

## JUDICIAL REVIEW

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### *Administrative Law*

All public bodies (including prisons, Parole Board and government departments) should perform their duties and the making of decisions speedily, efficiently and fairly. Administrative law which includes the Human Rights Act 1998 and 'Judicial Review' procedure governs the making of these "decisions".

### *Making a Decision – What Constitutes a Decision*

"Decisions" relate to a particular matter affecting an individual or group, such as assigning a prisoner to a particular security category. However the Courts have held that Judicial Review extends to things like policies (of general application), reports and recommendations, and advice and guidance.

Administrative law has developed a series of tests for measuring the lawfulness of a public law power:

- **Legality** – acting within the scope of any powers and for a proper purpose
- **Procedural Fairness** – so for example to give the individual an opportunity to be heard
- **Reasonableness or Rationality** – following a proper reasoning process and so coming to a reasonable conclusion
- **Compatibility** – with European convention rights and EC law

### *Are Any Kinds of Decisions Immune from Judicial Review*

"Private law" which governs the relationships between private individuals or private bodies (such as companies) acting in their private capacity is outside the scope of Judicial Review.

There also remains a class of decision (usually 'political judgement') where the Court accepts that the decision maker is better qualified than the Court to make a judgment. So for example:

- Ordering financial priorities, in deciding to spend public money in one way rather

than another

- Assessing the needs of national security and public order
- Setting policy on prisons, immigration and deportation.

### *Can Anyone Challenge a Decision?*

To apply for judicial review of a decision in principle a person (the 'Claimant') must have a 'sufficient interest or standing' in the decision. This means they must have a direct or personal interest in the decision. So a person cannot challenge a decision which does not affect them personally simply because they disagree with it. However groups protecting or campaigning for a particular public interest may have 'standing' to challenge a decision on the basis that they represent the interest of the person directly affected.

### *A Typical Judicial Review Case*

#### *The Pre-action Stage*

The procedure is set out in the Civil Procedure Rules CPR Part 54. The 'Pre-Action Protocol' sets out the steps that should be taken before commencing a Judicial Review challenge. The person challenging the decision must set out in a "letter before action" the decision they are challenging, the reasons and how the decision can be remedied. Any response from the decision maker should say what aspects of the claim are conceded (if any) and what is disputed. If there is some more immediate form of appeal or review then this should be tried first before any court action.

#### *The Timing of an Application for Judicial Review*

The claim for Judicial Review must be issued (CPR Part 54.5):

- Promptly; and
- In any event not later than **three** months after the grounds to make the claim (the decision) first arose.

The Court has the power to extend time if a

“good reason” can be shown, so where for example there is a strong case and there is no detriment to another person by any delay.

#### *Duty of Candour*

Judicial Reviews are not usually about facts but about legality, fairness and procedure. The Courts will therefore expect all the parties involved to be open and honest and not withhold information suggesting weaknesses in their cases. However the Freedom of Information Act 2000 does allow a person challenging a decision of a public body to make an application for all information he thinks may be relevant.

#### *The Permission Stage*

The Claimant is required to issue in the Administrative Court (located in London, Birmingham, Manchester, and Cardiff) and to ‘serve’ the Defendant (and any ‘interested parties’) with a Claim Form accompanied by a statement of the grounds for bringing a claim and supporting evidence. “Serve” means sending these documents by post or fax to the Defendant directly or to their lawyers. In most cases this will be the Treasury Solicitor but some government departments and private prisons have in house lawyers or private solicitor firms. Once the Claim Form is issued and served the Defendant must within 21 days send an Acknowledgement of Service (a defence). This response time may be shortened by the Court in cases of emergency.

A decision will be made on the papers received by the Judge who can grant permission to proceed (indicating the claim has some prospect of success), refuse permission, or grant permission only on certain grounds or on conditions.

#### *Permission Refused*

The Judge will give reasons and the Claimant can seek an oral hearing within **seven** days. You can apply for permission to appeal to the Court of Appeal if permission is again refused.

#### *Permission Granted*

The Defendant is required within **35 days** to respond in full providing evidence in the form of witness statements, the procedure followed in coming to its decision and the reasoning process etc. At this stage (or in cases of urgency such as deportation even before the permission hearing) the Court may grant ‘interim relief’ such as an

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injunction which prevents the decision of the Defendant being implemented until the case has been decided by the Court. Alternatively the Defendant may give an undertaking not to implement the decision.

#### *Procedure at the Hearing*

Procedure at the substantive hearing;

- The case will normally be heard by a single Judge. Claimants can act in person and without a lawyer.
- In advance of the hearing all parties must prepare an outline (‘skeleton’) of their arguments for use by the Court.
- The evidence is usually on the papers and it is rare for witnesses to give oral evidence.
- The party who is unsuccessful has the right to apply for permission to appeal to the Court of Appeal. This is subject to a strict timetable.

#### *Remedies following a Successful Challenge*

The remedies the Court may grant following a successful Judicial Review are:

- A quashing order, by which the Court sets aside or cancels a decision found unlawful;
- A prohibiting order, by which the Court forbids the public authority to perform an act found unlawful;
- A mandatory order by which the Court instructs the public authority to perform a public duty;
- A declaration, by which the Court declares what the law is;
- An injunction, usually an order not to do something but it can be a positive order to do something instead;
- Damages, by which (in limited circumstances) the Court can award financial compensation.

The Court can make a ‘Declaration of Incompatibility’ as legislation and a convention right under Section 4 of the HRA 1998. This *does not* make the legislation invalid but the Government *may* take action to change the legislation in some way to remove the incompatibility.

#### *Legal Aid*

Public funding is available to take an action for judicial review and is subject to both a merit (the prospects of success) and means (income and capital financial limits) test.

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