

JUDICIAL REVIEW: A QUICK AND EASY GUIDE

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The coalition government is introducing drastic and far reaching changes to the way in which public services operate. The cuts announced to public spending will result in huge cuts to public services, which are likely to have devastating effects on many members of our society. The law can help to challenge the cuts being implemented.

PUBLIC BODIES AND THE LAW

When public bodies, whether at local or national level, make decisions which affect the services they provide, they have to do so in accordance with the law. There are a variety of legal obligations which they have to follow and a failure to do so renders any subsequent decision potentially unlawful.

JUDICIAL REVIEW

Judicial review is a process by which the courts review the lawfulness of a decision made (or sometimes lack of a decision made) or action taken (or sometimes failure to act) by a public body. It is mechanism by which a judge considers whether a public body has acted in accordance with its legal obligations and if not, can declare a decision taken by it invalid.

BODIES THAT CAN BE JUDICIALLY REVIEWED

The sort of public bodies whose decisions can be challenged include:

- Government ministers and government departments
- Local authorities and local NHS trusts
- Chief constables and prison governors
- Maintained schools and school governing bodies
- Magistrates, coroners and county courts
- Quangos
- Regulatory and supervisory bodies such as Monitor, Care Quality Commission, Charity Commission
- Some tribunals.

The principle behind PCOs is that if a claimant cannot afford the risk of having to pay the other side's costs, they should be protected from such a possibility at the outset of the case. Such orders are considered appropriate where the court is satisfied the claim is of public importance and that it is in the public interest to have the issues decided by a court. They enable claimants to pursue cases, safe in the knowledge that even if they lose there will either be no order for costs against them, or that any order to pay the defendant's costs will be capped to a limit set by the court, at a level they can afford.

The cost risk of the application itself is also limited. The guideline figures are £1,000 for an unsuccessful application, decided by the judge on the papers. If the application is renewed to an oral hearing, and it is refused, the cost risk in relation to this is normally a further £2,500. These figures may be reduced if the claimant cannot afford these sums.

LEGAL AID

It may be that those affected by the public body's decision are in receipt of means tested benefits such as income support, income based job seekers allowance or guaranteed state pension credit. If so, and their claim has a reasonable chance of success, they are likely to be eligible for public funding (legal aid). In such circumstances the legal services commission covers the costs of the claimant's solicitors and protects them from any adverse costs risk.

Given these various options it is often possible to find a way to fund a judicial review challenge and costs exposure should not be a barrier to access to the courts.

Again, as before, you should seek expert advice from a public lawyer about your options in relation to funding before deciding whether to pursue a judicial review.



HOW TO PAY FOR A JUDICIAL REVIEW

LEGAL COSTS

The cost of bringing judicial review claims can be very high, (upwards of £30,000) if a case proceeds to a full hearing and the claimant is unsuccessful. This is because if unsuccessful the claimant is likely to be ordered to pay the defendant's costs as well as their own. These figures however should not put you off. There are a variety of ways you may be able to fund a judicial review claim, some details of which are below.

CONDITIONAL FEE AGREEMENTS (CFAs)

CFAs may be available to fund judicial review proceedings. The basic principle is that the claimant is not liable for their own legal costs if they lose the case, and if they win the defendant will be ordered to pay them.

However, that leaves the defendant costs should the claim be unsuccessful. In order to cover this potential risk/liability, it may be possible to obtain after the event insurance. However, due to the unpredictability of judicial review proceedings, this can be extremely difficult to obtain. Before the event insurance is also occasionally available to cover the other side's costs (usually as part of home contents insurance) but again, most policies specifically exclude judicial review proceedings so this is unlikely to be an option.

PROTECTIVE COSTS ORDERS (PCOs)

Because of these difficulties in some circumstances a claimant may be able to apply for a PCO in order to help with the potential risk/liability that they would face if their claim is unsuccessful.

PCOs are available in cases concerning environmental issues (for example planning decisions) and/or cases where an individual or NGO is bringing a claim in the public interest. The court normally considers a claimant's application for a PCO at the same time as it determines permission. However, it can be done sooner if necessary.



ALTERNATIVE REMEDIES

Judicial review is only available when there are no alternative ways the dispute can be resolved. If, for example, there is an internal appeal or complaints procedure or a statutory right of appeal, these may be considered "alternative remedies" by the court. If an alternative remedy is available the court is likely to refuse to hear a judicial review application.

However, it is important to remember that an alternative remedy must be meaningful. If the alternative route by which the dispute could be resolved does not, for example, result in a quick enough decision or the decision made by the body/individual reviewing the decision is not binding, it is arguable that the alternative remedy is not appropriate and judicial review would be available.

The question whether an alternative remedy precludes the availability of judicial review is not straightforward and it is best to seek expert advice from a lawyer specialising in public law before deciding whether to take legal action or not.

GROUND OF CHALLENGE

THE DIFFERENT GROUNDS

Decisions by public bodies can be challenged on a number of grounds. For example if,

- the public body does not have the power to make a particular decision, or it has used a power which it does have for an improper purpose;
- the decision is irrational;
- the procedure followed by the public body is unfair or biased;
- the decision taken is in breach of the Human Rights Act;
- the decision taken is in breach of European Community Law;
- the public body failed to comply with one of its legal duties, for example, the public sector equality duties.

Illegality: Public bodies must understand and apply the law that regulates their decisions and actions. For example, it is likely to be unlawful if a public body refuses to do something because of a mistaken belief that the law does not allow it to do so. Or for example, if the public body takes into account irrelevant factors when making a decision or fails to take into account relevant factors.

Irrationality: It is unlawful for a public body to make a decision which is so unreasonable as to be perverse or irrational. This is difficult argument to win in court, as the threshold for irrationality is extremely high. Lord Green stated in the case of *Wednesbury* that for a decision to be irrational it must be, “a decision on a competent matter...so unreasonable that no reasonable authority could ever have come [to] it.” Only then could “the Courts interfere... but to prove a case of that kind would require something overwhelming.”

The test under European Law or the Human Rights Act is easier - in this case the relevant test is proportionality. In order to act proportionately, a public body must undertake a balancing exercise between the legitimate aims of the state on the one hand and the protection of individual rights and interests on the other.

Unfairness: Public bodies should not act so unfairly as to amount to an abuse of power. This means that if there are clear procedures a public body is required to follow, it must do so. Similarly, public bodies must not breach the rules of “natural justice” For example a public body must act impartially and be seen to do so. There must be a “fair hearing” before a decision is made, although this does not always mean an oral hearing. Fairness also demands that in most circumstances the public body gives reasons for its decisions.

DOES THE DECISION SEEM WRONG?

As with alternative remedies, it is not always easy to tell whether a decision or action taken by a public body is unlawful. One way to approach this question is to apply the “bloody hell” test. If a decision seems particularly outrageous, it is worthwhile seeking advice from a lawyer specialising in public law about whether a judicial review may be possible.

- Prohibiting orders: the public body is forbidden from doing something unlawful in the future;
- Mandatory orders: the public body is ordered to do something specific which it has a duty to do;
- A declaration, for example on a way to interpret the law in the future or a declaration that legislative provision is incompatible with the Human Rights Act.

COMPENSATION (DAMAGES)

- This remedy is rarely provided in public law but damages can be awarded, for example where a public body has breached an individual’s rights under the Human Rights Act.

REMEDIES ARE DISCRETIONARY

All the remedies listed above are discretionary. The judge does not have to provide the claimant with any remedy at all, even if the claim is successful. For example, if a claimant’s conduct is considered unreasonable because he or she did not apply for a judicial review quickly enough, the court may decide that no remedy should be awarded as a result.

CARRY ON CAMPAIGNING!

It is important to remember that a successful judicial review is likely to result in the decision of a public body being quashed. In these circumstances, the public body will reconsider the question or issue again. In order to try to avoid the public body making the same decision again you will have to win the political argument about why the original decision was wrong.

The aim is to make it too politically difficult for the public body to make the same decision again and local and/or national campaigns about the case can be very useful to ensure the long term real success of the claim, rather than simply a legal one.



13. The hearing can last from a couple of hours to several days depending on the complexity of issues involved. There is usually no oral evidence and the claimant does not have to attend court him or herself. It normally takes place in open court either in the Royal Courts of Justice in London or at one of the regional court centres.

THE DECISION

14. The judge then normally provides a fully reasoned written decision sometime (often weeks) after the hearing, although again this can be done more urgently if required. Occasionally the judge gives an indication of the decision at the end of the hearing with written reasons to follow.

APPEALING

15. Either party can appeal against the court's decision to the court of appeal. However, as mentioned above permission to appeal is required. The Judge hearing the case has to be asked for permission to appeal. If it is refused an application has to be made to the court of appeal within 14 days of the administrative court's decision.

IF SUCCESSFUL, WHAT WILL YOU GAIN FROM A JUDICIAL REVIEW CHALLENGE?

TYPES OF ORDERS

If an application for judicial review is successful the court has four potential orders it can grant to the claimant

- Quashing orders: the original decision is declared invalid, it is struck down and the public body has to take the decision again;

TAKING LEGAL ACTION AND THE JUDICIAL REVIEW PROCEDURE

FIRST STEPS

If you think a decision taken by a public body is potentially unlawful the following steps should be taken as a matter of urgency:

- Find somebody affected by the public body's decision willing to take legal action. This can be an individual or a group which represents the interest those concerned.
- Request and obtain as much documentation as you can about the decision, for example copies of the minutes of meetings at which the public body made the decision, any press releases or press cuttings about the decision, any correspondence you have had with the public body about the decision.
- Obtain legal advice/help in order to write a letter before claim.
- And do not delay! It is extremely important that you act quickly. Cases must be brought promptly, within weeks of the decision to ensure the greatest chance of success.
- The latest time you can bring a judicial review application is normally three months, from the date of the decision. However, the court usually expects the application to be made sooner than this.



LETTER BEFORE ACTION

If you have grounds to start a judicial review, the case is likely to proceed as follows:

1. The individual or group bringing the challenge (the claimant) sends a letter before action to the public body (the defendant). This letter needs to set out details of the decision or conduct and the reason why the claimant believes it is unlawful. It also needs to state what the claimant wants the defendant to do and within what time scale. A deadline by which the defendant needs to respond to the letter should be set. It must state that judicial review proceedings will be issued if a satisfactory response is not received within that time limit. Normally, this time limit is 14 days (although it can be shortened for more urgent cases).
2. Normally within 14 days the defendant must respond and set out, either the basis upon which it considers the decision lawful and why the claimant's arguments are wrong, or it should agree to reverse its decision and/or enter into negotiations with the claimant about terms of a possible settlement.

APPLICATION FOR PERMISSION

3. If there is no response to the letter before claim or the response is unsatisfactory, an application to the administrative court for permission to bring judicial review proceedings should be made. This must be served on the defendant and there is a £50 court fee to be paid.

URGENT ORDERS

4. Depending on whether the defendant agrees to put its decision on hold pending the outcome of the legal challenge, the claimant may need to ask for an urgent order from the court preventing the public body taking any further steps that will prejudice his or her case. This request should be made in the application form and an urgent decision by a judge on the papers requested.

THE DEFENCE

5. The defendant then normally files and serves an acknowledgment of service and summary grounds of resistance, a document which sets out the basis upon which the public body intends to defend the claim.

DECIDING PERMISSION

6. Having considered all the documents, a judge will then decide on the papers whether the claimant should be granted permission to proceed to a full judicial review hearing.
7. If permission is refused the claimant can request that decision to be reconsidered at an oral hearing. This request must be made within 7 days of their notification of the judge's decision on the papers.
8. If permission is refused again at the oral hearing, the claimant can appeal to the court of appeal which also must be done within 7 days. However, the permission of the court of appeal is required before an appeal can be heard, so again this is a two stage process.

THE SUBSTANTIVE (MAIN) JUDICIAL REVIEW HEARING

9. If permission is granted, the parties then both prepare for the full substantive hearing.
10. The claimant must pay a further fee of £180 within 7 days of service of the judge's decision.
11. Within 35 days, the defendant must file and serve its detailed grounds of resistance setting out in greater detail the basis upon which it intends to contest the claim and any written evidence it wishes to rely on.
12. The substantive hearing will then take place where a judge will consider the claim in detail. This can be several months from when the claim was first issued, although this again will depend on the urgency with which the case needs to be resolved.

