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AN INTRODUCTION TO JUDICIAL REVIEW: A GUIDE TO GETTING ON THE BANDWAGON!

1. What is Judicial Review?

CPR 54.1

(2) In this Section –

(a) a 'claim for judicial review' means a claim to review the lawfulness of –

(i) an enactment; or

(ii) a decision, action or failure to act in relation to the exercise of a public function.

Lord Diplock '*judicial control of administrative action'* (*CCSU*)

Judicial Review is a discretionary remedy

Administrative Court (sub-division of QBD): supervisory jurisdiction

Upper Tribunal in transfer cases

2. What decisions can be challenged by way of Judicial Review?

Decisions made by public bodies in a public law capacity (as opposed to when acting in a private law capacity)
Private companies exercising public functions

Judicial review is the procedure by which you can seek to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function. If you are challenging the decision of a court, the jurisdiction of judicial review extends only to decisions of inferior courts. It does not extend to decisions of the High Court or Court of Appeal. (Administrative Court Website)

3. Who can bring a Judicial Review?

'Standing' sufficient interest/connection to the subject matter of the claim

Remedy of last resort: have alternatives been exhausted

Time-limit: CPR 54.5 promptly and in any event within 3 months (cf JR of refusals of permission by UT CPR 54.7A: 16 days)

4. What are the grounds for Judicial Review?

a. Illegality
b. Irrationality
c. Procedural impropriety

Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6 (22 November 1983)
http://www.bailii.org/uk/cases/UKHL/1983/6.html

> *Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. 1 have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community ; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.*
>
> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its*

jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

5. What is the procedure for Judicial Review?

a. Pre-action protocol letter: follow template; 14 days and think costs
b. Commence Proceedings: N461; statement of facts and grounds for review and duty of candour. Pay the fee
c. Urgent proceedings: N463
d. Service of claim form: 7 days CPR 54.7
e. Acknowledgment of service setting out summary grounds of defence: CPR 54.8
f. Permission required: CPR 54.4. Is there an arguable case for review?
g. Permission decision on the papers. Permission granted court may give directions CPR 54.10; Permission refused costs of AOS (*Mount Cook Land Ltd & Anor v Westminster City Council [2003] EWCA Civ 1346 (14 October 2003)* *http://www.bailii.org/ew/cases/EWCA/Civ/2003/1346.html*) or Permission adjourned to oral hearing. Possibility of rolled up hearing.
h. Request permission reconsidered at oral hearing: CPR 54.12(3). 7 days CPR 54.12(4). If Defendant attends and permission refused don't usually get costs for attendance CPR PD 54A 8.6
i. Full hearing: Claimant serves skeleton and agreed bundle 21 working days before CPR PD 54A 15.1 & 16.1. Defendant's skeleton 14 working days before CPR PD 54A 15.2.
j. Costs: broad discretion. CPR 44 applies. Generally costs follow the event.
k. Settlement & Costs: *Bahta & Ors, R (on the application of) v Secretary of State for the Home Department & Ors [2011] EWCA Civ 895 (26 July 2011)* *http://www.bailii.org/ew/cases/EWCA/Civ/2011/895.html*
   How successful have you been: *M v London Borough of Croydon [2012] EWCA Civ 595 (08 May 2012)* *http://www.bailii.org/ew/cases/EWCA/Civ/2012/595.html*

6. What are the potential remedies in Judicial Review?

CPR 54.2 & 54.3

a. Mandatory order
b. Prohibiting order
c. Quashing Order: CPR 54.19 remit and reconsider or substitute its own decision
d. Declaration
e. Injunction
f. Damages (but not damages alone CPR 54.3): non-HR, HR & EU
g. Interim relief

Remedies discretionary: court does not have to grant

7. **What are the most common types of Judicial Review applications? (an immigration lawyer's perspective)**
    a. Fresh claims for asylum/human rights. §353. Now made in Upper Tribunal (lots of fun in Field House!). *WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495 (09 November 2006)*
    http://www.bailii.org/ew/cases/EWCA/Civ/2006/1495.html

The task of the Secretary of State

6.There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7.The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at p 531F.

The task of the court

8.There is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim. The court has therefore been engaged only through the medium of judicial review. The content of such an application was first addressed by this court in R v SSHD ex p Onibiyo [1996] QB 768. The applicant in that case argued that whether or not a fresh claim for asylum had been made was a matter of precedent fact, on the same level as for instance a decision on whether an applicant was an illegal entrant, and thus to be decided, in case of dispute, by the court. The Secretary of State argued that the decision on whether a fresh claim had been made was for him, to be challenged only on grounds of irrationality. Sir Thomas Bingham MR, giving the judgment of the court, inclined tentatively and "with some misgivings" to the latter view, concluding therefore that the decisions of the Secretary of State were challengeable only on "Wednesbury" grounds.

9.Commentators for a time regarded that conclusion as still open for debate, but in truth no other answer could have been given to the question posited by counsel in Onibiyo. As the Secretary of State rightly submitted, his conclusion as to whether there was a fresh claim was not a fact, nor precedent to any other decision, but was the decision itself. The court could not take that decision out of the hands of the decision-maker. It can only do that when it is exercising an appellate role. With appeal excluded, the decision remains that of the Secretary of State, subject only to review

and not appeal. And in any event, whatever the logic of it all, the issue to which Bingham MR gave only a tentative answer in Onibiyo arose for decision before this court in Cakabay v SSHD [1999] Imm AR 176. There is no escaping from the ratio of that case that, as encapsulated at the end of the judgment of Peter Gibson LJ at p195, the determination of the Secretary of State is only capable of being impugned on Wednesbury grounds.
10.That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in Cakabay recognised, at p191, that in any asylum case anxious scrutiny must enter the equation: see §7 above. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
11.First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision.

MN (Tanzania), R (on the application of) v Secretary of State for the Home Department [2011] EWCA Civ 193 (04 March 2011)
http://www.bailii.org/ew/cases/EWCA/Civ/2011/193.html

b. Certified Claims: merits review
Clearly Unfounded: is the case bound to fail upon any view of the facts
Toufighy & Anor, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 3004 (Admin) (30 October 2012)
http://www.bailii.org/ew/cases/EWHC/Admin/2012/3004.html

68. The conclusion in MN (Tanzania) is therefore that, on the present state of the authorities, there is a difference between the approach to "fresh claim" Rule 353 cases and cases of "clearly unfounded" asylum or human rights claims. Maurice Kay LJ considered: (i) the two classes of case had been set on different tracks (see [6]); (ii) the difference between them is not illogical because in Rule 353 cases the individual has already had full access to the immigration appellate system (see [16]); but (iii) an assimilation of the tests would be justifiable but is not possible on the present state of the authorities (see [16]).

69. It is unsatisfactory for the law to be in this state. There are powerful statements by judges in the House of Lords and the Supreme Court favouring the court having a primary power to decide, both in section 94 cases and in Rule 353 cases, but a power so to decide only on the material that was available to the Secretary of State. They also consider the tests to be the same. However, the most recent Court of Appeal authority which binds this court has held that the scope of review is broader or more intrusive in the section 94 "clearly unfounded" cases than in the Rule 353 "no realistic prospect of success" cases.

70. Fortunately, the difficulty produced does not affect this case because it is clear that this is a "clearly unfounded" case, albeit one governed by paragraph 5 of Schedule 3 to the 2004 Act

rather than section 94 of the 2002 Act. In MN (Tanzania), it was stated (see [2011] EWCA Civ 193 at [14]) that the ratio of YH's case is limited to section 94 cases. Carnwath LJ stated that the court is entitled to exercise its own judgment provided that the issue is judged on the material available to the Secretary of State and in relation to section 94, that was approved in MN (Tanzania). There appears to me to be absolutely no difference between the meaning of and approach to "clearly unfounded" in section 94 cases and its meaning in cases that fall to be governed by paragraph 5 of Schedule 3 to the 2004 Act.

71. *The position in the authorities which bind me thus appears to be as follows. In the context of section 94 of the 2002 Act and paragraph 5 of Schedule 3 to the 2004 Act the court is entitled to exercise its own judgment but only on the material available to the Secretary of State. In the context of Rule 353, despite the statements of Lord Phillips and Lord Brown in ZT (Kosovo), the test is Wednesbury applied with "anxious scrutiny" but, if Lord Neuberger's judgment is added to the mixture, and if there is no dispute of primary fact, "normally" the test will admit of only one answer.*

c. Other no right of appeal cases. Often challenges in regard to Article 8, the failure to apply a UKBA policy or the failure to make an appealable decision.
Daley- Murdock, R (on the application of) v Secretary of State for the Home Department [2011] EWCA Civ 161 (23 February 2011)
http://www.bailii.org/ew/cases/EWCA/Civ/2011/161.html

d. Delay cases especially legacy cases or failure to implement a decision.
Mohammed, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 3091 (Admin) (02 November 2012)
http://www.bailii.org/ew/cases/EWHC/Admin/2012/3091.html

e. Age assessment cases. Court hears evidence like a civil trial and decides on balance of probabilities. Neither party bears the burden of proof.
CJ, R (On the Application Of) v Cardiff City Council [2011] EWCA Civ 1590 (20 December 2011)
http://www.bailii.org/ew/cases/EWCA/Civ/2011/1590.html

f. Unlawful detention
Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12 (23 March 2011)
http://www.bailii.org/uk/cases/UKSC/2011/12.html

Hardail Singh challenges

Lord Dyson :

22. *It is convenient to introduce the Hardial Singh principles at this stage, since they infuse much of the debate on the issues that arise on this appeal. It is common ground that my statement in R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888, [2003] INLR 196 para 46 correctly encapsulates the principles as follows:*
    (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
    (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

Public law error challenges

68. I do not consider that these arguments undermine what I have referred to as the correct and principled approach. As regards Mr Beloff's first point, the error must be one which is material in public law terms. It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain a person under conditions different from those described in the policy. Errors of this kind do not bear on the decision to detain. They are not capable of affecting the decision to detain or not to detain.

Lady Hale:

207. I would therefore answer 'yes' to the first question. I would also answer the second question in the way proposed by Lord Dyson. In other words, the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result – which is not the same as saying that the result would have been different had there been no breach.

8. Judicial Review Resources

a. CPR Part 54
http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54
b. CPR Part 54A Practice Direction
http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/pd_part54a
c. Pre-Action Protocol for Judicial Review
http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv
d. Administrative Court Guidance
http://www.justice.gov.uk/downloads/courts/administrative-court/judicial-review.pdf
e. Fresh Claim Judicial Review Applications in the UT: forms and guidance
http://www.justice.gov.uk/tribunals/immigration-asylum-upper/fresh-claim-judicial-review
f. PLP Short Guide 03: An Introduction to Judicial Review
http://www.publiclawproject.org.uk/downloads/PLP_Short_Guide_3_1305.pdf
g. LAG Book: Judicial Review Proceedings (3rd Edn)
http://www.lag.org.uk/bookshop/civil-justice/2013/judicial-review-proceedings-a-practitioner's-guide.aspx
h. The Bible: Judicial Review Handbook Michael Fordham QC (6th Edn)
http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849461597