

Supporting Parents of Children with additional needs in early education settings, schools and young people 16-25

Factsheet #25: Judicial Review

Judicial review is the procedure by which an individual can seek to challenge the policy, decision, action or failure to act of a public body. Bodies which are amenable to judicial review include government departments, local authorities or other body exercising a public function such as a CCG or an NHS Trust.

Grounds of Judicial Review and remedies

A challenge against a public body can be brought on a growing number of grounds. The main grounds of challenge in most judicial review cases are the following:

- **Irrationality / unreasonableness** – unreasonableness is where the decision is so “outrageous” or “absurd” that no reasonable body of persons could have reached it. This is one kind of irrationality – a more common example of an irrational decision is where the decision maker has failed to ask himself or herself the right questions, has failed to take account of all the relevant considerations or has taken account of irrelevant matters.
- **Illegality** – this is where a public body:
 - acts outside of its powers. This is known as acting “ultra vires”;
 - acts in breach of a requirement under a particular statute. This is the most common type of illegality – for example, a local authority may fail to arrange the special educational provision specified in a child’s EHC Plan, and thereby breaches the requirements of section 42 of the Children and Families Act 2014;
 - unlawfully fetters its discretion – for example, by using a blanket policy when deciding whether to carry out assessments without considering the merits of each individual case;
 - Error of law – meaning that the public body has misunderstood its legal obligations and needs to be corrected in its understanding of the law by the court;
 - Failure to provide reasons for its decision.
- **Procedural impropriety** – this includes a duty to act in accordance with rules of natural justice and procedural fairness and follow procedural requirements. Specific grounds under this heading can include:
 - Bias – both actual bias (very rare) and appearance of bias – as the law requires decision making both to be fair and to be seen to be fair.
 - Fairness – at its most basic meaning that two like cases should be treated in the same way.

- Legitimate expectation – where a public body says that it will act in a particular way, that representation may give rise to a legitimate expectation that the public authority will do as it said it would and the court may enforce this.
- Consultation – see separate factsheet on this specific duty.

Breach of Human Rights

- The vast majority of the rights contained in the European Convention on Human Rights are now part of English law as a result of the Human Rights Act 1998 and as a result it is unlawful for a public body not to act in accordance with those rights. The courts are much less likely to allow an application for judicial review which relies solely on another human rights treaty that has not been incorporated into English law, for example the UN Convention on the Rights of the Child.

Judicial Reviews are heard in the Administrative Court, a part of the High Court, which sits in locations across the country. Appeals in judicial review cases are heard by the Court of Appeal and then in the most important cases by the Supreme Court. Decisions of the Supreme Court trump all other decisions; decisions of the Court of Appeal trump those of the High Court.

If a judicial review challenge is successful, the court may:

- make a mandatory order (i.e. an order requiring the public body to do something);
- make a prohibiting order (i.e. an order preventing the public body from doing something);
- make a quashing order (i.e. an order quashing the public body's decision); or
- issue a declaration – a way in which the court can state what the law is and how the public body has got it wrong without directly interfering with the decision. The public body will be expected to take necessary steps to act in accordance with the declaration.

The most common types of remedies are quashing orders and declarations. It is very rare that the court will make a mandatory order unless there is really only one lawful course of action open to the public body and it refuses to take that action voluntarily.

In addition, the court has powers to grant interim relief (requiring something to happen / not to happen pending a final decision). For example, in a case where a family are arguing that their child is not being provided with suitable social care and that the local authority are therefore acting unlawfully under s2 Chronically Sick and Disabled Persons Act 1970, the court might order that some social care provision should be put in place on an interim basis pending the final hearing of the claim.

What types of decisions can be challenged?

In the context of Part 3 of the Children and Families Act 2014; the following types of decision could be challenged by way of judicial review:

- Failure to provide provision which is set out in the Plan (where there is an enforceable duty to provide it);
- The rationality and / or lawfulness of the contents of the social care and health sections of the Plan – as there is no right of appeal to the Tribunal in relation to these sections;
- Failure to comply with duties under the Local Offer – for example regarding its contents or failing to consult;
- Refusal to provide a personal budget or award direct payments;
- The use of a policy or eligibility criteria limiting access to assessment or provision which is arguably unlawful.

In all cases however, judicial review must be used as a last resort and the court will not grant permission unless it is satisfied that there is no suitable alternative remedy such as using the complaints process or appealing to the Tribunal.

Procedure and Time-limits

Before an application for judicial review can be issued, the claimant has to comply with the pre-action protocol which requires, where time permits, for the claimant to send a letter before claim and allow 14 days for a response.

The claimant must then obtain “permission” from the court to bring the judicial review claim. Permission is usually determined by a Judge considering the papers but sometimes an oral hearing is required. The test for permission is whether the claimant has an arguable case, and only once permission has been granted, can you proceed with the judicial review.

It is important to note that any judicial review challenge must be brought promptly and in any event **within three months of the original decision being challenged**. The court has discretion to extend time where it is fair and just to do so but it cannot be assumed that this will happen in any particular case. It is therefore important to consider at an early stage whether a formal complaint to the local authority and/or Ombudsman will provide a satisfactory remedy to the concerns or whether a legal challenge by way of a judicial review is more appropriate.

Subject to means and merits tests, legal aid is available to cover the legal costs of a Judicial Review and further information on legal aid is provided in a separate factsheet