Ten Dos and Don'ts of Judicial Review

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1. **DO** remember that your petition can be dismissed at the stage when you are seeking First Orders. Normally there won't be a hearing at this stage unless the judge can see some problem with the petition (see Rule 58.7 as amended from 7 January 2008), or you are seeking interim orders and a caveat is triggered. Nonetheless, there is potential at this stage for the petition to be dismissed in its entirety after the petitioner's counsel has been heard. It is therefore important to make sure that all relevant points are identified in the petition and all relevant documents lodged along with it at this early stage.

2. **DO** remember that most petitions for Judicial Review are disposed of at the First Hearing. Unless there is a dispute of fact on an essential matter, most cases are dealt with by way of legal submissions at this stage. Judicial Reviews tend to run, and you cannot assume that there will be any settlement proposal. All of this points up the need to be fully prepared in a Judicial Review at an early stage in the proceedings.
   - Instruct revision of the petition; particularly if the petition has initially been drafted urgently
   - Ensuring that Legal Aid in place in good time
   - Affidavits (if required)

3. But **DON'T** forget that First Hearings can also be used to deal with procedural matters and to make sure that the case is properly on track for either a substantive debate at a continued First Hearing or to focus the issues ahead of a Second Hearing with evidence. Rule 58 gives the judge a good deal of flexibility and discretion regarding procedure. The First Hearing can be continued on a number of occasions if this is necessary in order to achieve finality in the pleadings and focus the issues: see comments of the First Division in *Somerville v Scottish Ministers* 2007 SC 140 at paragraphs 174 and 175.

4. With that in mind **DON'T** forget to communicate with other parties to the petition and with the Court to clarify what the scope of the First Hearing is to be. Do you expect to be able to have the case dealt with fully at the First Hearing, or should the First Hearing be "procedural" with a view to focusing matters for a further hearing?

5. Respondents' agents, **DON'T** underestimate the value of lodging answers. Instruct these and lodge them in good time. Just as the petition should identify the legal issues and state briefly the legal argument relied on, the answers should put the respondent's position on the legal issues. This may show the petitioner that you have a "knock out" point. It is an opportunity for you to focus the issues and summarise your position for the judge when he/she is reading the papers. Not lodging answers, or lodging only formal answers, is a lost opportunity if you have a good point to make.

6. When you are instructing counsel for a Judicial Review, **DO** make sure you send the decision that your client is unhappy with (assuming that the complaint is about a decision rather than a failure to exercise a power). Send everything in your possession that the decision-maker had in front of him/her when making the decision. This may sound elementary, but it is surprising how often some or all of these documents can be omitted.

7. **DO** think about what your objective is in the proceedings. It may simply be reduction of a decision for a particular client. On the other hand, you may be seeking to challenge legislation, or a policy, which affects a number of people. Be clear about what it is you need to challenge? Is there a wider statutory or policy context? What practical result does your client want? How can this best be achieved? What remedy should be sought?

8. If there is a particular practice or policy you want to challenge, and there are a number of potential litigants, **DO** consider which case will best focus the issue and have the best chance of success. Consider whether a strategy can be adopted in relation to "test cases". If there are a number of live cases on a particular issue, this is an issue for respondents' agents as well as petitioners' agents. Communication and negotiation around the appropriate strategy may be required between petitioners' and respondents' agents and counsel.

9. Respondents' agents, **DO** be aware that there are cases that you may not wish to run, even though you may win them. There may be issues that, for policy reasons, you do not wish to have ventilated in open court. You and the client can work together with counsel to ensure that all involved are aware of the wider policy and operational context. Is the challenge, although apparently a "one off", one that could have wider implications? Is there scope for conceding the petition, or will the point inevitably have to be fought in some case, at some stage?

10. **DON'T** forget that, although there is no formal procedural time-bar in relation to Judicial Review in Scotland similar to that which applies in similar proceedings in England, delay can still cause problems for a petitioner. The respondent can plead mora, taciturnity and acquiescence. If another party has relied in some way on the fact that your client has done nothing to challenge the decision or act complained of, a plea of mora may be successful. If you are raising proceedings in reliance on section 6(1) of the Human Rights Act 1998, bear in mind the one-year time bar in section 7(5).

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