



Judicial Review – a Brief Guide

What is Judicial review?

Judicial review is the procedure by which an individual can seek to challenge the policy, decision, action or failure to act of a public body. A public body could include government departments, local authorities or other body exercising a public function, such as a Clinical Commissioning Group or an NHS Trust.

When can Judicial Review be used?

A challenge against a public body can be brought on a number of grounds. The main grounds are:

1. **Irrationality/unreasonableness** - Unreasonableness is where the decision is so “outrageous” or “absurd” that no reasonable body of persons could have reached it. Other examples could be where the decision maker has failed to ask the right questions, has failed to take account of all the relevant considerations or has taken account of irrelevant matters.
2. **Illegality** - This is where a public body acts:
 - outside of its powers. This is known as acting “ultra vires” (beyond the powers);
 - in breach of a requirement under a particular statute. This is the most common type of illegality – for example, a local authority may fail to arrange the special educational provision specified in a child’s EHC Plan, thereby breaching the requirements of section 42 of the Children and Families Act 2014;
 - unlawfully by fettering its discretion – for example, by using a “blanket policy” when deciding whether to carry out assessments without considering the merits of each individual case;
 - in error of law – meaning that the public body has misunderstood its legal obligations and needs to be corrected in its understanding of the law by the court;
 - By failing to provide reasons for the decision.
3. **Procedural impropriety** - Is a duty to act in accordance within the rules of natural justice and procedural fairness and to follow procedural requirements. Specific grounds under this heading can include:
 - Bias – both actual bias and appearance of bias – as the law requires decision-making to be both fair and to be seen to be fair;
 - Fairness – at its most basic meaning that two like cases should be treated in the same way;
 - Legitimate expectation – where a public body says that it will act in a particular way that may give rise to a legitimate expectation that the public authority will do as it said it would and the court may enforce this.

Where are Judicial Reviews heard?

Judicial Reviews are heard in the Administrative Court, this is part of the High Court based in locations across the country. Appeals in judicial review cases are heard by the Court of Appeal and then, in most important cases, by the Supreme Court. Decisions of the Supreme Court take precedence all other decisions; decisions of the Court of Appeal take precedence over those of the High Court.

What powers does this Court have? - If a judicial review challenge is successful, the court may make a:

- mandatory order (requiring the public body to do something);
- prohibiting order (preventing the public body from doing something);
- quashing order (i.e. an order quashing the public body's decision);
- or issue a declaration – a way in which the court can state what the law is and how the public body has got it wrong, without directly interfering with the decision. The public body will be expected to take necessary steps to act in accordance with the declaration.

The most common types of remedies are quashing orders and declarations. It is very rare that the court will make a mandatory order unless there is really only one lawful course of action open to the public body and it refuses to take that action voluntarily.

The court also has powers to grant interim relief (requiring something to happen/not to happen pending a final decision). For example, in a case where a family are arguing that their child is not being provided with suitable social care and that the local authority are therefore acting unlawfully under s2 Chronically Sick and Disabled Persons Act 1970, the court might order that some social care provision should be put in place on an interim basis pending the final hearing of the claim.

What types of decisions can be challenged? - Under Part 3 of the Children and Families Act 2014; the following types of decision could be challenged by way of judicial review:

- Failure to provide provision which is set out in the EHC Plan (where there is an enforceable duty to provide it);
- The rationality and/or lawfulness of the contents of the social care and health sections of the Plan – as there is no right of appeal to the Tribunal in relation to these sections;
- Failure to comply with duties under the Local Offer – for example regarding its contents or failing to consult;
- Refusal to provide a personal budget or award direct payments;
- The use of a policy or eligibility criteria limiting access to assessment or provision which is arguably unlawful.

Procedure and Time-limits - Before an application for judicial review can be issued, the claimant has to comply with the pre-action protocol which requires, where time permits, that the claimant sends a letter before a claim, allowing 14 days for a response.

The claimant must then obtain “permission” from the court to bring the judicial review claim. Permission is usually determined by a Judge considering the papers, but sometimes an oral hearing is required. The test for permission is whether the claimant has an arguable case, and only once permission has been granted, can you proceed with the judicial review.

It is important to note that any judicial review challenge must be brought promptly and, in any event, within three months of the original decision being challenged. The court has discretion to extend time, where it is fair and just to do so, but it cannot be assumed that this will happen in a case. It is, therefore, important to consider at an early stage whether a formal complaint to the local authority and/or Ombudsman will provide a more satisfactory remedy to the complaint or whether a legal challenge by way of a judicial review is actually more appropriate.

Subject to means and merits tests, legal aid may be available to cover the legal costs of a Judicial Review, but you are advised to check availability, as this is subject to change.

Further Information - A judicial review must be used as a last resort. The court will not grant permission unless it is satisfied that there is no suitable alternative remedy, such as using the complaints process or appealing to the Tribunal.