HLPA

HOUSING LAW
PRACTITIONERS' ASSOCIATION

JUDICIAL REVIEW UPDATE: 21 JULY 2021

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Judicial Review update

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Judicial review update

- Practice Direction 54A and *R (Dolan) v Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326

- Practice Direction 54B and *DVP v Secretary of State for the Home Department* [2021] EWHC 606 (Admin) [2021] 4 WLR 75

doughty street chambers

PD 54A: overarching themes

- Fundamental changes to procedure and practice
- Codification of best practice
- Focus on “succinct” and “concise”
- Further front loading of preparation
- Electronic filing as a matter of course

PD 54A: the claim form and SFG

- **Rule 54.6**
- Before seeking permission to apply for JR or interim relief C must *"make proper and necessary inquiries"* to ensure, so far as reasonable possible, that all relevant facts are known – para 4.2(1)
- Claim form (or application for urgent considerable) must
  - Set out all material facts "those relevant to the clam"
  - Any statutory provision which excludes jurisdiction of the court – ouster clauses
  - Reference to any alternative appeal mechanism that exists

PD54A: Statement of Facts and Grounds

- Must have a SFG using numbered paragraph – clear and concise – §4.2(1)
- These statements
  - Can be contained in a single document and as concise as possible
  - Must not (without permission) exceed 40 pages. Court expectation in many case is that SFG will be "significantly shorter" (§§4.2(2) and 4.2(3)
  - Identify in separate numbered paragraphs each ground of challenge
  - Identify the relevant provision or principle of law said to have been breached
  - Provide sufficient detail of the alleged breach to enable the parties and the court to identify the essential issues alleged to arise
  - State precise the relief sought

PD 54A :The claim bundle

- §4.4 sets out list of documents which must accompany the claim form
- List replicates the old PD 54A §5.7 – the only addition is express provision in §4.4(1)(e) – where the claim is directed to the decision of a public authority other than a court or tribunal, a copy of any record of the decision under challenge must be provided
- C must prepare and lodge a hard copy and electronic paginated and indexed bundle containing all the documents referred to in §§4.2 and 4.4 (§4.5)
- If file size exceeds 20MB core bundle should be prepared with other documents sent as a separate bundle (Electronic Bundles Guidance §3)

Electronic Court Bundle Guidance

- Published by the ACO 27 May 2021
- Must be suitable for use with Adobe Acrobat Reader, PDF Expert and PDF Xchange Editor
- Bundle must be one single PDF file
- Where seeking urgent consideration it must not exceed 20MB and should be filed by email only (if non urgent can exceed 20 MB but must then have a 20 MB core bundle)
- Must be uploaded using the Document Upload Centre
- Must be paginated electronically starting with ‘1’ so numbers on PDF same as on paper copy

Electronic Court Bundle Guidance

- Each document should be bookmarked / identified in the side bar
- Hyperlinked index
- Landscape format documents must be rotated
- Default view must be 100%
- Resolution must be 200-300dpi
- Document must be text based rather than scanned – but if must be scanned must be OCRed
- If there are additional documents to add, enquires should be made as to how the judge would like them

Practice Directions 54B: Urgent claims

- Cultural change towards a culture of compliance including with urgent claims
- *DVP v Secretary of State for the Home Department* [2021] EWHC 606 (Admin) [2021] 4 WLR 75
- “identified significant concerns about the conduct of the claims”. In particular that the claim was not urgent, failed to provide the required information and breached the duty of candour

Practice Directions 54B: Urgent claims

- File form N463 *"all the information required by the form must be provided. In particular [why the application needs to be considered urgently, why the request wasn't made sooner and the timescales for consideration]"* §1.2
- Do not refer to other documents "please see attached grounds" is not acceptable when dealing with why the application is urgent. (see *DVP* at §16

Practice Directions 54B: Urgent claims

- File a hard copy and electronic bundle containing at least: (i) For N463, (ii) pre-action correspondence, (iii) all communication with the defendant concerning the urgent application (§1.3)
- All applications must be accompanied by the draft order setting out the interim relief requested and/or the expedited timetable sought (§§2.4 and 3.2)
- Where urgent application is for interim relief, the grounds must be ”set out clearly and concisely” (§2.1)

Practice Directions 54B: Urgent claims

- Applicant will be expected to have taken reasonable steps to investigate matters material to the application. The application must be supported by evidence in a witness statement which must cover “all matters that it is reasonable to assume a court would consider material to the application” including matters “supporting and those undermining the application” (§§2.2 and 2.3)

PD 54B: Applications for expedition

- Must include “a clear and concise explanation of the reasons why expedition is necessary” (§3.1)
- *”the application must include a statement of the position of the Defendant and any interested party on the expedition sought or, in default of that must explain the steps taken to contact the Defendant and IP to ascertain that position”* (§3.1)

PD 54A: Renewed permission applications

- Request to reconsider a permission refusal must be succinct and identify the scope of the renewed application
- In particular it must identify grounds relied upon in support of the renewed application and must address reasons given by the judge who refused permission on the papers
- Standard time estimate for renewal hearing is 30 minutes (to include time for judgment). Longer hearing can be requested in renewal application
- Court must be informed of agreed time estimate within 7 days of application being filed

CPR 54.15: Additional grounds of claim

- Part 23 application required where permission to amend sought (§11.1)
- Application must be made
  - Promptly
  - Should include or be accompanied by a draft of the amended grounds
  - Be supported by evidence explaining the need for the proposed amendment and any delay in making the application for permission
- PD 54A
  - 11.4: CPR 17.1 and 17.2 applies when determining applications to rely on additional grounds.

PD 54A: Skeleton arguments

- The purpose is “to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely” (§4.1)
- As well as being concise – no more than 25 pages (unless with permission) a skeleton should:
  - Define and confine the area of controversy
  - Be cross referenced to any relevant document in the bundle
  - Be self contained and not incorporate by reference material from previous skeleton arguments or pleadings
  - Should not include extensive quotations from documents or authorities

PD 54A: Skeleton arguments

- Where it is necessary to refer to an authority, state the proposition of law it demonstrates and identify the part that support the proposition
- If more than one case is cited in support of a given proposition, briefly explain why (§14.2 and 14.3)
- Non-compliant skeleton arguments may be returned by the ACO and may not be re-filed unless and until it complies with PD requirements. Costs of preparing non-compliant skeletons may be disallowed (§14.4)

PD 54A: Documents

- *Not less than 7 days* before the date of the hearing (or the warned date) the parties shall file
  - An **agreed** list of issues
  - And **agreed** chronology of events with page numbers to the bundle); and,
  - An **agreed** list of essential documents for the advance reading of the court (with page references in the hearing bundle to the passages relied on) and a time estimate for the that reading (§14.7)

PD 54A: Documents

- Novel core bundle requirement where hearing bundle exceeds 400 pages. This agreed core bundle must include
  - The pleadings
  - A copy of the challenged decision and/or measure
  - Such further documents (or extracts from them) as the parties consider essential for the purposes of the hearing (15.1)

- Solicitors for each party must certify compliance with requirements of para 15.1

PD 54A: Documents

- Electronic and hard copy hearing bundle (and, if applicable, core bundle) to be lodged with ACO not less than 21 days before the date of the hearing (or warned date) (§§15.2 and 15.3)
- An agreed authorities bundle must be lodged with the ACO – in hard copy and electronically – not less than 7 days before the date of the hearing (or warned date) (§§15.3 and 15.4)

Listing policy - timescales

- New administrative court listing policy issued 31 May 2021
- In London general expectation is notification of renewal hearing within 2 weeks with the hearing to take place between 3-8 weeks of the date of the Renewal Notice being filed
- Counsel's availability not usually relevant (§ 10)
- Ordinarily final hearings will be within 9 months (§14)
- A case will enter warned list on the first day after final deadline for documents to be heard within 3 months (§16)

PD 54A: Agreed final orders

- Where the parties agree the terms of a final order to be made disposing of the claim (prior to judgment) the Claimant shall file:
  - 3 copies of the proposed agreed order
  - A short agreed statement of the matters relied on as justifying the proposed agreed order
  - Copies of any authorities relied upon

  - **Both** the draft order and the agreed statement shall be signed by all parties to the claim (PD 54A §16.1)

Everyone In:

Where do we stand?

Derek Bernardi, Solicitor-Advocate, Camden Community Law Centre

Background

26 Mar 2020 – Everyone In initiative was announced

28 May 2020 – Luke Hall MP sent letter to all local authorities: law regarding ineligible persons and those with NRPF remains in place; LAs must use judgement in deciding what support they can lawfully give, considering a person's circumstances and support needs

5 Nov 2020 – Protect Programme announced: new scheme to protect most vulnerable; additional £15 mil funding; to run alongside Everyone In

R (oao Ncube) v Brighton & Hove CC [2021] EWHC 578 (Admin)

Mr Ncube was a former asylum seeker who was sleeping rough

BHCC initially had policy of accommodating all ineligible rough sleepers, but subsequently decided that their own policy as unlawful as they had no power to do so

Mr Ncube argued they did have such powers under:

- s.138 Local Government Act 1972
- s.2B NHS Act 2006

R (oao Ncube) v Brighton & Hove CC [2021] EWHC 578 (Admin)

Freedman J held:

Local authorities do have a power to accommodate under s.138 LGA 1972

They also have a power to accommodate under s.2B NHS Act 2006

Neither provision may be used to circumvent the prohibition under s.185 Housing Act 1996 (ie to provide Part 7 homelessness accommodation through the back door)

s.138 Local Government Act 1972

Four elements:

1. there has been an emergency or disaster or it is imminent or there is reasonable ground for apprehending such an emergency or disaster;
2. the type of disaster is one involving danger to life or property;
3. if so, whether the Council is of opinion that it is likely to affect its area or some of its inhabitants;
4. if so, the Council may incur such expenditure as they may consider necessary to avert, alleviate or eradicate its effects or potential effects.

s.2B NHS Act 2006

Each local authority must take such steps as it considers appropriate for improving the health of people in its area.

The steps that may be taken include:

- providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment (s.2B(3)(e)), and

- making available the services of any person or any facilities (s.2B(3)(g))

Key question: is provision of accommodation within the target of addressing public health functions?

Whether such step is ‘appropriate’ likely a decision for the LA, challengeable on the basis of rationality (ie a high bar)

Pending JRs

Lambeth LBC:

- Claim brought by Lawstop on behalf of ineligible and unvaccinated 68 year old
- C argues that LGA/NHSA powers should be exercised irrespective of whether EI is ongoing
- Awaiting permission

Lewisham LBC:

- Claim brought by Morrison Spowart
- Lewisham accept that pandemic is emergency under s.138 LGA, but dispute that they are required to accommodate those with NRPF
- C argues refusal to accommodate breaches articles 3 and 8 ECHR
- Permission recently refused (including on renewal)

Tower Hamlets LBC:

- PAPL sent challenging decision to end EI accommodation for client with NRPF
- Arguments involving A3 and A8; arbitrary decision-making; mistake of fact re: EI ending; failure to publish criteria for exercise of LGA and NHSA powers

R (oao ZLL) v LB Camden (CO/1515/2021)

ZLL is a Chinese national and overstayer of less than 20 years; no underlying health conditions but unvaccinated

Sought accommodation under LGA/NHSA when facing eviction from hostel

Camden initially claimed that EI had been superseded by Protect Programme, and argued that they are only required to accommodate particular categories of rough sleepers (symptomatic or positive test; sleeping rough during winter restrictions; long-term rough sleepers)

ZLL advised to seek help from the Routes Off the Streets (RTS) team

Advised that he must first be ‘verified’ as sleeping rough

R (oao ZLL) v LB Camden (CO/1515/2021) cont.

Grounds:

1. Failure to accommodate a rough sleeper during pandemic automatically breaches A3, as does Camden's requirement that a person must actually sleep rough before assistance will be offered.
2. Mistake of fact/law – Camden has adopted EI as a local policy, and has failed to appreciate that they are required to accommodate people at risk of rough sleeping as well as actual rough sleepers.
3. Irrational arbitrariness – failure to adopt clear policy/criteria for use of LGA/NHSA powers
4. Contrary to statutory purpose – Camden's policy of not accommodating people at risk of sleeping rough, and/or requiring them to actually sleep rough, is contrary to the purpose of LGA/NHSA

R (oao ZLL) v LB Camden (CO/1515/2021) cont.

Permission granted on all grounds

Shelter to file witness evidence dealing with issue of rough sleeper verification and results of FOI requests regarding EI and move on plans

Liberty considering whether to intervene

Has Everyone In ended?

Recent statements saying that EI has ended

- Tweet by Oxford City Council 2 Jul 2021: Government has instructed councils that they should no longer be accommodating people with NRPF
- Inside Housing article 6 Jul 2021: Councils have been told that they must close the hotels they used to house homeless people during the COVID-19 pandemic as a condition of the latest round of rough-sleeper funding from the government
- Letter states that use of hotels and other emergency accommodation should end by end of Q1 (ie July 2021)
- Also states that funding for immigration advice is not to be used to challenge immigration decisions made by the Government (!)

No it has not, but…

7 July 2021 – MHCLG published article on their blog confirming EI is ongoing

Article did not mention anything about ineligible persons

There appears to be an increasing number of people being evicted from hotels and other emergency accommodation; no doubt result of letter from Government

How to reconcile public position with private position?

Commitment to end rough sleeping

Will ‘Freedom Day’ have an impact? What about third wave?

Practical considerations

Does client have any alternative routes to accommodation?

Eg Part 7; Children Act 1989; Care Act 2014; ss.4/95 IAA 1999; challenging NRPF

Is client particularly vulnerable to covid-19?

Vaccinated? Medical conditions? Age? Ethnicity?

Does LA have any policies related to EI?

Has LA provided reasons for refusing to exercise powers under LGA/NHSA?

If based on EI funding, how is this rationally connected?

If client already in EI accommodation, how does present situation compare?

Government Response to IRAL

A warning for housing lawyers

Government Response to IRAL: Procedural matters

Promptness

Claimants would no longer be required to bring a claim ‘promptly’, and would only be required to do so within three months

Tracks

Potential for track system to be introduced, as with Part 7 claims in the County Court

Reply to AoS

CPR Part 54 would be amended to provide for Claimants to file a Reply within 7 days of an Acknowledgment of Service

Government Response to IRAL: Procedural matters

Summary Grounds

Defendants would only be required to file Summary Grounds of Resistance:

a) Where the PAP has not been followed, or
b) Where the claim raises new grounds without sufficient notice

Detailed Grounds

Time for filing detail grounds for contesting claim would be extended from 35 to 56 days from date of service of order granting permission (CPR 54.14)

Government Response to IRAL: Remedies

Suspended Quashing Orders

Quashing order would be made but would not take effect unless the Defendant fails to comply with conditions in the order

Prospective-only Remedies

Remedy would have no retrospective effect; eg if a piece of legislation if held to be unlawful, decisions already made pursuant to it would stand – and Claimant would not benefit from winning the claim

Government considering presumption or requirement for both, with only very limited exceptions

Government Response to IRAL: Remedies

What could go wrong?

Suspended quashing orders may be sensible in some contexts, eg where the illegality can be remedied within a reasonable time

However, this could increase the time and costs involved in JR proceedings, as cases would not conclude until conditions have been met (or else, the proceedings restored)

Judges are used to exercising remedial discretion and this should not be restricted

Prospective-only remedies would only apply to Statutory Instruments, so would be irrelevant to most common housing JRs

However, if a client did seek to challenge a SI, it may be difficult to justify funding when they wouldn't stand to directly benefit from litigation

Thank You

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