



An Introduction to Judicial Review



The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers;
- enhancing the quality of public decision-making;
- improving access to justice.

Uniquely for an organisation of its kind, PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

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Judicial Review

1 What is judicial review?

Judicial review is a form of court proceeding, usually in the Administrative Court¹, in which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. It is only available where there is no other effective means of challenge.

Judicial review is concerned with whether the law has been correctly applied, and the right procedures have been followed. In order to succeed the claimant will need to show that either:

- A public body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so; or
- A decision or action has been taken by a public body that is beyond the powers it is given by law.

Judicial review is about the supervision of administrative decision making. It can be a fast, effective and powerful way to convince a public body to reconsider a decision or force them to take action they should be taking. The court's decision must be followed, and one judicial review case can make a difference to many other people.

¹In certain circumstances, judicial review claims can be heard by the Upper Tribunal.

However, the court's role is supervisory only, and any remedies are discretionary. Even if unlawful behaviour is proved, you may not get the outcome you want. The court has very limited power to award financial compensation (see section 7 below).and if your case is not urgent, it can take many months or even years to be heard.

Judicial review can be very complicated, the court procedures are not designed to be used by people who are not lawyers, and it is expensive. For those reasons, you are strongly advised to get help from a specialist lawyer if you think you have a claim. If you are on income related benefits, or you are on a low income, you may be able to get free advice from a solicitor. What follows is designed to make the advice you get easier to understand, not to replace it.

2 Whose decisions can be challenged by judicial review?

Decisions made by public bodies in a public law capacity may be challenged by judicial review. Examples of the public bodies whose decisions can be challenged are:

Government ministries and departments, local authorities, health authorities, chief constables, prison governors, some tribunals (but not if you could appeal to a higher tribunal or court), magistrates, coroners and county courts, boards of school governors (but not independent schools).

If a public body is not exercising a public function, for instance where it is acting as an employer, or in

a contractual relationship with a supplier, or if it acts negligently, its actions are governed by private, not public law.

Increasingly public functions are contracted out to private companies. If a private company is deemed to be exercising a public function, its acts and omissions are governed by public law. For example a private company that runs a prison is deemed to be exercising a public function and so its actions in the running of the prison are governed by public law.

3 Who can bring a judicial review?

You have to have an interest in the decision you are challenging to bring a judicial review, or what is called "standing". That means you have to have sufficient connection to the subject matter of the claim. If the remedies the court can offer (see section 8) might make a practical difference to you, then the test is likely to be met.

4 Alternatives to judicial review

If there are other effective ways of challenging decisions or delays, you are usually expected to use those. The following may be adequate alternatives;

- A statutory right of appeal against a disputed decision, such as to a social security appeal tribunal against a decision about your entitlement to benefit. There is usually a strict time limit for appeal so you need to make sure you appeal in time. You can only appeal

against decisions, you cannot appeal against delays in making decisions. Not all decisions carry a right of appeal, so you need to check.

An appeal may be the best way to deal with the dispute, because the tribunal can look at the whole matter again. It can deal with disputes about the facts. If you win the appeal, the tribunal sets aside the decision appealed against and substitutes its own decision. That may be the best outcome for you.

- Internal appeal or disputes procedures. That may be adequate where the complaint concerns disputed facts. See [Short Guide 02 Making an Effective Complaint to a Public Body](#).
- Ombudsman where there are issues of maladministration.

These alternatives are all usually free, do not involve any risk of costs being awarded against you if you are unsuccessful, and they are all designed to be used by claimants who are not represented by lawyers. However, some appeals to First Tier Tribunals can involve complicated legal issues, and legal aid is not generally available. This can put unrepresented claimants at a disadvantage, especially when their opponent is a large government department with access to its own lawyers.

5 Time limits and advice

A judicial review case must be brought before the court quickly and in any event within three months of the decision or action being challenged. These time limits mean applications should be made as soon as possible once it is clear that the case is suitable for judicial review.

The following are not usually accepted as excuses for late applications:

- Ignorance of the law even if you have been badly advised;
- Unjustified delay in seeking proper advice; or
- Delay by the public body if you add to it by your own delay.

If you think you may have a case you should seek specialist advice immediately.

It is possible to get interim remedies very quickly in judicial review, and urgent cases can be expedited. If your case is not urgent it can take a very long time to get to a final hearing, possibly a year or more, especially if your case is heard in London, where the court is extremely busy.

6 What are the grounds for judicial review?

a Illegality

Public bodies can only generally do what the law allows them to do. The law is set out in Acts of Parliament and in regulations, rules and orders made by government ministers.

Public bodies may also have guidance and policy on the exercise of their legal powers. Guidance and policy do not have to be followed, but they should be followed unless there is good reason not to.

Public bodies must correctly understand and apply the law that regulates their decision making powers. If they do not follow the law correctly their decision, action, or failure to act will be unlawful. An action or decision may be unlawful if the decision maker had no power to make it or exceeded the powers given to him/her, or if it misapplies the law.

Example

If a local authority operates a scheme for discretionary housing payments (DHP's), it is a public body exercising a public function and it must follow public law principles. It must apply the relevant law, in this case the Discretionary Financial Assistance Regulations 2001. It must also take into account any relevant guidance. The DWP has issued such guidance; "Guidance for

local authorities on the operation of discretionary housing payments." The test the local authority has to apply is whether it considers that the claimant needs additional help with housing costs. If it applies a different test, or otherwise does not apply the law correctly or if it does not follow the guidance without good reason, its decision would be unlawful, and could be challenged.

A failure to process the DHP application can in itself be subject to challenge. The local authority has a power to operate the scheme set out in the Regulations. There is also guidance about how they should go about this. Applicants are entitled to have their applications dealt with, and dealt with within a reasonable period of time. Unreasonable delay can amount to an abuse of power by a public body.

Where the law gives a public body a discretion to do something, that discretion must be exercised in line with public law principles which require the public body to:

- Take into account relevant information and disregard irrelevant information;
- Ask the right questions, for example by addressing the right issue and taking reasonable steps to obtain information on which a proper decision can be based;
- Not delegate a decision for which the law gives it responsibility. Only the public body can make

the decision; if they allow another person to take a decision for them they are giving their power away and failing to be properly accountable;

- Make sure they have not limited, or fettered, their discretion by applying a very rigid policy as if it were the law

Example

Jayne applies to her local authority for a discretionary housing payment to help her meet a shortfall in her housing benefit. She has two children aged 5 and 6. Her younger child has autism.

The local authority tells her that because of the changes to the benefit rules it will now only award DHPs to large families with 4 children or more. If the local authority is applying a rigid policy, that would be a fetter on its discretion, and Jayne could challenge it.

Jayne asks the local authority to take into account the fact that she has to pay out extra to support her younger child because the nature of her disability means she wears out clothes more quickly than usual, and she has extra travel expenses to attend therapy. The local authority takes no account of this information in its decision refusing to make a DHP. This could give rise to an argument that the decision was unlawful because the local authority did not take account of relevant information.

b Fairness

A public body should never act so unfairly that it amounts to an abuse of power. If there are express procedures laid down by law that it must follow in order to reach a decision, then it must follow them.

If you are affected by a public body's decision you must be given a fair hearing. You are entitled to know the case against you, and have the opportunity to put your case properly.

A public body must be impartial, that is it must not be biased. It must not allow decisions to be taken by people with strongly held views that may result in decisions based on prejudice, nor allow decisions to be taken by people who have a financial interest in the outcome.

The public body must consult people it has a duty to consult before a decision is made, or who have a legitimate expectation that they will be consulted, perhaps because they have been consulted in the past, or they have an obvious interest in a matter.

A public body must keep its promises unless there is a good reason not to. If a public body has made a promise to an individual or to a group that may give rise to a "legitimate expectation" that the promise will be kept.

Examples

Derek was unable to attend his ESA appeal because he was ill on the day of the hearing. The tribunal refused to postpone the hearing and went ahead without him. Derek lost his appeal. Derek may be able to get the decision set aside on the basis that it was not fair for the tribunal to go ahead without him being there, but he may need to show medical evidence of his illness.

Elsa was told by the council that she would have a home for life at Beechwood care home, and then the local authority decides to close it down without any consultation. The local authority may be acting unlawfully by breaking its promise to Elsa.

c Irrationality and proportionality

The courts may intervene to quash a decision where they consider it to be so demonstrably unreasonable as to be “irrational” or “perverse”. In practice this is very difficult to show, and it is usually argued alongside other grounds. The test is:

“If a decision on a competent matter is so unreasonable that no reasonable authority could ever had come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..”

Lord Greene, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 HL.

The test is a lower one, of proportionality, where European law or Human Rights issues are involved. The concept of proportionality involves a balancing exercise between the legitimate aims of the state on one hand, and the protection of the individual’s rights and interests on the other. The test is whether the means employed to achieve the aim correspond to the importance of the aim, and whether they are necessary to achieve the aim.

Example

Maria is a Romanian national who has come to the UK to work with her partner and her son Georgi who is 3. She gets a job which is “authorised work” under the rules that apply to Romanian nationals. After 6 months she has to leave her partner because he is violent towards her and go in to a refuge. She has to leave the area where she was living to escape the violence and she loses her job. She claims benefits, but she is refused because she is no longer in work and the rules say you have to have undertaken authorised work for 12 months before you can claim benefits. In a similar case, a court held that even though the benefit rules have a very harsh result in Maria’s case, the rules are proportionate. It accepted the government’s view that the rules overall are necessary to achieve the aim of stopping “benefit tourists” coming to the UK to claim benefits, and keep count of the migrants who come to the UK.

7 The approach of the Administrative Court

There are special procedures for handling judicial review claims and the approach the courts take have important practical consequences:

- Judicial review claims proceed as far as possible on the basis of agreed facts. The rules do not easily accommodate cases where the facts are in dispute;
- Both parties are expected to co-operate with the court and to take a candid, cards on the table approach to the litigation;
- The court will sometimes act proactively; bringing issues into play which have not been raised by either party;
- Depending on the nature of the decision being challenged, the court may show a degree of deference to the decision maker, given their democratic mandate, or special expertise; the court may be reluctant to intervene in matters of public policy or in areas where a specialist expertise is needed.

8 What can the court do?

When you bring proceedings for judicial review you are asking the court to grant you a remedy, this is the order the court makes if you win the case.

The remedies the Administrative Court can give on an application for judicial review are as follows.

a Quashing order

This is an order which overturns or undoes a decision already made.

b Prohibiting order

This stops a public body from taking an unlawful decision or action it has not yet taken.

c Injunction

This is a temporary order requiring a public body to do something or not to do something until a final decision has been made in your case.

d Mandatory order

This makes a public body do something the law says it has to do.

e Declaration

The court can state what the law is or what the parties have a right to do.

f Damages

Damages may be awarded where a public body has breached your human rights. Otherwise the court will not normally give you any compensation if you win your case, unless you have some other entitlement to damages.

g Discretion

The remedies outlined above are discretionary. Even if the court finds that a public body has acted wrongly it

does not have to grant a remedy. It might decide not to do so if it thinks the claimant's own conduct has been wrong or unreasonable, for instance where the claimant has delayed unreasonably, has not acted in good faith, or where a remedy would impede a public body's ability to deliver fair administration.

Remember that the court will not normally make a decision for a public body, even if you win your judicial review. Very often the public body will have to take a decision again, but following a fairer procedure. It is possible that you may still not get what you want.

9 How to pay for a judicial review

Legal costs

If you lose your case, the usual rule is that you pay the other side's legal costs. Those will be the costs of their solicitor and barrister, and the court fees. That could amount to £30,000 or more.

The complexity and the high cost of judicial review are the main reasons why you are advised to get legal advice and representation from a specialist lawyer to help you bring a case for judicial review.

The costs rule is modified if you have legal representation which is funded by legal aid. If you are legally aided you have some protection from having a costs order made against you if you lose your case.

Legal aid

This is administered by the Legal Aid Agency, and it is

a way to pay for a solicitor and a barrister to represent you if you are an individual. It is not available for organisations.

You will need to get initial advice from a solicitor, and s/he will help you apply for legal aid. Your solicitor will instruct a barrister to represent you in court. Barristers are often called counsel, and both solicitors and barristers can be called lawyers.

You have to be on means tested benefits or on a low income to get legal aid, and the Legal Aid Agency will need to be satisfied that you have a good case. Usually a letter before claim will have to have been written before legal aid will be considered.

Protective Costs Orders

These are sometimes obtained by NGOs challenging public bodies. They are more difficult for individuals to obtain. They usually limit costs recoverable on either side to nil or to a capped amount. The problem with them is that you usually cannot recover your own costs if you win.

Pro bono

You can get free help from a lawyer, for example from the Bar Pro Bono Unit. However, this does not protect you from the risk of the other side's costs being awarded against you if you lose.

Privately

An individual or a community group could raise a collective fund to pay for a judicial review. That would

need to cover not only the costs of bringing the case, but also an amount to cover the other side's costs in the event the case is lost.

9 The procedure for applying for judicial review

a Pre-action stage

Where a public body has taken a decision you think is unlawful, if there is time, it is essential to write a letter before claim for judicial review to the public body. There is a format set out in the pre-action protocol for the administrative court. This should be done by a lawyer who specialises in judicial review if possible and it should:

- Explain in detail how it is alleged the public body has gone wrong;
- Say what you want the public body to do to put this right, and when you would like them to do it by;
- Ask for a response within a time limit, which is usually 14 days

A letter before claim can be a very effective way of sorting out judicial review claims, and often the reply will resolve the issue without the need to go any further.

b The permission stage

If there is no satisfactory response to the letter before claim, the next step is to make an application for permission to bring a judicial review claim against the public body.

If you have a solicitor, s/he will act on your behalf in the case, and will usually prepare all the papers and take all the procedural steps for you. If you have legal aid, that will cover the court fees.

Proceedings are usually issued in the Administrative Court. There are Regional Administrative Courts in London, Birmingham, Cardiff, Leeds and Manchester.

A judicial review claim form and grounds are lodged with the court, together with supporting witness statements and the relevant law. There is currently a court fee of £60 for a permission application. The papers are usually prepared by your solicitor and barrister. The papers are also served on the public body.

Once the claim is issued by the court, you are the claimant in the case and the public body is the defendant.

The defendant public body has 14 days to file an acknowledgment of service and set out the grounds on which it is going to defend the claim.

All of the papers are put before a judge who decides whether to grant permission to proceed to a full hearing. Permission should be granted if the judge accepts that you have an arguable case.

If permission is refused, you have 7 days to request that the decision be reconsidered at an oral hearing. If permission is refused again, your lawyer can ask the judge at the hearing for permission to appeal to the Court of Appeal. If the judge refuses to grant this, a written application can be made within 7 days of refusal.

c The final hearing

If permission is granted to bring a claim for judicial review, your case will go to a final hearing. You have to pay a fee of (currently) £215 within 7 days of the decision to grant permission.

Within 35 days of the decision to grant permission the defendant must file and serve its detailed grounds of resistance, setting out in more detail the basis on which it is defending the claim. That must include any written evidence it wants to rely on.

The case is then set down for hearing before a judge in the Administrative Court. The time estimate for the hearing will be given by your lawyer, but it is not likely to be more than a day or two. The full hearing is very formal. It involves lawyers from both sides making arguments about the lawfulness of the decision, policy or practice which you have challenged.

It is very unlikely you will have to give evidence, and you may not even need to attend the hearing, unless you would like to do so for your own interest.

At the end of the hearing the judge can give judgment, the court's decision, on the day, but that is unusual. The judge usually "reserves" the judgment, which means that the judgment will be given later, and that could be a few weeks after the hearing has taken place.

Once judgment is given then both sides can make representations about costs. The usual order is that the loser pays the winner's costs.

There is a right of appeal to the Court of Appeal. The party that wants to appeal must first ask permission from the Administrative Court, and if that is refused, they have 7 days from the date of the judgment to renew their application to the Court of Appeal directly.

Guides in this series:

01 An Introduction to Public Law

02 Making an Effective Complaint to a Public Body

03 An Introduction to Judicial Review

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A Guide to Urgent Judicial Review

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