Hogan Lovells

Challenging government decisions in the UK

An introduction to judicial review

Further information
If you would like further information on any aspect of challenging government decisions, by judicial review or other means, please contact a person mentioned below or the person with whom you usually deal.

Contact
Charles Brasted
T 020 7296 5025
charles.brasted@hoganlovells.com

Paul Dacam
T 020 7296 2615
paul.dacam@hoganlovells.com

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Introduction

As the role of the public sector (both as regulator and contracting party) has grown, so has the commercial impact of its decisions become more frequently business-critical. It is, therefore, no surprise that businesses are increasingly often seeking to challenge those decision in the Courts.

The main legal means by which the decisions and actions of Government departments, regulators and other public bodies can be challenged is judicial review. This note provides a brief introduction to judicial review, focusing on:

- the bodies and decisions that can be challenged;
- the grounds on which decisions can be challenged;
- the remedies available; and
- the judicial review process.

What bodies and decisions can be challenged?

Unless judicial review has been expressly excluded by statute, then any decision or action that contains a sufficient "public law element" is amenable to challenge by way of judicial review. Whether a decision is challengeable does not depend solely on the identity of the decision-maker but also on the nature of the decision. Thus, for example:

- a Government department, while obviously a public authority, may do some things that do not contain a sufficient public law element, such as employing staff, and are therefore not amenable to judicial review; and
- conversely, a body that is not obviously "public" may perform some functions that do fall within the ambit of judicial review [add example].

Decisions and administrative action

Judicial review is, in principle, available in respect of most decisions by Government departments, regulators and other public authorities (including local authorities). However, although statutory exclusion of judicial review is rare, a growing number of statutory powers are coupled with specific statutory appeals mechanisms (often to specialist tribunals such as the Competition Appeal Tribunal). As judicial review is a remedy of last resort, these appeals mechanisms usually have to be exhausted first before judicial review can be pursued.

Legislation

Legislation can also be challenged by way of judicial review. Secondary legislation — Orders, Regulations or other statutory instruments made by a Minister, regulator or public authority — can be challenged on the full range of judicial review grounds (as to which, see below). By contrast, primary legislation (that is, Acts of Parliament) can only be challenged on limited EU and human rights law grounds.

Standing

In order to be entitled to bring a claim, you must have “sufficient interest” in the outcome of the claim. However, the court takes a liberal view of the requirement and will very rarely consider it separately from the **[x]**. It is well established that interested groups and trade associations, for example, may bring claims concerned without their sphere of interest.

On what grounds can decisions be challenged?

In a judicial review claim, the Court's job is to decide whether the decision in question was lawful. As such, judicial review is, in most cases, not directly

concerned with the merits of the decision (was it a good or the best one?) but with whether the decision was reached in a proper manner and is within the range of permissible outcomes.

Although the grounds are fluid and developing, the main grounds for judicial review are usually categorised as:

- *ultra vires* — that is, that the decision-maker did not have legal power to make the decision;
- procedural impropriety; and
- unreasonableness.

Ultra vires

A decision may be *ultra vires* because the decision-maker simply does not have the power (whether statutory or otherwise) to make the decision in question or (particularly in the case of statutory powers) because he has not met the pre-conditions or criteria for exercising the power. These pre-conditions may be procedural or substantive. For example, an Act may provide that the Minister may only take action in specified circumstances; if he acts in a case where those circumstances do not exist, then he is acting outside his powers.

A decision or action would also be *ultra vires* if it were contrary to EU law or (since enactment of the Human Rights Act) the European Convention on Human Rights.

Procedural impropriety

A decision or action may also be unlawful if the process followed was unfair when judged against the public law standards of procedural fairness. These standards, developed by the Court in case law, apply irrespective of any statutory procedural requirements, but the standard imposed will depend on the circumstances and the nature of the matter: the standard of fairness required in a quasi-judicial context will, of course, be higher than that required when making a routine administrative decision, for example. Aside from rare cases of bias, procedural impropriety may typically arise where there has not been proper consultation or where the defendant has breached a legitimate expectation as to the procedure to be followed.

Unreasonableness

Although judicial review is concerned with the lawfulness and not the merits of the decision being challenged, it has long been accepted that a decision may be so unreasonable as to be one that a decision-maker could not lawfully have reached. Traditionally, this ground has been very limited in its application, with the Court giving public authorities a wide margin of discretion as regards what is reasonable. However, there has been a trend in recent years towards a more critical consideration of the reasonableness of the decision. It is now well-established that the Court is entitled to review the rationality of a decision, that is whether the decision-maker has taken into account the relevant (and only the relevant) considerations. In cases that engage issues of EU or human rights law, the Court's scrutiny in this regard can be more intense, where it is required to consider the proportionality of the decision, which involves the balancing of the various considerations.

Nevertheless, for both constitutional and practical reasons, the Court remains anxious not to substitute its own views for those of the body charged with making a judgment on the matter in question and so will afford the decision-maker a wide margin of appreciation on matters of discretion.

What remedies are available?

If you are successful in challenging a Government decision or piece of legislation — that is, the Court decides that it is unlawful on one or more of the grounds outlined above — then it is a matter for the

Court's discretion what remedy (if any) should be granted. The Court may:

- quash the decision or legislation;
- order the decision-maker to take a particular action (such as to reconsult or to grant a licence); and/or
- make a declaration as to the lawfulness of the decision challenged.

In deciding upon remedies, the Court may have regard to public policy considerations such as the costs of unravelling a decision that has already been made and may have affected a substantial number of people. This may lead it to refuse a remedy even in respect of an unlawful decision.

In relation to primary legislation, the Court's powers are more limited: it may only quash legislation if it is found to be contrary to EU law; if it is contrary to the European Convention on Human Rights, then the only remedy available to it is to make a declaration of incompatibility. In practice, such a declaration, and indeed any declaration of unlawfulness, would likely be taken very seriously by the public sector defendant, who should be expected to remedy the unlawfulness.

Damages are, as a general rule, not available in judicial review proceedings. They may, in principle, be available where a human rights breach is found, but such damages are rare and essentially nominal. However, compensation or other forms of financial redress may naturally flow out of a successful challenge.

The judicial review process

Compared with ordinary civil litigation, the judicial review process is substantially faster and more streamlined. There are a number of significant features of judicial review that differ from most other forms of litigation:

- speed is of the essence — claims must be "promptly" and in any event within three months of the decision being challenged;
- it is a two-stage process — a claim can only proceed with the permission of the Court, so unmeritorious claims are weeded out at an early stage before other parties have submitted all of their arguments and evidence;
- there is no standard disclosure procedure — save in exceptional circumstances, specific disclosure is not required, but the parties are under a duty of candour to include in their evidence what the Court requires in order fairly to dispose of the case; and
- there is no oral evidence or cross-examination — save in the most exception cases, all of the evidence is given in writing via witness statements.

As with most claims, in accordance with the Pre-action Protocol for Judicial Review, the first step is to serve a letter before claim on the defendant and other parties setting out the legal challenge and stating what action is required. If the defendant does not provide a satisfactory response and you wish to go ahead and commence proceedings, the claimant is obliged to file its entire case, including full arguments and all supporting evidence, at the launch of proceedings (and therefore within the three-month time limit) — unlike other litigation, it is not possible to commence proceedings with a bare claim form, or only limited particulars. In principle at least, the claimant cannot expect any subsequent opportunity to submit further evidence.

Once the claim has been lodged with the Court, the defendant has 21 days to file an acknowledgement of service and to indicate whether it will defend the claim and, if so, on what grounds. A judge will then consider whether to grant permission. This is usually done on the papers without a hearing, but if permission is refused, a claimant may request an oral rehearing.

If permission is granted, the defendant has 42 days in which to file its defence and supporting evidence, after which there will be an oral hearing of the claim. In stark contrast to civil litigation, those hearings are short (very rarely more than three days) and usually within six to 12 months of the claim being commenced (sooner in urgent cases).

One of the other specific features of judicial review is that "interested parties" may be joined in the proceedings. These are full parties to the proceedings that are neither the defendant nor the claimant but do have an interest in the outcome of the proceedings. It is often the case that commercial parties are joined as interested parties where a decision in their favour (such as the grant of planning permission or a licence) by a public authority is challenged or where they have been involved in the matter under review.

Is judicial review worth it?

Successfully challenging a government decision is difficult, not least because of the wide margin of discretion that the public authority will be afforded by the Court. For this reason, winning the policy debate before a decision is made is preferable. However, judicial review can be a swift, effective and cost-efficient mechanism for challenging an unfavourable outcome. When it really matters, judicial review is a powerful option that can deliver results with enormous commercial value.

Moreover, it is a very powerful tool in the armoury of any business engaging with the public sector, and it is crucial that the relevant public law arguments are deployed effectively, and the groundwork for a challenge laid, long before any decision is made.

Our UK & EU Public Law and Policy team

Hogan Lovells' UK & EU Public Law and Policy team brings together in a dedicated specialist team substantial experience of judicial review litigation and of working with clients to influence and shape policy and other governmental decisions at an early stage. As such, we are able to draw on our public law and litigation knowledge to ensure that your case is advocated as strongly as possible before a decision is made. Our experience in bringing high-profile, highly political and highly complex judicial review challenges, and our international network of specialties also mean that we have the skills and resources to act swiftly and effectively in any case.

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