

# Judicial Review: what do you need to know?

An introduction to the fundamentals of Judicial Review

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# Introduction

**Judicial review allows a party to challenge the lawfulness of a decision or action made by a public body.**

**This know how guide details: (1) the requirements; (2) the procedure; (3) grounds; (4) challenges; and (5) remedies associated with judicial review. Before those questions can be considered though, we must first look at when you would consider bringing a judicial review.**

A claim for judicial review must challenge a decision, act or failure to act by a body “exercising a public function”. This means decisions taken by public bodies, such as government departments, but can also extend to the private sector where a public function has been contracted out to them.

In practice, decisions by public bodies very often directly affect businesses. Many businesses operate in markets that are heavily regulated and frequently subject to government intervention (such as transport, energy and financial services). Even for business operating outside heavily regulated markets, decisions by public bodies can often have a significant impact, for example in relation to licences, regulatory decisions or government supported financing.

Threatened or actual judicial claims are frequently used to attempt to challenge the substance of a decision of a public body. However, importantly, in formal legal terms, judicial review is not concerned with the merits of a decision made by a public body, but instead whether the decision has been correctly made and implemented according to public law. It is not enough to disagree with the decision that has been made. This means that it is critical to seek specialist legal advice at an early stage, in order to develop a strategy which is effective under public law to achieve your aims.

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## When can a claim be brought?

When considering bringing a claim, you therefore need to seek advice to understand the powers given to the public body in question and identify if they have been complied with. Most commonly, it will be some form of statutory power.

However, it can be more complicated where the government has “contracted out” services to private companies. Here ultimately the courts will need to determine (1) if the private company had a commercial relationship and its associated powers were purely contractual, or (2) if the powers conferred to the private company had “statutory underpinning”.

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## What needs to be established?

In order to bring a claim for judicial review, the party bringing the claim (applicant) must show that it has ‘standing’. This means that the individual or organisation bringing the claim has a “sufficient interest” in the matter.

In practice, the applicant can show this through a direct or personal interest in the matter being challenged, or simply a public interest in the legality of the decision they are challenging. The latter basis is often used by NGOs and campaign groups when bringing claims for judicial review, for example in relation to climate change. Even a single individual may have standing.

Identifying a claimant’s standing will include an initial assessment of the merits of their case, including the grounds in which they bring the claim to ensure they have an arguable case. Details of the grounds for bringing a judicial review claim are discussed in detail below.

Before proceeding with a judicial review claim, usually all alternative remedies must have been exhausted. For example, the relevant appeal procedure, complaint to ombudsman or any statutory right to appeal.

It is important to ensure this has been done, if the alternative remedies are still available, the court may refuse permission to bring the claim or refuse a remedy. There are exceptions to this where the applicant can show that other remedies would not be effective in the circumstances, or where the applicant can demonstrate a need for interim relief.

Ordinarily the claimant should send the defendant a letter of claim prior to commencing JR proceedings, pursuant to the Pre-Action Protocol for Judicial Review.

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## Why do you need to be aware of judicial review?

For public bodies or those private bodies that would be categorised as carrying out a public function, the risk of judicial review challenge should not be overlooked. Ultimately, successful or not, the delay, publicity and financial cost involved in responding to a claim, even just at the permission stage, can be costly for businesses.

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## What is the procedure?

**For businesses affected by decisions of public bodies, an understanding of judicial review is critical given it informs whether an effective legal challenge can be made. The ability to effectively challenge adverse public decisions can be business critical. Businesses may also be impacted indirectly, for example in a public procurement context where an unsuccessful bidder may bring a judicial review claim which if successful could deprive the success bidder of the contract award.**

The procedure for the bringing a judicial review claim has two stages, the first being the permission stage.

### Stage one

Here the court will consider the applicant’s standing, if they have brought the case in good time, and if they have shown grounds to bring the claim.

It is important to remember that the permission stage is not a full hearing of the facts and arguments relevant to the case. Although some claims are stopped at this stage, permission to proceed is no guarantee of success. Many claims that pass this stage do eventually fail, as they only had to show arguable grounds to be permitted to bring the claim.

The permission stage may be conducted with or without a hearing. A permission hearing may be required if the court wishes to hear submissions on whether the outcome for the applicant would have been substantially different if the public body's conduct complained of had not occurred<sup>1</sup>.

## Stage two

If permission has been granted, directions can be given for a full hearing to be scheduled where the applicant can present their full grounds to challenge the public body decision.

Throughout judicial review proceedings, the parties are required to assist the court and make “*full and frank*” disclosure of all relevant matters and issues. This includes points that both undermine their case as well as those that support it.

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## What are the grounds for judicial review?

There are multiple grounds for judicial review, which are outlined below. In practice, claims are usually brought on multiple grounds.

### Illegality

Claims under this ground challenge whether the public body has acted within the limits of its prescribed powers. This ground goes beyond proving whether the power to act existed. It considers:

- 1 whether the body acted outside of the boundaries of the power given to it;

- 2 whether the body erred in its application of the power;
- 3 whether it was wrong to act in view of material considerations;
- 4 if it abused its discretion to assess all relevant consideration or use its power for an improper purpose; or
- 5 if it fettered or unlawfully delegated its discretion.

### Unreasonableness

This ground challenges whether the body in question acted unreasonably. It is also referred to as “irrationality”, meaning the body decision is “*so outrageous in its defiance of logic or acted moral standards that no sensible person... could have arrived at it*”<sup>2</sup>.

Historically the courts were mindful not to interfere with a public body's decision. Over the years there has now been a significant body of cases where the courts have established the body in question has acted so unreasonably that it has been compelled to intervene. This includes:

- where relevant factors have been wrongly evaluated;
- where the weighing up of factors has imposed excessive hardship or infringed the rights those affected by the decision; or
- where the decision violates “constitutional principles” and represents arbitrary decision-making.

The courts will determine the degree to which it is entitled to review the details of the decision in question based on its subject matter. For example, decisions affecting fundamental and human rights of individuals are more likely to be heavily reviewed, whereas broader questions of policy are less likely to be scrutinised.

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<sup>1</sup> CPR 54.11A

<sup>2</sup>*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

## **Procedural impropriety**

This ground challenges whether the body in question followed the correct statutory procedure when making its decision and generally acted fairly. When considering the correct statutory procedure, the courts will not only look at if there has been an error, but also if the relevant legislation intended the particular non-compliance should result in a quashing of the decision.

Any decision made must also be done in accordance with a body's duty to act fairly. What is deemed "an appropriate level of fairness" varies, again depending on the subject matter of the decision. In general though, the more there is at stake for the person(s) affected by the decision, the higher the level of fairness they should have been owed. In their assessment the courts have tended to focus on:

- 1 The notice to the affected person(s) of the case against or involving them.
- 2 A person(s) right to make representations as part of the decision-making process.
- 3 If those affected were able to call witnesses and challenge witnesses against them. This will depend on the nature of the decision-making process in question.
- 4 Whether those affected had a right to legal representation; this will be again assessed on the nature of the relevant decision-making process.
- 5 Whether those affected were given reasons for the decision being made.

## **Legitimate expectation**

This ground applies where the body in question had an established practice or gave representations, which create a legitimate expectation for affected persons to rely on how a decision would be made. It can be a procedural representation, in relation to the process for how the decision would be made, or a substantive representation, where a tangible benefit has been promised.

In considering if any established representation creates a legitimate expectation, the courts look at (1) the detail of the representation, (2) the circumstances in which the representation was made and (3) the nature of any discretion the body in

question had to make that representation. For any promises made, it will need to be shown that the body was legally able to make the representation.

Applicants under this ground will also need to show that they relied on that expectation. For a procedural expectation, it is not enough that the procedure was well established if it was not known to the applicant before making the claim. The applicant must have known about it at the time and demonstrate they relied on it to their detriment.

It is important to note that a body can "frustrate" a legitimate expectation. This means that the body could override the legitimate expectation if it can prove it did so lawfully because of compelling public interest reasons. It is on the body to prove it had compelling reasons to frustrate the expectation and the courts have been seen to take a proportionality approach in assessing if the frustration was lawful.

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## **What are the courts looking for?**

The courts assess whether the claimant has presented "arguable grounds" for its judicial review claim. As well as establishing one or more of the grounds detailed above, this primarily involves a review of the relevant legislation providing the power, the statutory duty, and how the body has exercised its power. In making their assessment, the courts will be cautious about dictating how a public body should use its discretionary powers and, in particular, how much weight a body should give to a particular consideration before making its decision.

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## **What are the potential challenges?**

It is fundamental that any claim for judicial review be brought promptly, and in any event no later than 3 months after the grounds to make the claim first arose. The courts take a strict approach to this so there have been instances where claims have been refused because they were not brought promptly, even though they were brought within 3 months. For planning decisions and public procurement the time limit is even shorter – 6 weeks for planning and 30 days for public procurement.

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## Remedies?

There are a wide range of awards that can follow a successful challenge. The courts have long enjoyed a broad discretion when it comes to awarding a remedy following a successful judicial review challenge. Very often, the claimant will seek a quashing order (which means, with retrospective effect, that the decision has no legal effect and renders any prior action based on that decision invalid). Other remedies that are available include a prohibiting order (restraining the public body from doing something), mandatory order (requiring the public body to do something) and a declaration as to the state of the law.

In 2022, the government introduced suspended and prospective only quashing orders. The suspended quashing orders allow the court to issue an order which only comes into effect after a specified period of time, allowing the public body time to prepare for the impact of their decision being overturned. The prospective only quashing orders allow the court to prohibit an unlawful decision from applying in the future, but this would not invalidate any prior actions based on that decision. The aim of this change was to mitigate the detrimental effects on groups who had relied on the decision until that point. It also prevents a flood of claims following on from the quashing order.

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