Public
Law
Project

Cover Illustration: Kev Adamson

matrix
chambers

Public Law Project

GUIDE SERIES

An introduction to Judicial Review

The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision-making and facilitate access to justice. We work through a combination of research and policy work; training, conferences, and second-tier support; and legal casework including public interest litigation. Our strategic objectives are to:

- promote and safeguard the Rule of Law;
- ensure fair systems for public decision making; and
- improve access to justice.

www.publiclawproject.org.uk

In this guide we explain what public law is and the ways in which you may be able to use public law to change or influence decisions that affect you.

The Public Law Project would like to thank Matrix Causes Fund for supporting our short guides project.

This guide is intended for information only. While we hope it will be helpful to those involved in judicial review, it is not a replacement for legal advice. Reading this guide cannot give enough information to bring a judicial review case. If you believe you have a case, you should seek specialist legal advice immediately.

An introduction to Judicial Review

Contents

What is judicial review?

Judicial review is a way of challenging the decisions, acts (and sometimes the failure to act) of a public body, because it has not acted lawfully. It is a court procedure, brought in a branch of the High Court known as the Administrative Court, or in relation to certain types of case,[1] in the Upper Tribunal. For the purposes of this guide, the essential facts about judicial review in the Administrative Court and in the Upper Tribunal are the same. For simplicity, we will refer only to the Administrative Court in the rest of this guide, and will mention the Upper Tribunal only where there is an important difference.

Under the judicial review procedure, judges examine (or "review") the decision[2] being challenged in the claim, and consider whether the law has been correctly followed by the public body. As well as the claimant (who seeks to change the decision) and the defendant (who has made the decision), other parties who want to be involved in the case – because they are concerned that they will be affected by the outcome – may be able to intervene.

Public bodies such as central and local government have to obey the law in how they take decisions and act. Where they don't, they can be said to have acted unlawfully. The type of law governing the conduct of public bodies is known as 'public law'. Public law principles ensure that public bodies discharge their legal duties, do not abuse their powers and act compatibly with the human rights of those affected by their actions.[3]

Where a public body acts unlawfully, there are a number of ways that those affected can challenge that behaviour or decision. The most common of these are complaining using public bodies' complaints procedures, and exercising rights of appeal to a tribunal (if such rights exist in relation to the particular decision to be challenged, such as in welfare benefits cases). If a person can make a further complaint to or about the public body, or they can appeal the decision, then it is usually not necessary (or appropriate) to use judicial review.

---

[1] These include challenges to certain decisions taken (a) by the immigration authorities, (b) under the Criminal Injuries Compensation Scheme, and (c) by the First-tier Tribunal if there is no onward right of appeal.

[2] As well as "decisions", policies, practices, other acts and failures to act can also be challenged by judicial review, but decisions are referred to in the rest of this guide for simplicity.

[3] See PLP's short guide to Public law.

Some judicial review cases are not given 'permission' by the Administrative Court, usually because they are unlikely to be successful. If a case is given permission, it is heard before a judge. Instead of making a decision on the day, the judge usually adjourns the case, and produces a written judgment in which he or she decides, with reasons, whether the public body acted unlawfully, and if it did, what (if anything) should be done to put things right. The court's judgment sets out the law which the public body, and all similar public bodies, must follow.

Who can bring a claim for judicial review?

The court will not accept a judicial review on any subject from any person. To be permitted to bring a claim for judicial review, the court will expect you to have some sort of 'standing'. This will usually mean that you are an individual who is affected in some way (maybe by being the subject of the decision, or because it affects your community), or that you are an organisation with sufficient interest in the issue. For instance, the Public Law Project made a judicial review claim against changes to legal aid rules in 2013. The claim was considered by the Administrative Court because PLP has an interest in whether people can access courts (including by legal aid funding) and it is an issue of general public importance.

What decisions, acts, and failures to act can be challenged by judicial review?

Decisions, acts, and failures to act by public bodies exercising their public functions are all potentially challengeable by judicial review.

Public bodies may be thought of as bodies that deliver a public service. They may include government ministers, local authorities, chief police constables, prison governors, NHS Trusts, regulatory bodies such as the Office for Standards in Education (Ofsted), and courts and tribunals themselves.

Public bodies 'exercise their public functions' when they carry out the work they were created for. So when a local authority decides a planning application, it is exercising a public function. But when it employs a member of staff, or enters into a contract with a company to clean its offices, it is acting like any private individual or company, and its actions are not governed by public law.

Some public functions are contracted out to private companies. If a private company is exercising a public function, its behaviour will be governed by public law principles, and its decisions, acts and failures to act are potentially challengeable by judicial review. For example, a private company that runs a prison is exercising a public function, and so its behaviour in treatment of prisoners is governed by public law.

Important points to consider when bringing a case

1. Judicial review is **expensive** – typical expenses that have to be budgeted for by the claimant include the claimant's lawyers' fees, court fees, and any expert fees. In addition, like other forms of litigation, if you lose a judicial review case, you will normally have to pay the other side's legal costs. All of these costs have to be considered before a case is commenced. For more detail, see 'Paying for a judicial review' on page 12.

2. Judicial review is **risky** – even if the court concludes that a public body has acted unlawfully, it may decide that it will not set aside the decision being challenged or make any other order to give the claimant what he or she wants. This is because the remedies possible in judicial review are always at the court's discretion, and are not automatically applied where a claimant has been successful. The reason for this is that judicial review cases are always concerned with public administration. As well as doing justice to the individual claimant, the courts will take care not do anything that makes it impossible for the public body to do its job for the public good. Although expert lawyers can advise in advance that a case is strong and likely to succeed, there is no such thing as a dead certain judicial review case. The remedies the court can give are explained further below under the heading 'What can the court do?' on page 6.

3. Judicial review can be **complex** – the law governing the public body's conduct, and the effect of the public body's legal error on the decision that is being challenged have to be carefully analysed. The rules governing what is and what is not lawful are complex and have developed through many decisions of the courts. Even experts may disagree on the correct approach and in all cases, well-informed legal assistance is essential.

4. Judicial review may not to be an appropriate way of getting financial compensation, as the court only has a limited power to award damages. This is explained further under 'What can the court do?' on page 6.

5. Judicial review cases need to be prepared and brought quickly – most claims need to be brought promptly and in any event within 3 months, and some types of case must be brought even quicker than 3 months. See 'Time limits and seeking advice' on page 8.

For these reasons - and others - readers of this guide are strongly advised to get urgent advice from a specialist lawyer if you think you have or may 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 under the legal aid scheme. **This guide should not be construed as legal advice.**

Alternatives to judicial review

If there are other effective ways of challenging a decision, act or failure to act, then you will be expected to use them, or justify why you have applied for judicial review when you could have used a different procedure. Judicial review is generally a remedy of last resort.

Tribunals

An example of an alternative remedy which will almost always be considered adequate (and so which will make judicial review impossible) is having a right of appeal to another court or tribunal. For example, if you apply for Job Seekers' Allowance, and your application is refused, there will be a right of appeal to the First-Tier Tribunal, which you will be expected to exercise rather than applying for judicial review – unless you can show that appealing to the Tribunal is not an adequate or sufficient remedy in your case.

An appeal can be more effective than an application for judicial review, because an appeal tribunal may be quicker and more expert. And if you win an appeal, the tribunal will usually substitute its own decision for the decision appealed against. This can be better for you than bringing a claim for judicial review, where the court will focus on whether the decision was reached in a lawful way (and not on whether it was the right decision to make). If you win a judicial review, the court will tend to order the public body to take the decision again – this time lawfully – rather than substitute its own decision for the decision under challenge. Sometimes the court will give specific directions or guidance to the public body on how to re-make the decision in accordance with the law. This means that with judicial review cases, you often have to wait longer for a lawful decision, and also that there is a chance that the public body will reconsider, and then come to the same decision, but this time in a lawful (and so unchallengeable) way.

Most public bodies taking formal decisions will explain in the letter communicating the decision whether the decision has a right of appeal, and if it does, how you can exercise it. Appeal procedures vary in relation to what decisions can be appealed, on what grounds, and within what time limits. You may have to check or get advice about this.

Complaints

If there is no right of appeal, you could consider making a complaint under the public body's complaints or dispute resolution procedure. This may be adequate where the complaint concerns disputed facts, and where you can afford to wait some time for resolution (see short Guide 02: Making an Effective Complaint to a Public Body).

Ombudsman Schemes

Where using the complaints procedure does not result in a satisfactory resolution, you can often complain to an ombudsman (for example the Parliamentary and Health Service Ombudsman, if your complaint concerns central Government or the NHS, or the Local Government Ombudsman, if your complaint concerns a local authority). Ombudsmen will generally investigate complaints of maladministration (see PLP's Introduction to public law[4]).

[4] www.publiclawproject.org.uk/resources/category/21/guides

Other Advantages of Alternatives to Judicial Review

The alternatives to judicial review referred to above are all usually free, do not normally 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. You may be able to apply for Exceptional Case Funding (ECF) in some circumstances. You will find guides to applying for ECF [5] on PLP's website.

What can the court do?

When you bring proceedings for judicial review you are asking the court to grant you one or more orders. These are known as 'remedies.' There are a limited number of remedies that the court can give in a judicial review case. They are:

- **A quashing order**
  This is an order which overturns or undoes the decision being challenged, so that it has no legal effect. This is the most common outcome of successful judicial reviews.
- **A prohibiting order**
  This stops a public body from taking an unlawful decision or action that it has not yet taken.
- **A mandatory order**
  The court can direct a public body to take an active step, e.g. to take a new decision within a specific period of time. This type of order is comparatively rare.
- **A declaration**
  This is an order stating clearly and concisely what the law is, where this is disputed. Often judges prefer not to do this because (they say) the law is adequately set out in their written judgment, so a declaration is not necessary.

[5] https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/legal-aid/exceptional-funding-project

- **A declaration of incompatibility**
  This is a special type of declaration that a particular provision of an Act of Parliament contravenes the Human Rights Act. It is not binding on Parliament, but is an invitation to MPs to change the law so that it complies the Human Rights Act.

- **Damages**
  The court can order damages only if some other form of legal remedy is also being sought. There are three circumstances in which damages may be ordered:

  – where there is a right to damages under private law but you need to bring the judicial review proceedings to establish an element of the damages claim (for example, you need to show that a period of detention was unlawful, before you can claim compensation for it); or

  – where there has been a breach of your human rights under the Human Rights Act 1998; or

  – where there has been a breach of your rights under European Union Law.

In addition the court can grant an 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 the case.

It is important to remember that 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 will make its decision based on the circumstances and what it considers appropriate, fair and practical.

As can be seen from the list of remedies above, the court will not normally re-take the public body's decision itself, even if you win your judicial review. Instead, the court will normally order the public body to reconsider its decision, this time in accordance with the law that the court has now made clear. It may be possible in those circumstances for the public body to reach the same decision but this time by a lawful procedure. So it is possible that even if you win a judicial review, you may still not get what you want.

It is also important that judicial review cases should not be brought to challenge minor or technical errors by a public body that did not really make a difference to the outcome. If the court considers it is 'highly likely' that the public body would have reached the same decision even if it had not made a legal error, then the case will fail. So a judicial review claimant has to show that the public body's error may have made a material difference to the decision under challenge.

Time limits and seeking legal advice

Most judicial review cases[6] must be brought before the court promptly, and in any event within three months of the decision or action being challenged. The key word is 'promptly' - in certain cases three months may not be "prompt" enough. It is best to view three months as a longstop rather than as a deadline to aim for. 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; or
- delay in seeking proper advice; or
- the fact that the public body's decision may itself have been delayed; or
- any agreement by the public body to give you extra time to bring a claim for judicial review.

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

[6] Challenges to certain decisions by the Upper Tribunal where there is no right of appeal to the Court of Appeal may be subject to judicial review. In these cases, you must apply for judicial review within 14 days of the decision. Challenges to planning decisions must be brought usually within 6 weeks, and challenges to procurement decisions within 30 days.

The procedure for applying for judicial review

Pre-action stage

Where a public body has taken a decision you think is unlawful it is essential, if there is time, to write a letter to the public body setting out why you think they have acted unlawfully and what you want them to do to rectify the situation. You should state your intention to apply for judicial review if they do not confirm they will take the action you have specified within a certain time, usually 14 days. There is a format setting out all the issues the pre-action letter should address in a document known as the Pre-action Protocol for Judicial Review.[7]

The pre-action protocol letter is a crucial document. It should be prepared if at all possible by a lawyer who specialises in judicial review. Many public body defendants will withdraw a disputed decision in response to a well drafted pre-action protocol letter. A well-drafted response can also assist claimants by exposing flaws or weaknesses in their arguments, which can help claimants to decide if their case is strong enough to continue with. The pre-action protocol can therefore lead to the resolution of a dispute without the need for judicial review proceedings to be started.

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 apply for judicial review. Your solicitor, if you have one, will act on your behalf throughout the case, preparing the court papers, corresponding with the other side and with the court, and instructing a barrister, on your behalf.

Proceedings are issued (commenced) in the Administrative Court offices in London, Birmingham, Cardiff, Leeds or Manchester. Some judicial review cases are heard by the Upper Tribunal. These include challenges to certain decisions taken (a) by the immigration authorities, (b) under the Criminal Injuries Compensation Scheme, and (c) by the First-tier Tribunal, where there is no onward right of appeal. These cases must be issued in the Upper Tribunal.

[7] www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

A judicial review claim form and statement of facts and grounds (which include the legal arguments) are lodged with the court, together with supporting documents. The papers are usually prepared by your solicitor and barrister. The papers are served on the public body, and on anyone (be they individuals, companies, or public bodies) who will be affected by the proceedings and may wish to participate.

Once the claim is issued by the court, you are known as 'the claimant' in the case and the public body as 'the defendant'.[8] Others who have been served with the papers and wish to participate in the case are known as 'interested parties'. The defendant public body and any interested parties usually have 21 days from when they receive the claim documents from you to file an acknowledgment of service and set out grounds if they are going to argue that the claim is unarguable, and should not be granted permission to proceed.

All of the papers are put before a judge who decides whether to grant permission to proceed to a full hearing. The judge can make the following orders:

- to grant permission to proceed with the claim (if the judge accepts that you have an arguable case);
- to refuse permission (if the judge considers the claim unarguable);
- to refuse permission and certify the claim as "totally without merit" (if the judge considers the claim to be hopeless);
- to order that permission be considered at an oral hearing (if the judge is not sure whether the claim is arguable, and would like to hear oral argument on that point);
- to order that the question of permission be decided at a hearing, with the final hearing to follow immediately afterwards if permission is granted (this is often referred to as a 'rolled up/hearing'). An order of this sort is often made in cases that the judge considers are too complicated to grant permission without a hearing but need to be heard and decided urgently.

If permission is refused, you have seven days[9] to request that the decision be reconsidered at an oral hearing, unless the case has been certified as totally without merit, in which case the claim cannot proceed further.

[8] In the Upper Tribunal, the person brining the judicial review is called the 'applicant' and the public body is called the 'respondent'.

[9] In a case in the Upper Tribunal, you have 14 days from the date the decision is sent to request renewal (or nine days in the case of an immigration judicial review in the Upper Tribunal).

If permission is refused at an oral hearing (or the case is certified as totally without merit when permission is refused on the papers), a written application can be made to the Court of Appeal for permission to appeal within seven days of refusal.[10] If the Court of Appeal refuses permission to appeal against the refusal of permission to apply for judicial review, that is the end of your case.

The final hearing

If permission to apply for judicial review is granted, your case will go to a final hearing.

Usually 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 normally be agreed by the lawyers for all the parties.

The full hearing is very formal. It involves lawyers from both sides making arguments about the lawfulness of the decision, act or failure to act which you have challenged. It is very unlikely you will have to give oral 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 there and then, but that is unusual. The judge usually "reserves" the judgment, which means that the judgment will be given later, usually a few weeks after the hearing has taken place.

Once judgment is given then both sides can make representations about who should pay the costs of the proceedings. As explained below, the usual order is that the loser pays the winner's costs.

[10] If your application for permission was heard in the Upper Tribunal then you must first apply to the Upper Tribunal for permission to appeal either at the oral hearing, or within 7 days if the case is certified as totally without merit. If permission to appeal is refused, you may apply to the Court of Appeal for permission to appeal within 7 days of the decision refusing you permission to appeal.

How long do judicial review cases take?

Once a judicial review case has commenced, it is possible to ask the court for an order (known as an "injunction") to stop the public body from acting on the decision under challenge while the judicial review case is ongoing. These orders can be considered and made quite quickly if necessary. Urgent cases can be prioritised by the court, but if your case is not urgent it can take a very long time to get to a final hearing, possibly longer than a year, especially if your case is heard in London, where the court is extremely busy.

Paying for a judicial review

In general, the loser of a judicial review case is ordered to pay the winner's costs of bringing the case. That means that before you bring a claim for judicial review, you must budget for 2 separate items of expenditure:

1. your own lawyers' fees and expenses (which have to be paid in any event); and

2. the other side's legal fees and expenses (which you are likely to have to pay if you lose the case).

You may be able to agree a fixed fee with your own lawyer, but you will have no way of quantifying your opponent's costs in advance. Those will usually be the costs of their solicitor and barrister, and any expert or court fees. The total could amount to £30,000 or more, although this is a very rough general estimate – the true figure could be much more or less.

Unless you are very wealthy, or you have a legal expenses insurance policy that covers judicial review (most of them don't), you will need to take steps to cover both your legal costs and those of your opponent. This could include raising money from the public through a site like Crowdjustice.[11] You will need to act very quickly – delays due to lack of funds are very unlikely to be treated by the court as a good reason for missing the time limits for bringing a judicial review, referred to above.

There are some ways, however, of limiting how much you need to pay for judicial review.

[11] https://www.crowdjustice.com

Conditional Fee Agreements

Your solicitor and barrister[12] may agree to act for you under a conditional fee agreement (often referred to as a "CFA"). The effect of such an agreement is that your solicitor and barrister will not charge their full fees unless the case is successful, and you obtain an order that the opponent pays your costs. In that event, and only in that event, your solicitor and barrister would charge their full fee. In effect, solicitors working under a CFA, are gambling on your winning the case. The main problem with a CFA is that even if you find a solicitor who will take a case on that basis, you will not be protected against having to pay the other side's costs if you lose.

Sometimes it is possible to obtain a special insurance policy to cover the risk of losing the case and having to pay the other side's costs. Insurance of this type is known as After the Event insurance. It is hard to find for judicial review cases, and if it can be found, will be very expensive.

Pro bono representation

You may be able to 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. Most lawyers will prefer to work under a CFA than pro bono, because there is a chance they will get paid [i.e. if you win the case].

Legal aid

The usual costs rules are modified if you have legal representation which is funded by legal aid. If you are granted legal aid, it will pay the legal fees of your solicitor and barrister, and in general it will protect you against the risk of paying the other side's costs if you lose.

[12] Barristers are often called "counsel". They are engaged on your behalf by your solicitor to draft certain court documents and to represent you as an advocate in court. Both solicitors and barristers are qualified lawyers.

The legal aid scheme is administered by the Legal Aid Agency. To get legal aid you have to be on means tested benefits or on a low income, with very limited savings or other assets. As well as satisfying a means test, the Legal Aid Agency will need to be satisfied that you have a good case. You will need to get initial advice from a solicitor, who will help you apply for legal aid, if you are eligible and they are willing to take on your case. You can find more information on the Legal Aid Agency website.[13]

Costs Capping Orders in public interest cases

These are orders that the court makes at an early stage in the proceedings to limit the amount of their opponent's costs that each side will have to pay if they are unsuccessful. They are often applied for by non-governmental organisations such as charities seeking to bring a claim to clarify the law on behalf of their client group.

Before it grants a costs capping order, the court will need to be persuaded (amongst other things):

1. that the case raises important issues so that it is in the public interest for it to be heard (e.g. it might clarify the law for many other people besides the particular claimant), and

2. that without a limit on the amount of costs the claimant would have to pay if the case is lost, the claimant could not afford to proceed with the claim.

The court will examine the financial position of the claimant, and all the circumstances of the case. If it is persuaded to make a costs capping order, it will limit both sides' costs liability to whatever amounts the court considers reasonable.

There are two main problems with costs capping orders. The first is that they are uncertain: the court can only make a decision on whether to cap the legal costs after it has decided to grant permission for judicial review. So until that point, you will not know whether the costs will be capped or not. The second is that if the outcome of the case will benefit you, you are less likely to get one.

[13] www.gov.uk/legal-aid

Costs in environmental cases

Under Article 9 of the Aarhus Convention,[14] the cost of litigating certain environmental cases must not be "prohibitively expensive". To comply with this obligation, claimants in environmental judicial review cases can choose to restrict the costs they will have to pay the other side if the claim fails to £5000. There is also a cap of £35,000 on the costs that can be recovered from the defendant. Both sides can apply to court to amend these figures.

The need for legal advice on costs

Given the complexity and high cost of judicial review, the financial risks of bringing a claim, and the need to consult a solicitor if you may be eligible for legal aid, you are advised to get legal advice as soon as you become aware that a judicial review may be possible. Your appointment needs to be made urgently. There will be no time to lose if you are going to have a chance of meeting the judicial review time limit.

Court fees

There are a number of different fees payable by the claimant in a judicial review case. The main ones are as follows:

- £154 on applying for permission for judicial review at the beginning of the case
- £385 on requesting that a refusal of permission is reconsidered at an oral hearing
- £770 for a full hearing (i.e. if the case is given permission by the court). This is reduced to £385 if you have already paid £385 to have permission reconsidered at an oral hearing.

You can get the fee reduced or completely removed if you are on a low income. More guidance is available from HM Court and Tribunals Service.[15]

[14] Or to give its full title, "The Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters"

[15] www.gov.uk/get-help-with-court-fees.

Court fees are money payable to the court for using its service. They are not money which is paid to the other side in the case. If you win the case, you will usually be paid back your court fees. If you are funded by legal aid, they will be paid by legal aid. If your lawyers are working under a CFA or pro bono, then you will need to pay them yourself.

What are the grounds for judicial review?

Acting outside their powers

Public bodies are generally only free to do what the law says they can do.[16] With some exceptions, the law is set out in Acts of Parliament and in secondary legislation (typically things like regulations, rules and orders) made by government ministers. So, with some exceptions, every decision a public body takes must be authorised by a piece of legislation, which will define any limits on the public body's powers.

Public bodies must correctly understand and apply the law that regulates and limits their decision-making powers. If they do not follow the law correctly any resulting decision, act, or failure to act will be unlawful.

Example – Authority Acting Outside Powers

Alice lives in a flat she has bought on the top floor of a large block. The owner of the freehold wants to build an extra floor with new dwellings directly above Alice's flat. Alice learns about the proposals when she receives a letter from the council enclosing a copy of the completed planning application which, the letter states, is under consideration by the council's planning officer. She is given two weeks to make any representations.

Alice is concerned about the building work, and the prospect of having a number of dwellings on a new floor above her flat, but feels she has very little time to understand the planning issues before the deadline for making representations.

[16] Unlike people, who are generally free to act as they please, provided the law does not forbid it.

She looks at the documentation and notices that in the planning application, the owner of the freehold has wrongly certified that he was the sole owner of the land to which the application relates. In fact, Alice's property is also directly affected. Because the owner of the freehold completed the wrong ownership certificate, he was not required to give advanced notice of the application to the residents of the block, like Alice, whose properties would be affected by the application. If Alice had had the correct notice, she would have had months to learn about the proposed development, coordinate with her neighbours and make a considered response before the council decide the planning application.

Alice consults a solicitor who advises her that section 65 of the Town and Country Planning Act 1990 provides that "A local planning authority shall not entertain an application for planning permission" if the requirements imposed by that section have not been satisfied. One of the requirements imposed by section 65 is that the ownership certificate on a planning application must be correct. The solicitor advises Alice that because the ownership certificate is incorrect, the council must not "entertain" the application, and therefore the council have no power to decide it. Alice instructs the solicitor to write a letter to the council pointing this out, and threatening to apply for judicial review if the council proceed to decide the planning application.

A week later, Alice receives a letter from her solicitor confirming that the council has confirmed that the planning application was defective and had been withdrawn.

Use of Discretion by Public Authorities

As well as the limits placed on public bodies' powers in legislation, the judges have developed public law rules over many years that impose further restrictions on what public bodies can do. For example, where the law gives a public body the 'discretion' to take a decision as it sees fit, public law regulates the public body's power in a number of ways, including by requiring it:

- to take into account only relevant information and to disregard all irrelevant information;
- to address the right question, and take reasonable steps to obtain the information necessary to make a properly informed decision; and,
- to make sure they have not limited, or 'fettered', their discretion by applying a very rigid policy as if it were the law.

There may be relevant external guidance (for example guidance from government departments about how local authorities exercise certain powers), or a policy issued by the public body itself, to make sure that powers are used consistently and fairly in each case. Public bodies should take such guidance and policy into account when they exercise their legal powers. Guidance and policy are not law, and do not have to be followed, but they should be followed unless there is good reason not to. If a public body decides not to follow its own policy, or not to follow external guidance, it should normally give reasons.

Example 2 – Use of Discretion

Brian is a single parent with care of two children aged 5 and 6. He rents a property in the private rented sector. His younger child is severely disabled, and the family requires an additional bedroom for a non-resident overnight carer. Brian and his family have been living in the property for three years.

Brian receives Housing Benefit, but it does not cover all of this rent and Brian cannot afford to pay the shortfall as well as his other living expenses.

Brian is under particular financial pressure because he also has to pay extra for clothes and travel, as the nature of his child's disability means she wears out clothes more quickly than usual. Further, there are extra travel expenses to attend regular therapy sessions. His child's school is very supportive for children with disabilities, and he and his family have built up a good support network in the local area over the years. The family also have a good relationship with the child's therapists. Brian therefore does not think it is a good idea for him to move home.

Brian therefore applies to his local authority for a discretionary housing payment (DHP). DHPs are payments that those like Brian, who are on Housing Benefit, can apply for. They are essentially grants paid by local authorities to top up Housing Benefit where the full rent is not covered. They are granted or refused at the discretion of the local authority.

The relevant law is the Discretionary Financial Assistance Regulations 2001. These state that a local authority may make a DHP to a person who appears to the authority "to require some further financial assistance … in order to meet housing costs".

The Department for Work and Pensions (DWP) has issued guidance to local authorities operating DHP schemes. It is in a document called the "Discretionary Housing Payments Guidance Manual". Brian looks at the Manual, and sees the following paragraph:

"The Department recommends that LAs consider awarding DHPs to claimants who require an additional bedroom for a non-resident overnight carer for a disabled child or non-dependent."

In response to his application, Brian receives a letter from the council stating that because its budget has been cut, it will now only award DHPs to large families with 4 children or more. The letter states that unfortunately, no exceptions can be made. Further, the council state that Brian's disability-related expenses are irrelevant because of the size of his family, and so cannot be taken into account either.

Brian visits his local CAB and sees an adviser. The adviser states that the council's decision is unlawful because (a) they have adopted a rigid policy to which they have refused to consider exceptions, (b) they have failed to take into account evidence of Brian's hardship, which was relevant to the question the council had to consider (whether Brian needed financial assistance with his housing costs), and which should have been considered regardless of the council's policy, and (c) they have failed to consider another relevant factor, namely the DWP guidance recommending DHPs be made to people in Brian's situation, and have not given any good reason for not following the guidance.

The adviser calls an officer in the council to explain the situation, and follows this up with a letter. Following this letter the council agree to reconsider Brian's application.

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". The test is whether a decision "is so unreasonable that no reasonable authority could ever have come to it". In practice this is very difficult to show, and it is usually argued alongside other grounds.

In some cases, particularly where European law or human rights law regulates the public body's powers, a public body is required to act proportionately.

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 are no more intrusive on the rights of the individual affected than is necessary to achieve the aim. By way of example, to use a sledgehammer to crack a nut (when a nutcracker would do) would not be acting proportionately.

Example 3 – Irrationality and Proportionality

Cathy is contacted by her son's headteacher, who said that her son, Daniel, aged 15, had today been permanently excluded from school. The headteacher said that Daniel had been found with a gang of 5 other boys who had been involved in a fight. Some other students had been hurt, and knives were apprehended on 3 of the other boys. All the boys have been excluded. Cathy is shocked. Daniel has never been in trouble before. She meets with the headteacher, who explains that, although Daniel has not been in any trouble before, he has been hanging out with a bad crowd at school, including the group who were involved in the fight, with whom he had been apprehended. The headteacher explained that it was not suggested that Daniel had been actively involved in the fight, but given his association with the other gang members, exclusion would be better for everyone in the school.

Cathy speaks with Daniel – he said he was doing nothing wrong, and that he did not know the other boys had been carrying knives. He said that the other boys involved in the fight were not his friends. He had been in the wrong place at the wrong time. He thought it was unfair that he should be blamed for what they had done.

A hearing was fixed before the school's governing body. Cathy represented Daniel at the hearing, and said that there was no evidence that Daniel had done anything wrong. She read out some Government guidance she had found, which stated:

"A decision to exclude a pupil permanently has profound implications for the likely outcomes for any child or young person. The decision to permanently exclude should only be taken:

- in response to a serious breach, or persistent breaches, of the school's behaviour policy; and
- where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in school."

Cathy argued that Daniel had never been in any trouble before, there was no evidence that he had been involved in the fight, or had misbehaved in any way, no evidence that he had been associating with the troublemakers, and no evidence that allowing him to remain in school would seriously harm the education or welfare of anyone in the school. Despite Cathy's arguments, the Governing Body upheld Daniel's exclusion, on the grounds that he was apprehended with the other excluded boys, so was probably involved in the fight.

Cathy should ask for the Governing body's decision to be reviewed by an Independent Review Panel, on the grounds that (1) the decision was irrational, since there was no evidence that Daniel had been guilty of anything other than being in the wrong place at the wrong time, and (2) it was disproportionate for Daniel to be permanently excluded, as – even if he had associated with the other boys as was claimed – there was no evidence that he had played an active role in any breach of discipline. Permanent exclusion would be disproportionate to any breach of discipline he could reasonably be held responsible for. If the Independent Review Panel were to uphold the exclusion, Cathy should seek legal advice about bringing a judicial review against the Panel's decision on the grounds of irrationality and proportionality.

Fairness of Procedure

A public body must never abuse its power by acting unfairly. If you are affected by a decision that a public body (including courts and tribunals) is going to take, you must be treated fairly. That means, among other things, that you are entitled to know the case against you if there is one, and have a proper opportunity to put your case.

A public body must be – and be seen to be - impartial, that is it must not give the appearance of being biased (whether or not it is actually biased). It must not allow decisions to be taken by people who have a financial interest in the outcome or a personal relationship with one of the parties that could give the appearance of bias.

If there are express procedures laid down by law that a public body must follow in order to reach a decision, then it must follow them. For example, a public body may be under a duty to consult people who it believes may be affected by a decision before the decision is made, perhaps because the law says there is such a duty, or perhaps because people have been consulted on similar proposals in the past and so have a reasonable expectation that they will be consulted again.

Example 4 – Unfair Procedures

The freeholder of the building where Alice lives resubmits a planning application that had previously been withdrawn (see Example 1) this time in proper form. The application is for additional dwellings to be built on a new floor to be constructed on top of the building. Having received proper notice of the application, all the residents in the block oppose the planning application, and make representations to the council's planning officer. The application is considered by the council's planning committee. Alice attends the meeting at which the planning application is considered.

At the meeting, the 7 members of the planning committee each indicate they don't have any interest in the application. However Alice shouts out from the public gallery that she has received information that the chairwoman is a close friend and business partner of the developer, whose application is before the committee.

On hearing what Alice has said, members of the public become agitated, and the chairwoman is asked to clarify her position. She says that her business with the developer is unrelated to the present planning application, and states that she is quite capable of deciding the planning application fairly, and with an open mind. Some members of the committee are unhappy with this late disclosure, and invite the chairwoman to stand down, but she refuses.

The committee proceeds to consider the planning application, and decides to grant planning permission, by 4 votes to 3, with the chairwoman effectively casting the deciding vote.

Depending on the precise relationship between the chairwoman and the developer, Alice may have grounds for judicial review to challenge the grant of planning permission on the basis that the chairwoman's participation gave the appearance of bias.

Why is judicial review important?

Judicial review cases are therefore an important part of regulating how government works in the UK. Without judicial review, once a government policy or decision was in place it would be impossible to change it without a successful political campaign or a new decision by the government. However, it does include judges taking a decision that what a government minister or body has done is against the law. This means it can be controversial.

By bringing a judicial review claim, a claimant can also (if the claim is successful) get a court to set aside a decision, practice or policy of a public body that affects not just the individual claimant but also everyone else in the claimant's position. So one judicial review case can affect thousands of people.

When they are deciding judicial review cases, judges are careful not to judge whether the decision being challenged was right or wrong, or good or bad, as these are matters over which they have no expertise, and no democratic mandate. Instead the judges confine themselves to considering whether the decision being challenged was lawful, and complies with the principles of public law.

Further information

The Administrative Court publishes a regularly updated judicial review guide.[17]

We would really appreciate some feedback about this guide. If you don't mind us contacting you e-mail publications@publiclawproject.org.uk and we'll get in contact.

[17] www.gov.uk/government/publications/administrative-court-judicial-review-guide