**(b) any directions,**

**on—**

**(i) the claimant;**

**(ii) the defendant; and**

**(iii) any other person who filed an acknowledgment of service.**

#### Notification of the decision

**54.11.1** The court will serve the order giving or refusing or granting permission, and any directions, on the claimant, and any interested party who served an acknowledgement of service. There is no longer any requirement for the claimant to enter and service a notice of motion following the grant of permission. The grant of permission itself triggers the next stage in the judicial review procedure, which is the filing of a detailed response and written evidence by the defendant and interested parties under r.54.13. This rule applies, it seems, both to decisions taken on the papers only or after an oral hearing.

The court will also serve on the parties its reasons for granting or refusing permission (r.54.12(2)).

### Permission decision where court requires a hearing[1]

**54.11A** **54.11A—(1) This rule applies where the court wishes to hear submissions on—**

**(a) whether it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred; and if so**

**(b) whether there are reasons of exceptional public interest which make it nevertheless appropriate to give permission.**

**(2) The court may direct a hearing to determine whether to give permission.**

**(3) The claimant, defendant and any other person who has filed an acknowledgment of service must be given at least 2 days' notice of the hearing date.**

**(4) The court may give directions requiring the proceedings to be heard by a Divisional Court.**

**(5) The court must give its reasons for giving or refusing permission.**

#### Editorial note

**54.11A.1** Rule 54.11A provides that the court may direct an oral hearing where the court wishes to hear submissions on whether it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained had not occurred. In such circumstances, the court must refuse permission unless there are reasons of exceptional public interest which make it appropriate for leave to be given. Rule 54.11A was inserted by the Civil Procedure (Amendment No.2) Rules 2015 (SI 2015/670) r.10 and came into effect on the day on which s.84(1) to (3) of the 2015 Act came into force, that is to say, on April 13, 2015 (see SI 2015/778 art.3). Section 84(1) to (3) and r.54.11A do not apply to an application for judicial review where the claim form was filed before that date (ibid art.4, Sch.2 para.6, and SI 2015/670 r.12(2)).

### Permission decision without a hearing[2]

**54.12** **54.12—(1) This rule applies where the court, without a hearing—**

**(a) refuses permission to proceed; or**

**(b) gives permission to proceed—**

**(i) subject to conditions; or**

**(ii) on certain grounds only.**

**(2) The court will serve its reasons for making the decision when it serves the order giving or refusing permission in accordance with rule 54.11.**

**(3) Subject to paragraph (7), the claimant may not appeal but may request the decision to be reconsidered at a hearing.**

**(4) A request under paragraph (3) must be filed within 7 days after service of the reasons under paragraph (2).**

**(5) The claimant, defendant and any other person who has filed an acknowledgment of service will be given at least 2 days' notice of the hearing date.**

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[1] Introduced by the Civil Procedure (Amendment No.2) Rules 2015 (SI 2015/670).

[2] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and amended by the Civil Procedure (Amendment No.3) Rules 2010 (SI 2010/2577) and the Civil Procedure (Amendment No.4) Rules 2013 (SI 2013/1412).

**(6) The court may give directions requiring the proceedings to be heard by a Divisional Court.**

**(7) Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing.**

#### Reconsideration of a refusal of permission

**54.12.1** If the judge has determined the application for permission without a hearing, and permission has been refused or granted on certain grounds only or is subject to conditions, the claimant cannot appeal against the decision but there is provision for the claimant to request that the decision be reconsidered at a hearing (CPR r.54.12(2)). The request for reconsideration must be filed in the Administrative Court Office within seven days of service of the reasons for refusal (r.54.12(4)). The claimant and any person who has filed an acknowledgement of service must be given at least two days' notice of a hearing date. The clear implication is, therefore, that there will be an oral hearing at which the claimant and the defendant and other interested persons will be able to attend and make representations. In *R. (MD (Afghanistan)) v Secretary of State for the Home Department* [2012] EWCA Civ 194, February 28, 2012, CA, unrep., the Court of Appeal was prepared to proceed on the assumption that r.54.12(3), insofar as it imposed a restriction on an appeal to the Court, was inconsistent with the Senior Courts Act 1981 s.16(1) (see Vol.2 para. 9A-59). But, even assuming the Court of Appeal had jurisdiction to hear an appeal against a refusal of permission on the papers, it would not normally be appropriate to exercise that jurisdiction. Rather, instead of proceedings by way of appeal, the claimant should seek reconsideration of the refusal at an oral hearing before a High Court judge (ibid).

The 2013 amendments to the Civil Procedure Rules limit the right to an oral hearing to reconsider the refusal of permission. They provide that if the court refuses permission to grant judicial review and certifies that the claim is totally without merit, the claimant cannot request that the decision refusing permission be reconsidered at an oral hearing. The amendment only applies where the claim form was filed on or after July 1, 2013. The Court of Appeal has held that the proper test for determining whether an application is totally without merit was whether it was bound to fail. It was not necessary to show that the application was abusive or vexatious: *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, *The Times,* July 14, 2014, CA. Subsequently, in *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, 9 February 2016, CA, unrep., the Court recognised the continuing difficulty about the proper approach to be taken by the High Court or the Upper Tribunal in considering whether to certify an application for permission to apply for judicial review as totally without merit (TWM). In attempting to give guidance the Court noted that the rule-maker evidently intended that applications considered as TWM should represent a sub-set of applications in which permission was refused. There must therefore be a difference between refusing an application for permission because a claim is "not arguable" and certifying that the application is TWM because it is "bound to fail".

Applications for a request for reconsideration must be filed within even days of service of the reasons for refusal of permission: see r.54.12(4). The Court of Appeal has indicated the appropriate approach to consideration of applications for an extension of time in the context of applications to renew in the Upper Tribunal (where the relevant rules provide for requests to made within nine days). The court should consider the seriousness and significance of the failure to comply with the rule, whether there is a satisfactory explanation for the failure and all the other circumstances. Delay arising out of the need to obtain legal aid is unlikely of itself to be a satisfactory explanation. Similar principles are likely to apply to applications for reconsideration in the Administrative Court. See *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286 at paras 6, 20, 25 to 29 and 32.

#### Appeals against refusal of permission to the Court of Appeal

**54.12.2** Where permission has been refused in a civil (i.e. non-criminal) case after a hearing in the High Court, the person seeking permission may apply to the Court of Appeal within seven days of the decision of the High Court refusing permission (CPR r.52.15) The Court of Appeal may, on considering that application, grant permission to apply for judicial review and, if so, the claim will proceed in the High Court in the usual way (CPR r.52.15(3) and (4)).

#### Appeals to the Supreme Court

**54.12.3** In *Re Poh* [1983] 1 W.L.R. 2, the House of Lords held that there can be no appeal to the House of Lords against a decision of the Court of Appeal refusing permission to apply for judicial review. The reasoning in *Re Poh* had been doubted by the Privy Council in *Kemper Reinsurance Co v Minister of Finance* [1998] 3 W.L.R. 630. The House of Lords has, however, upheld the decision in Re Poh and confirmed that the House of Lords has no jurisdiction to entertain an appeal against the refusal of permission to apply for judicial review: *R. v Secretary of State for Trade and Industry Ex p. Eastaway* [2000] 1 W.L.R. 2222. The House of Lords reasoned that the Court of Appeal only had jurisdiction to entertain an appeal against a decision of the High Court refusing permission to apply for judicial review. If the Court of Appeal refused permission to appeal, then such a decision was covered by the rule in *Lane v Esdaile* and there could not be an appeal against that refusal of permission to appeal. Where, however, the Court of Appeal grants permission to appeal, but then

refuses to grant permission to apply for judicial review (because of the alleged delay in filing the claim), the House of Lords has held that it does have jurisdiction to hear an appeal against the refusal to grant permission to apply: *R. v Hammersmith and Fulham LBC Ex p. Burkett* [2002] 1 W.L.R. 1593.

**Appeals in non-criminal cases**

**54.12.4** There can be no appeal to the Court of Appeal against the refusal by the High Court to grant permission to apply for judicial review in a criminal case (SCA 1981 s.18(1)(a)). The decision in *Re Poh* would prevent a refusal of permission by the High Court being appealed to the House of Lords (now the Supreme Court). Where the High Court considers that the possibility of an appeal to the Supreme Court should be preserved, the usual course is for the High Court to grant permission, to dismiss the substantive application and to certify that a question of general public importance arises. The claimant may then petition the Supreme Court for permission to appeal against the decision to dismiss the claim (*R. v DPP Ex p. Camelot plc* (1998) 10 Admin L.Rep. 93 at 105).

**Costs at the permission stage**

**54.12.5** The courts have discretion under SCA 1981 s.51 to award costs on an application for permission for judicial review (*R. v Camden LBC Ex p. Martin* [1997] 1 W.L.R. 359). Where the claimant is granted permission, the costs will be costs in the case unless the judge granting permission makes a different order: *Practice Statement (QBD (Admin Ct): Judicial Review: Costs)* [2004] 1 W.L.R. 1760. Costs will usually follow the event with the unsuccessful party being ordered to pay the costs of the successful party *M v Croydon London Borough* [2012] 1 W.L.R. 2607. If the defendant successfully resists the claim, those costs will include the costs of dealing with the claim after the grant of permission and also other costs reasonably incurred by the defendant prior to the grant of permission (including the acknowledgment of service but excluding the costs of any oral permission hearing) unless the court makes an alternative order: see *R (Davey) v Aylesbury Vale DC (Practice Note)* [2008] 1 W.L.R. 878. If the claimant is refused permission, whether there has or has not been a hearing, they will generally have to bear their own costs. The principles governing the award of costs where the claim for judicial review does not proceed to a full hearing of the substantive application and has been settled have been usefully summarised in *R. (Bahta) v Secretary of State for the Home Department (Public Law Project and the General Council of the Bar Intervening)* [2011] EWCA Civ 895 and *M v Croydon LBC* [2012] EWCA Civ 595; [2012] 1 W.L.R. 2607. The court retains a power to make a costs order where the substantive hearing has not proceeded to a trial. It will ordinarily be irrelevant that the claimant is legally aided. The overall objective will be to do justice between the parties without unnecessarily using court time or incurring further costs. Where a defendant does not adequately address an adequately formulated pre-action protocol letter, the claimant is entitled to institute proceedings and, if he obtains what he sought, then he can expect to be awarded costs (see *Bahta* especially at paras 59 and 63 and *M v Croydon LBC* at paras 61-62). The fact that the defendant decides to settle the proceedings, rather than risk litigation, and to reconsider the matter will not usually justify the refusal of the claimant's costs; the time for taking that decision is when the defendant receives the pre-action protocol letter not after proceedings have been issued (see *M v Croydon LBC* at para.54). There may be other cases where the proceedings are comprised at a later stage. Such cases may cover a wide number of factual situations and circumstances of each case require analysis. At each end of the spectrum, there will be cases where it is obvious which side would have won (and costs can be awarded accordingly). In between, the position will be less clear. The extent to which the court will be prepared to consider the unresolved substantive issues will depend on the circumstances of the case and, in particular, the amount of the costs at stake and the conduct of the parties. If the courts are unable to determine the issue without a disproportionate expenditure of costs, they may make an order that the claimant only recover a proportion of his costs or may make an order that there be no order for costs although the courts should not be too ready to resort to making no order for costs and will need to analyse the particular circumstances of each case (see *Bahta* at para.62). Similarly, if the claimant has been only partly successful, the courts may need to consider how reasonable the claimant was in pursuing the unsuccessful part of the claim and how much costs were increased as a result. If they are able to determine these issues, they may make an appropriate order including an order that the claimant recover only a proportion of his cost. If the courts are unable to determine who is the successful party without a disproportionate expenditure, it may make no order for costs (see *M v Croydon LBC* at para.61).

The Court of Appeal has also reviewed the position in relation to the award of costs against a claimant who is unsuccessful at the permission stage: see *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405. A defendant who has complied with the pre-action protocol and who has filed an acknowledgment of service should, generally, be able to recover the costs of filing an acknowledgment of service from an unsuccessful claimant where permission is refused: see paragraph 76(1) of the judgment in *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405 and *Leach, Re* [2001] EWHC Admin 455; *The Times,* August 2, 2001. Defendants who wish to claim such costs should normally make an application for costs in the body of the acknowledgment of service and provide details of the amount claimed. In *R. (on the application of Mount Cook Land Ltd) v Westminster City Council*, the Court of Appeal appeared to go further and indicated that an interested party who complied with the pre-action protocol and served an acknowledgement of service ought

also to be able to recover the costs of doing so against an unsuccessful claimant, although strictly, that issue did not arise in that case.

The court should not order an unsuccessful claimant to pay the costs of a defendant or an interested party attending an oral hearing and successfully resisting an application for permission except in exceptional circumstances. Such circumstances may consist in the presence of one or more of the following factors: (a) the hopelessness of the claim; (b) the persistence by the claimant in the claim after having been alerted to facts or the law demonstrating its hopelessness; (c) the extent to which the court considers that the claimant has sough to abuse the process of judicial review for collateral purposes; (d) whether, as a result of full argument and the deployment of documentary evidence, the claimant has, in effect, had the advantage of an early substantive hearing of the claim. The court may also consider the extent to which the unsuccessful claimant has substantial resources which they have used to pursue the unfounded claim and which are available to meet an order for courts. See *R. (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405 at para.76 of the judgment and para.8.6 of the Practice Direction. A court may order an oral hearing of the application for permission with the substantive hearing to follow immediately if permission is granted (commonly referred to as a "rolled-up hearing"). In such circumstances, if permission is refused, the courts will usually order the unsuccessful applicant to pay the defendant's costs as the defendant had no choice but to attend and incur the costs of preparation for a full hearing. The Court of Appeal in *Mount Cook* did not have to deal specifically with the position of an interested party and it may be that, even if there were exceptional circumstances justifying the award of costs in favour of a defendant, that the court would not, generally, order the unsuccessful claimant to pay the costs of an interested party unless there was some separate issue or some separate interest calling for the interested party to appear: see *Bolton MDC v Secretary of State for the Environment (Costs)* [1995] 1 W.L.R. 1176 and para.54.16.7 below. See above for applications for protected costs orders.

In *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583; [2006] 1 W.L.R. 1260; December 12, 2005, CA, unrep., the Court of Appeal suggested that an opportunity should be found as soon as possible to introduce a specific rule or practice direction governing the procedure for applications for costs at the permission stage, and the principles to be applied. The court said it would be helpful if, at the same time, there could be clarification of what is required to be incorporated in the acknowledgment of service by way of "summary grounds" as required by r.54.8(4) (see para.54.8.2 above) and whether it is necessary to impose the same requirement on all parties in this respect, or whether distinctions should be drawn between defendants and interested parties.

Pending any new rules or directions, the court stated that the following procedure should be followed (ibid. at para.37 per Carnwath L.J.):

1. where a proposed defendant or interested party wishes to seek costs at the permission stage, the acknowledgment of service should include an application for costs and should be accompanied by a schedule setting out the amount claimed;
2. the judge refusing permission should include in the refusal a decision whether to award costs in principle, and (if so) an indication of the amount which he proposes to assess summarily;
3. the claimant should be given 14 days to respond in writing and should serve a copy on the defendant;
4. the defendant shall have seven days to reply in writing to any such response, and to the amount proposed by the judge;
5. the judge will then decide and make an award on the papers.

The court also said that, where a claimant does not follow the Pre-Action Protocol procedure, they must expect to put their opponents to greater expense in preparing the summary of grounds and this may be reflected in any order for costs against them if permission is refused (ibid. at para.54 per Brooke L.J.).

## Defendant etc. may not apply to set aside(GL)[1]

**54.13 Neither the defendant nor any other person served with the claim form may apply to set aside(GL) an order giving permission to proceed.** **54.13**

### Applications to set aside

The court has an inherent jurisdiction to set aside orders, including orders granting permission to apply for judicial review, which have been made without notice being given to the defendant or other interested party (*R. v Secretary of State for the Home Department Ex p. Chinoy* (1992) 4 Admin L. Rep. 457). That jurisdiction continues to exist in relation to permission granted under CPR Pt 54. Where, however, the claim form has been served on the defendant or an interested party, so that they had the opportunity of filing an acknowledgment of service setting out a summary of the grounds of resistance, that defendant or interested party cannot apply to set aside the grant of permission (CPR r.54.13). As the claim form must be served on such persons, applications to set aside the grant of permission are likely now to be rare and to occur only when by oversight or **54.13.1**

[1] Introduced by the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092).