

# ashfords

## CLIENT GUIDE

### JUDICIAL REVIEW

A brief guide to bringing and defending challenges to the decisions of public bodies.

The number of judicial reviews has increased substantially over the past few years. But what is a judicial review and on what grounds can one be brought or defeated?

This Guide explains judicial review under English Law in general terms. The intention of the Guide is not, however, to advise you on whether or not to claim for judicial review (which will depend on the facts of your case). The subject of judicial review is a complex area and no guide can ever set out all the factors relating to a particular case. This Guide is not therefore a substitute for detailed advice on your case. If you would like further explanation of any points in this Guide, please contact us.



## CHALLENGEABLE DECISIONS

### Which decisions can be reviewed?

The Court has the power to review a decision made by a public body to ensure that the decision was made properly and fairly. The definition of “public body” is a broad one and can cover all bodies which exercise a public function. Therefore the decisions of a local authority, an NHS Trust, a government body (such as HMRC) and a local planning authority are all potentially reviewable. The key is that the function carried out by the body whilst making the decision must be of a public, rather than a private, nature.

## PARTIES

### Who can bring a judicial review?

A claimant must show that it has a “sufficient interest in the matter to which the application relates” - known as “standing”. To do this, a claimant must show that it is affected to some degree by the decision which was made. Companies, individuals and even interest groups have been successful in claims for judicial review.

### Who can be a defendant?

A defendant can be any entity which was carrying out a public, rather than a private, function whilst making the decision which the claimant would like to review.

### Can there be any other parties?

Any person who is directly affected by a claim may in certain circumstances take part in proceedings. They are known as “interested parties”.

Where there is a public interest in proceedings, parties known as “interveners” may in certain circumstances participate (e.g. industry regulators).

## FOUNDATIONS

### The grounds include:

- **Irrationality** - This is where the Court considers that the decision made was so unreasonable that no reasonable authority could ever have come to it. It is a high threshold to reach. Alternatively, if the claimant can show that the body making the decision considered irrelevant issues, failed to consider relevant issues, or made a mistake of fact, a challenge may succeed.
- **Illegality** - This ground covers decisions which were made outside the scope of a body's powers, where a body wrongly exercised a power or where it got the law wrong.
- **Procedural impropriety** - Where a body has failed to follow a statutory procedure or has been biased in its decision-making, a decision may be reviewable under this ground.
- **Legitimate expectation** - In the event that a body makes a clear and unambiguous representation that it will act in a certain way and a claimant has reasonably relied on that representation, a claimant may be successful in a review where the body fails to act in line with that representation.

## COSTS

### Who pays the costs of a judicial review?

- The general rule is that the unsuccessful party will be ordered to pay the legal costs of the successful party. However the Court has a wide discretion and will consider many factors including whether the Protocol has been followed and whether any party has acted unreasonably. It is unlikely that a party will in any event recover 100% of its legal costs.
- Interested parties will not normally be able to recover their costs of the proceedings from the claimant or the defendant.

- Interveners cannot recover their costs from the parties but expose themselves to having to pay the costs of the successful party if the Court orders them to do so.
- In some judicial review cases, orders protecting the claimant from paying all or some of the costs of the defendant should the claim fail can be granted by the Court (known as judicial review costs capping orders or protective costs orders).

## REMEDIES

### What remedies are available?

All remedies are discretionary which means that even if a claimant shows that it has grounds for judicial review, the Court can decide whether to grant a remedy. The following remedies may be available:

- **Quashing orders:** Where the decision is set aside so that it needs to be re-considered.
- **Mandatory orders:** Where a body is ordered to make a decision in a certain way.
- **Prohibitory orders:** Where the body is restrained from making a decision in a certain way.
- **Declaration:** Where the Court makes a statement on the rights of the parties.
- **Damages:** Where a claimant is granted compensation for loss it has suffered. Damages will only be available if the claimant would be entitled to damages in an ordinary civil claim.

## PROCEDURE

### What is the procedure?

#### Pre-action Protocol

Parties are expected to comply with a protocol set by the Courts before issuing an application for judicial review (the "Protocol"). The Protocol, in summary, requires a claimant to set out in writing its proposed claim against the defendant and requires the defendant to respond in an attempt to narrow the issues over which there is a dispute.

#### Promptly

Generally speaking, an application for judicial review must be made "promptly" and therefore judicial review claims should be pursued as quickly as possible to reduce the risk of them being out of time. Adherence to the Protocol does not normally constitute a good reason for missing a deadline. In any event, an application in most cases must be made within three months of the decision which the claimant is seeking to review. However, the deadline can sometimes be shorter than this. For example, if it relates to a planning decision or a decision governed by Public Contract Regulations 2015 then the challenge period is 6 weeks. If you are considering bringing a judicial review, it is therefore important to seek advice as soon as possible after the decision is made and to take advice and act quickly on that advice. If you are defending a judicial review, raising any issues of delay may be an important element of a response.

#### Permission

An application for judicial review does not proceed automatically and is a two stage process. The first stage which the claimant must go through is to make an application for permission for judicial review. The application must be supported by a detailed statement of facts and grounds and a supporting witness statement. The defendant to the challenge (and any interested parties) in turn will have the opportunity to set out grounds for resisting the claim (see below). This aspect of the process tends to take 3 - 4 months. Cases which do not have an arguable case will not be granted permission to proceed to a substantive hearing.

## Proceedings and hearing

If permission is granted, a substantive hearing of the application will be held, usually within 9 - 15 months from issuing the application, albeit planning related judicial reviews are subject to particular target timescales imposed by the specialist planning court. The Court will consider the application in full and decide whether to grant a remedy (and if so what remedy) if the grounds for judicial review are upheld.

## DEFENDING A JUDICIAL REVIEW

### What steps must a defendant take to defend a judicial review?

#### Acknowledgment of service (“AOS”)

A defendant must file an AOS at Court within 21 days of being served with the Court proceedings. The AOS must contain a summary of the grounds for defending the claim.

#### Detailed grounds of defence

If permission is granted for the claimant to proceed, a defendant must file at Court detailed grounds of defence setting out why the application ought not to succeed. The detailed grounds must be accompanied by written evidence often in the form of witness statements and supporting documents.

#### Trial

A trial will be listed where the Court will consider the evidence in support and in defence of the application, although the Court will not normally require the witnesses to be present. Interested parties may also take part in the process and, where potentially detrimentally affected by a judicial review, often choose to participate alongside the defendant to defend the decision.

## ABOUT ASHFORDS

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Above all, we believe that every client should expect and receive value for time and value for money. Which means that we always aim to provide advice that is not just technically sound, but that is grounded in our understanding of your world.

### For further information please contact



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