



# JUDICIAL REVIEW: CHALLENGING PUBLIC AUTHORITY DECISIONS

Andrew Denny and Angeline Welsh  
Allen and Overy

**Type:** Legal guide  
**Published:** March 2011  
**Last Updated:** March 2011  
**Keywords:** Judicial review; courts;  
government; public  
administration.

This document provides general information and comments on the subject matter covered and is not a comprehensive treatment of the subject. It is not intended to provide legal advice. With respect to the subject matter, viewers should not rely on this information, but seek specific legal advice before taking any legal action

Any opinions expressed in this document are those of the author and do not necessarily reflect the position and/or opinions of A4ID

© Advocates for International Development 2012

## 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 "abdication" of 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.