



LAW ANSWERED

SAMPLE CHAPTER FROM OUR ADVANCED COMMERCIAL LITIGATION ELECTIVE GUIDE

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JUDICIAL REVIEW

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WHAT IS JUDICIAL REVIEW?

Judicial review is relevant for claims which question the lawfulness on an enactment/decision of a body exercising a public function (**CPR 54.1(2)(a)(ii)**), not the merits of a particular decision. Judicial review considers how a decision was made and is therefore a review, not a rehearing.

The power of judicial review is derived from **s. 31 Senior Courts Act 1981**. Judicial reviews are always held in the Administrative Court, which is part of the High Court, King's Bench Division.

DIFFERENCES BETWEEN JUDICIAL REVIEW AND TYPICAL CIVIL PROCEEDINGS:

- Judicial review is more cooperative / less adversarial.
- The parties are expected to assist the court as far as possible and to be open and candid.
- The defendant has a duty to make full and fair disclosure of all relevant material. This extends beyond simple disclosure to a full and accurate explanation of all the facts relevant to the decision being challenged on both sides (including disclosure of facts which assist the claimant's case or adversely affect the defendant's) – there is no standard disclosure regime in judicial review proceedings.
- The court is reviewing actions and/or decisions of a public body – not investigating the whole background to the case, so the scope of court's role is more limited.
- Third parties can become involved in judicial review if they have a legitimate interest and / or are able to assist the court
- Judicial review is faster than civil litigation procedures because actions must be brought quickly and public body decisions should not be delayed by lengthy court process or overturned after a disproportionate amount of time.

APPLYING THE REQUIREMENTS FOR JUDICIAL REVIEW

STEP 1:

Is the defendant amenable to judicial review?

In order to be amenable to judicial review, the defendant must be a public body or be carrying out a public function. Any challenge must relate to that public function.

A public body may be:

- An organisation that derives power from statute such as a government department, an industry regulator, or a local authority, and exercises such a power; or
- A private company **provided that** the private company is carrying out a public function (i.e. a function that has consequences relating to public law).

STEP 2:

Was the defendant's decision carried out as part of a public function?

Under **CPR 54.1(2)(a)**, the defendant's decision must have been carried out as part of a public function.

This means that matters of private law (i.e. law governing relations between individuals as opposed to constitutional, administrative or criminal law) may not be judicially reviewed.

STEP 3:

Does the claimant have standing?

Per **s. 31(3) SCA 1981** the claimant must have "sufficient interest" in the matter to bring a claim.

Who will have "sufficient interest"?

- An individual with a *direct personal interest* **will** have sufficient standing.
- A citizen concerned by a serious issue of public importance **may** have sufficient standing.

Ex Parte Rees-Mogg

Rees-Mogg was deemed to have sufficient standing on the basis of his "*sincere concern for constitutional issues*".

- A pressure group **may** have standing, provided that it is an appropriate case. An appropriate case is one that concerns the pressure group's area of interest.

Ex Parte Greenpeace (No 2)

Greenpeace had sufficient standing to issue a claim for judicial review on behalf of local members affected by the commissioning of a new nuclear plant.

Other parties involved in judicial review:

Aside from the claimant and defendant, other parties who may be involved in a claim for judicial review include:

Interested Parties

"any person who is **directly affected** by the claim" (**CPR 54.1(2)(f)**).

- As per the **Pre-Action Protocol for Judicial Review** (the "**Protocol**"), these persons must be identified by the claimant in the claim form and by the defendant in the acknowledgement of service.
- The claimant must serve the claim form upon interested parties (see the **Protocol**).

- Interested parties may then decide whether to involve themselves in the case.
- Interested parties will not usually recover their costs of the case unless they have added to proceedings in a way that could not have been covered by the claimant or defendant.

INTERVENERS	Third parties who have been permitted to become involved by the court on account of their knowledge or evidence (often organisations (e.g. charities and other pressure groups) or the Secretary of State).
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- Interveners become involved on application to the court under **CPR 54.17**, which allows a person to make representations to court.
- Alternatively, the claimant, defendant and interest parties may consent to an intervener becoming involved in the case (**CPR 54A PD 13.1**).
- Interveners are usually required to bear their own costs and may even be required to pay the costs of the claimant or defendant in certain circumstances.

STEP 4:	What are the grounds for judicial review?
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State the grounds for judicial review and apply each to the facts. Explain which grounds are appropriate or inappropriate and why or why not.

The case of ***Council of Civil Service Unions v Minister for the Civil Service ("GCHQ")*** identified the main grounds for judicial review, which have developed in case law into four categories:

1:	<p><u>Illegality</u> – encompasses a decision-maker doing one of the following:</p> <ul style="list-style-type: none"> a) acting outside of his or her powers; b) misinterpreting the law; c) performing an abuse of discretion (i.e. considering irrelevant factors or ignoring relevant ones, or failing to exercise discretion properly when required to do so); or d) making an error of fact.
2:	<p><u>Irrationality</u> or <u>Wednesbury unreasonableness</u></p> <p>This applies where a decision is “<i>so unreasonable</i>” that no reasonable person would ever have come to it, per <i>Associated Provisional Picture Houses Ltd v Wednesbury Corporation</i>. This is a <u>very</u> high threshold so is unlikely to apply in most cases.</p>
3:	<p><u>Procedural impropriety</u> – encompasses a decision-maker doing one of the following:</p> <ul style="list-style-type: none"> a) Failing to observe express procedural requirements (e.g. not giving reasons where reasons are required by law); or b) Failing to observe the common law rules of natural justice, such as the right to be heard and the rule against bias.

4:

Legitimate expectation

Where a decision-maker, by an express promise or by past conduct, has created a legally enforceable expectation that a particular procedure will be followed, such as right to be consulted (*ex parte Liverpool Taxi Fleet*), or a substantive benefit or outcome achieved (*ex parte Asif Khan*).

See GDL Answered or LLB Public Law Answered if you need to refresh your memory of the substantive law on the grounds for judicial review in detail.

STEP 5:**Which remedies are available?**

CPR 54.2 and 54.3 set out the possible remedies for judicial review, granted at court's **discretion**:

1:

Quashing order:

Nullifies a decision that has already been made. This will send the case back to the original decision-maker, requiring them to remake the decision. It is therefore possible that the decision-maker could arrive at same decision again.

2:

Prohibitory order:

Prevents **ongoing conduct**, e.g. by stopping the public body from acting outside its powers. Also appropriate where the public body is threatening to do something in the future.

3:

Injunctions:

Various injunctions are available, often with the same effect as a prohibitory or mandatory order, so are more commonly sought as a form of interim relief.

4:

Mandatory order:

Compels the public body to do what it ought to have done in the first place. Appropriate where a public body is under a **duty to act**.

5:

Declaration:

A statement by the court which **clarifies the legal position** of the parties. Per s. 31(2) SCA 1981, a declaration may be made even if no other remedies are available.

6:

Damages:

Available in **limited** circumstances. A claimant cannot claim for damages alone, only if some other remedy is also sought. The claimant must also be able to establish a **private law** cause of action, such as a breach of contract.

STEP 6:**Conclude**

Are all of the requirements for judicial review met? Is the claim likely to be successful – if so, why? If not, why not? Which remedies are most appropriate?

(A procedural flowchart is overleaf.)

PROCEDURE FOR JUDICIAL REVIEW FLOWCHART

