ground of apparent bias).
- So the appointments did not give rise to indirect discrimination on the basis of race or disability contrary to the Equality Act 2010. But the secretary of state *had* failed to comply with his public sector equality duty in making two of the decisions.

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11. *Good Law Project v PM contd*

1. **Standing: general principles** - court noted that Claimants such as NGOs had standing to bring claims even though they were not directly affected by a decision. However, in all such cases the NGO concerned had a particular interest and in a sense was representative of an identifiable group in society which was affected by the decision or policy in question. In cases of *individual* employment, an individual could bring proceedings in an employment tribunal. Where no individual had done so, it was difficult to accept that a claim for judicial review could be brought by other individuals or an NGO (paras 21-23).
2. **Standing: indirect discrimination claim** - Neither of the claimants had standing to pursue the indirect discrimination claims in circumstances where no individual complainant had come forward. The claimants did not have sufficient interest. The employment tribunal was far better suited to adjudicate on disputes of fact likely to be material to the outcome of any discrimination claim (paras 31, 33-34, 39).

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12. *R (AB) v A city Council* [2022] EWHC 2707

- (renewal permission hearing) Did a teacher have standing to bring judicial review proceedings about the approach taken by a school to gender identity issues concerning a child?
- Claimant did not teach X, but sought to ventilate safeguarding concerns about X. Claimed was acting in the public interest and as a whistle-blower, relying on the Department for Education's statutory guidance on Keeping Children Safe in Education 2022 para.7- states all staff have a responsibility to provide a safe environment in which children could learn.
- **Standing-** Not everyone with a personal interest in an issue would necessarily have standing, even if their beliefs or concerns were strongly held. Difference between a general duty on teachers to provide a safe environment and the right of any teacher to apply to court when she disagreed with a school's decision. Claimant had no particular role in bringing public interest challenges. If the mere assertion that she represented the public interest were sufficient to give her standing, court would have no way of *distinguishing* between a person with a genuinely sufficient interest and others.
- **Delay-** Time was critical in a case concerning educational provision for a young child. Claimant had taken months to start proceedings against the school- not brought proceedings even arguably promptly.
- **Merits-** The formation and implementation of policies on gender issues in schools concerned complex issues of social policy. Long-established principle of JR that in relation to issues of social policy that raised multifactorial considerations for decision-makers and discretionary questions of social policy, the courts would be slow to intervene. The Claimant was using the banner of law in an attempt to persuade the court to enter into a policy debate that was ill-suited for JR. Grounds raised no arguable questions of public law.

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13. *Duff v Causeway Coast and Glens BC* [2023] NICA 22

- Claimant's interest in PP granted for an infill dwelling purely based upon environmental protection.
- Therefore found to have standing to bring JR even though he had not participated in the planning process.
- The circumstances were exceptional:
- The local authority had conceded that the permission was unlawful and invited him to issue judicial review proceedings so that it could quash the decision. He was the only challenger. (There had been no objectors to the planning application, planning committee had granted permission despite the officer's recommendation that it be refused as it was in breach of several policies).
- Leave had been refused on the grounds that Claimant had failed to participate in the planning process that led to the challenged decision and because the environmental harm at stake was modest. He also had another- lead- case challenging policy, which therefore militated against bringing myriad applications on the same point.

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14. *Duff contd*

- Sufficient interest test should usually be determined at the leave stage, but could arise whenever a court was considering relief. The question of standing was a matter of jurisdiction to be considered carefully and in context. Courts should avoid unnecessary cost and administration by not encouraging the proliferation of litigation by the busybody.
- To have sufficient standing in the planning sphere, a litigant should ordinarily have participated in the planning process. There were exceptions to that rule, for example where the litigant was misinformed or misled about the planning process. Each case had to be judged on its own facts, considering the context, the interest in play, and the purpose of judicial review to correct public law wrongs.
- So ordinarily, the fact that D had not participated in the planning process would bar JR. However, although court reluctant to interfere with a standing decision, the judge had not struck the correct balance between the competing interests. It was critical that the LA had invited D to apply for a quashing order. If D was refused standing then there would be no challenger to the impugned planning decision. There was an overarching public interest in ensuring good administration and in correcting admitted public law wrongs. It was a rare case, certainty was not undermined. D had standing to proceed because of the local authority's actions in supporting him to apply for judicial review. The decision was highly fact specific (so not a charter for myriad judicial reviews to be brought in this area- paras 33-38).

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Expert evidence in judicial review: admissibility & procedure

Brendan Brett

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Expert evidence - the principles

Evidence in JR generally is relatively restrictive

CPR 54.16 – no written evidence unless filed and served in accordance with a provision of the CPR, or with the permission of the Court.

R v Secretary of State for the Environment, ex parte Powis [1981] 1 WLR 584: Evidence other than evidence of the decision under challenge only be admissible in judicial review proceedings in restricted circumstances (not exhaustive):

- The material was before or available to the decision-maker;
- A question of fact on which the decision-maker's jurisdiction depends;
- A pleaded issue as to whether proper procedure was followed;
- A pleaded issue as to whether proper procedure was followed;

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Expert evidence – the principles

Expert evidence

i.e. opinion evidence given by a person who has relevant expertise on a given subject

Civil Evidence Act 1972, section 3: opinion evidence inadmissible unless it is given (i) on relevant matter (ii) by a person who is qualified to give expert evidence on that matter

> RBS Rights Issue Litigation [2015] EWHC 3433 (Ch). " a recognised body of expertise governed by recognised standards and rules of conduct"

CPR 35.1: expert evidence should be limited to that which is "reasonably required" to determine claim.

R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin): could will seldom grant permission for expert evidence in JR (cited in Admin Court Guide at section 20.2.1).

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Expert evidence – the principles

Expert evidence

R (Lynch) v General Dental Council [2004] 1 All ER 1159 and Law Society

- May be appropriate in particular types of rationality claim
- e.g. where argued decision was irrational due to a serious technical error, which, although not obvious to untutored eye (incl. judge),when explained by relevant expert, would be incontrovertible
- E.g. Bop-Me Ltd v Secretary of State for Health and Social Care [2021] EWHC 1817 (TCC)

R v Haringey Borough Council ex parte Norton (1998) 1 CCLR 168: must not given any opinion on matters of law or to purport to answer questions that the Court is seised of in determining the claim

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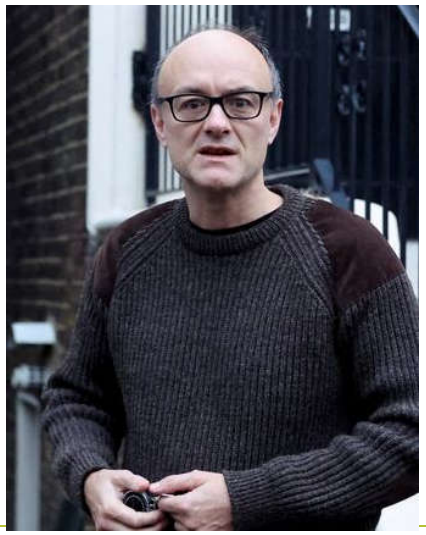
Good Law Project v Minister for the Cabinet Office [2021] EWHC 2091 (TCC)

Procurement of services from Hanbury for policy development during Covid

Summary of principles [19]-[24]

Evidence refused permission [39]-[45]

Dicta as to what is *not* expert evidence



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Good Law Project v SSHSC [2021] EWHC 2595 (TCC)

Procurement of rapid flow COVID tests

Secretary of State refused permission to rely on expert evidence as to state aid

Importance of procedural rigour in approach to expert evidence in public law proceedings as in any others

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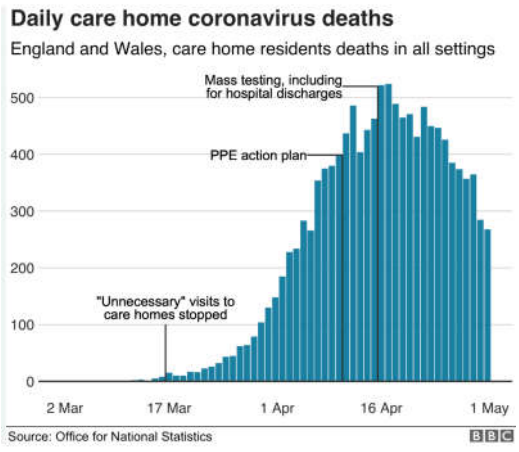
Gardner v SSHSC [2021] EWHC 2946 (Admin)

Failure to protect residents of care homes in England from the risk of serious harm or death from COVID between March and June 2020.

Dicta on "comment" [17]

Different approach in ECHR cases?



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The Public And Commercial Services Union v SSHD [2022] EWHC 517 (Admin)

Challenge to 'pushback' policy

Claimant sought to rely on two expert reports.

Careful, section-by-section analysis of those reports, considering whether or not reasonably required.

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R (Vanriel) v Adjudicators Office [2023] EWHC 925 (Admin)

Challenge to financial compensation awarded under Windrush Compensation Scheme

Whether an abuse of process for claimant to seek judicial review having received a sum "in full and final settlement"

Evidence of Martin Forde KC as to drafting of scheme ruled inadmissible

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Key lessons

Will seldom be appropriate to rely on expert evidence in JR

Where it is relied upon, permission must be sought (proactively) and careful attention by paid to CPR 35 and PDs to ensure compliance

Focus must be on the grounds of challenge and the extent to which the evidence is *necessary* ("reasonably required") for the Court to determine those grounds – not desirable or necessary *in the view of the party relying on it,* but objectively

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Overview

- In this case the complaints to the LGO were premised upon an issue of law.
- In those circumstances, JR is probably an appropriate remedy.
- Whether it would be reasonable to resort to JR will depend on the facts.
- The Judgment could have serious implications, although n.b. there could be a PTA.
- In practical terms, Claimants will have to decide at an early stage whether to complain to the LGO or seek JR because of the 6 week / 3 month time limit for JR.
- If there is any doubt, it would not be sensible to defer lodging JR until the LGO reaches a decision on whether JR would be an adequate alternative remedy. By that time, the time limit for JR will have expired.