JUDICIAL REVIEW: CHALLENGING PUBLIC AUTHORITY DECISIONS

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Overview

Judicial Review
- What is Judicial Review?
- Public law obligations of public authorities.
- Limitations on Judicial Review.
- Remedies.
- Practical and procedural considerations.
- Third Party Interventions.
- Human Rights Act and EU law.

What is Judicial Review?
- The procedure by which decisions of a public body can be challenged in the Courts.
- To rectify a “public law wrong”, breach of the Human Rights Act, or breach of EU law.
- The Court will not generally interfere with the “merits” of a decision.
- Generally Court will not substitute own decision.

What decisions can be challenged?
- Decisions of body exercising a statutory or governmental function.
- Central government – e.g. Secretary of State for Home Department/Foreign and Commonwealth Affairs.
- Local government – e.g. London Borough of Tower Hamlets
- Regulators e.g. the Environment Agency.
- Non-departmental public bodies e.g. the Legal Services Commission.
- Other (potentially private) bodies exercising public functions e.g. private psychiatric hospital.
- Certain exceptions apply including employment matters and “purely commercial” issues.

What are the basic public law obligations?
A public body must act:
- Lawfully: It must act within the power granted to it by statute.
- Fairly: It must adopt a fair procedure in making decisions.
- Reasonably: It must not make a decision that no reasonable body would have made.
Limits to Judicial Review

- Need permission to seek judicial review - an "arguable ground" on which there is a "realistic prospect of success".
- Must be able to demonstrate “sufficient interest” – Greenpeace and World Development Fund cases have demonstrated that in certain circumstances campaign groups can do this.
- Cannot strike down primary legislation (c.f. EU law).
- The Court will not generally substitute its own decision.

Acting lawfully

- Errors of law - has the body exceeded its legal powers?
- A public body must ensure that it complies with: Primary and secondary legislation; Directions from government; EU Law; The Human Rights Act.
- Must avoid “fettering” or “abdicating” its discretion.

Adopting a fair procedure

- Procedural errors - has the body adopted a fair procedure?
- Generally, a public body must: Consult adequately; Treat every party in a consistent and even-handed manner; Avoid bias or the appearance of bias – *Pinochet*; Avoid frustrating a party’s “legitimate expectations”; Where appropriate provide reasons for decisions.
- Article 6 ECHR - right to a fair hearing.

Acting reasonably

- Substantive errors - has the body reached an “irrational” decision?
- The hardest ground to prove - challenging the substance of the decision.

*The public body must not:*

- Make a decision no reasonable body would make.
- Ignore relevant factors or take into account irrelevant factors.
- Adopt reasoning which does not “stack up”.
- Act in a manner which is “disproportionate”.

The Human Rights Act
Human Rights Act: a “public authority”

- purely public body- any of its functions.
- Others - functions of a “public nature”.

Remedies

- Declaration of incompatibility re primary legislation *Alconbury* [2003] 2 AC 295.
- Strike down secondary legislation or administrative decisions incompatible with the Act.
- Damages (if within the jurisdiction of the Court).
- ECtHR (Strasbourg) - only remedy is damages.

Breaches of EU law

- Courts can disapply UK legislation that is incompatible with EU law which has direct effect.
- Commission can bring enforcement action in ECJ.
- Individual can seek damages in national courts.
- Reference to ECJ possible where national court requires clarification of EU law.
- A higher JR permission threshold applies if an ECJ reference may be required.

Remedies in Judicial Review proceedings

Six different types of remedy

- Order quashing decision (quashing order).
- Order restraining body under review from going beyond its powers (prohibiting order).
- Order requiring body under review to carry out its legal duties (mandatory order).
- Declaration.
- Stay or injunction.
- Damages.

Judicial Review

Practical considerations

- Majority of cases fail.
- Which decision to challenge?
- Must exhaust all alternative remedies.
- Opportunity for further consultation?
- The starting point - has there been an error of law?
- Timing - must apply promptly and in any event within three months.
• Will the decision remain the same on reconsideration.
• Costs issues: Risk of adverse costs order; Methods to avoid/mitigate the risk.

**Procedure**

• Letter before action.
• Claim form (including request for permission) & evidence.
• Acknowledgement of service - brief grounds for opposition.
• Permission dealt with initially on paper but right to request an oral hearing if rejected.
• Detailed grounds for opposing & evidence.

**Third Party Interventions**

• Intervention in existing judicial review proceedings to bring specialist information or expertise to court’s attention.
• Particularly useful where no ‘standing’ / can limit costs risk.
• Ways of intervening: Impact evidence; Direct intervention; Direct judicial invitation.
• Practical considerations: Court’s permission needed for direct intervention; Act promptly and contact other parties first.