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Public Law Principles - Planning

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Planning judicial reviews: principles

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Introduction

- Nature of judicial review
- Amenability to judicial review (targets)
- Ouster
- Entitlement to make a claim (standing)
- Principles specific to judicial review of planning permissions

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Nature of judicial review: court's function

- Uphold the law as enacted by Parliament
- Provide constitutional supervision of the Executive, i.e.
  - Control of administrative action
  - Restraint of abuses
  - Securing obedience to law

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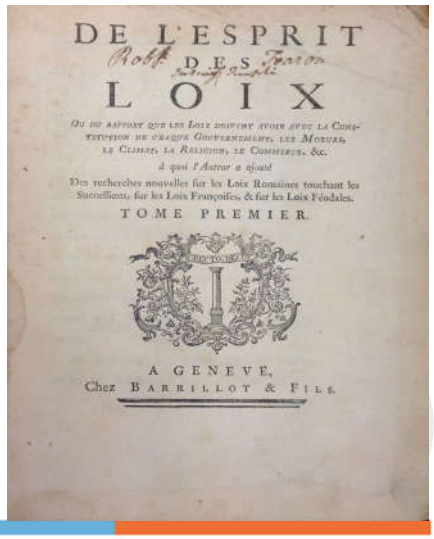
Separation of powers

'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.'

Montesquieu


DE L'ESPRIT
DES
LOIX
TOME PREMIER.
A GENEVE,
Chez BARRILLOT & FILS.

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Latimer House Principles

(1) Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

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Nature of planning judicial reviews

- Distinct from the wide range of statutory challenges in the planning context, e.g.
  - Section 23 Acquisition of Land Act 1981
  - Sections 288/289 Town and Country Planning Act 1990
  - Section 113 Planning and Compulsory Purchase Act 2004

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Amenability to JR (targets)

- Wide range of measures, acts, decisions, policies and omissions can in principle be the target of judicial review
- CPR 54.1

  "(2) In this Section –

  (a) a 'claim for judicial review' means a claim to review the lawfulness of –

  (i) an enactment; or

  (ii) a decision, action or failure to act in relation to the exercise of a public function."

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Targets ctd

- Examples in the planning context:
  - JR by a local authority where no alternative statutory mechanism (e.g. HS2 Act 2017; to the designation of a national policy statement) – look separately at ouster in the context of proposed reform
  - Exceptionally – a JR by a local authority to the dismissal of a s.78 appeal (a decision in its favour, see e.g. ***Tewkesbury v. SofS*** [2019] EWHC 1775 (Admin))
  - JR of the grant of planning permission by a local authority
  - JR of other local authority decisions (e.g. to designate an area as a "detailed emergency planning zone"; re: procurement)

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Targets ctd

- No decision - judicial restraint ("the Administrative Court exists to adjudicate upon specific challenges to discrete decisions. It does not exist to monitor and regulate the performance of public authorities" – ***R. (P) v. Essex County Council*** [2004] EWHC 2027 (Admin))
- Omission – failure/refusal to act can properly be the subject of JR & relief can take the form of a mandatory order (see e.g. ***Mayor of London v. Enfield LBC*** [2008] EWCA Civ 202)
- A fresh/further decision
  - Planning – consent to quashing & reconsider – further claim?
  - V. other contexts (note cases pre-CPR 1998) – possibility of a stay & court considering most recent decision?

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Ouster

(i) Definition: as used in Government's Response to the Independent Review of Administrative Law (March 2021) para. 58: "An ouster clause is a clause in primary legislation intended to render a decision or use of a specific power non-justiciable, so that the courts cannot judicially review that decision or the use of that power".

(ii) Note: while "partial" ouster clauses are generally given effect by the courts (e.g. particularly short limitation period in which to file a claim, such as the time limit in CPR 54.5) the courts tend not to give effect to ouster clauses which purport to oust their jurisdiction entirely. This has been the norm since the case of *Anisminic* (recently reaffirmed in *Privacy International*).

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Ouster: the debate?

"Ouster clauses are not a way of avoiding scrutiny. Rather, the Government considers that there are some instances where accountability through collaborative and conciliatory political means are more appropriate, as opposed to the zero-sum, adversarial means of the courts. In this regard, ouster clauses are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability."

v.

Exclusion of judicial scrutiny of executive action.

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Current thinking (Govt's response)

"As a core principle, the **Government considers that ouster clauses legislated for by Parliament should not be rendered as of no effect, and invites consultees to put forward proportionate methods for achieving this**. It has already considered some methods, set out below, and invites comments on these. These methods would consist in setting out principles of interpretation which the courts would have to apply when interpreting an ouster clause."

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Current thinking (Govt's response) ctd

- E.g. safety valve – not where procedural impropriety (only!) but where "a wholly exceptional collapse of fair procedure"
- Overall, mechanisms sought in order to defend against matters of "outright injustice", while preserving the effect of ouster clauses and the certainty they can bring.

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Entitlement to make a claim (standing)

- Section 31 of the Senior Courts Act 1981:

"(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates." (Emphasis added.)

- Matter of judgment (not discretion), which is sensitive to context; approach to standing is generally liberal

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Standing: example

- Specific procurement context
- ***R. (On the application of the Good Law Project) v. SofS*** [2021] EWHC 346 (Admin)

- Considered ***R. (Wylde) v Waverly Borough Council*** [2017] EWHC 466 (Admin)

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Judgment of Chamberlain J at [104]

"The challenge [was] not one that an economic operator can realistically be relied upon to bring. The position of the… Claimant [is that it] has a sincere interest, and some expertise, in scrutinising government conduct in this area. There is no allegation (and no evidence) that it is seeking to use the public procurement regime as a tool for challenging decisions which it opposes for other reasons. There is no dispute about the importance of the transparency obligations it claims have been breached. As to the "gravity" of the alleged breaches, they relate to contracts worth (at least) several billion pounds; and there is a pleaded allegation (in respect of which permission has been granted) that they result from a deliberate policy on the part of the Secretary of State. To my mind, there is a powerful public interest in the resolution, one way or the other, of the issues raised."

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Principles specific to planning claims (***Bloor Homes East Midlands Ltd v SSCLG*** [2017] PTSR 1283 at [19])

- The weight to be attached to any material consideration & all matters of planning judgment are "within the exclusive jurisdiction of the decision-maker". A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in ***Tesco Stores Limited v Secretary of State for the Environment*** [1995] 1 W.L.R. 759, at p.780F-H)

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Principles ctd

- The proper interpretation of planning policy is ultimately a matter of law for the court
- The application of relevant policy is for the decision-maker
- Statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context
- A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration

➢ ***Tesco Stores v Dundee City Council*** [2012] P.T.S.R. 983 [17-22]

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Principles ctd

- Consistency in decision-making is important both to developers and local planning authorities
- However, it is not a principle of law that like cases must always be decided alike

➢ ***Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government*** [2013] 1 P. & C.R. 6, [12-14]

➢ ***North Wiltshire District Council v Secretary of State for the Environment*** [1992] 65 P. & C.R. 137, at p.145

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The end

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Public Law Principles in Planning

Grounds for judicial review of planning permissions

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Main grounds of judicial review challenge

- The main traditional grounds of challenge can be summarised using the three heads identified by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374:
  - Illegality
  - Irrationality
  - Procedural impropriety

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Illegality

- Must correctly understand the law that regulates a decision-making power and give effect to it:
  - Excess of power: going beyond powers granted
  - Abuse of power
  - Frustrating the intention of a statute: using a discretionary power under legislation other than to achieve Parliament's intention

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Illegality cont'd

- Error affecting jurisdiction: where an error is made as to a fact which is essential to empowering the step taken
- Unauthorised **delegation** of power
- **Error of law**: where the decision or action is founded upon an incorrect interpretation of the law

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Irrationality

- Failure to exercise, or abuse of, discretion
- Acting as if discretion is fettered: a failure to exercise any discretion at all
- Acting in bad faith
- Acting for an improper purpose

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Irrationality cont'd

- **Over-rigid adherence** to policy: where a decision-maker formulates a policy to assist in the decision-making process, a rigid application of the policy rather than consideration of each case on its merits is a failure properly to exercise their discretion

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Irrationality cont'd

- **Irrelevant considerations** taken in to account, or a refusal to take in to account relevant considerations: in exercising discretion only relevant factors, as allowed by any relevant governing rules, should be taken in to account
- Must take into account **mandatory considerations**
- Discretion to take into account relevant, but not mandatory, material considerations

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Irrationality cont'd

- **Unreasonableness**
  - so unreasonable decision could've been made by no reasonable decision-maker properly directing itself on the relevant material
  - conduct such that no sensible authority, acting with due appreciation of its responsibilities, would have adopted it

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Irrationality cont'd

- Unreasonableness cont'd
  - beyond the range of reasonable responses to a given set of information
  - decision proceeds by **flawed logic**
  - a decision which does not add up - in which, in other words, there is a **error of reasoning which robs the decision of logic**

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Procedural impropriety

- Failure to observe **procedural rules**
- Acting as a judge in your own cause or bias
- **Predetermination** (pre-disposition is OK)
- Right to a fair hearing: procedural **unfairness**
- Failure to give **reasons**: no general duty to give reasons, but there are substantial exceptions
- Reasons must be intelligible and adequate

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Apparent bias

- Where the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased
- If LPA has an interest in application: must be particularly scrupulous to ensure that decision is seen to be fair – enhanced obligation to deal thoroughly, conscientiously & fairly with objection

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Error of fact

- For an **error of fact** to amount to an error of law, four conditions apply:
  1. there must have been a mistake as to an existing fact
  2. the fact must have been 'established', in the sense that it was uncontentious and objectively verifiable
  3. C must not have been responsible for the mistake
  4. mistake must have played a material part in the reasoning

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Misinterpretation of planning policy

- It is essential that a **policy is properly understood**; if an authority failed properly to understand a policy, its decision would be unlawful and the Court should quash its decision unless it is quite satisfied that the failure to have proper regard to the policy had not affected the outcome in that the decision would have been the same in any event: *Gransden v SSE* [1986] JPL 519

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Officers' reports to committee

- Decision will be unlawful if the report fails to place adequate or sufficient information before Members or is materially deficient
- There is a duty to provide in officers' reports sufficient information and guidance to enable the members to reach a decision

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Officers' reports to committee cont'd

- There is an obligation upon officers to produce fair, accurate and objective reports
- An officer's report must not significantly mislead or fail properly to inform Members

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Breach of statutory duties

- Section 70(2) of the 1990 Act
- Section 38(6) of the PCPA 2004
- Sections 66 and 72 of the Planning LBCA Act 1990
- Human Rights Act 1998
- Public sector equality duty
- Other duties eg Crime and Disorder Act 1998 s17

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Planning material consideration issues

- Planning policy and guidance
- Emerging plans and policies
- Alternative sites
- Fallback position & competing uses / schemes
- New material considerations arising (*Kides*)
- Consistency in decision-making
- Financial considerations

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Environmental grounds of challenge

- EIA screening
- EIA errors
- Habitats Regulations

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PUBLIC LAW PRINCIPLES FOR THE LONDON BOROUGHS LEGAL ALLIANCE

JUDICIAL REVIEW PROCEDURE

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Overview

Pre-Action Procedure	• Pre-Action Letter • Pre-Action Response
The Steps in the Claim	• Statement of Facts and Grounds • Summary Grounds of Defence (and Reply) • Permission Decision • Detailed Grounds of Defence (and Reply) • Substantive Hearing
Other Procedural Issues	• Evidence in Judicial Review Proceedings • Duty of Candour • Procedural Rigor as an Emerging Concern

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Pre-action procedure (1)

- Pre-Action Protocol on Judicial Review (September 2019)
- *Singh v Public Service Commission* [2019] UKSC 18 on the importance of compliance with the pre-action protocol (at paragraph 26):

  'compliance with the pre-action protocols plays a significant part in achieving the important objective of avoiding unnecessary legal proceedings, by requiring the parties to identify in advance key aspects of their respective cases, so as to maximize the prospects of resolution of any underlying dispute before proceedings are commenced
- Letter before claim should be sent *'in good time before making a claim'* the purpose of which is to *'identify the issues in dispute and establish whether they can be narrowed or avoided'* (at paragraphs 14 – 19). Annex A contains a template.

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Pre-action procedure (2)

- Defendant must *'normally respond within 14 days',* and where that is not possible should *'send an interim reply and propose a reasonable extension'* (paragraphs 20 – 21).
- Should cover (paragraphs 22 – 23):
  - any points that are being conceded;
  - provide a full explanation if appropriate (reasons challenges);
  - address points of dispute and identify points where parties agree;
  - respond to any requests for documents or information;
  - respond to any respects for interim remedies or costs proposals.
- Opportunity for the Defendant to consider merits and avoid costs exposure (*R (M) v London Croydon LBC* [2012] EWCA Civ 595 at paragraphs 55 and 61).

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Pre-action procedure (3)

- Remember, sending a pre-action letter does not stop the clock for filing a claim: complying with the pre-action protocol not necessarily a good reason to extend time ('*it cannot be taken that compliance with the protocol will of itself be sufficient to excuse delay or justify an extension of time'*)
- If you are up against it with time, typical to issue in order to stop the clock and then to stay to allow the issues to be narrowed. but the Court is sceptical of this practice (*R (Archer) v HMRC* [2019] EWCA Civ 2021 at paragraph 93) Sometimes might be asked not to take a time point in correspondence (*R (Rafique) v St George's University Hospital* [2018] EWCA Civ 2520 at paragraph 21).
- Need to think about tactics: a detailed reply might put a potential challenger off; where you receive a request for documents, think carefully about disclosure (non-disclosure could prompt an application for disclosure).
- Non-compliance can sound in costs (*Archer* at paragraph 103).

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Claim Form and Bundle

CPR r. 54.6 (Claim Form) and PD54A r. 5.6 – 5.10 (Contents of the Claim Bundle) (remember e.g. the essential reading list and the relevant statutory material and evidence). Time to put your case: front loading!

Note:

- applications for costs capping orders should be made at this stage where possible (*R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin) at paragraph 7);
- application for costs capping order under the Aarhus Convention should be made at this stage (CPR r. 45.42);
- application to rely on expert evidence should be made at the '*earliest possible opportunity*' and ideally with the claim form (*R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) at paragraph 44)

Interim orders if relevant (or other applications e.g. specific disclosure).

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Statement of Facts and Grounds (1)

- Administrative Court Guide (2020) says they are '*the detailed statement of the grounds for bringing the claim for judicial review'*. They should be *'as concise as reasonably possible'* (at paragraph 6.3.11).
- The case needs to be '*formulated with precision in the original grounds'* (*Fisherman and Friends of the Sea v Environmental Management Authority* [2018] UKPC 24 at paragraph 51).
- Choose your points wisely, as '*the overloading of a case with hopeless points simply operates potentially to devalue points which otherwise might be made to appear arguable'* (*R (Naing) v Immigration Appeal Tribunal* [2003] EWHC 771 (Admin) at paragraph 59).
- Court will not be fooled by long grounds: *'it is not to be assumed that there is an arguably point simply because a number, even a large number, of different points are raised and expanded on at length'* (*ex parte Frost* (1997) 73 P&CR 199, 204).

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Statement of Facts and Grounds (2)

- Recent warning by the Court of Appeal in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 (at paragraph 120):

  '…we are concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than to illuminate the essence of the case being advanced. They make the task of the Court more difficult rather than easier and they are wasteful of costs…'
- Claimants need to heed these warnings and plead in a clear and concise way
- Defendants may want to point out to the Court where Statement of Facts and Grounds take e.g. a scattergun approach and do not set out the grounds clearly.

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Acknowledgement of Service (1)

- CPR r. 54.8 (Acknowledgement of Service) to include Summary Grounds of Defence (r. 54.8(4)(a)(i)), filed *'not more than 21 days after service of the claim form'.*
- Purpose is to *'assist the Court in deciding whether permission should be granted or not'* (*R (Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin) at paragraph 44).
- Focus on *'knock-out points or procedural bars, or the practical or financial consequences for other parties'* of granting permission (especially s. 31(3C) SCA 1981) (*R (Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583 at paragraph 43).
- If you intend to make a *Mount Cook* application for costs, do so in your Summary Grounds and include a Costs Schedule (*Ewing* at paragraph 47).

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Acknowledgement of Service (2)

- Other options:
  - if a point is *'obviously arguable',* but the defendant merely thinks it is wrong then *'what should be pleaded is that the defendant accepts that the point is arguable, though the defendant does not think it is right' (R (K (A Child) v SSHD* [2018] EWHC 1834 (Admin) at paragraph 105);
  - might decide not to contest, although need to be clear here if you intend to remain neutral or if you agree in principle to quashing (consider consent order).
  - argue that a point is totally without merit (r. 23.12), but be careful doing this (*K (A Child)* at paragraph 107).
- The important tactical consideration at this stage is to decide how much evidence to put in (e.g. factual evidence) and how much detail to put forward: it is a matter of balance, but generally short and pithy better at this stage.

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Reply to Summary Grounds of Defence

- There is '*no provision for the Claimant to file a Reply, or any other response, to the Summary Grounds of Defence filed in a judicial review claim*', and if such a document is filed, then it will be *'for the discretion of the permission Judge whether to have any regard to it'* (*R (Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin) at paragraphs 80 – 81).
- Practice seems to have grown around putting in replies anyway in order to assist the court, although the Administrative Court Guide says that this is *'not encouraged'* and is *'rarely if ever necessary'* (paragraph 7.2.5).
- Sometimes the Court will order that a reply be served before a permission decision is made.
- There is a risk that if you put a reply in without permission (a) you will be asked to pay to do so; and, (b) you will most likely not be able to recover the costs of filing it even if you win.

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Permission Stage (1)

- Decision on the papers (CPR r. 54.12), with opportunity for reconsideration at oral hearing (CPR r. 54.12(3) – (7)).
- Permission is *'no more than a filter to weed out groundless cases'* (*Knibbs v HMRC* [2019] EWCA Civ 1719 at paragraph 25). Question is whether there is *'an arguable ground for judicial review having a realistic success and not subject to a discretionary bar such as delay or alternative remedy' (Sharma v Antoine* [2006] UKPC 57 at paragraph 14(4)). The Court will not go into the merits in detail (*R (Wilson) v Prime Minster* [2019] EWCA Civ 304 at paragraph 68).
- If permission refused on paper and a renewal application made, important that the renewal application actually sets out the reasons for disagreeing with paper decision else there is a risk of an adverse costs order (Administrative Court Guide (2020) at paragraph 8.4.5).

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Permission Stage (2)

- Parties are encouraged to prepare a skeleton argument for oral renewal hearings and to file and serve it *'in good time'* before the permission hearing (Administrative Court Guide (2020) at paragraphs 17.1.3 – 17.1.4).
- Defendant and Interested Parties do not need to attend the oral renewal hearing, and if they do the Court will not generally make an order for costs covering attendance (CPR PD54A r. 8.5 – 8.6)
- The hearing should be *'short and not a rehearsal for, or effectively a hearing of, the substantive claim'* (*R (Mount Cook) v Westminster City Council* [2003] EWCA Civ 1346 at paragraph 71). Generally c. 30 minutes, with the focus on the Claimant.
- Possibility of a *'rolled up hearing'*, although not easy to get.
- Focus at this stage on knock-out blows, to get the claim or parts of it discarded.

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Detailed Grounds of Defence (and Reply)

- Detailed Grounds of Defence (CPR r. 54.14(1)) within 35 days of the order giving permission, and if the Defendant intends to rely on documents not already filed, must file a paginated bundle of these (CPR PD54A r. 10.1).
- Possible for the Summary Grounds of Defence to stand as the Detailed Grounds — and often the case (*R (Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin) at paragraph 44).
- Standard Directions include provision for a reply by the Claimant to be lodged within 21 days of service of Detailed Grounds of Defence, but if there is not such a direction there is no right to Reply (*R (Ikram) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1869 (Admin) at paragraph 85).
- Detailed Grounds is the place to set out the case in full!

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Substantive Hearing (1)

- Bundles:
  - Hearing Bundle (21 Days before hearing (PD 54A r. 16.1))
  - Authorities Bundle (c. 5 Days before the hearing) (see Administrative Court Guide (2020)).
- Parties are expected to co-operate when preparing bundles and should in particular try to agree a core bundle with the essential documents for the hearing (*Mayor of London v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1176 (Admin))
- Note the specific requirements for electronic bundles (e.g. size and hyperlinks). This can take time — but it is important and will help the judge!

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Substantive Hearing (2)

- Skeletons:
  - Claimant 21 Working Days before the Hearing (PD54A r. 15.1);
  - Defendant 14 Working Days before the Hearing (PD54A r. 15.2).
- Specific requirements set out in PD54A r. 15.3 (e.g. list of issues and time estimate).
- Administrative Court Guide (2020) Part 17 and note in particular the twenty page limit!
- Not acceptable for new points to be raised in the Skeleton Argument for the first time (*R (Ikram) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1869 (Admin) at paragraph 85).

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Other Procedural Issues: Evidence

- Admissibility of factual evidence is tightly controlled because judicial review not typically suitable for resolution of factual disputes and the court generally only interested in information before the decision-maker. But has been relied on in certain cases:
  - (a) to set out background information (e.g. decision-making process);
  - (b) evidence of impact (e.g. prejudice, fairness or other evidence that should have been considered);
  - (c) evidence of actual factual issues.
- An extremely limited role for expert evidence, which you need permission to rely on (CPR 53 (*R (Banks Renewables) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 436 (Admin) at paragraph 75, is it *'reasonably required to resolve the issues'*).
- Also very rare to have oral evidence; only where justice requires it (*R (Jedwell) v Denbighshire County Council* [2015] EWCA Civ 1232 at paragraph 54).

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Other Procedural Issues: Duty of Candour

Claimant Duty of Candour:

- duty to *'disclose all material facts […] including those which are or appear to be adverse to his case prior to applying for permission is well established* (*R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 at paragraph 35);
- need to (a) keep the court updated; and, (b) keep merits under review.

Defendant Duty of Candour

- duty to *'make full and fair disclosure of all of the relevant material'* (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 4)* [2016] UKSC 35 at paragraph 192)
- need to (a) describe the decision-making process; (b) provide proactive explanation, which is not selective or defensive; (c) look beyond the pleaded grounds. It is a heavy and continuing duty.

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Procedural Rigour

- The emerging theme over the last few years has been a renewed focus on procedural rigour. In *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841, the Court of Appeal explained that *'public law litigation must be conducted with an appropriate degree of procedural rigour'* (paragraph 67). Concerned with *'rolling grounds'* — watch out!
- Court now expects the parties to co-operate with each other and to keep the Administrative Court Office abreast of developments (see e.g. *R (Westminster City Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC (Admin) 1472 (Admin)).
- Need to be particularly careful with (a) witness statements; (b) expert evidence being presented as factual evidence; (c) compliance with duty of candour; (d) compliance with court orders; and, (e) bundles for hearings.

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Planning Committees and Bias

Gregory Jones QC
and
Jonathan Welch

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OVERVIEW

1. Natural justice
2. Bias
   (a) Real/Actual bias
   (b) Presumed bias & automatic disqualification
   (c) Apparent bias
3. Localism Act 2011
4. Nolan principles
5. Member/officer conduct

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The twin pillars of natural justice

"The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it."

Per Lord Denning ***Kanda v. Government of the Federation of Malaya*** [1962] A.C. 322 (at 337)

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Bias: the basics

- Rule against bias is to ensure fairness in decision making by insisting on the impartiality of the decision maker: no one shall be judge in their own cause (***R (Sergeant) v First Minister of Wales*** [2019] EWHC 739 (Admin) at [94]).
- Narrow definition of "bias": "a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case".

  Bubbles & Wine Limited v. Lusha [2018] EWCA Civ 486 at [17] per Leggatt LJ. Assumed to be correct in ***Serafin v. Malkiewicz*** [2020] UKSC 23, see [39] of the judgment of Lord Wilson.

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Bias: categorisation

- Real or actual bias
- Presumed bias & automatic disqualification
- Apparent bias

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Real/actual bias

- Conclusive vitiating factor
- "Rare and difficult to prove" (Fordham on Judicial Review, 7th Ed, 63.2); "involves drawing conclusions about a person's state of mind… and drawing a causal connection between the biased state of mind and the decision" (***R (Hussain) v Sandwell Metropolitan Borough Council*** [2017] EWHC 1641 (Admin) at [154]).

Nevertheless: 2013 Transparency International report:

- A councilor in the West Country was recorded making claims that he could obtain planning permission in return for payment.
- Former leader of a County Council sought to influence the route of a new bypass so as to divert it through his own land for financial benefit.

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Presumed bias & automatic disqualification

- Decision maker party to the matter, with direct interest in its outcome in common with a party = automatic disqualification.

- ***Regina v. Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet)*** [2000] 1 AC 119 (Pinochet No. 2)
    - Amnesty International intervened in proceedings re the arrest/extradition of General Pinochet. Lord Hoffman was the unpaid chair & director of AI's charitable arm. That interest (in a cause rather than a financial interest) resulted in automatic disqualification from deciding the case, "without any investigation into whether there was a likelihood or suspicion of bias".

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Presumed bias & automatic disqualification

- Pecuniary interest

- "Prejudicial interest"

- De Minimis (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451)

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Apparent bias – Fertile ground for challenges

"… a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Lord Hewart C.J. ***R. v. Sussex Justices*** [1924] 1 K.B. 256.

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Apparent bias: the test

"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Porter v Magill [2002] 2 AC 357 per Lord Hope at [103].

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Apparent bias: the court's approach

Two stage process:

- First – ascertain all the circumstances which have a bearing on the suggestion that the decision maker was biased.
- Second – ask whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility that the decision maker was biased.

Re Medicaments [2001] 1 WLR 700; ***Bubbles & Wine Ltd v Lusha*** [2018] EWCA Civ 468 at [17].

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Apparent bias: important factors to consider

- The "fair minded and informed observer" is a person who reserves judgment until both sides of an argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint of apparent bias (***Helow v SSHD*** [2008] UKHL 62 at [1]-[3]).
- Apparent bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so (***R v Barnsley Licensing Justices, ex parte Barnsley LVA*** [1960] 2 QB 167 at 187).
- Therefore, no weight should be attached to the evidence of the decision-maker in which it is said that he approached the decision with an open mind (***Porter*** at 495 B-C).
- The involvement of a single member of a committee who is disqualified by bias would vitiate the decision made (***R v SSE, ex parte Kirkstall Valley*** [1996] 3 All ER 304 at 327J-328A).

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Apparent bias: examples

R (on the application of The Good Law Project) v Minister for the Cabinet Office [2021] EWHC 1569 (TCC)

- Contract for opinion polling at the start of the Covid-19 pandemic.
- Awarded to former colleagues of former No.10 SpAd, Dominic Cummings.
- Procurement rules challenges failed.
- Apparent bias challenge succeeded.
- Court took into account the urgent need for contract due to Covid-19.
- Mr Cummings' professional and personal contacts did not preclude an impartial assessment.

"However, the Defendant's failure to consider any other research agency, by reference to experience, expertise, availability or capacity, would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, that the decision-maker was biased" [168].

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Apparent bias: examples

R (on the application of Piffs Elm Ltd) v Tewkesbury BC [2016] EWHC 3248 (Admin)

- Multiple planning applications made by Piffs Elm Ltd rejected
- Planning officer was married to the planning manager at a rival developer, Bloor Homes

His Honour Judge Jarman found that there was apparent bias, applying Porter v Magill

At paragraph 51, "the fair minded observer on all of the facts would come to the conclusion that there was a real possibility of bias infecting the whole decision making process"

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Apparent bias: examples

Lobbying: ***Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government*** [2016] EWCA Civ 562

- Secretary of State refused permission for a wind turbine after recovering the application
- Andrea Leadsom MP, the representative for the area, had lobbied against the grant of permission
- Her lobbying included private interaction with the decision taker (the 'tea room' conversation)
- Challenge dismissed at first instance by Mr Justice Cranston (see [33]-[35])
- Andrea Leadsom was acting "perfectly properly, as a diligent constituency MP although in this case it just so happened that her political judgement aligned with her constituents' interests" [38]
- Court of Appeal upheld decision not to quash: Noted it was incumbent on decision-maker (Minister) to make clear to any person trying to make oral representations that they cannot listen to them ([27]).

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Apparent bias: examples

Contractual obligations: ***Steeples v Derbyshire CC*** [1985] 1 WLR 256

- Local authority had interest in site the subject of application before it as LPA.
- Existence of contractual obligations on a determining authority to "take all reasonable steps to obtain [planning permission]" and obligations to "take all reasonable steps to assist in the obtaining of planning [permission]").
- Found to lead the reasonable observer to think there a real likelihood that such provisions of the contract had a material and significant effect on the determining authority's decision.

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Apparent bias: examples

Predetermination

R (on the application of Ghadami) v Harlow Borough Council [2004] EWHC 1883 (Admin): planning permission quashed because of views expressed by the chair of the planning committee to an objector in recorded telephone conversations.

R (on the application of Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746: Politically charged planning application application. Councillors' expression of views showed predisposition, not the same as predetermination, so long as it does not appear minds were closed; not equivalent to judicial or quasi-judicial position.

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Specific context: s.25 Localism Act 2011

"(1) Subsection (2) applies if—

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because—

(a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and

(b) the matter was relevant to the decision."

(n.b. similar to ***Lewis***)

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Example of the application of s.25

IM Properties Development Ltd v Lichfield DC [2014] EWHC 2440 (Admin)

- An email explained that there was a to be a "three line whip". It said, "In plain terms group members either vote in favour of the report I will be giving regarding the local plan or abstain."

➢Statutory wording covered the email.

➢A strongly worded predisposition not predetermination.

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Disqualification from sitting: ss.29-31 LA 2011

- A member who has a 'disclosable pecuniary interest' (held by themselves or spouse/partner) in a matter on the agenda may not participate in the discussion or vote at that meeting (s 31(2)–(4)) without a dispensation under s 33.

- Whether there is an interest needs to be approached with realism: ***R (on the application of Freud) v Oxford City Council*** [2013] EWHC 4613 (Admin) (at [39]-[42]); ***R (on the application of Kelton) v Wiltshire Council*** [2015] EWHC 2853 (Admin) (at [45]).

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Role of non-committee and disqualified members

- No prohibition on members speaking in favour or against application unless they have a pecuniary interest within the Localism Act 2011.
- Committee must be careful not to adopt the position of a non-committee member for improper reason, such as a purely political one.
- Disqualified members may address committee as if they were any member of the public, in the appropriate non-committee members' slot, but must be very careful to dissociate themselves entirely from decision-making of committee.

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Bias

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ELB seeks to provide regular posts on developments in environmental law and policy, from the forthcoming Environment Bill to recent climate litigation to developments in environmental policy both domestically and internationally.

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