Blackstone
CHAMBERS

ARGUABILITY PRINCIPLES

Michael Fordham QC
Blackstone Chambers

Here are some suggested principles relating to the question of arguability, which applies at the stage of permission for judicial review.

1. The permission judge needs to be satisfied that there is a proper basis for claiming judicial review, and it is wrong to grant permission without identifying an appropriate issue on which the case can properly proceed: *R v Social Security Commissioner, ex p Pattni* (1993) 5 Admin LR 219, 223G. However voluminous the papers, or complex the putative issues, the task remains the same: *R v Local Govt Commission, ex p North Yorks CC* 11th March 1994 unrep (Laws J); *R v London Docklands Development Corporation, ex p Frost* (1997) 73 P&CR 199, 204 (Keene J).

2. It is not enough that a case is potentially arguable, said to justify permission on a speculative basis (*Sharma v Brown-Antoine* [2006] UKPC 57 [2007] 1 WLR 780 at [14(4)] (Lord Bingham)). It is not sufficient (cf. *R v IRC, ex p National Federation* [1982] AC 617, 644A (Lord Diplock)) for the papers to disclose what might on further consideration turn out to be an arguable case: *R v Legal Aid Board, ex p Hughes* (1993) 5 Admin LR 623, 628D-G (Lord Donaldson MR). The Court should however bear in mind that the picture may be materially incomplete, if disclosure by the defendant has not yet occurred.

3. The concept of 'arguability' can be unduly lax and vague, since lawyers can argue almost any point. What is meant is an arguable ground for judicial review having a realistic prospect of success: *Sharma* at [14(4)]

(Lord Bingham). There must be a real, or a sensible, prospect of success: *R v Legal Aid Board, ex p Megarry* [1994] PIQR 476; cf. *Swain v Hillman* [2001] 1 All ER 91.

4. Whether there is an arguable ground for judicial review includes whether there is some properly arguable vitiating flaw such as unlawfulness, unfairness or unreasonableness. Where multiple grounds are relied on, permission can be restricted to those grounds which are considered arguable: CPR54.12(1)(b). The vitiating ground must have been arguably material to the impugned decision. That decision must be arguably amenable to judicial review: *R v Chief Rabbi, ex p Wachmann* [1992] 1 WLR 1036, 1037H. There must be a realistic prospect that the court would give a remedy in the exercise of its discretion: *R (Rhodes) v Kingston upon Hull CC* [2001] ELR 230.

5. The approach to arguability is flexible. Even if the case is not considered to have a real prospect of success, permission for judicial review can be appropriate because of the importance of the issues: *R (Gentle) v Prime Minister* [2006] EWCA Civ 1078 at [23]; cf. CPR52.3(6)(b). Thus, it can be sufficient that there is an "other reason" warranting a substantive hearing: *Law Com 226* at 118; *Access to Justice* (1996) at 253. Where a serious allegation is made against a public authority, the strength or quality of the evidence adduced may in practice be adjusted: *Sharma* at [14(4)] (Lord Bingham). The Court does not engage in a full-scale dress-rehearsal of the case: *R (Mount Cook) v Westminster CC* [2003] EWCA Civ 1346 [2004] 1 PLR 29 at [71] (Auld LJ). But the Court can in practice impose a higher hurdle if required by the circumstances, such as the nature of the issue, the urgency of its resolution, and whether extensive material and argument have been considered: *R (Federation of Technological Industries) v CCE* [2004] EWHC 254 (Admin) at [8] (Lightman J; CA is at [2004] EWCA Civ 1020); *R v Derbyshire CC, ex p Woods* [1998] Env LR 277 (CA). Sometimes, the permission Court may adjudicate on a point of law: a question of jurisdiction (*Ex p Scott* [1998] 1 WLR 226, 229F); amenability to judicial review (*R v Parliamentary Commissioner for Standards, ex p Fayed* [1998] 1 WLR 669), or a point of law, construction or principle (*Al-Zagha v SSHD*

[1994] Imm AR 20, 26; *R v SS Trade & Industry, ex p Greenpeace* [1998] Env LR 415, 418).

6. Finally, the claim must not be the subject of any 'discretionary bar': *Sharma* at [14(4)] (Lord Bingham). Thus, the permission judge can reach a judgment as to whether judicial review is rendered inapt, for example by: (1) undue delay and absence of a good reason to extend time (CPR54.5; *R v CICB, ex p A* [1999] 2 AC 330, 341B-F (Lord Slynn)); (2) a suitable alternative remedy (*R v Chief Constable West Yorks, ex p Wilkinson* [2002] EWHC 2353 (Admin) at [42] (Davis J)); or (3) circumstances which make the claim premature or hypothetical and/or not a suitable test case (*R (Tshikangu) v Newham LBC* [2001] EWHC Admin 92). It may be appropriate to approach such questions through the prism of 'arguability' (*R v University of Cambridge, ex p Evans* [1998] ELR 515, 517H), but generally they can be straightforwardly asked and dispositively determined.

This is a paper for the Public Law Project conference, *Judicial Review: Trends & Forecasts* on 9th October 2007. It will in due course be published in the journal *Judicial Review*.