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CHAPTER 27 JUDICIAL REVIEW
SECTION 6 THE PRE-ACTION PROTOCOL

1. GENERAL

1.1. The Judicial Review pre-action protocol is a process that is designed to try to resolve disputed cases before they reach the Court. It operates only for cases in England and Wales. The intention is that a potential claimant (which in immigration cases would be the applicant) should be able to present his grounds for dispute against a decision to the potential defendant (the Secretary of State or the individual immigration officer) in order that these can be considered in full. This will give an opportunity for the case to be conceded, if the defendant thinks that this is appropriate, without the use of a Court's time. A copy of the pre-action protocol is at ***Annex B***.

1.2. The protocol will not be appropriate in all cases where JR could be sought. For example, in urgent cases where removal directions have been set or where the decision under challenge has been made by an adjudicator or the IAT (see section 4 below). However in cases where it could be used, the Court will take compliance with the protocol into account when it comes to assess costs or damages.

1.3. A copy of the pre action protocol and its guidance notes can be obtained by claimants from the Administrative Office to the Court.

2. LETTER BEFORE CLAIM

2.1. Before starting JR action the claimant should send a standard format letter to the defendant which gives a clear account of the decision which is to be challenged and a summary of the facts on which a JR claim would be made. See ***Annex B***. Letters before claim should be addressed to the Judicial Review Management Unit, IND, Electric House, 3 Wellesley Road, Croydon CR0 2AG. A copy of any letter before claim that has not been addressed to JRMU should be faxed (0208 603 8586 or 0208 603 8585) to them as soon as possible.

2.2. If a letter is sent which makes representations in circumstances where it would be appropriate for a letter before claim to be used and where it contains all of the information which is described in the standard letter before claim, it would be appropriate to treat it as if it were a letter before claim and advise the sender that this is what has been done. This is to show to the Court, if the case should come to JR, that the HO is complying with the aims of the protocol. A standard paragraph to be used in this circumstance is at ***Annex C***.

2.3. If a letter is received which threatens JR but which does not give the information which is described in the standard letter before claim, there is no need to advise the applicant of the pre action procedure. The letter should be considered on its merits

and if appropriate, the applicant should be advised that action will proceed unless confirmation is received that a claim has been made.

2.4. If a letter before claim, or letter which threatens JR, is received which seeks to make the HO perform an action (for example, to return a passport or proceed with an appeal hearing), every effort should be made to resolve the case or to explain why the requested action cannot be taken, before a claim is made. Failure to do this could be construed by the Court as a failure to abide by the protocol.

2.5. If a letter before claim is received it would not be appropriate to set removal directions before a letter of response has been sent. To set the directions in advance of the response could be interpreted as circumventing the Court's procedures by making the claimant apply for an injunction or permission before the protocol has had a chance to work.

2.6. When removal directions are set after a letter before claim has been sent but before it is received or linked to the file, the directions should be cancelled and re-set once the letter of response has been sent. Removal procedures could then continue unless a JR application was made when the concordat would apply.

2.7. A claim for JR should not normally be made before the defendant has replied to the letter before claim.

3. LETTER OF RESPONSE

3.1. The recipient of the letter before claim should respond to it within 14 days using the standard format laid down in the protocol. If it is not possible to reply within 14 days, the defendant could ask the claimant for an extension of the time limit in which to respond, but the claimant does not have to agree to this if he considers the request to be unreasonable, nor will it effect the time limit for making a claim for JR. (A claim for JR must be made within three months of the decision to be challenged).

3.2. Therefore, if it is not possible to send a letter of response within 14 days an interim letter should be sent to the claimant which proposes an extended time for a reply and which reminds the claimant of the time limit for making a JR claim. A standard paragraph is at ***Annex C***. If a response is not sent to a letter before claim and this leads to time and money being wasted (for example a Court hearing in a case which was conceded) it could result in an order for some or all of the claimant's costs being made against the Home Office.

3.3. If it is decided to concede the case as a result of the letter before claim, the letter of response should clearly say so.

3.4. If it is decided to only concede part of the case or to maintain the decision, the letter of response should,

(i) clearly identify what aspects of the claim are being conceded

(ii) give a new decision (if this is appropriate) or say when a new decision will be made,

(iii) provide a fuller explanation of the decision (if this is appropriate),

(iv) address the points of dispute or explain why they cannot be addressed,

(v) enclose any relevant documentation requested by the claimant or explain why the documents are not being enclosed and,

(vi) confirm whether an application for an interim remedy will be opposed (if this is appropriate).

3.5. If the claimant has identified any other interested parties to his JR claim, (for example where the same challenge is being made on similar cases) the letter of response should be copied to them. The letter could also contain details of any other parties which the defendant considers might have an interest.

4. CASES WHERE THE PROTOCOL IS INAPPROPRIATE

4.1. The protocol will not be appropriate in cases where the defendant does not have the legal power to change the decision being challenged. In immigration cases, only the Court has the power to overturn a decision made by the Tribunal except in the limited circumstance where an appellant may apply within 10 days to the Tribunal for it to review its decision to refuse leave to appeal on the ground that it was wrongly made as a result of a procedural or administrative error by the Tribunal itself. (Section 19 of The Immigration and Asylum Appeals (Procedure) Rules 2000).

4.2. In addition the protocol will not be appropriate where the decision which is to be challenged has been made by an adjudicator and where there is no right of appeal to the Tribunal. As in Tribunal determinations, adjudicator's determinations cannot be overturned by the Secretary of State, and they can only be reviewed by the Chief Adjudicator, upon application, within 10 days and directed to be re-heard if there was a procedural or administrative inaccuracy. (Section 16 of the Immigration and Asylum Appeals (Procedure) Rules 2000.)

4.3. The protocol will not stop the implementation of a disputed decision. It is not therefore appropriate for it to be used in cases where removal directions have been set.

4.4. The guidance notes to the protocol (***Annex B***) make it clear where the use of the protocol would be inappropriate. In urgent cases (where removal directions have been set) and in cases where the protocol is inappropriate (where the challenge is to an adjudicator or the Tribunal's determination) the claimant should make an application to the Court.

4.5. If a letter before claim is received seeking to challenge an IAT determination that the Secretary of State does not have the power to over turn, the claimant should be told

that this is an inappropriate use of the protocol and that we will proceed to remove unless prevented from doing so by an injunction or the grant of JR permission. A standard paragraph is at ***Annex C***.

4.6. If a letter before claim is received after removal directions have been set the claimant should be told that this is an inappropriate use of the protocol (as at 4.4 above) and the case should be treated as agreed for those cases where JR is threatened at the point of removal. (See also para 2.6 above).