

Judicial review

This paper is based upon internet research of Government publications and guides posted by specialist law firms. It is for background reading only and should not in any event be used as a substitute for proper, qualified, legal advice.

Background

A public body such as a Ministry 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 to reach a decision, then it must follow them.

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.

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 based on 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.**

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.

Definition of a Judicial Review

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body such as The Ministry. In other words, **judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.** The court is not really concerned with the conclusions of that process and whether those were 'right', only if the correct procedures have been followed.

The court will not substitute what it thinks is the 'proper' decision.

If a JR claim is successful, the usual result is that the original decision is "quashed" or nullified. In turn this usually means that the decision must be taken again; the issue will be reconsidered having rectified any defects that were found.

This can result in the same decision being taken - so victories in JR can be and often are pyrrhic.

Applying for Permission

For CBC, the first step in the JR procedure is to write a formal letter to the Ministry setting out the proposed claim and what CBC are seeking. This is known as a pre-action protocol (or PAP) letter. Normally a response is expected within 14 days.

If CBC judge the response to the PAP is unsatisfactory it may then lodge a JR claim in the Administrative Court (which is a branch of the High Court handling, among other things, JR cases).

In effect, CBC apply for "permission" to apply for a JR. The test for obtaining permission to proceed is that CBC has an arguable case. The court will weed out cases where it cannot see any arguable error of law.

Another test at the permission stage that can be important is that the claimant has "standing" - in effect, a genuine interest in bringing the case, rather than being a mere busybody.

The process of applying for permission is simple – CBC complete a short claim form, setting out the facts, the grounds (why CBC consider the decision was unlawful) and certain other details; CBC must provide documents explaining the background to the case and relevant legal provisions; and CBC lodge these papers with the Administrative Court.

In practice, this permission stage can involve a lot of work, considering documents, chronology, and analysing what legal grounds CBC have (or don't have) to apply for JR. CBC will need to involve counsel to advise and draft the statement of facts and grounds. **It is usually expensive.**

CBC then serve the Ministry and any interested party with the papers. The Ministry will then submit "summary grounds of defence" to explain why permission for a JR should not be granted. In practice, though there is no provision for this in the rules of procedure, CBC then have a short window of opportunity to reply to those defences.

The court then sends the papers to a judge for a decision on paper. If permission for a JR is refused, CBC can "renew" the decision to be heard in open court. Permission is often refused on paper but granted upon renewal in open court. Sometimes the judge will order that the matter be referred to open court anyway.

If permission is granted, the claim proper can proceed.

The Claim Proper

How complex this turns out to be depends on the circumstances. CBC must now wait for evidence from the Ministry, and any interested party. Interested parties tend to put in substantial amounts of evidence to show how much care was in fact given to making the decision in question and how much money they and others would lose if the decision were quashed.

These factors should not sway a court if the decision has, in fact, been made unlawfully - but, inevitably, they often do.

CBC will then try to undermine this evidence. For example, to show that however carefully the decision was made, it was still unlawful.

The culmination of the second stage, the final hearing, will usually take place a few months after receipt of evidence from the parties.

A few weeks before the date fixed, counsel for both sides will submit "skeleton arguments" - summaries of the respective legal cases. The judge should pre-read these and essential parts of the papers. If this is done, the hearing itself can proceed quite rapidly. JRs seldom take more than three days, and many are over within one

Judgement and Costs

The judge may deliver judgment there and then or it may be "handed-down" in writing later. Handed-down judgments are more satisfactory as they are usually better thought through.

Although going to court is certainly expensive, the relative speediness of the judicial review process means that costs are not the "telephone numbers" one reads about in the papers for libel cases and so forth.

After judgment is given, there is usually argument about who pays the costs, and whether permission should be given to appeal the decision.

Rules about costs are complicated. However, the general rule remains that the loser pays the winner's costs in addition to their own.

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March 2018