

Judicial review and the voluntary sector

The Public Law Project,

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1. There are a number of ways that individuals or groups can challenge the exercise of power by public bodies. These include complaints procedures and ombudsman schemes, appeals to tribunals, and judicial review litigation in the High Court. Of these, judicial review will in many cases be the most powerful tool for achieving effective change to public bodies' decision-making practices. This is due to the flexibility of the judicial review procedure, its consideration of the effect of the case on public administration, and its tradition of deciding individual cases partly with a view to determining the rights and responsibilities of those not involved in the litigation, including other public bodies and individuals. One judicial review case can make a difference to many - sometimes thousands of - other people and can give members of the community a focus for lobbying politicians and persuading public bodies to reconsider their policies. That is what makes judicial review such a powerful campaigning tool.
2. However, there are many hurdles to overcome before a judicial review case can be brought, and the costs and risks inherent in the process are high, including the potential for individuals bringing a case to incur huge debts, and the risk of making the law worse if a case is lost. So judicial review must be used wisely.
3. A typical feature of strategic litigation is that cases are brought by individuals to test a legal point that applies to cases other than their own. Hence, strategic litigation is sometimes referred to as "impact" or "test case" litigation.
4. The aims of strategic litigation involve more than simply winning legal arguments in court: test case strategies might seek to create awareness and publicise the cause for which the strategy is mobilised, encourage public debate, set important precedents, achieve change for people in similar situations, and spark policy changes.
5. Individuals and groups might consider using strategic litigation where they want to:
 - (1) Enforce the law;
 - (2) Clarify the meaning of the law;
 - (3) Challenge the law;
 - (4) Create new law.
6. NGOs might be involved in JR in different ways:
 1. They may have clients who have potential JR claims
 2. They may themselves want to bring a claim for JR
 3. They may want to provide evidence in support of a JR, or intervene in a JR

4. 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.

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, claimants are strongly advised to get help from a specialist lawyer.

5. 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.

6. Who can bring a judicial review?

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

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

7. Alternatives to judicial review

If there are other effective ways of challenging decisions or delays, claimants 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.
- Internal appeal or disputes procedures. That may be adequate where the complaint concerns disputed facts.
- Ombudsman where there are issues of maladministration.

These alternatives are all usually free, do not involve any risk of costs being awarded if the claim is unsuccessful, and they are all designed to be used by claimants who are not represented by lawyers.

8. 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 the case is not urgent it can take a very long time to get to a final hearing, possibly a year or more, especially if the case is heard in London, where the court is extremely busy.

9. 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, 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 "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

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.

- 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.

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 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.

10. The approach of the Administrative Court

There are special procedures for handling judicial review claims, and these 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.

11. 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.

12. 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 the claimant has legal representation which is funded by legal aid. If the claimant is legally aided s/he has some protection from having a costs order made against him/her if s/he loses his/her 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 the claimant if s/he is an individual. It is not available for organisations.

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

Claimants can get free help from a lawyer, for example from the Bar Pro Bono Unit. However, this does not protect him/her from the risk of the other side's costs being awarded against him/her if s/he loses.

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.

13. The procedure for applying for judicial review

a. Pre action stage

Where a public body has taken a decision that is considered 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 the claimant wants the public body to do to put this right, and when the claimant 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.

Proceedings are usually issued in the Administrative Court. There are regional 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 a court fee of £60 for a permission application. The papers are served on the public body.

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, the claimant has 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 £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 the claimant will have to give evidence, and s/he may not even need to attend the hearing, unless s/he would like to do so.

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.

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