Graya No 32 Spring 2019

# DO'S & DON'TS OF ADVOCACY

## IN THE ADMINISTRATIVE COURT

MASTER DUNCAN OUSELEY

Four general observations to start ...

**First**, the do's and don'ts of good advocacy for other courts are equally applicable to advocacy in the Administrative Court.

**Second**, the nature of the jurisdiction and the procedural stages of the Administrative Court place a greater emphasis on written advocacy than in most courts, and oral evidence is rare.

The procedural stages for most cases involve, first, an application for permission to apply for judicial review, or to appeal under a statute, within time limits which may or may not be extendable. The challenge is often to a written decision. These applications are made and responded to on paper. The claim form is the detailed statement of the grounds upon which relief will be sought. The summary grounds of defence seek to knock the claim out as not reasonably arguable. The decision on whether to grant permission to apply for judicial review or to appeal is usually made by a judge on the papers. **DO** think of the judge reading and trying to reach a decision on the basis of what you and your opponent have written.

Claims may include written urgent or immediate applications for interim relief or directions often made without formal or any notice to the other side; they too are usually considered first by a judge on the papers. A judge is deployed each day to deal with immediate applications on paper. **DO** remember that the judge will often need to reach a decision quite rapidly, but will want to feel confident in the basis upon which the decision is reached.

Such immediate applications may also be made orally out of hours. The applicant must explain in writing why it is being made out of hours, and provide a filled-in claim form, with supporting documents, before any oral advocacy is called for. The judge no longer has to deal with such applications without papers in front of him. Argue your case but **DO NOT** argue with the judge, as if an unco-operative call centre operator.

If permission is refused by the judge on the papers, the claimant can renew the application at a usually short oral hearing; interim relief applications may also be dealt with at a short oral hearing. The number of other oral interlocutory applications – such as for disclosure – is quite small. Most applications are dealt with on paper.

**DO** consider the time estimate carefully.

The substantive hearings, often heavy in documents and a multiplicity of authorities, are disposed of in hearings which only fairly rarely exceed two days, and are often shorter. The judge dealing with your case may or may not be very familiar with the particular area of public law involved in your case. The advocacy in the skeleton arguments is important.

Oral evidence would be very exceptional. The relevant documents usually speak for themselves. Written evidence, however, can be very important in explaining how events transpired, or in filling in gaps in the documented sequence of events. Most factual differences, are not really factual differences at all, as opposed to differences in appreciation, knowledge or focus.

**Third**, claims are often poorly presented, the facts in a muddle, partial in both senses, the law misunderstood, documents all over the shop or missing, even when the claimant is legally represented. **DO** remember the importance of helping the judge to see your case, rather than trusting to the judge to work out what it is.

**Fourth**, the Rules. A cri de coeur from a former lead judge: I sometimes feel that parties regard judicial review as a rule free zone. **DO** read Part 54; and the commentary is very good too for those venturing into this area for the first time. Applications to amend grounds or to vary orders are not to be made unannounced in skeleton arguments, let alone orally.

### The paper application for permission or interim relief

The judge, who will have many sets of papers to deal with, needs your help in getting to the issue straightaway. All the points I make are designed to enable the judge to see your case clearly. That is often more than half the battle.

**DO**

- summarise at the start the key allegations of fact, identify the act or failing which is said to constitute the error of law, and why that is unlawful

- set out the key statutory or other provisions and provide photocopies in the bundle

- set out the facts relied on: a chronological narrative, in a neutral tone, is best

- set out how those constitute an error of law

- if you are outside a time limit for applying for permission and need an extension, explain why and **DO NOT** duck it

- if applying for interim relief, you must explain why the case requires interim relief, and why it cannot wait even for a short hearing on notice

**DO NOT**

- simply word process large chunks of authorities or previous applications which have not been edited to focus on this case; otherwise it merely adds to what the judge has to skip over

- simply reproduce your favourite quotes from your trusty selection of preferred judgments in other cases, especially when they add no point of principle and the quotes simply reflect a comment pertinent to the facts of an individual case

## Responding in the summary grounds of defence

**DO**

- remember that your task is to show why the claim is not arguable

- you must identify knock out points, even if you include some that may win in the end but cannot knock the claim out. It is a summary document focussing on those points.

- If permission is granted, you will produce detailed grounds of defence and full evidence. A long SGD may persuade a court that you will win in the end, but that these are not knock out blows. It is surprisingly rare for a defendant to concede the arguability of a claim, even when it obviously is arguable.

**DO NOT**

- say that every claim is Totally Without Merit even if it is unarguable. That simply shows a lack of judgment, but it happens all too often and is Totally Without Value. Regular defendants' lawyers can be bad at that.

## Short oral permission and interim relief hearings

*For the claimant*

**DO**

- produce a short skeleton argument, so that it can be considered with the papers at least the day before the hearing

- apply for permission to amend the grounds, if that is necessary, giving due warning of approach

- keep the oral advocacy succinct; summarise your evidence and claim; deal with the points raised in the refusal and the defendant's knock out points; keep a good eye on the clock.

**DO NOT**

- introduce new grounds in your skeleton argument, as if it were an application to amend

- raise new grounds without alerting the court and defendant to that fact

- challenge other decisions without at least an application to amend with all the grounds.

*For the defendant*

**DO**

- produce a short skeleton argument which should set out, briefly, the knock out points. It should also be supplied to the court in time for consideration when the judge reads the papers. They are not at all as useful at the court door, when the judge probably will have a provisional view.

- focus your oral advocacy on knock out blows – not all your arguments which may succeed at a full hearing are knock out blows.

*BOTH*

- consider the realism of the time estimate, usually 30 minutes, well before the hearing. If it is realistic, the claimant can expect no more than 15 minutes with 10 for the defendant and 5 for judgment. Watch the time: it passes so much more quickly for the advocate taking wing, than for those who have to listen and get the case moving.

- If the estimate is unrealistic, provide a better one: otherwise, your advocacy will be curtailed, unless other matters have fallen out. Judges are encouraged, unless other cases go short, to adjourn underestimated cases to another date, regardless of counsel's availability.