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60 Judicial Review and Injunctions

Judicial review (JR) is the legal process whereby the lawfulness of a decision, action or failure to act of a public body such as a government department or local authority or other body exercising a public law function can be challenged. The generic term for this area of law is "administrative law".

Normally the court will not hear a case unless satisfied that all statutory remedies open to an applicant has first been exhausted. Immigration cases should not therefore reach the stage of JR until they have been through the entire appeals system. Executive decisions or actions which do not attract an in-country right of appeal, such as the certification of an asylum or human rights claim as clearly unfounded, may be challenged by judicial review. A failure to act (such as a delay in issuing a document or making a decision) may also be challenged by judicial review (such JR challenges will not generally be suspensive of removal action). It is also possible to challenge the setting of removal directions by JR, although this is not an immigration decision as defined by the 2002 Act.

Challenges to removal

A challenge by way of Judicial Review to removal will generally suspend the removal action. A challenge to removal is a challenge to the setting of Removal Directions, or a challenge (which may be prior to setting of Removal Directions) that removal would be unlawful: normally on the grounds that it would breach a fundamental right (Refugee Convention, ECHR) or EC law.

This means that we suspend removal when an application for permission is made except in specified circumstances. We will not remove if permission is granted and cannot reset removal directions until the permission application has been determined by the Court.

Where there is a challenge to a decision relating to a breach of human rights (e.g. Art 3) or refusal of a fresh asylum claim without an in-country right of appeal and removal is not specifically challenged by the claimant we would normally still not proceed with removal action until permission was decided by the Court.

JR Challenges other than to removal.

These will only be potentially suspensive if Art 6 of the ECHR is engaged and should be decided on a case by case basis. Art 6 covers such situations where an individual's rights maybe breached in respect of proceedings which they have instigated or where they are a party to such proceedings and it is alleged that removal will so breach these rights. Chapter 21.7 – 21.14. of the Enforcement Instructions Guidance (EIG) provides guidance on the handling of cases involving Art 6.

- ◆ Once a claim has been issued and the grounds disclosed, UK Border Agency must submit a summary defence within 21 days. In some cases this is drafted by UK Border Agency and in other cases by Treasury Solicitors (TSols) acting on behalf of UK Border Agency. If this deadline is not met UK Border Agency forfeits the right to take part in the permission hearing unless the court agrees;
- ◆ Most claims will be dealt with on papers in the first instance but the claimant may, if refused permission on the papers, request reconsideration at an oral hearing (see 60.9);
- ◆ If permission is granted, the UK Border Agency then has 35 days to submit a full defence. TSols act for UK Border Agency and can appear at the substantive hearing but, in those cases where the 21 day deadline was missed, the court will take that into account when considering the awarding of costs.

60.1 Third party access to JR pleadings - Corner House judgement (Disclosure of Acknowledgement of service, Summary Grounds and Detailed Grounds) *

Background

Under a recent judgement it was held that the Acknowledgement of service, Summary Grounds and Detailed Grounds in Judicial Review proceedings are disclosable to third parties (including the media) under part 5.4C of the Civil Procedure Rules (Attached witness statements are non-disclosable). The judgement was given on 4th February 2008 and is retrospective in effect but provides that documents lodged up to that date have been taken to have been lodged with an objection.

Preparation of Acknowledgement of service, Summary Grounds or Detailed Grounds

UK Border Agency case owners must be satisfied when either preparing an Acknowledgement of service, Summary Grounds or Detailed Grounds or providing information to a TSol case worker that information supplied can be disclosed to a third party.

Case owners must firstly consider on a case by case basis whether it is necessary to include sensitive information or materials and where this is the case whether an objection to disclosure should be made. Case owners should discuss this with the TSol caseworker assigned to their case.

The primary obligation remains to disclose all information necessary for the fair disposal of the case and in any event TSol have a duty of candor to disclose all material facts relating to a challenge.

There may be occasions where an objection to disclosure should not be made, for instance where information may be properly disclosed under the Freedom of Information Act.

Issues that might merit this consideration

Where information or materials referred to in the Acknowledgement of service, Summary Grounds and Detailed Grounds are:

- sensitive on grounds of security, policy or some other ground of public interest;

and / or

- **contain personal information relating to a third party.**

* (Corner House (JR (oao Corner House Research & Campaign Against the Arms Trade) v SFO;
Third Party Application: Mark Thomas)

60.2. UK Border Agency policy in JR cases where removal directions are in place

The UK Border Agency will not automatically defer removal in cases where JR is threatened (see 60.7) or where a claim is filed (see 60.8).

60.3. Responsibility for case handling

In most enforcement cases, the Operational Support & Certification Unit (OSCU) has responsibility as a point of contact when removal directions (RDs) are in place and will provide advice to Local Enforcement Offices (LEOs) concerning removal. Where RDs have been cancelled and JR proceedings have commenced, the case will be handled by the Judicial Review Unit (JRU). However, third country judicial review cases will be handled by Third Country Unit (TCU), and deportation judicial reviews will be handled by Criminal Casework Directorate (CCD): both these business areas have their own dedicated JR team.

The procedures set out below must be adhered to when setting RDs, when notified by a subject or his representative of an intention to seek permission to apply for JR, or that an application has already been lodged, or when an injunction has been obtained or alleged to have been obtained.

60.3.1. Port cases

These procedures do not apply to persons refused entry at a port provided that removal takes place within 7 days of the decision to refuse entry.

60.4. Timing of Removal (For Third Country or NSA Cases see 60.5)

We need to ensure that persons subject to enforced removals have sufficient time between the notification of RDs and the date/time of removal to seek legal advice and/or apply for JR.

- ◆ A minimum of 72 hours (including at least 2 working days) must be allowed between notification of RDs to the person being removed, and the removal itself. The last 24 hours of this period must include a working day.
- ◆ The only exceptions to this minimum timeframe are set out at 60.5 and 60.6.
- ◆ Removal directions (IS151D) should also be notified to legal representatives where the UK Border Agency has details of any representative actively involved in the case post-appeal, or where a person asks that a specified representative be sent copies of papers served with removal directions.
- ◆ Removal directions should be accompanied by a short factual summary of the case (ICD 2599) which includes notification that the case is one to which paragraph 18 of the Practice Direction supplementing part 54 of the Civil Procedure Rules applies (see annex A below), informs the subject of the address to which any claim for JR must be copied, advises the subject to seek legal advice, and includes contact details in the event of an injunction.
- ◆ Where removal directions are being set within 3 months of the conclusion of a previous JR or a statutory appeal (where the claimant is appeal rights exhausted), this summary should also include a statement saying that this is so and notification setting out that if a JR is lodged in accordance with Paragraph 18 of the Practice Direction supplementing Part 54 of the Civil Procedure Rules, there is no longer a requirement to automatically defer RDs and that removal may proceed unless an injunction is obtained. (See 60.8 below)
- ◆ Persons detained for removal must be given prompt access to telephone facilities to enable instruction and on-going contact with representatives.

The chart below illustrates notification times/earliest removal dates:

Notification of removal directions	Earliest time of removal
00hrs to midnight Sunday	Same time (i.e. +72 hours) Wednesday
00hrs to midnight Monday	Same time (i.e. +72 hours) Thursday
00hrs to midnight Tuesday	Same time (i.e. +72 hours) Friday
00hrs to 10.00hrs Wednesday	Same time (i.e. +72 hours) Saturday
10.00hrs Wednesday to 10.00hrs Friday	From 17.00hrs Monday
10.00hrs Friday to 17.00hrs Saturday	From 17.00hrs Tuesday
17.00hrs to midnight Saturday	Same time (i.e. +72 hours) Tuesday

NOTE: Chart does not take account of Bank holidays. These must be added in as extra days.

60.5. Timing of Removal - Third Country and Non-Suspensive Appeal (NSA) Cases

In TCU cases, and where asylum and/or human rights claims have been certified as clearly unfounded (Non-suspensive appeal (NSA) cases), the relevant timeframe is between certification and removal (not RDs and removal). This is because there has been no opportunity to appeal against the asylum decision from within the UK, and JR is the effective remedy in such cases. If the certificate is successfully challenged the appeal against the decision to remove becomes suspensive.

A minimum of **3 working days** must (other than in the circumstances set out at 60.6) be allowed between the service of the certificate and the removal itself.

60.6 Timing of Removal - Exceptional Cases

An exception to the minimum 72 hour notification period (60.4 and 60.5) may be made where prompt removal is in the best interests of the person concerned due to:

- ◆ Medically documented cases of either potential suicide or risk of self-harm,
- ◆ In TCU cases, removal of unaccompanied children in liaison with Social Services and the receiving country (for full guidance on the processes involved for same day removal of unaccompanied children under third country processes refer to chapter 7.3 of the [Third Country Cases: Referring and Handling](#) instruction).

In all cases where applying an exception, the **[written]** authority at Deputy Director level must be obtained where it is proposed to depart from the usual procedures set out at 60.4 and 60.5. A monthly report of these cases will be sent to the Chief Executive of UK Border Agency by the Litigation Management Unit.

The only other exception is for persons refused entry at port – **unless** removal does not take place within 7 days of refusal.

60.7 Procedures where JR is threatened

For TCU and NSA cases see 60.7.1 below.

In other cases there is **no longer** a requirement to defer RDs simply on a threat of JR. On receipt of any threat of JR the case should be referred to OSCU immediately.

Where a person is unable to file a claim due to the Administrative Court office being closed but provides UK Border Agency a copy of detailed grounds for filing and undertakes to lodge with the court at the earliest opportunity, consideration should be given as to whether deferral is appropriate.

In any case where it is decided not to defer removal the claimant and any representative should be notified immediately and advised that it is necessary to either;

- ◆ File a claim for JR with detailed grounds (or a statement of reasons for not filing detailed grounds), or
- ◆ Obtain an injunction to prevent removal proceeding.

These procedures apply equally to asylum and non-asylum enforcement cases, and charter flight cases, where no special arrangements have been put in place (see 60.11 on charter flights)

60.7.1. Procedures where JR is threatened in TCU or NSA cases

Upon being notified (orally or in writing) by a person due to be removed, or their legal representative of their intention to seek permission to apply for JR, OSCU or TCU in a third country case will defer removal for 3 working days to enable proceedings to be filed with the court and an Administrative Office reference number obtained.

60.7.2. Threats of JR outside OSCU`s/TCU`s hours

For TCU or NSA cases where a threat of JR is received outside of OSCU's hours (07:00 – 21:00 weekdays, 07:00 – 19:00 weekends and bank holidays) and there is no time for OSCU to consider the case prior to the actual removal the duty CIO **must** defer removal:

- ◆ Advise the claimant to file the claim, obtain an Administrative Office reference number and provide a copy of the Claim Form as outlined in 60.8 below.
- ◆ Minute the file to this effect and inform OSCU (and TCU if a third country case) as soon as possible.

- ◆ OSCU or TCU will then follow the procedures set out at 60.7.

60.8. Procedures where an Administrative Office reference number is provided (challenges to removal)

Paragraph 18 of the Practice Direction supplementing Part 54 of the Civil Procedure Rules:

In cases where paragraph 18 of the Practice Direction supplementing Part 54 of the Civil Procedure Rules is applied on seeking permission to apply for JR, a claimant must file the claim form at court (noting on the form that section 18 of the Practice Direction applies) together with a copy of

- ◆ the RDs
- ◆ the relevant immigration decision,
- ◆ any document which accompanies the RDs including the UK Border Agency's factual summary of the case,
- ◆ and a statement of the substantive grounds for bringing the claim for JR.

If these documents can't be produced the claimant must give reasons for failure to comply by providing a statement of reasons to the Court.

If the Administrative Court Office issues the claim, the claimant must send copies of these documents, together with the issued claim form – containing the Administrative Office reference number – to the address specified by the UK Border Agency in the factual summary, without delay.

In accordance with paragraph 18 of the Practice Direction supplementing part 54 of the Civil Procedure Rules when issuing a claim (and Administrative Court reference number) the court will identify cases where detailed grounds have been not been received, and whether good reason has been given for the absence of such grounds.

On receipt of the claim form issued by the court – containing the Administrative Office reference – the case should be referred to OSCU.

There is no longer a requirement to automatically defer RDs where a JR application is lodged with detailed grounds within 3 months of the conclusion of;

1. a previous JR on the same issues
- or
2. a statutory appeal on the same issues.

OSCU must consider the detailed grounds provided to decide whether the claimant has raised the same or virtually identical grounds in the judicial review application as material previously considered or material that could reasonably have been raised at the previous judicial review or as is the case in a statutory appeal.

If the grounds are the same or virtually identical then there is no longer a requirement to defer RDs. In the event that the previous JR or appeal has either been withdrawn or otherwise concluded, OSCU will consider whether it is appropriate to maintain removal.

If the OSCU decides not to defer removal, the claimant or his representatives must be informed of this decision and the reasons for it in writing and must be told that removal will proceed unless an injunction is obtained.

If an injunction is obtained, all enforcement action must be suspended immediately (see 60.13 below).

These procedures apply equally to asylum and non-asylum enforcement cases, and charter flight cases, where no special arrangements have been put in place.

Removal must be deferred if

- ◆ The JR application is lodged 3 months after a previous JR or an appeal on the same or virtually identical issues concluding AND
- ◆ The UK Border Agency has received a copy of the claim form as issued by the court AND
- ◆ a copy of the detailed statement of grounds,
- ◆ Where no detailed grounds are provided and the court notifies parties that it is considering a statement of reasons as to why detailed grounds have not been provided UK Border Agency may initially decide not to defer at this point. However if the court has not reached a decision on the matter prior to removal taking place, removal must be deferred pending an outcome.

Where a claim has been issued JRU (TCU in a third country case or CCD in deportation cases) must be informed, and JRU, CCD or TCU will in turn notify TSols.

The UK Border Agency must then instruct TSols on the grounds for defence (it is important that the UK Border Agency ensure that TSols can obtain instructions or they cannot get the case before a judge quickly). TSols will liaise with the Administrative Office to ensure the case is put before a judge at the earliest appropriate date.

Where detailed grounds have been lodged but the UK Border Agency considers that the claim has no merit TSols should be instructed by the UK Border Agency to notify the Court of this, with a request that the application is expedited. Where possible, detention should be maintained pending the outcome of the judicial review.

Further removal directions should not be set until the outcome of the application for JR is known and the appropriate unit has given its authority.

Where it is not possible for the individual or their representative to file a claim due to the Administrative Court office being closed, OSCU may defer removal if provided with a copy of detailed grounds. The onus remains on the claimant to file the claim form as soon as possible on the next day the Administrative Court office is open and to send a copy of the issued claim form to the UK Border Agency.

Where paragraph 18 of the Practice Direction supplementing Part 54 of the Civil Procedure Rules does not apply (NSA and TCU cases):

As above but removal will be deferred either on a threat or on confirmation that proceedings have been issued (i.e. an AO reference number is provided).

In Third Country cases please refer to TCU between 9.00 -5.00 Monday-Friday and to OSCU at any other time.

60.8.1. Requesting expedited consideration of permission

JRU will decide in conjunction with TSols whether a case is suitable for the expedited JR process. Where a JR is being processed outside of JRU (eg CCD) and there are reasons to request expedited consideration of permission, the case should be referred to JRU with the AOS, noting reasons for expedition. For TCU cases expedition will be agreed directly with Treasury Solicitors, and JRU will be notified for stats purposes.

Each case will be considered for the expedited process on the individual circumstances of the case. The circumstances in which expedition will be considered include cases where:

- ◆ The claimant is in detention
- ◆ The claimant's family, including children, are also detained
- ◆ The claim appears to be clearly without merit
- ◆ The claim is an abuse of process
- ◆ The issue of public safety arises
- ◆ The decision making process has previously been subject to accelerated timescales
- ◆ There is a risk of self-harm
- ◆ The claimant is/was to be removed as part of an enforcement operation (e.g. such as a special charter flight)

The decision as to whether a case is expedited or not rests with the Court.

60.8.2. Notification that RDs will not be deferred

Removal will not normally be deferred in the following circumstances:

- ◆ Pending any challenge to the court's decision concerning compliance made under paragraph 18.3 of the Practice Direction

60.9. Procedures where permission to apply for JR is refused

If permission to apply for JR is refused and the court decided that the application for JR is clearly without merit, that indication will be included in the order refusing permission. In these circumstances

- ◆ The appropriate unit (JRU, TCU or CCD) will advise whether removal can proceed.
- ◆ OSCU will notify the claimant and their representative where it is decided that removal will not be deferred pending any application for oral renewal.

In other cases where permission on papers is refused but oral renewal remains a possibility

- ◆ JRU/TCU/CCD will usually advise the LEO not to reset RDs until the time limit for oral renewal has elapsed unless there is a specific finding/order from the Court.

60.9.1. Procedures where permission to apply for JR is granted

(These instructions apply to challenges to removal cases)

If permission to apply for JR is granted, JRU, TCU or CCD as appropriate, in conjunction with TSols, will decide if the challenge should be resisted.

- ◆ JRU, TCU or CCD will inform the enforcement office of the procedure to follow and the likely time scale involved - especially when detention is a consideration.
- ◆ All enforcement action must be **suspended** immediately and should not be resumed until the application is resolved.

60.10 Applications to the Court of Appeal/House of Lords

It is open to either party to seek leave to appeal against the decision of the Administrative Court (to refuse permission or to dismiss the substantive claim) to the Court of Appeal. The final remedy is by petition to the House of Lords

- ◆ Should a claimant or their representative notify the enforcement office of an intention to seek leave to appeal to the Court of Appeal or the House of Lords, any removal directions in force must be **suspended** and the appropriate unit OSCU/TCU/CCD must be contacted immediately **EXCEPT**
- ◆ Where the application to the Court of Appeal concerns a challenge to a high court judge's decision to refuse to grant permission to apply for judicial review. [Following the case of Pharis].
- ◆ OSCU/TCU will advise whether the outstanding application is a barrier to removal.
- ◆ Do not reset RDs until advised by JRU/TCU/CCD

60.11. Judicial Review in Scotland

Judicial review in Scotland is pursued by means of a petition to the Court of Session in Edinburgh. There are several differences in the way cases are handled in Scotland, not the least of which is the fact that there is no permission to apply stage. Applications for judicial review in Scotland should be brought to the attention of the Office of the Solicitor to the Advocate General

for Scotland (OSAGS), via JRU, who act on our behalf in these cases, and who can provide advice on how to proceed.

Removal directions must be cancelled **immediately** if we are notified that a person is petitioning the Court of Session.

60.12. Charter Flights

Chartered flights may be subject to different arrangements where it is considered appropriate because of the complexities, practicalities and costs of arranging an operation.

Where no special arrangements are in place for the charter flight the provisions already set out in this chapter apply.

Operational constraints will determine the arrangements necessary for each charter operation. Details concerning these arrangements will be communicated to the court in advance of the date planned for the operation, and those subject to removal are notified that removal will not necessarily be deferred in the event that a JR is lodged. Where removal is not deferred, the person concerned will be advised of the need to obtain an injunction to prevent removal.

If proceedings are lodged or JR is threatened by, or on behalf of, a person who is due to be removed on a charter flight, the case **must** be referred to OSCU immediately. OSCU will consider whether it is appropriate to proceed with removal on a case by case basis in order to guarantee the viability of the operation. If the OSCU decides not to defer removal, the claimant or his representatives **must** be informed of this decision and the reasons for it in writing and **must** be told that removal will proceed unless an injunction is obtained.

If an injunction is obtained, all enforcement action **must** be suspended immediately (see 44.9 below).

60.13. Injunctions

Where a person alleges that an injunction has been obtained, the court has made it clear that it is the responsibility of individual members of staff to take all reasonable steps to confirm whether an injunction has been issued. Failure to do so increases the risk of breaching an injunction, and contempt proceedings may be initiated;

- ◆ Against the Home Office, and/or
- ◆ Individual members of staff.

60.13.1. Procedures where an Injunction is alleged to have been obtained

- ◆ Seek to confirm the allegation with the legal representative (time permitting in writing/by fax).

Staff should be aware that the written confirmation from the representative may be no more than “At [time] this evening Mr Justice X has granted an injunction over the telephone barring removal – this is the phone number of the clerk of the judge who can be called to confirm the existence of the order”.

- ◆ If there is any reason to believe an injunction may have been granted the LEO must make every effort to check with the duty judge to confirm verbally that an injunction has been issued.
- ◆ Where the escorting agency is contacted directly by the legal representative or alerted by the person being removed, they will refer the case to the relevant LEO to complete the actions noted above.

60.13.2. Procedures where an Injunction is confirmed

- ◆ While enquiries are being made as to whether an injunction has been issued, the removal must be halted.
- ◆ Where the removal is imminent (the subject is en route to, or at, the port of embarkation) or is in progress (the aircraft is on the ground and the doors are still open) all reasonable steps must be taken to ensure that the removal is stopped. In these cases you should NOT wait until you have received written confirmation of the injunction before cancelling the removal.
- ◆ The LEO/CCU must immediately notify escorts (via their Central Control Centre), DEPMU and other relevant personnel that removal is to be deferred
- ◆ Confirm to representatives or the court that the removal has been stopped and/or did not proceed.

60.13.3. Audit trail of actions

Staff handling allegations of injunctions must maintain a clear audit trail of all the actions taken on both the file minutes and on CID. Staff must include the following details as part of their notes:-

- ◆ The source of the allegation of an injunction and the time the allegation was received.
- ◆ Whether confirmation was received from the legal representative or the judge and, if so, the time confirmation was obtained.
- ◆ If no confirmation was received, the steps taken to confirm the existence or otherwise of the order.
- ◆ Units/personnel that were contacted to cancel the removal in the escorting agency / Removals Facilitation Unit. Include the time these units were notified to cancel the removal and the time they confirmed removal was cancelled (if times are different)

60.13.4. Out of hour's injunctions

- ◆ Representatives should routinely be given contact details for the LEO for all removals.
- ◆ Representatives should also be provided with the contact details for CCU for urgent, last minute queries regarding removal when the LEO is closed.

CCU operates 24 hours a day, 7 days per week and will follow the same instructions as those noted above for LEOs. LEOs must inform OSCU of developments where the section is dealing with representations on the relevant case.

Form IS151D has been amended to incorporate the following lines:

All queries between the hours of 9am and 5pm on weekdays should be made to the office handling your case on *(insert telephone number of LEO)*

Outside of these hours and during weekends or Bank Holidays urgent queries relating to any injunction against an imminent removal should be made to the emergency hot line on 0161 261 1640.

The relevant Border Control forms (used for ports Third Country cases) will be amended in similar fashion.

All answer-phone and voice mail messages for all areas should be updated to include the following:

For LEOs – “This office is now closed and will re-open at (*insert time*), for out of hours assistance, please call the Command and Control Unit on 0161 261 1640”.

Other areas – “This office is now closed and will re-open at (*insert time*), for assistance with the service of injunctions or last minute Judicial Reviews please call the Command and Control Unit on 0161 261 1640”.

60.14. Applications to the Court of Human Rights

The Human Rights Act 1998 came into force on 2 October 2000, incorporating rights and freedoms guaranteed under the European Convention on Human Rights into domestic law. A decision under section 82 of the NIA Act 2002 can be appealed on human rights grounds. It is still possible for an application to be made to the European Court of Human Rights (ECtHR), in Strasbourg, but it is unlikely that such an application will now be made until appeal rights have been exhausted.

An application made to ECtHR does not in itself require the suspension of removal. However a person may also apply to the ECtHR for a Rule 39 indication, which acts in a similar way to an injunction. If the ECtHR decides to make a Rule 39 indication it will ask the Government to defer any removal. Such a request from the ECtHR would be made to the Home Office via the FCO. The FCO will immediately contact the Home Office Legal Adviser's Branch (HOLAB) who will in turn notify UK Border Agency. Where a Rule 39 indication has been made it is our practice to comply with the request and defer any removal. However unless you are notified by HOLAB that a Rule 39 indication has been made, removal action need not be suspended and enquiries with the FCO are not necessary.