



A brief guide to the grounds for judicial review

1. Public law wrongs

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.”

(Sedley J in R v Somerset CC ex parte Dixon [COD] 1997 323, QBD).

The ultimate (though not necessarily the most appropriate) means by which public law disputes are resolved is by bringing the matter before the Administrative Court using a claim for judicial review. Broadly, in order to succeed, the claimant (the person or body bringing the case) will need to show that either:

- the person or body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so; or
- a decision or action that has been taken is ‘beyond the powers’ (in Latin, ‘ultra vires’) of the person or body responsible for it.

Only then, will a public law wrong have occurred. Generally, it does not matter if the judge, faced with the same decision, would have decided the merits of the case differently. This reflects the fact that judicial review involves ‘supervision’ of administrative decision making – did the public body act in a lawful manner in deciding the way that it did. There are three categories of public law wrongs which are commonly used and which will be considered in turn:

- (a) Illegality;
- (b) Fairness; and
- (c) Irrationality and proportionality.

2. The approach of the Administrative Court

The approach of the courts to public law disputes, and the development of special procedures for handling judicial review claims have a number of important practical consequences. For example:

- there are special protections in the procedure intended to ensure administrative decision making is not paralysed by the prospect of claims, or the way they are pursued. These are manifested in the time limit rules, and in the requirement to seek permission;
- judicial review claims proceed, as far as possible, on the basis of agreed facts. The rules do not easily accommodate cases where the facts are in dispute (orders for disclosure are rare, oral evidence rarer);
- both parties are expected to co-operate with the court, and take a candid, cards on the table approach to the litigation;

- the court will sometimes act proactively, bringing issues into play which have not been raised by either party;
- depending on the nature of the decision being challenged, there may be a degree of deference to the decision maker, given her/his democratic mandate, or special expertise;
- the court has a discretion to refuse permission for judicial review, or a remedy, even when a public law wrong has been committed; and
- decisions will often be remitted back to the decision maker with guidance from the court, rather than quashed.

3. Illegality

Decision-makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be “illegal”. Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. This arises, for example when the legislation relating to a public body does not include the necessary power or has precise limits on when the power can be used. Public bodies acting illegally in this way can be described as acting “ultra vires” (which means beyond or outside their powers).

Sometimes legislation allows the exercise of a wide and seemingly unrestrained discretion by the public body, or provides that a duty should be discharged in certain circumstances, but does not prescribe a particular process for determining whether those circumstances arise in an individual case. Here, illegality can occur where the action, failure to act or decision in question violates the public law principles set down by the courts for processes of this kind. These principles require public bodies to:

- take into account relevant information (and to assign the appropriate amount of weight to such information), and to ignore irrelevant information;
- ask the right questions and to undertake sufficient enquiry, for example by addressing the right issue, and taking reasonable steps to obtain the information on which a proper decision can be based;
- not to delegate a decision for which they are exclusively responsible, and that therefore only they can make - allowing another person to take a decision for them, means that they are giving their power away and fail to be properly accountable.
- ensure that they have not fettered their discretion by for example applying a very rigid policy as if it were legislation.
- comply with the Human Rights Act by acting compatibly with the Convention, so far as it is possible for them to do so.

4. Fairness

Fairness demands that a public body should never act so unfairly that it amounts to an abuse of power. This means that:

1. If there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them.

2. It must not breach the rules of natural justice. One of the key issues here is the rule against bias, which requires the public body to be impartial and to be seen to be so. For example, the public body must not allow decisions to be made by people who have strongly held views which may cause them to reach a decision based on prejudice, nor allow decisions to be made by people who have a financial interest in the decision.

There must also be a “fair hearing” before a decision is reached, although this does not always literally mean an oral hearing. Basically, a person is entitled to know the case against them, and must have the opportunity to put their case properly. Any other requirements above and beyond this will depend on the seriousness of the issue, for example, if someone’s livelihood or liberty is at stake. Examples of unfairness could include the following:

- Failing to tell the individual what the case was against them, or taking into account evidence or factors which s/he was not aware of
- Failing to allow the individual to put their case forward
- Failing to give the individual the facilities for putting their case forward properly
- Refusing to hear evidence which might have led to a different decision
- Denying access to relevant documents
- Holding a hearing in the absence of the individual when they had a good reason for not being able to attend
- Failing to notify the individual of the time and place of the hearing that would lead to the decision being taken
- Failing to consult those who the public body had a duty to consult, or those who had a “legitimate expectation” that they would be consulted before the decision was made, perhaps because they had been consulted in the past or because it would seem obvious that someone has an interest in a matter and should be consulted.

A legitimate expectation may also arise where a public body has made a promise of a benefit, and it then goes back on this promise. In this instance the courts have said that it could amount to an abuse of power to take such a benefit away. The classic example here is a promise of a “home for life” which was in fact what the key case was all about. A local authority that had promised a resident of a care home that it would remain their home for life, was found to have acted unlawfully by breaching this promise.

Finally, fairness may also demand that the public body give reasons for their decision. Certain statutory procedures will require this, although there is no specific requirement in law generally. However, more recent cases have suggested that in certain circumstances reasons should be given, and this will often depend on the nature of the decision and how important it is to an individual. Reasons for a decision may be required when the decision-maker is a professional judge, the decision would otherwise appear aberrant (aberrant meaning “to diverge from the normal type”), or where the subject matter is particularly highly regarded, such as a person’s liberty.

5. Irrationality and proportionality

The courts may also intervene to quash a decision if they consider it to be so demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948, in the *Wednesbury* case:

"If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..."
Lord Greene *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL.

This threshold is extremely difficult to meet, which is why the *Wednesbury* ground is usually argued alongside other grounds, rather than on its own. The onus is also on the claimant to establish irrationality or perversity.

However, the threshold will be a lower one, that of proportionality, when European Union law or Human Rights Act breaches are involved. In general terms, the concept of proportionality requires a balancing exercise between, on the one hand, the general interests of the community and the legitimate aims of the state and, on the other, the protection of the individual's rights and interests. One approach is to ask:

- is the state's objective legitimate?
- is the measure suitable for achieving it?
- is it necessary, in the sense of being the least intrusive means of achieving the aim? and
- does the end justify the means overall?

The onus also lies upon the State to show that these conditions can be met.

6. What shall I do next?

If you think you may have grounds to bring a judicial review you should seek advice from a solicitor who specialises in public law or in the area of law which covers your situation e.g. housing, community care etc. Don't forget you may be able to make a formal complaint or go to the Ombudsman instead. There is more information in the other leaflets in this series.

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