Judicial review: Briefing for local Compacts and voluntary organisations

Compact voice
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Overview

Judicial review is the process by which the courts examine the lawfulness of a public authority's decision. This briefing note explains what judicial review is (and what it isn't), how it works in practice and the main issues that voluntary and community sector (VCS) organisations need to consider. This note is not, and is not intended to be, a substitute for professional legal advice, which should be sought by anyone considering bringing a judicial review.

What is judicial review?

Judicial review is a way of challenging how an organisation is carrying out a public function. It is a specialised type of legal proceeding; unlike private law (which involves a dispute over a person's own rights and obligations), judicial review has a wider public importance because it is ultimately about ensuring that the state does not exceed the powers given to it by law. This difference means that special rules apply to judicial review as compared to private law disputes.

Importantly, in judicial review the court does not consider whether it would have made the same decision had it been in the place of the public authority; the court's role is only to look at whether the decision made was lawfully available to the body which made it. Judicial review is a two stage process. In the first stage, the court considers whether there is an "arguable" case. If so, the court will grant permission

to proceed to the second stage, where it considers the arguments in full and decides whether the claim should succeed.

Grounds

The grounds for judicial review are traditionally divided into three categories (although in practice there is considerable overlap between them and cases will usually be brought on more than one ground). The grounds are as follows:

- **Illegality**: a public authority may not act outside the powers which it has been given by legislation. It must also comply with certain established principles when exercising its powers, for instance, by not improperly delegating its discretion to make decisions to another person or using its powers for a purpose which they were not intended. For example, the government's decision to introduce a residence test for legal aid was recently declared unlawful as there was no power in the primary legislation (the Legal Aid, Sentencing and Punishment of Offenders Act 2012) to introduce such a test.[1]

- **Procedural impropriety**: the decision maker must follow the correct procedure in making the decision. This means complying with any statutory requirements as to process, but also ensuring that there is a fair hearing (the meaning of which differs according to the circumstances). In some cases, there will be a duty to consult, and if the decision maker decides to consult (whether or not such a consultation is required) there is a duty to carry out the consultation "fairly" in all the circumstances. For instance, the decision to give residents of a care home five days' notice that their home was about to close with no further consultation was held to not meet this standard of fairness.[2]

- **Irrationality/proportionality:** the general rule is that the court will not allow a decision to stand if it is so unreasonable that no authority could ever have come to it. The point to take from this circular test is that it is very hard to satisfy. It will not be enough to show that you think the decision is unreasonable; the decision must be outside the bounds of what can be considered reasonable. In cases which involve European Union law or the European Convention on Human Rights, the test is the more relaxed one of "proportionality", which involves balancing the interests of the relevant parties. In one recent example, the High Court ruled that the Home Secretary had acted irrationally in setting the financial support paid to people claim asylum in the UK, in particular

[1] *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/2014/2365.html
[2] *R v Devon County Council ex p Baker* [1992] EWCA Civ 16 http://www.bailii.org/ew/cases/EWCA/Civ/1992/16.html

because she had failed to take reasonable steps in gathering sufficient information to allow her to make a rational judgment.[3]

Who's who in a judicial review?

- **The claimant.** The claimant is the person bringing the judicial review claim. In order to be able to bring the claim, the claimant must have a "sufficient interest" in the case. This test has been interpreted quite generously by judges because it is recognised that it is in everyone's interest that instances of public authorities overstepping their powers are brought to the attention of the court, even if the person doing so is only indirectly affected. Only claimants who are busybodies or who have an improper motive are likely to be refused standing.

- **The defendant.** The defendant is the body which made the decision under challenge. That decision must have a public law element in order for it to be subject to judicial review. For instance, a public authority may be the defendant in a judicial review when exercising a public function (e.g. closing a library) but not in relation to private law functions (e.g. dismissing an employee). Importantly, a private organisation may be subject to a judicial review in relation to any public functions which it carries out. The law as to whether an organisation is exercising a public function is complex, but VCS organisations should be aware that if they are delivering public services, there is a possibility that their actions may be challenged by way of judicial review.

- **Interested parties.** Interested parties are parties who are not the claimant or the defendant but who have an interest in the claim. For instance, if a VCS organisation decided to challenge a decision to cut funding to three organisations, of which it was one, the other two organisations may be named as interested parties. Interested parties can participate in the proceedings by submitting legal argument and evidence.

- **Interveners.** Interveners are third parties who are able to provide the court with extra information or expertise which is not otherwise available from the parties. Unlike the claimant, defendant and interested parties, interveners will not usually have a direct stake in the case, but may have a general policy stance relevant to the case. Interventions are a powerful tool for VCS organisations engaged in advocacy activities and interveners have frequently been praised by the court for helping it understand certain issues.

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[3] *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2014/1033.html&query=%22refugee+and+action%22&method=boolean

Judicial review practice and procedure

- **Judicial review as a remedy of last resort.** If there is an alternative route of appeal (for instance, a tribunal has been set up by statute in relation to disputes arising from certain types of decision) then this avenue must be followed before a judicial review can be brought. However, if the other method is not a realistic alternative, for instance because there will not be a binding decision or it is too slow, judicial review may be pursued instead. It is important to remember that pursuing an alternative (for instance, the dispute resolution procedure in the local Compact) will not extend the time limit for judicial review.

- **Pre-action correspondence.** Before formally starting proceedings, the claimant is usually expected to write a letter notifying the public authority of its intention to bring a judicial review claim and its reasons for doing so, and the public authority is expected to reply. The aim of this correspondence is to try and identify the issues in dispute to see if they can be resolved or narrowed without the need for court proceedings. A pre-action letter is not a strict requirement, but if you do not write one without a good reason, there may be costs consequences (see below).

- **Time limit for bringing a claim.** The general rule is that the claim must be brought "promptly, and in any event within three months" of the decision being made. The court takes time limits extremely seriously, so it is important to act quickly. Different time limits apply for some categories of cases. In particular, challenges to procurement decisions made under the Public Contracts Regulations 2006 must be brought within 30 days of finding out about the decision.

- **The permission stage.** The claim is formally started with a claim form in the Administrative Court which sets out the facts and grounds of the claim, along with supporting evidence. The public authority then replies with a summary statement of defence. The judge will then decide (usually on the papers only and without a hearing) whether or not to grant permission to proceed based on whether there is an arguable case.

- **The substantive stage.** If the claim is granted permission, the public authority will be expected to set out in more detail its reasons for resisting the claim, along with any supporting evidence. The case will then be considered at an oral hearing before a judge.

- **Remedies.** If the judicial review succeeds, the judge will decide what remedy to order. Common remedies include quashing orders (in which the decision is set

aside and the decision maker must remake the decision), prohibiting orders (which restrains the public authority from taking a particular action) and declarations (which set out the legal position but which do not order anyone to do anything). The court can technically order damages but only does so in exceptional circumstances. Importantly, all remedies are discretionary, which means that the court does not have to grant them even if the public authority has been found to have acted unlawfully.

Key considerations for VCS organisations

Costs

General considerations

Judicial review is expensive. As a guide, each party in a case which goes to a one day substantive hearing is likely to incur legal costs of at least £25,000-£40,000 and in many cases much more. Legal aid is not available for organisations.

Parties also need to consider the risk of being ordered to pay the other side's costs. The general rule is that the losing party pays the winning party's costs, with the court also taking into account factors such as the behaviour of each of the parties, for instance whether they have failed to send a pre-action letter without a good reason. As a rule of thumb, the winning party can expect to recover around two thirds of its costs.

Pro bono

Solicitors and barristers (particularly from larger firms or barristers' chambers) are sometimes willing to work for VCS organisations on a pro bono basis, but this is obviously dependent on finding someone with the interest and resources to do so. Even if you manage to secure advice on a pro bono basis, there is still the risk that you will have to pay the other side's costs if your claim is unsuccessful.

Protective costs orders

Another option to obtain a protective costs order (PCO). These are orders which are made at the beginning of the case and provide that regardless of who eventually wins, the party in question will either not have to pay the other party's costs, or will only have to pay the other party's costs up to a set amount.

In general, the court will only be persuaded to grant a PCO in limited circumstances, and among other things the applicant will need to show that the issues are of general public importance and that it has no private interest in the outcome. Further, the Criminal Justice and Courts Bill (which is currently before the House of Lords) contains provisions which would further limit the use of PCOs.

An important exception applies to environmental judicial reviews as a result of the UK's international obligations. In such cases, claimants who are organisations have their potential liability for the other side's costs automatically capped at £10,000.

Interveners

At the moment, interveners generally pay their own costs, and unless the court has some criticism of their intervention, will not be ordered to pay the costs of any of the other parties. However, the Criminal Justice and Courts Bill contains a provision which requires interveners to pay their own costs and those of the other parties which have been incurred as a result of the intervention unless there are exceptional circumstances which would make such an order inappropriate. This would make the financial risk of intervention much greater for any potential intervener.

Your relationship with the public authority

Another important issue that you need to consider is your working relationship with the public authority whose decision you are judicially reviewing. Judicial review does not need to mean the end of that relationship. However, you must also not underestimate the adversarial nature of litigation; even where relations are generally good, the process of entering into legal correspondence and putting forward conflicting versions of events can lead to a breakdown of trust. You need to factor in this risk before starting proceedings.

The Compact and judicial review

Although not legally binding, the Compact can be a relevant factor in judicial review; in one judicial review, the local Compact was described as "more than a wish list but less than a statement of intent"[4]. In particular, where a public authority signs up to a Compact this can create a legitimate expectation as to the behaviour of the public authority. Past judgments show that the court takes the commitments made in a local Compact seriously; in one instance, the judge stated that the local Compact in question "would form the expectation of behaviour in the absence of compelling reasons to the contrary"[5].

[4] *R (Berry) v Cumbria County Council* [2007] EWHC 3144 (Admin) at 44 http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2007/3144.html&query=%22%22the+compact%22%22&method=boolean

[5] *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin) at 53 http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2011/944.html&query=%22judicial+and+review%22+and+%22%22the

Further information

Further and more detailed guides on judicial review and other forms of public law litigation have been produced by the Public Law Project, an organisation working on access to justice issues. With a number of judicial review reforms being pursued by the government, the Public Law Project website is also a good place to follow the most recent developments.

As will be clear from the above, judicial review is a complex area and there can be substantial risks associated with starting proceedings. If you are considering bringing a claim, you should seek legal advice from a solicitor specialising in public law. You can find solicitors in your area on the Law Society "Find a Solicitor" database.