



Government  
Legal Department

# JOYS

The Judge Over  
Your Shoulder



# A GUIDE TO THE LEGAL ENVIRONMENT IN WHICH DECISIONS IN PUBLIC BODIES ARE MADE.



The image used on the cover of this guidance is taken from a mosaic mural on the wall of the Cardiff Magistrates Court. It depicts Lady Justice, blindfolded and carrying her scales and sword. She is positioned in front of a banner, saying (in Medieval Welsh) 'yn nessaf y gellit y'r (g)wiryoned a iawnder', which translates as "as near as may be to truth and justice". It comes from the Laws of Hywel Dda (Hywel the Good), 880–950, a codification of traditional Welsh law, considered highly enlightened for its time, with an emphasis on compassion rather than punishment, plenty of common sense, and recognition of the rights of women. © Copyright Lewis Clarke and licensed for reuse under this Creative Commons Licence



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102 Petty France, London SW1H 9GL  
6th Edition originally published 2022

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**Susanna  
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**Treasury Solicitor and Head of the  
Government Legal Profession**

I am delighted to launch this 6th edition of the Judge Over Your Shoulder (JOYS) publication. As a lay person's guide to Administrative Law it is highly regarded across the legal profession and remains an important resource for civil servants advising Ministers and supporting government decision making.

The 2021 Declaration on Government Reform committed Ministers and Civil Servants to improving decision-making in Government. Transparency and the rule of law are at the core of this commitment, underpinning the delivery of first-class public services which meet the diverse needs and interests of citizens across the United Kingdom. The rule of law requires a balance of powers between the Government, Parliament and judiciary. Collaboration between government lawyers, civil servants, and ministers is crucial to maintain this balance.

Whether you regularly require legal support, or are engaging with a legal team for the first time this 'just in time' guidance is aimed at helping you navigate the legal frameworks within which public bodies, particularly Government, make decisions. Drafted by expert lawyers from across the Government Legal Profession it provides guidance on legal concepts such as consultation, proportionality and justiciability that often crop up in our work. It is particularly useful in the event of a legal challenge, as it serves to guide you through the basic judicial review procedure

This latest version is more modern and user friendly based on feedback from Civil Service colleagues – for which many thanks. It also reflects the significant legal changes of recent years, for example the Judicial Review and Courts Act 2022, our departure from the European Union and the case examples reflect the most up-to-date legal position, with key insights from government lawyers.

I hope you find this latest version of JOYS valuable in enhancing your understanding of the legal issues inherent in the delivery of government priorities and services, and helping you manage the legal risks you may encounter whilst working in a Modern Civil Service.

A handwritten signature in black ink that reads "Susanna J" followed by a long horizontal flourish.

**The Judge Over Your Shoulder (JOYS) is designed for the Civil Service — whether you are advising ministers on their decision making, have had something delegated to you by a minister to decide, or are taking a decision that is one for civil servants to make.**

JOYS is correct as at May 2022 but the law is constantly evolving through the courts and government policy and legislation, so referring to your departmental lawyers is important. JOYS is not legal advice and it cannot replace the legal advice that your departmental lawyer gives. However, it is designed to help you to understand the context in which the Government Legal Profession works, and to enable you to prepare questions for us as your legal advisers.

Your departmental lawyers in the Government Legal Profession are trained to advise on legal risk as part of their work advising government. This takes many different forms. The key is that their role is to help civil servants and ministers by identifying and quantifying risks and finding solutions and mitigations, as needed. This can include advising on the likelihood of litigation being brought (including a judicial review), on the chances of it being successful, and on its impact. This is all designed to help the decision maker and achieve good administration. This guidance does not explain what ‘good administration’ is: rather, it explains how decisions may be considered by the courts in their role of supervising public bodies carrying out their public functions.

The guidance is presented in 6 sections, and at relevant points throughout the guidance, you will find panels offering a **case example** or a **defined term** to assist your understanding.

## **1 Good administration — and administrative law**

JOYS begins by explaining what is administrative law: it should give you a general idea about how the law will apply to you as a civil servant. It is important that you understand this, because it is where people or organisations can bring legal cases against the government.

## **2 Decisions and decision making**

This sets out legal information about decisions and decision making, starting with what the courts consider to be a decision and then going through how decisions must be made.

This covers how decisions must be made procedurally fairly, how legal powers must be exercised, what factors must be taken into account when can decisions be delegated, and when you must give reasons for your decisions. It also covers a lot of the legal concepts that the courts have considered when people or organisations have brought legal claims against the government, for example: proportionality, consultation, bias, human rights and discrimination.

People can bring legal claims about decisions that you may have made or been involved in as a civil servant, and you may be responsible for ensuring that others, including ministers, make legally sound decisions. It is important that you understand the ways that decisions may be challenged so that you can understand how to minimise the risk of challenge.

Following these principles should help you to make better decisions and policies.



### 3 Judicial review

Here, we give full details about judicial review. Judicial review is the legal name for a type of legal claim brought by people or organisations against public bodies.

Judicial review claims are different to other types of legal claims where one person may be seeking money from another (in a civil law claim), where one person may be asking for custody of a child from another (as in family law), or where the Crown brings a prosecution against another (criminal law).

Judicial review claims are brought to the Administrative Court or Upper Tribunal in the first instance against public authorities including Central Government Departments to challenge the lawfulness of their decision, action or inaction.

This section sets out how that process happens, going through each stage. It also explains about the **duty of candour and disclosure** in such claims. Witness statements and evidence in judicial review claims are explained. The options that the court has when making a decision about a judicial review claim is in the part headed 'Remedies' — this is the legal term for what the outcome may be.

This section will be most important if you are involved in a decision of the government which is being challenged, but it can also help you to see why you must try to minimise the risk of a legal challenge to decisions you are involved in, and how best to do this.

### 4 The public sector equality duty (PSED)

The public sector equality duty is a legal obligation from the Equality Act 2010. It requires public bodies to think about the equality implications of decisions.

It is important that you understand this obligation, and the section includes practical tips.

There are other duties that public bodies must consider when making policy, such as the Family test and taking into consideration the Environmental principles. These are not covered here, but more information is available about them on gov.uk and you should seek advice from your departmental lawyers about how they apply in context.

### 5 Devolution

The devolution process gave legislative competence (law-making power) in certain policy areas to three territorial legislatures: Scotland, Wales and Northern Ireland.

### 6 EU exit and EU relations

Although the UK is no longer a member of the EU, EU-derived law continues to impact on our decision making procedures. This section will help you to understand how you need to be aware of the EU-related legal environment when developing policy, considering legislative proposals or making decisions.

### Appendices

At the end of this guidance, you will find a classification of ECHR rights in the Human Rights Act 1998, also details on where you can find out more information. Please remember that you are able to contact your departmental lawyers for legal advice, in line with your department's procedures for doing so, and that our purpose is to help the government to **govern well, within the rule of law**.



# CHECKLIST FOR MAKING DECISIONS

## Step 1

### Prepare: getting ready to decide

- 1 Where does the power to make this decision come from and what are its legal limits?
- 2 For what purposes can the power be exercised?
- 3 What factors should I consider when making the decision?
- 4 Is there a policy on the exercise of the power?
- 5 Does anyone have a legitimate expectation as to how the power will be exercised?
- 6 Can I make this decision or does someone else need to make it?
- 7 Has devolution affected the power?
- 8 Will I be complying with human rights law?
- 9 Will I be complying with retained EU law?
- 10 Will I be complying with equality legislation?
- 11 What are my environmental duties?
- 12 What are the financial implications of the decision?

## Step 2

### Process: Investigate and gather evidence

- 13 Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?

- 14 Have I consulted properly?
- 15 Will I be acting with procedural fairness towards the persons who will be affected?
- 16 Could I be, or appear to be, biased?
- 17 Am I handling data in line with Data Protection and Freedom of Information obligations?

## Step 3

### Decide: taking the decision

- 18 Have I taken necessary considerations into account, and is my decision reasonable?
- 19 Does the decision need to be, and is it, proportionate?
- 20 Are there decisions where the courts are less likely to intervene?

## Step 4

### Notify: notifying others of the decision

- 21 To what extent should I give reasons for the decision?

## Step 5

### Respond: responding to challenge

- 22 What type of legal challenge can a decision maker face?
- 23 What are the parties' duties to the court?
- 24 What is specification of documents and what do I need to do?

This checklist is taken from *Right First Time: a practical guide for public authorities to decision-making and the law*, 3rd edition, produced by the Scottish Government, 2021.



# 1. GOOD ADMINISTRATION AND ADMINISTRATIVE LAW





**1.1** All public bodies should aim to practise ‘good administration’: i.e. to perform their public duties speedily, efficiently and fairly.

**1.2** ‘Public bodies’ describes a range of bodies exercising public, often statutory, functions. Examples include: central government departments, non-ministerial departments, non-departmental public bodies, arm’s-length bodies, executive agencies, devolved administrations, NHS bodies and local government.

### What is ‘administrative law’?

**1.3** Administrative law is the branch of law that governs the relationship between government and citizens. The basis on which the courts consider how public bodies have exercised their public functions.

**1.4** Public law includes both constitutional law and administrative law. In contrast, private law governs the relationships between private individuals or private bodies and also public bodies acting in their private capacity. An example of private law is the law of contract.

**1.5** Administrative law includes an extensive body of case law in which the courts have developed legal principles

and legislation.

**1.6** Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers; some of them are:

- **legality** — acting within the scope of any powers and for a proper purpose. To act lawfully, the department must have the legal power to do what it intends to do. If it does not, it will be acting *ultra vires*, or outside its powers: i.e. it will be acting unlawfully. Where the power does exist, it will usually be found in primary legislation (an Act of Parliament) or subordinate or secondary legislation (such as a statutory instrument)
- **procedural fairness** — for example, to give the individual an opportunity to be heard
- **reasonableness or rationality** — following a proper reasoning process and so coming to a reasonable conclusion
- **compatibility with the ECHR rights**

## DEFINED TERM

### Public body

A comprehensive list of ‘public authorities’ for the purposes of the Freedom of Information Act 2000 is contained within Schedule 1 to the Act, to be read with section 3. Schedule 19 of the Equality Act 2010 also sets out a list of public authorities for the purposes of that Act.

The lists of public bodies in FOIA 2000 and EA 2010 are not comprehensive lists of all bodies whose decisions may be subject to judicial review.

Further information on public bodies is provided on the [gov.uk website](http://gov.uk).



## Administrative law can also apply to private bodies

**1.7** There is no clear dividing line between public law and private law. The activities of private bodies may sometimes be governed by public law if the bodies carry out public functions. Generally, all bodies (including private bodies) are said to be performing public functions when they act, and have the authority to act, for the collective benefit of the general public (and thus must comply with administrative law).

**1.8** Sometimes bodies which are obviously public bodies— such as government departments — engage in

activities which are governed by private law. For example, if a government department enters in a contract for the provision of IT equipment, the contract with a supplier will be governed by the terms and law of the contract — but the decision of the department to put the contract out to tender, or some aspect of the tendering procedure, may well be governed by public law.

**1.9** It is not always easy to see where private law ends and public law begins. The court will examine each case to see how far public law functions are involved; for example, where a process is set out in regulations, it is more likely that managing the process is a public law function.

### DEFINED TERM

#### Ultra vires

This term literally means ‘beyond the powers’ in Latin. For example, if a decision maker acts outside their power for a purpose that the power was not created to achieve, that action (often in the form of a decision) will be *ultra vires*.

#### ECHR rights

These are rights from the European Convention on Human Rights as incorporated into UK law and set out in Schedule 1 to the Human Rights Act 1998. These rights are not affected by our exit from the EU. [For more details, see Appendix 1.](#)



## **2. DECISIONS AND DECISION MAKING**



## What constitutes a decision?

**2.1** Decisions by public bodies may be challenged through the court procedure known as **judicial review** — a mechanism by which decisions of public authorities may be challenged and their powers clarified or confirmed.

**2.2** ‘Decision’ is a wide concept. The definition from Rule 54.1 (2)(a) of the Civil Procedure Rules (the rules of court that all parties in civil claims must follow) is that a claim for judicial review means a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function.

**2.3** What constitutes a ‘decision’ is wide ranging and can include an act or failure to act. For example:

- a decision to detain an individual in immigration detention
- a decision to reorganise schools in a particular area
- a decision to assign a security categorisation to a prisoner

- a decision to award a public contract to a particular company

**2.4** The courts have also held that judicial review extends to, amongst other things, the following:

- statutory provisions, e.g. a declaration of incompatibility with the Human Rights Act 1998
- subordinate legislation — regulations, orders, statutory instruments
- exercise of discretionary powers
- policies
- reports and recommendations
- advice or guidance
- procedures used when making decisions, e.g. a challenge to whether a consultation process has been adequate
- inaction, e.g. a challenge to a failure to issue guidance
- delay, e.g. a challenge to a delay in making a decision regarding an individual’s application for leave to remain in the UK

## DEFINED TERM

### Judicial review

Judicial review is the procedure by which people or organisations can apply to ask the Administrative Court or Upper Tribunal to review decisions of a public body and the court decides if they are lawful (more detail is given in Chapter 2 about the procedure).

### Statutory

‘Statutory’ refers to things set out in legislation, which include Acts of Parliament and regulations, orders, etc.

### Human Rights Act

The Human Rights Act 1998 brought the rights from the European Convention on Human Rights into domestic law and gave people the right to bring claims in UK courts for breach of human rights.



## CASE EXAMPLE

***In R. (on the application of A) v Secretary of State for the Home Department [2021] UKSC 37*, the Supreme Court considered the correct approach to the judicial review of policies.**

The appeal concerned non-statutory guidance on the Child Sex Offender Disclosure Scheme, which had been issued by the Home Office to police forces in England and Wales. The scheme provides that a concerned person can ask the police for information about whether a specific individual has a history of child sex offending. If the police consider that the individual poses an identified risk to a particular child, they can disclose relevant information to the child's parent or guardian (or to another person who is in a position to take steps to protect the child).

A (who was appealing) is a convicted child sex offender. He was concerned about the potential for information about his offending to be disclosed under the scheme. In particular, A argued that the Home Office guidance was unlawful as it did not require the police to seek

representations from the sex offender before making disclosures about him, so the challenge was to the guidance itself.

The Supreme Court decided that there are three situations where a policy might be unlawful because of what it says (or omits to say) about the law when giving guidance to others:

- where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way
- where the public body which promotes the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position
- where the public body purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position

## DEFINED TERM

**Public body**

A comprehensive list of 'public authorities' for the purposes of the Freedom of Information Act 2000 is contained within schedule 1 of the act, to be read with section 3. Schedule 19 of the Equality Act 2010 also sets out a list of public authorities for the purposes of that Act.

The lists of public bodies in FOIA 2000 and EA 2010 are not comprehensive lists of all bodies whose decisions may be subject to judicial review.

Further information on public bodies is provided on the [gov.uk](https://www.gov.uk) website.



## Decisions: the exercise of discretion

**2.5** The government, through each of its ministers departments, must govern within the powers and duties it has been given. Today, most of those powers and duties are derived from statute (Acts of Parliament), but a small category come from the Royal Prerogative.

**2.6 Powers** are different from **duties**. The exercise of a power is always subject to the discretion of a decision maker. Duties are mandatory, requiring a particular function to be exercised in a certain way: they lack the discretionary element of a power.

**2.7** When considering whether a decision maker is able to exercise discretion in a particular way, the starting point will always be to look at the power itself; for example, a provision in an Act of Parliament. The power may expressly limit the way in which discretion should

be exercised (for example, by placing a cap on the amount that may be payable under a statutory compensation scheme), but even where a power appears to be unlimited, its lawful exercise will be subject to a range of implied factors, including but not limited to:

- principles established by the court, derived from public law cases, e.g:
  - the need to exercise the power reasonably
  - the need to exercise the power for the purpose for which it was provided
  - the need to take relevant factors into account when reaching a decision, and not to take into account irrelevant factors
- other express limits contained in other statutes (e.g. the Human

## DEFINED TERM

### Statute

A statute is an Act of Parliament — for example the Ivory Act 2018. We use the term ‘statutory’ to describe something that is in a statute — for example, the Ivory Act 2018 include statutory powers to make regulations about the exceptions to the prohibition on dealing in ivory.

### Royal Prerogative

These are powers which are exercised by ministers. They were described in the case of *R. (on the application of Miller and another) (Respondents) v Secretary*

*of State for Exiting the European Union (Appellant)* [2017] UKSC 5 as follows:

“The Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation.”

### Equality Act

Equality Act 2010 — this brought together all previous equality legislation and includes prohibitions on discrimination and a duty to have due regard to the public sector equality duty.

Rights Act 1998 and the Equality Act 2010)

**2.8** When considering the limits of a power, the language used in setting out the power should bear its natural English or Welsh meaning. Sometimes the language used can support different interpretations, in which case it will be necessary to consider how those providing the power (e.g. Parliament) intended it to be used. This may require research on the general purposes of the statutory scheme in question, or even consulting *Hansard* to see what was said in Parliament when the provision was enacted. Additionally, there may already be court decisions (in addition to those generally applicable principles referred to above) which deal with the interpretation of the specific provision.

**2.9** Importantly, the Human Rights Act 1998 adds a further dimension to interpreting legislation. So far as it is possible to do so, legislation must be read and given effect to in a way which is compatible with ECHR rights.

**2.10** In considering whether a decision is lawful where Parliament has given the discretion to a particular decision maker, the court will respect the fact that the discretion remains with the

decision maker, and it is not for the court to exercise that discretion instead. The practical effect of this approach is that where the court finds that the decision was unlawful (on any of the grounds explained below) and that it has to be reconsidered, the court will not generally substitute its own view on how the power should have been exercised. Instead, the court will usually 'quash' the faulty decision and order it to be remade by the decision maker. In doing so, the sovereignty of Parliament is respected.

### Unreasonableness or irrationality

**2.11** Where a decision maker can exercise discretion in making a decision, that decision must be **reasonable** and **rational**. The terms 'reasonableness' and 'rationality' are used interchangeably by the courts. Where a court is asked to judicially review a decision, the person challenging the decision may say that it is unreasonable. This is not always easy to prove but care should be taken to minimise the risks of a challenge.

**2.12** The term 'reasonableness' includes an implicit recognition that there can be various ways in which a decision maker might exercise a particular discretion. The courts have recognised that when two

## DEFINED TERM

### ***Hansard***

The official report of all Parliamentary debates.

The courts sometimes refer to *Hansard* when they interpret Acts of Parliament (the circumstances in which the courts can use *Hansard* to interpret legislation are set out in what is sometimes called

the **Pepper v Hart** rule, and there are more details later, in the [Parliamentary privilege case example](#)).

### **Quash**

When the courts reject a decision as legally invalid. Where a decision is quashed, the decision is treated as if it had never been made.



reasonable persons are faced with the same set of facts, it is possible for them to come to different conclusions. A range of lawful decisions may lie within the discretion of a decision maker. Provided that the decision was rationally open to a reasonable decision maker in possession of all the facts in the case, if challenged, the courts should uphold it as reasonable.

**2.13** The courts have provided guidance regarding the circumstances in which a decision will be considered as unreasonable or irrational as follows:

- "...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". (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1. This case coined the term 'Wednesbury unreasonableness')
- "By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". (*Council of Civil Service Unions and Others Appellants and Minister for the Civil Service Respondent* [1985] A.C. 374)
- "The decision to impose the general ban is also within the range of reasonable decisions open to a decision maker. It follows that there is no sustainable ground on which the validity of the administrative decision can be challenged".

(*Boddington v British Transport Police* [1998] UKHL 13)

**2.14** The threshold for a decision to be considered as unreasonable or irrational is high, and traditionally the circumstances in which the courts have intervened to quash decisions on this ground are limited. This is particularly the case where the decision maker is using professional judgment or technical expertise. Additionally, where the exercise of discretionary powers involves a large element of political, social and economic judgment, the courts will be slower to find that a particular decision was so unreasonable as to be unlawful.

**2.15** The courts have, however, developed their approach to the question of whether a decision is unreasonable, calibrating the standard of reasonableness according to the circumstances and context of the case. Where there is an interference with a fundamental freedom, a court is required to tailor the level of scrutiny according to the level of the interference, and significant interference with a fundamental freedom would require substantial objective justification *R. (on the application of Mahmood) v Secretary of State for the Home Department* [2000] EWCA Civ 315).





## CASE EXAMPLE

**The case of *R. (on the application of Naidu) v Secretary of State for the Home Department* [2016] EWCA Civ 156, illustrates how this ground has been used.**

In this matter, an applicant had been refused a business visitor visa on grounds that he had submitted a false document in his first application. In making a second application, the applicant submitted considerable additional material to support his application. However, the second application was rejected on the

basis that the first application had been rejected. The second decision made no reference to the additional information presented but focused exclusively on the fact that the first application had been rejected because the applicant had submitted a false document.

The court ruled that it was *Wednesbury* unreasonable and irrational to decide the second application automatically on the basis of the first decision despite the different evidence presented.

## CASE EXAMPLE

**In the case of *Secretary of State for Work and Pensions v Johnson and others* [2020] EWCA Civ 778, the claimants successfully challenged the Secretary of State's decision on irrationality grounds.**

This case concerned how a new system of Universal Credit which provides social security benefits was implemented. The method used of calculating the income earned in a certain monthly assessment period, which in turn determined the claimants' social security benefits, did not accommodate fluctuations in pay date (which happened when a pay date fell on the weekend or a bank holiday). This resulted in significant variations in claimants' monthly social security benefits which had an adverse affect on the claimants. In all, the Court of Appeal ruled

that the way the department calculated Universal Credit awards involving earnings in an assessment period was a correct application of the regulations, but that not considering the impact on the specific cases of those paid calendar monthly who are affected by 'a non-banking day salary shift' was irrational.

Lady Justice Rose of the Court of Appeal stated that "the threshold for establishing irrationality is very high, but it is not insuperable. This case is, in my judgment, one of the rare instances where the Secretary of State for Work and Pensions' refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable Secretary of State for Work and Pensions would have struck the balance in that way".



## Is the power being exercised for a lawful purpose?

**2.16** As well as having the power to act, a decision maker must use the power for a lawful purpose. If a public body acts outside its power for a purpose that the power was not created to achieve, the action will be *ultra vires* (beyond its powers), regardless of whether that purpose is considered in the public interest. Discretionary power must be exercised for the purposes for which it has been given.

**2.17** The purpose of the power may be expressly set out in legislation, or

it may be implied from its objectives. If the legitimate purposes for which a power can be exercised are specified by statute and those stated purposes are considered exhaustive, any exercise of that power to achieve a different object will be pronounced unlawful. If the permitted purposes are left unspecified, or are not exhaustively specified, by statute the courts may ultimately be left to determine what, if any, are the implied restrictions on the purposes for which the power is exercisable, consistent with the spirit of the enabling Act.

### CASE EXAMPLE

**In *Trafford v Blackpool Borough Council* [2014] EWHC 85 (Admin) a council was not entitled to use its statutory contractual powers under section 123 of the Local Government Act 1972 (which allows councils to dispose of land held by them in any manner they wish) for the sole or dominant purpose of punishing a solicitors firm that had brought a substantial number of personal injury claims against the council.**

In November 2012 the council refused to consider an application to grant a new tenancy to the claimant's law firm for office space in the council owned building, taking account that the claimant's firm had 'submitted several tripping claims against the council on behalf of clients'. The claimant challenged

the council's decision on various grounds including improper/unauthorised purpose.

The court held that the council had failed to exercise its legal power to dispose of land for the purpose for which it was conferred. The court's judgment noted that: 'The exercise of a power with the sole or the dominant intention of punishing the claimant and subjecting her firm to a detriment, in circumstances where there was no evidence that the claimant was actually doing anything at all unlawful or improper, was in my judgment the intentionally improper exercise of the power conferred on the defendant and the exercise of that power for unauthorised purposes.'

Consequently, the decision was 'fundamentally tainted by illegality' and was quashed.

## CASE EXAMPLE

**In April 2014 the government introduced an amendment to the Civil Legal Aid (Remuneration) Regulations 2013, establishing a ‘no permission, no fee’ arrangement for making a legally aided judicial review application. The changes also meant there would be no entitlement to payment where permission has neither been granted nor refused, for example where the claim has been settled or withdrawn.**

*In R. (on the application of Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), four law firms and a charity brought a judicial review challenge to these regulations.

Having regard to the Lord Chancellor’s purpose in bringing in the regulations, which was to incentivise lawyers to focus efforts only on meritorious cases by ensuring that payment would not be made

(subject to discretionary exceptions) in cases where the merits were not such as to lead to permission being granted, the court identified a number of scenarios where a case may never reach the permission stage, or permission might be refused, because of factors wholly outside the control of the claimant or his representatives.

The High Court concluded that the amended regulations were incompatible with the purposes of the enabling legislation, the Legal Aid, Sentencing and Punishment of Offenders Act 2012, as they did not further the act’s purpose of incentivising legal aid providers to reflect on the merits of a case before applying for judicial review.

The regulations were therefore found to be unlawful.

**2.18** The use of statutory powers to impose penalties in respect of conduct of which the decision maker does not approve will be quashed (set aside) where that is not a legitimate purpose, as will the improper use of a power to obtain financial benefits, or the use of a power for illegitimate political purposes.

**2.19** Where a power is exercised for purposes partly authorised and partly unauthorised by law, the courts generally seek to identify the dominant or true purpose for which a power is exercised. If that purpose is permitted, the exercise will be lawful even though some secondary or incidental advantage may be gained for a purpose outside the authority’s powers. Alternatively, the courts will

ascertain whether the decision to exercise the power was significantly influenced by the existence of the unauthorised purpose, and if it was, quash the exercise of the power on the ground that it was exercised having regard to an irrelevant consideration.

**2.20** However, the courts have accepted that a public body has a power to undertake tasks ‘conducive to’ or ‘reasonably incidental to’ a defined purpose. For example, a power for a decision maker to hold a public hearing to assist in reaching their decision will extend to a power to hire accommodation for that hearing as it is reasonably incidental to that purpose.



## What factors should inform the decision?

**2.21** In addition to the above, for a decision to be lawful, the decision maker must:

- not have exercised his discretion on the basis of irrelevant factors; and
- have taken into account relevant factors

**2.22** Failure to follow either of the above rules will usually lead to a decision being held to be unlawful.

**2.23** Even where there is an apparently unfettered discretion enabling the minister

to make a decision, that decision must be made on the basis of relevant matters and must not take into account irrelevant matters. The exercise (or even the non-exercise) of discretion also must not frustrate the overall policy of the legislation from which the power to decide is derived (known as the **Padfield principle** from the case *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1. The question as to what is relevant will be a question of fact and law — see below for the summary of factors to be considered.

## DEFINED TERM

### Statutory

‘Statutory’ refers to things set out in legislation, which include Acts of Parliament and regulations, orders, etc.

### Quash

When the courts reject a decision as legally invalid. Where a decision is quashed, the decision is treated as if it had never been made.

### Fettering discretion

When a public body is given a discretion to make a decision, (that is, to choose from different options before making a decision) but somehow binds themselves so they cannot use that discretion, for example by rigidly adhered to a policy it has formulated rather than considering decisions based on the circumstances.

## CASE EXAMPLE

**In *R. (on the application of National Association of Health Stores and another) v Department of Health* [2004] EWCA Civ 154, challenge was brought against a ban of a herbal substance through secondary legislation. The claimant submitted that the minister decided upon that ban not knowing that the ban was opposed by a leading expert based on cogent grounds including detailed analysis.**

The Court of Appeal found that whilst the full details of the expert opposing the ban were not disclosed to the minister making the decision, sufficient information was disclosed by way of an explanation

of the opposing view and a summary of the objections made. Although the extra information may have been useful, it was not essential information that the minister needed to be aware of to make the decision.

The court approved the views of the High Court of Australia in a case where the judge made it clear that the minister couldn't be expected to read all the relevant papers for himself and it wasn't unreasonable to rely on a summary of relevant facts provided the summary contained all the material facts which were not insignificant or insubstantial.

## CASE EXAMPLE

**In *R. (on the application of Evans) v Lord Chancellor* [2011] EWHC 1146 (Admin), the Secretary of State for Justice exercised powers under the Access to Justice Act 1999, to restrict the availability of legal aid for judicial review claims brought in the public interest where there was no direct benefit to the claimant.**

Evans, a civil liberties campaigner, challenged that decision. A consultation considering the decision stated that limited legal aid funds should not be spent on such cases. However, it did not refer to concerns expressed by the Ministry of Defence that adverse results in cases challenging military intervention in Iraq

(such as an earlier case brought by Evans) could negatively impact defence, security and foreign policy interests.

The court held that while it was open to the Secretary of State for Justice to make the changes for proper reasons, it was not open to him to deny funding to avoid the consequences of an adverse finding. The Secretary of State for Justice had improperly taken into account the concerns of the Secretary of State for Defence, and those concerns were material to his decision to make the amendments to the availability of legal aid for this category of judicial review.

The decision to amend legal aid was quashed.

**2.24** If a decision maker is exercising statutory powers, the statute may set out certain matters which the decision maker is obliged to take into account. For example, section 70(2) of the Town and Country Planning Act 1990 stipulates that, when dealing with an application for planning permission, a local planning authority must have regard to (among other things) the provisions of a development plan, so far as material to the application.

**2.25** Where a statute sets out matters which a decision maker must take into account, this does not necessarily mean that these are the only factors which should (or may) be taken into account.

**2.26** If the statute is silent on what is relevant to a decision maker, then it is for the decision maker to decide what factors are relevant and should be taken into account. This could then be challenged in the courts, if the decision maker acted irrationally in deciding what factors to take into account.

**2.27** If a decision or action will touch on an ECHR right, you must consider if what is proposed is compatible with that right. If it is not, the decision or action will usually be unlawful unless the duty under primary legislation means a different course of action is impossible. Failure to recognise that ECHR rights are affected may itself be a failure to take account of a relevant factor.

### CASE EXAMPLE

**The applicable principles on relevant/irrelevant considerations were summarised by the Supreme Court in *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd [2020] UKSC 52*:**

- There are three categories of consideration, namely (i) those which statute expressly or impliedly identifies as considerations to which regard must be had; (ii) those which statute expressly or impliedly identifies as considerations to which regard must not be had; and (iii) considerations to which the decision maker may have regard if in their judgment and discretion they consider it right to do so.
- A decision which fails to take into account considerations in the first category, and/or which takes into account considerations in the second category, will ordinarily be held to be

unlawful (subject to considerations of materiality):

- In relation to the third category of consideration, an obligation to take into account a consideration that is not expressly or impliedly identified by statute will only arise if the consideration is “*so obviously material*” that a failure to take it into account would be *Wednesbury* unreasonable.
- Providing all relevant considerations are taken into account, and no irrelevant considerations are taken into account, the weight to be given to any particular consideration is a matter for the decision maker, subject to the test of rationality (i.e. *Wednesbury* unreasonableness). It is in principle open to a decision maker to decide that no weight should be given to a particular consideration, notwithstanding that it is relevant.



**2.28** The facts on which the decision or action are based must be accurate and up to date. Further, the factors that influenced the decision should be recorded.

**2.29** In summary, things to think about when taking a decision include:

### **Power to take the decision**

What is the purpose of the power to take the decision?

Are the reasons for taking the decision in accordance with the power?

Is the decision being made one for which you have the power?

### **Influencing factors**

What factors must be taken into account?  
What factors may be taken into account?  
Are the facts relied upon accurate?

Have you sought input from those with up to date information? Have you consulted appropriately? Where representations have been made, have you taken account of them (including views opposing the preferred view) and is it appropriate to do so?

Has anything irrelevant been considered?

### **Making the decision**

Procedural fairness and correctness: has a fair procedure been followed?

Is the decision free from bias, or the appearance of bias?

Is the decision maker impartial and independent?

### **Additional duties**

Has the Equality Act been complied with?

Is there any foreseeable conflict with human rights (e.g. are any ECHR rights engaged)?

Does this decision breach any legitimate expectation?

Has discretion been appropriately and proportionately applied?

Has any relevant policy been complied with? Or is there is a good reason for departing from policy in the case at hand?

### **Recording the process**

Have the above points been recorded?

## **DEFINED TERM**

### **ECHR rights**

These are rights from the European Convention on Human Rights as incorporated into UK law and set out in Schedule 1 to the Human Rights Act 1998. These rights are not affected by our exit from the EU. [For more details, see Appendix 1.](#)

### **Statute**

A statute is an act of Parliament — for example the Ivory Act 2018. We use the

term ‘statutory’ to describe something that is in a statute — for example, the Ivory Act 2018 include statutory powers to make regulations about the exceptions to the prohibition on dealing in Ivory.

### **Equality Act**

Equality Act 2010 — this brought together all previous equality legislation and includes prohibitions on discrimination and a duty to have due regard to the public sector equality duty.



## Proportionality

**2.30** Proportionality is about balancing different interests. Proportionality is not a freestanding ground of judicial review — rather, it is an aspect of some specific grounds of Judicial Review, principally in relation to certain ECHR rights. It is separate from **Wednesbury reasonableness**.

**2.31** Proportionality is a standard of review applied by the courts to determine the lawfulness of a public authority's justification for infringing rights. It engages judges in the merits of public decision making more closely than traditional

standards of review and the courts generally approach the question of proportionality cautiously. Nonetheless, proportionality is increasingly regarded as the appropriate standard of review in a range of public law claims.

**2.32** The broad aim of the proportionality principle is consistent across the various legal contexts in which it arises: it seeks to balance private interests adversely affected by measures taken by public authorities against the public interests which those measures are intended to promote.

### CASE EXAMPLE

***In R. (on the application of British American Tobacco (UK) Ltd.) v Secretary of State for Health* [2016] EWHC 1169 (Admin), the claimants challenged as unlawful the Standardised Packaging of Tobacco Products Regulations 2015 (SI 2015/829).**

These regulations introduced standardised tobacco product packaging into the UK. Proportionality was considered in the context of grounds of challenge based on EU law and the Human Rights Act.

The claimants' challenge was on the basis that the regulations would be unsuitable, would not achieve their stated aim and would be counterproductive; their evidence was based on the Australian data on plain packaging. Further, they

contended that regulations were not necessary since other, less extreme measures were available and could have been adopted by the government.

The court considered that the evidence adduced by the Secretary of State supported the suitability and appropriateness of the regulations and therefore it rejected the claimants' submission that their evidence was compelling.

It is sometimes said that the courts apply a 'greater intensity of review' where (in particular) human rights are engaged: in other words, the courts lower the standard. This is because cases from the European Court of Human Rights have brought the principle of **proportionality** into UK decision making.



## CASE EXAMPLE

**In *R. (on the application of Daly) v Secretary of State for the Home Department [2001] UKHL 26*, the Secretary of State introduced a new prison cell search policy. The policy stated searches should take place in the prisoner's absence and should include an examination (without reading) of the prisoner's correspondence with his legal advisers to ensure nothing had been written or secreted in it which endangered security. D sought judicial review of the decision to examine his legally privileged correspondence in his absence.**

The House of Lords (now the Supreme Court) held that the possibility that

prison officers might read D's legal correspondence was an infringement of the legal privilege which he enjoyed at common law; and the application of the blanket policy to him without evidence of misconduct on his part was an intrusion that was greater than was justified.

Further, the policy was a breach of D's Article 8 rights under the Convention. Article 8 (right to private life) was not an absolute right but any interference had to be no greater than was necessary in the interests of public safety and the prevention of disorder or crime.

The interference in this case was held to be 'disproportionate' to the aims of public safety and prevention of crime.

**2.33** In the above case, on either basis (i.e. under both the *Wednesbury* reasonableness principle and the proportionality principle), the application of *Wednesbury* reasonableness and proportionality principles were applied in parallel and produced the same result, with both these points applying:

- the interference with the ECHR right was disproportionate because it was greater than was necessary in the interests of public safety and the prevention of disorder and crime
- the court said that although the same result was arrived under both principles in this case that would not always be so, because the intensity of review was greater under the proportionality approach

**2.34** The courts have developed the principle of proportionality as applied to ECHR rights and as distinct from *Wednesbury* reasonableness. The court has shown that where ECHR rights are concerned, it is willing to carry out a more

detailed analysis of the facts in a case, in order to determine the answers to four central questions:

- whether the legislative objective of a measure is sufficiently important to justify the limitation of a fundamental right
- whether the measure is rationally connected to the objective
- whether a less intrusive measure could have been used, or it is no more than necessary to accomplish the objective
- whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community

**2.35** This approach remains short of a review of the merits of a decision. However it is clear that the courts' approach to an issue of proportionality under the Convention goes beyond that traditionally adopted in judicial review



in a domestic setting. The intensity of review is greater than was historically appropriate and the courts will make a value judgment of the decision or

measure under challenge by reference to the circumstances prevailing at the relevant time.

## DEFINED TERM

### **The Convention, or the ECHR**

The European Convention on Human Rights.

### **Defined term: ECHR rights**

These are rights from the European

Convention on Human Rights as incorporated into UK law and set out in Schedule 1 to the Human Rights Act 1998. These rights are not affected by our exit from the EU. For more details, see Appendix 1.

## CASE EXAMPLE

***In R. (on the application of Lord Carlile of Berriew QC and others (Appellants) v Secretary of State for the Home Department (Respondent) [2014] UKSC 60, R (an Iranian dissident politician) was excluded from the UK.***

The appellants wanted R to attend Westminster to discuss Iranian policy issues and asked the Secretary of State to lift the ban, so as to allow R to enter the UK. The Secretary of State took advice from the Foreign Office and concluded that Iran would view allowing R to enter the UK as an aggressive political move, and would be likely to engage in reprisals risking British nationals. The appellants challenged the refusal to allow R to enter the UK on the basis that it violated their right to freedom of expression in breach of their rights under Article 10 of the Convention.

The Supreme Court confirmed that R's exclusion amounted to an interference with Article 10 and considered whether the interference was justified as a proportionate response to the predicted threat (to the interests of Britain and its nationals).

The Supreme Court held that all the following applied:

- interference with an ECHR right was justified if it was made in order to protect the democratic values of British society from the actions of a repressive regime
- the courts would not usually undermine the decisions of the executive, but the effect of the Human Rights Act 1998 is that any arguable allegation that a person's ECHR rights had been breached means the courts can review the relevant decision. This includes reviewing the compatibility of executive decisions with the Convention
- the court was not entitled to substitute its own view for that of the decision maker. The degree of judicial scrutiny when reviewing whether a decision is compatible with ECHR rights depends on the significance of the ECHR right, the degree of interference with the right, and the factors capable of justifying the interference

In this instance, the Supreme Court concluded that the interference with Article 10 was proportionate.



## A 'policy': when you can have a policy and when it can be challenged?

**2.36** Where decision makers may have to deal with a large number of cases, there may be a policy in place intended to ensure that cases can be dealt with in a standard way: applying the same criteria and attaching the same weight in each case, and so ensuring consistency and administrative efficiency. The courts have held that while it is lawful, and essential for fairness and consistency in decision making, for decision makers to have a policy, they should nevertheless direct their minds to the facts of the particular case and be prepared to make exceptions. This is particularly important in cases involving human rights.

**2.37** Policies must be rational and consistent with human rights, and a policy may be challenged on the basis that it is either irrational or unlawfully

interferes with human rights. A policy can be challenged on the basis that it is unlawful, and in such a case an individual may challenge a decision on the grounds that if the policy is unlawful so too is the related decision. An individual may also bring a challenge on the basis that the policy was applied too rigidly, so that the decision maker's discretion was fettered or limited unlawfully. On the circumstances in which a policy may be unlawful, see now also *R. (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37.

**2.38** In order to minimise the risks of unlawfully fettering a discretion, it can be helpful, when formulating a policy, to include an 'exceptional circumstances' exception to provide for circumstances where the policy can be departed from.

### DEFINED TERM

#### Fettering discretion

When a public body is given a discretion to make a decision, (that is, to choose from different options before making a decision) but somehow binds themselves so they cannot use that discretion, for example by rigidly adhered to a policy it has formulated rather than considering decisions based on the circumstances.



## CASE EXAMPLE

**In *R. (on the application of Blundell) v Secretary of State for Work and Pensions* [2021] EWHC 608 (Admin), the Secretary of State had power, within certain parameters, to deduct ‘any sum’ from the Universal Credit standard allowance to pay fines imposed under the criminal law.**

The Secretary of State adopted a policy of taking deductions at the maximum permitted level and the policy made no provision for reducing deductions on the ground of financial hardship. The court found that the Secretary of State

had adopted a rigid formula which gave no scope for the exercise of discretion. It determined that they had, therefore, unlawfully fettered their discretion to decide, where necessary in individual cases, how much to deduct.

Whilst the Secretary of State did not have to consider each case individually, they or their officials had to be prepared to consider departing from the normal policy if a request was made for exceptional treatment because of financial hardship in an individual case.

**2.39** A decision may also be challenged on the basis that a policy should have been complied with but was not, and clear reasons should be given when departing from a policy. A policy may give rise to a legitimate expectation that the government will act in a particular way or that a particular decision will be reached. Such an expectation may only be rejected with sufficient justification and so a failure to apply a policy may also be challenged on legitimate expectation grounds (you can see more detail in the section on [Legitimate expectation](#)).

**2.40** If a policy contains a statement of law, then it is important that the policy accurately reflects the law, especially where the policy provides guidance to others on how to comply with the law. A policy which contains an incorrect statement of the law may be found to be unlawful, especially where the policy effectively sanctions or encourages others to act in a manner which is unlawful.

## CASE EXAMPLE

**In *Shepherd Masimba Kambadzi (previously referred to as SK (Zimbabwe)) (FC) v Secretary of State for the Home Department* [2011] UKSC 23, the Secretary of State’s published immigration detention policy stated that officials should review detention: weekly**

**in the first month of detention and once a month thereafter.**

The Supreme Court found that failure to comply with this policy was a public law error which rendered the ongoing detention unlawful.



## Discretion or duty?

**2.41** As a general rule, where a statute expresses that the Secretary of State “may” do something it is interpreted that the Secretary of State has a discretionary power to do something, in that the Secretary of State is free to choose to exercise the power in a particular manner, or to not exercise the power at all. Where a statute expresses that the Secretary of State “shall” do something, it is generally interpreted that the Secretary of State has a duty to do something, in that it is mandatory for the Secretary of State to exercise a particular function in a certain way.

**2.42** However, in some cases where a statute appears to confer a discretion (that the Secretary of State “may” do something) it may be interpreted as a duty (i.e. the Secretary of State “shall” do something) where all the circumstances point to the power being exercised in a particular way.

**2.43** For example, a public body with the power to grant licences may be obliged to do so where an applicant fulfils all the prescribed requirements. The statute and its purposes as a whole, as well as the timing of the introduction of the statutory provisions in conjunction with international obligations, must be considered to determine whether there is discretion or a duty.

## CASE EXAMPLE

### **The Court held that there was a ‘duty’**

***In R (on the application of W, X, Y and Z) v The Secretary of State for Health & Ors [2015] EWCA Civ 1034, under section 48 of the National Health Service Act 2006, the Secretary of State for Health (SSH) “may require an NHS foundation trust to provide the Secretary of State with such information as the Secretary of State considers it necessary to have for the purposes of the functions of the Secretary of State in relation to the health service.”***

The Home Office could refuse an application for leave to enter or remain in the UK if the applicant had incurred NHS debts totalling at least £1,000. The Home Office made such refusals on the basis of information passed to it by the SSH, which in turn, had received that information from the relevant NHS bodies.

The appellants argued (amongst other points) that NHS bodies did not have the power to pass the information to the SSH, and the SSH did not have the power to pass it to the Home Office.

The Court of Appeal dismissed the appeal and held that the SSH had a power under the relevant statutory provision to require NHS bodies to transmit the information. Therefore, NHS bodies had a statutory duty to comply with that requirement. Under s.2 of the relevant Act, the SSH was permitted to do anything to facilitate the discharge of any duty imposed on them by the act. If they could lawfully require NHS bodies to provide information to them to facilitate the recovery of charges, then they could lawfully pass that information on to the Home Office for the same reason — i.e. to facilitate the discharge of the same statutory duty (to “secure the provision of services by facilitating the recovery of charges”).



## CASE EXAMPLE

**The Court held that there was a ‘discretion’**

**In *R (on the application of Gallastegui) v Westminster City Council* [2013] EWCA Civ 28, it was seen that section 143, Police Reform and Social Responsibility Act 2011 provides: “A constable or authorised officer who has reasonable grounds for believing that a person is doing, or is about to do, a prohibited activity may direct the person— (a) to cease doing that activity, or...”. This section conferred powers on the police and authorised local authority officers to stop protesters pitching tents in Parliament Square.**

When this power was enforced against G (an anti-war campaigner), she challenged the way this power was exercised and argued that in ordering her to remove her tent the police had failed to exercise the element of discretion in section 143(1). This was incompatible with Article 6 (right to a fair trial); Article 10 (freedom of expression); and Article 11 (right of assembly) of the Convention.

The Court of Appeal looked at the policy and objectives of the Act and held that it was to put an end to the prohibited activities defined in section 143 and, in particular, to stop the use of tents and other structures designed to facilitate sleeping in Parliament Square.

The Court of Appeal also held that “if Parliament had intended that a direction should be given in all cases, it would have used the word “shall” (our emphasis). That is the obvious way of giving effect to an intention to impose an obligation. As a matter of ordinary language, the word “may” connotes the existence of a discretion. If constables and authorised officers routinely refused to exercise the power conferred by section 143(1), they would not be exercising the power in accordance with the intention of Parliament: they would be frustrating the policy and objects of the 2011 Act”.

But by giving a discretion (rather than imposing a duty), Parliament intended that it might be appropriate in exceptional circumstances for the power not to be exercised.



## Delegation of a power

**2.44** The general rule is that where legislation confers a power on a specified individual or body, the power must be exercised by that individual or body and must not be delegated or 'given away' (unless it is made clear in the legislation that the power can be delegated).

**2.45** As far as departments of central government are concerned, the courts accept that ministers cannot possibly personally make every decision made in their name, and that officials in government departments may act on their behalf. This is known as the **Carltona principle** after the leading case (*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560). Theoretically, legally and constitutionally, there is no unlawful delegation in these circumstances because the acts of officials are the acts of their ministers and the ministers remain accountable to Parliament for those acts. The Carltona principle applies to both statutory and non-statutory powers.

**2.46** There are limits to the Carltona principle; for example:

- the decision must be taken by an official of appropriate seniority and experience
- some decisions or their consequences may have a special importance that means that the minister must exercise the discretion personally

- the principle is unlikely to apply to those holding independent statutory office
- the legislation may require a minister to take a particular decision personally or only delegate to certain grades of civil servant

**2.47** Ultimately, the courts will consider what degree of personal attention Parliament might reasonably have expected when conferring the power. The intention of Parliament, as made clear in the relevant provision(s), will be key.

**2.48** Any decision taken by an official on behalf of a minister must be within the limits of the power delegated and subject to the appropriate level of scrutiny and consideration, so that it is taken with regard to all relevant circumstances. For example, if advice is received from outside the department, it should be properly considered when making a decision on the minister's behalf. It will not be sufficient to simply rubber-stamp someone else's recommendations; the final decision must involve a genuine application of the mind and a conscious choice being made by the correct authority.

**2.49** Once made, such decisions will be subject to the usual common law requirements of rationality and fairness.

## DEFINED TERM

### Delegation

'Delegation' is where the person who has power to make a decision gives that power to someone else to make the decision, instead of making it themselves.



## CASE EXAMPLE

**In *R (on the application of Bourgass & Another) v Secretary of State for Justice* [2015] UKSC 54, Mr Bourgass and Mr Hussein were prisoners.**

At different times and for different reasons, they were segregated under rule 45 of the Prison Rules 1999. Rule 45 gave power to the governor to segregate prisoners (and to end segregation) but segregation was not to exceed 72 hours without the authority of the Secretary of State. In addition, the Prison Service Order 1700 stated that an initial Segregation Review Board must be held, to review whether to maintain segregation, within 72 hours of segregation and then at least every 14 days thereafter (in line with rule 45(2)). The Segregation Review Boards were to be chaired by “a competent operational manager”, being an officer performing a senior role within a prison.

Mr Bourgass and Mr Hussein challenged the legality of an operational manager giving authority for continued segregation under rule 45(2), given that the rule required such authority to be given by the Secretary of State. The Secretary of State submitted that rule 45(2) permitted governors and other senior prison officers to take such decisions, when authorised to do so by the Secretary of State, and that such authority had been lawfully

granted by the Prison Service Order (in line with the Carltona principle).

The Supreme Court held that the arrangements governing the relationship between the Secretary of State and prison governors bore no resemblance to those governing the relationship between a minister and their departmental officials. Prison governors held an independent statutory office, and as such, exercised powers vested in them personally by virtue of their office and were in a different constitutional position to that of an official in a government department. In light of this, and the wording of rule 45(2), it followed that a decision by the Secretary of State under rule 45(2) cannot be taken on their behalf by the governor, or by some other officer of the prison in question.

The Carltona principle was, therefore, held not to apply to rule 45(2) and the Secretary of State’s purported delegation of his function under rule 45(2) to the chairman of the SRB, in accordance with the Prison Service Order, was unlawful. It followed that the decisions to continue the segregation of the two appellants were taken without lawful authority, and that their segregation beyond the initial 72 hours was, therefore, unlawful.





## Duty to act compatibly with ECHR rights

**2.50** Under section 6(1) of the Human Rights Act, it is unlawful for a public authority to act in a way that is incompatible with ECHR rights (set out in [Appendix 1](#)). However, section 6(2) of the Human Rights Act provides an exception to this obligation where a public authority is acting under primary legislation that cannot be read or given effect in a way that is compatible with ECHR rights. The term ‘act’ includes a failure to act, but

does not include a failure to introduce a proposal for legislation or a failure to make any primary legislation or remedial order.

**2.51** Government departments are public authorities and must comply with the ECHR rights in respect of all their activities, whether or not those activities are public or private in nature. Subordinate legislation (regulations, orders) declared incompatible can be quashed by a higher court.

### DEFINED TERM

#### ECHR rights

These are rights from the European Convention on Human Rights as incorporated into UK law and set out in Schedule 1 to the Human Rights Act 1998. These rights are not affected by our exit from the EU. [For more details, see Appendix 1.](#)

### CASE EXAMPLE

**In *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, several widowers (men) brought a judicial review claim stating the Secretary of State’s failure to make extrastatutory payments of benefits available to widows (women) available to them under primary legislation was incompatible with ECHR rights (Article 14 read with Article 1, Protocol 1).**

The court found that the failure to pay corresponding amounts to widowers was

not unlawful because it fell under the exception in section 6(2) of the Human Rights Act.

Although the Lords hearing the case disagreed on some of the details, they found that the Secretary of State could rely either on the exception that they were giving effect to primary legislation in a way that was compatible with ECHR rights or that they “could not have acted differently”. The challenge was therefore unsuccessful.



## Discrimination

**2.52** Article 14 of the European Convention on Human Rights states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

**2.53** A policy, decision or statutory instrument may be found unlawful by a court if it is incompatible with a person’s right under Article 14 of the Convention to enjoy one or more of the other ECHR rights without discrimination. Article 14 is not a

free-standing right to equality, but rather protects equal treatment in the enjoyment of ECHR rights. In contrast to protected characteristics under the Equality Act 2010, the list of grounds on which discrimination is prohibited is non-exhaustive, and courts have found a wide variety of factors to give rise to a person holding an ‘other status’. Differential treatment under Article 14 may be justified (and not unlawful) if the government demonstrates that it is objective and reasonable.

**2.54** The courts can also declare primary legislation incompatible with the Article 14 right. (For more detail on the court’s power to grant Declarations of Incompatibility, see the chapter of this guidance entitled [3 Judicial review.](#))

## DEFINED TERM

### Equality Act 2010

Equality Act 2010 — this brought together all previous equality legislation and includes prohibitions on discrimination and a duty to have due regard to the public sector equality duty.

## CASE EXAMPLE

***In A and B v Criminal Injuries Compensation Authority [2021] UKSC 27, two Lithuanian nationals who had been trafficked from Lithuania to the UK and subjected to labour exploitation and abuse applied to the Criminal Injuries Compensation Scheme.***

Their applications were refused because they both had convictions which had resulted in custodial sentences and which were unspent at the time of their applications for compensation. They argued that the exclusionary rule amounted to unjustified discrimination in breach of Article 14 of the European Convention on Human Rights read with Article 4 — prohibitions on slavery and forced labour.

The Supreme Court found that the Criminal Injuries Compensation Scheme was not unlawfully discriminatory in denying compensation to victims of human trafficking who had unspent criminal convictions which had resulted in custodial sentences or community orders.

Although they found that Article 14 was relevant and that the situation was within the ambit of Article 4, this exclusion was justified: it pursued the legitimate aim of limiting eligibility to compensation to those deserving of it and it was also proportionate, being no more intrusive than was required and striking a fair balance between competing interests.



**2.55** Article 14 is different from the protection from discrimination under the Equality Act 2010. The public sector equality duty on decision making is set out in more detail later in this guidance, in the chapter entitled [4 The public sector equality duty](#).

### **Procedure: does the power have to be exercised in a particular way?**

**2.56** Following the correct procedure (or 'due process') is very important in public law because it is not just the substance of a decision that matters. There are a number of procedural requirements in a decision-making process which, if followed, are likely to secure a just outcome and demonstrate compliance with the rule of law.

### **Mandatory versus directory requirements**

**2.57** Due process requires you to consider if any relevant legislation expressly imposes a procedural requirement that must be met before a power should be exercised. There is a presumption that a statutory requirement is 'mandatory'. Failure to comply with mandatory requirements will usually result in a decision being unlawful. Examples of legislative imposed procedural requirements include:

- consulting with local authority representatives
- publishing the decision in draft
- making due inquiry
- considering any objections before making a decision

**2.58** Occasionally, the presumption of a mandatory requirement can be rebutted: for example, if the requirement is minor or technical; or the breach of the required procedure would not defeat the purpose of the statute, or is of insufficient importance in the context of the decision. In such a case, the requirement may be considered to be 'directory'.

**2.59** Failure to satisfy a directory requirement will not necessarily cause the decision to be unlawful. For example, a statute requires a public body to carry out a function within a certain time limit but the public body performed the function slightly late. The court might find that there had been substantial compliance with the procedure and that the breach could therefore be overlooked.

**2.60** There is no clear distinction between 'mandatory' and 'directory' requirements. These labels do not matter, but rather the court's view of the effect of noncompliance, any prejudice caused as a result, and the scope and purpose of the enactment as a whole. Complying with a statutory requirement is not a tick-box exercise: the requirement must be complied with in spirit as well as literally. It is therefore best practice to comply with any procedural requirement, including time limits, directory or otherwise.

## Procedural fairness — common law rules

**2.61** Decisions may be found unlawful if the procedure followed to make them is not 'fair'. Procedural requirements may be set out in statute, statutory instrument, guidance or a procedure which the decision maker has set for itself. In some cases, procedural requirements may also be implied.

**2.62** Fairness is a concept drawn from the constitutional principle of the 'rule of law'. That is the general principle that the government should govern in accordance with the law and not arbitrarily. It is an important feature of a fair decision-making process that the person affected by a decision will know in advance how the decision will impact them, so that they are able to prepare for it.

### CASE EXAMPLE

**In *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, under Schedule 7, Counter-Terrorism Act 2008, the Treasury made a direction against Bank Mellat (an Iranian bank) which restricted its access to the UK's financial markets.**

The Treasury made the direction because of Bank Mellat's alleged financial connection to Iran's nuclear weapons programme. The Treasury made this direction because it concluded that Bank Mellat posed a significant risk to national security by providing banking services that aided Iran's nuclear weapons programme. Bank Mellat sought to have the direction set aside.

The Supreme Court held that the direction was unlawful for a number of reasons, including on procedural grounds. Bank Mellat ought to have been given notice of the Treasury's intention to make the direction and ought to have been given

an opportunity to make representations. The only ground on which the Treasury could argue that it had no duty to consult the Bank was if such a duty was excluded by statute. Whilst the counter-terrorism legislation included a statutory right of recourse to the courts (by which a bank could apply to have a direction set aside), the legislation did not exclude common law requirements of fairness. Common law requirements of fairness meant that Bank Mellat should have been consulted before the direction was made and given an opportunity to make representations as to why the direction should not be made.

The Supreme Court found the Treasury's direction was unlawful because there was no prior notice of the direction, nor any procedure to hear it in advance.

## Procedural fairness: the Human Rights Act 1998

**2.63** The same principle of procedural fairness is reflected in the European Convention on Human Rights. The Human Rights Act has added statutory requirements to the common law requirements of fairness, because

it gives further effect to ECHR rights. For example, if you are taking decisions which will determine a person's civil rights and obligations (personal, private or economic rights), you will need to ensure that the procedural requirements of Article 6 of the Convention (the right to a fair trial) are met.

### DEFINED TERM

#### Human Rights Act

The Human Rights Act 1998 brought the rights from the European Convention on Human Rights into domestic law and gave people the right to bring claims in UK courts for breach of human rights.

### CASE EXAMPLE

**In *Tsfayo v United Kingdom (60860/00)* [2006] ECHR 1158, Ms Tsfayo, an Ethiopian asylum seeker, was initially given housing by a local authority.**

She was given assistance and submitted an application for housing and council tax benefit. However, she did not renew it annually because of her lack of familiarity and language difficulties. When she received letters regarding rent arrears, she sought advice from the local authority, and subsequently submitted both a prospective and a backdated claim for benefits. The prospective claim was successful, but the local authority rejected the claim for backdated benefit on the ground that she had not shown "good cause" why she had not claimed the benefits earlier.

She appealed to the local authority's housing benefit review board which included 5 councillors. The board rejected the appeal.

The European Court of Human Rights upheld Ms Tsfayo's complaint. She had a right to a fair hearing before an independent and impartial tribunal as her claim for housing benefit concerned the determination of her civil rights. The housing benefit review board did not fulfil the requirements of independence and impartiality as it included 5 councillors from the council that would have to pay the benefit if awarded.

The UK Government argued that she could apply for judicial review and that was sufficient to allow for independence and impartiality.

The European Court of Human Rights did not accept this because that did not involve reviewing the findings of fact or hearing evidence which meant that "there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."

## CASE EXAMPLE

**In *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, Mrs Begum had sought accommodation from a local authority on the basis that she was unintentionally homeless. She was offered permanent accommodation but she objected to it and requested a review of the local authority's decision.**

The review was conducted by the local authority's rehousing manager, who found that it would have been reasonable for her to have accepted the accommodation. Mrs Begum appealed the decision first to the county court.

After subsequent appeals it was considered by the House of Lords (now

the Supreme Court) who considered whether the review procedure, firstly the review to the rehousing manager and then to the County Court complied with Article 6.

The court held that it was appropriate for the decision about whether the accommodation was suitable to be entrusted to an administrator (who had specialist knowledge and experience), and the ability of the County Court to review the decision on judicial review grounds had been lawful and fair. This right of appeal was appropriate to the nature of the decision and was sufficient to satisfy the requirements of Article 6(1).

## The right to be heard

**2.64** The Courts may find that in the interests of fairness, additional conditions should be placed on the exercise of statutory or other executive powers. For example, the Courts may insist that before a decision is made, any of the following are required:

- the disclosure of the reasons the decision maker intends to rely on
- an opportunity for consultation of the persons affected or for the persons affected to make representations • an oral hearing where appropriate and after the decision, one of the following is required:
- the disclosure of material facts (which were material to the decision)
- the disclosure of the reasons for the decision

## CASE EXAMPLE

**In *Osborn v The Parole Board* [2013] UKSC 61, it was seen that Section 239 of the Criminal Justice Act 2003 provides that it is the duty of the Parole Board to advise the Secretary of State about the early release or recall of prisoners and licensing conditions.**

The Secretary of State makes rules about the Parole Board's proceedings. These did not always include a requirement to hold an oral hearing. In 2013, three prisoners appealed against decisions concerning the circumstances in which the Parole Board was required to hold an oral hearing.

The Supreme Court found that in order to comply with common law standards of procedural fairness, the Parole Board should hold an oral hearing before determining an application whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake.

By doing so the Parole Board will also fulfil its duty to act compatibly with Article 5(4) of the European Convention of Human Rights.

### “Hear the other side’s case”

**2.65** A decision maker must allow the person who is the subject of a decision to know the case against them. If you do not know the case against you, you cannot properly defend yourself against an adverse decision. You cannot effectively persuade the decision maker that their information is inaccurate or exaggerated. The operation of this principle can be seen in diverse situations, for example:

- the practice (prescribed in Prison Rules) of disclosing the parole dossier to prisoners seeking release on licence
- notifying in advance persons likely to be criticised by a public inquiry of the area of criticism, so that they know the substance of the case against them



## CASE EXAMPLE

**In the case of *R (on the application of Bourgass) v Secretary of State for Justice* [2015] UKSC 54, two life-sentence prisoners convicted of terrorist offences appealed against a decision that their segregation by prison operational managers had been lawful. The Supreme Court found that the decisions to segregate the two prisoners had been unlawful and unfair at common law.**

Lord Reed said:

“A prisoner’s right to make representations is largely valueless unless he knows the substance of the case being advanced

in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought. That will not normally require the disclosure of the primary evidence on which the governor’s concerns are based: as I have explained, the Secretary of State is not determining what may or may not have happened, but is taking an operational decision concerning the management of risk. It is however important to understand that what is required is genuine and meaningful disclosure of the reasons why authorisation is sought.”

## Consultation

**2.66** The Cabinet Office Consultation Principles provide that, in the absence of a legal duty to consult, departments should not carry out consultation for the sake of it. There is no general legal duty to consult. Voluntary consultation may not be appropriate where decisions need to be made quickly or where the policy proposals are already settled.

**2.67** Decision makers may consult people or organisations likely to be affected by decisions before they are made. Consultation helps to ensure that the decision maker is in possession of all relevant information, allows people to have their voices heard, and often results in better and fairer decision making. It may draw out points which have not been considered previously or inform the policy of any inherent difficulties of people or businesses in complying with the policy, helping to insulate the resulting decision against legal challenges for failure to take account of relevant considerations or irrationality. It may also draw out equalities concerns which can then be

considered as part of the public sector equality duty (PSED). (See more detail in the chapter entitled 4 The public sector equality duty.)

**2.68** Consultation is a ground of challenge as procedural unfairness where the consultation process is flawed: for example, if it is too short to be meaningful, or it fails to consult people listed in statute who should be consulted.

**2.69** A legal duty to consult may be set out in legislation. Where this is the case, the legislation may state who needs to be consulted and how long for. A legal duty to consult may also arise from a legitimate expectation, for example if there has been a promise to consult (in a statement or guidance), where there is an established practice of consulting on a particular kind of decision, or — in exceptional cases — where a failure to consult would lead to conspicuous unfairness. Where consultation is undertaken, whether voluntary or pursuant to a legal duty, it must be conducted properly to satisfy the requirements of procedural fairness.





## DEFINED TERM

**Legitimate expectation**

A legitimate expectation is where a public body acts in a way or says that it will act in a way that means that people are entitled to rely on them acting that way, for example a promise may be made that

consultation will be carried out before a decision is made or it may be that the public body has always consulted in the past before certain decisions are made and so they expect that to happen again (see more detail in the section entitled Legitimate expectation).

**2.70** In order for a consultation to be fair, all the following conditions must be satisfied:

- the consultation must be undertaken when proposals are still at a formative stage (this does not preclude there being a preferred option, but the decision maker must be open to the possibility of changing their mind)
- sufficient explanation for each proposal must be given so that consultees can consider them intelligently and respond
- adequate time must be given for the consultation process
- the consultation responses must be conscientiously taken into account when the decision is taken

**2.71** You should ensure that the title of the consultation document and the description of the policy proposals are clear so that people reading them can readily tell if and how the proposals would affect them. You should also think carefully about who needs to be consulted and how they will be consulted.

**2.72** Whether the above requirements have been satisfied in the case of a particular consultation will depend on all the circumstances. Any of the following may affect the level of detail required by way of explanation and the amount of time required for responses:

- requirements set out in legislation
- size of the group consulted
- resources of consultees
- urgency (where a decision needs to be made urgently, a less formal and shortened consultation may be appropriate)
- timing, e.g. weekends, bank holidays
- complexity of the issues

**2.73** You should also consider whether the proposed method of consulting has any equalities implications, particularly accessibility for disabled people.

**2.74** The decision maker does not need to see all consultation responses, but summaries provided must be fair, neutral and include all material points. The Cabinet Office Consultation Principles say that responses to consultations should be published within 12 weeks of the consultation.

**2.75** If, as a result of the consultation, the policy proposals change, there is no general duty to re-consult on the amended proposals. Whether further consultation is required will be a question of whether it would be unfair to proceed without it, for example where the decision maker wishes to proceed with an option which was fundamentally different to those consulted on.



## CASE EXAMPLE

***In R (on the application of Moseley) v London Borough of Haringey [2014] UKSC 56*, the central government had cut the amount it would reimburse local authorities for providing council tax relief to residents.**

This left local authorities with a shortfall. Haringey London Borough Council proposed to deal with its shortfall by amending its relief scheme to cut the amount of council tax relief it offered eligible residents. The council consulted its residents about the proposed relief scheme amendments by sending a consultation document to 36,000 households. The document contained no reference to alternative options for meeting that shortfall. The only option set out was the proposed cut to council tax relief. A resident legally challenged the council's consultation.

The Supreme Court considered the specific statutory duty of consultation applicable to the council, which stated it should "consult such other persons as [the authority] considers are likely to have an interest in the [amendments to the relief scheme]".

The purpose of this particular statutory duty to consult was to ensure public

participation in the council's decision-making process. The general public could not be expected to be familiar with the context of the relief scheme. Therefore, the council was required to provide the consultees with information about the draft scheme changes; an outline of the realistic alternatives; and the main reasons for the council's adoption of the draft changes.

A duty to consult will not always need to include information on any rejected options. It will depend on the context and the relevant statutory provisions. The statutory provisions may leave the scope of the consultation open without clarification. If so, the question is in that context, is information on the rejected options necessary in order for the consultees to express meaningful views on the proposal?

In this instance, the court concluded that the residents could not meaningfully participate in the decision-making process unless they had an idea of all the realistic options available to the council to meet the financial shortfall. The consultation document presented the proposed cuts in council tax relief as the only option. Therefore, there was no consultation on the fundamental basis of the scheme.

### **"It wouldn't have made any difference"**

**2.76** Prior to the statutory reforms discussed in the following paragraph, the court was unlikely to be sympathetic to the argument that any procedural unfairness (such as a failure to consult) would have made no difference to the outcome. Nonetheless, the court could decline to provide a remedy if was satisfied that the decision would 'inevitably' have been the same.

**2.77** However, the court is now required to refuse permission for a judicial review, and to refuse to award the claimant any remedy, if it appears 'highly likely' that the outcome would not have been substantially different had the conduct complained about not occurred, unless there are reasons of exceptional public interest why it should do so. This is the result of section 31(2A), (3C) and (3D) of the Senior Courts Act 1981, inserted by the Criminal Justice and Courts Act 2015.



**2.78** In considering whether it is highly likely that the outcome would not have been substantially different, the court will undertake its own objective assessment of the decision-making process, and what its result would have been had the conduct complained of not occurred. The court will consider the material available at the time of the decision and avoid basing its assessment purely on 'post-decision speculation' by the decision maker.

**2.79** These provisions of the Senior Courts Act 1981 are most likely to be relevant where a decision is alleged or found to be unlawful on procedural grounds, or because of a failure to take into account all relevant considerations, or the taking into account of irrelevant considerations.

### CASE EXAMPLE

***In R. (on the application of Wiggins and Another) v Neath Port Talbot County Borough Council [2015] EWHC 2266 (Admin)*, the claimants challenged the council's decision to close two primary schools, arguing that the council had failed to properly assess the impact of the decision.**

They alleged the council had not taken into account the closure costs (in particular, staff redundancy costs) as it was required to do under a consultation code of practice.

The court accepted that the council had failed to take into account the redundancy

costs but accepted the council's argument that it was highly likely that the outcome would not have been substantially different had the council done so.

On the facts, the worst case figure (i.e. the highest amount of redundancy entitlements payable) showed that the proposed school closures would have been cost effective and generated savings.

The court refused to grant permission for judicial review.

## CASE EXAMPLE

**In *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179, the claimants challenged the council's decision to grant planning permission for a new primary school and pre-school.**

The school was to be situated in a village where there was a US Air Force base. It was argued that there had been a failure to have due regard to the public sector equality duty by considering the effect of aircraft noise in the outdoor areas of the school on children with protected characteristics (for example hearing impairments).

The court accepted that the council had failed to have due regard to the public

sector equality duty. However, the court refused permission for judicial review because, even if the planning officer's report (upon which the council's decision had been based) had considered this issue, "it would have made absolutely no difference to the planning decision that was taken".

For example, the report noted that there was no site in the village which would not be subject to noise from aircraft, noise mitigating measures were in any event to be adopted in the outdoor areas of the school, and children with protected characteristics would in fact have a better noise environment at the new school than at the existing school.

## Bias

**2.80** The rule against bias on the part of the decision maker is a rule of natural justice: "no man shall be the judge in his own case". If the decision maker has a financial or other interest in the outcome of the case, they will not be, or be seen to be, impartial. Ministers must act without bias to comply with the Ministerial Code, and civil servants must act without bias to comply with the Civil Service Code.

**2.81** The rule against bias applies not only to actual bias but also to the appearance of bias: "Justice must not only be done, but be seen to be done". Nobody should be able to allege that the decision was a fix because the decision maker was biased, whether or not there is any truth in that allegation. Ruling out actual or potential bias ensures that the

decision-making process is not a sham because the decision maker's mind was always closed to the opposing case. You must observe the rule against actual or perceived bias strictly to maintain public confidence in the decision-making process.

**2.82** Actual bias is rare: most cases are concerned with the appearance of bias. The test is whether, in all the circumstances, the court considers that there appeared to be a "real possibility of bias to the fair-minded and impartial observer". The "real possibility" of bias excludes a remote or insignificant risk of bias. If there was an appearance of a real possibility of bias to such an observer, the decision will be set aside. The decision maker must not act if there is a real danger that bias might be open to question.



## CASE EXAMPLE

**In *R (on the application of the Good Law Project) v Minister for the Cabinet Office & Anor* [2022] EWCA Civ 21, a decision by the minister for the Cabinet Office to directly award a £564,394 contract for qualitative research to inform the government's communications strategy during the COVID-19 pandemic was lawful.**

The Court of Appeal found for the minister on the grounds that the fair minded and informed observer would have appreciated that there was an urgent need for research and that it was vital that the results and conclusions from the research were reliable.

The Court of Appeal agreed with the High Court that the professional and personal connections between the decision makers and Public First did not preclude an impartial assessment.

However, the Court of Appeal disagreed with the finding of the High Court about their finding of apparent bias. The Court of Appeal said that the failure to consider any other research agency, by reference to experience, expertise, availability or capacity, would not lead a fairminded and informed observer to conclude that there was a real possibility, or a real danger, that the decision maker was biased.

## Impartiality

**2.83** The importance of impartiality is a well-established common law principle and is also recognised in the European Convention on Human Rights: Article 6 (right to a fair trial) requires a tribunal be impartial and independent. The rules about impartiality apply to administrative decision making as well as to court procedure and decisions.

**2.84** For example, if an applicant for a benefit is known personally to the decision maker; or the decision maker has dealt with the applicant before and had decided against them; or has expressed a view adverse to the applicant in other circumstances indicating that their judgment is affected, then it may be appropriate to refer the application to a different (and impartial) official.

**2.85** The principle of impartiality can have practical implications. For example, when statute requires that the Secretary of State makes a decision on an application, they (or the officials acting in their name) may require more information before making a decision. This might include some sort of technical input, or requiring inspectors to carry out an investigation. In order to ensure as much impartiality as possible, it may be necessary to have a separation between the people providing the technical input/ carrying out the investigation, and the officials making the decision or submitting the matter to the Secretary of State (when their personal decision is required).

**2.86** This separation reduces the risk of an unsuccessful applicant claiming that the decision maker was not impartial because they was too involved in the case or had predetermined the application.



## Independence

**2.87** The independence of a decision maker is different from, but closely linked to, impartiality. Independence has been described as the structural or institutional framework that secures a decision maker's impartiality.

**2.88** For example, judges and the courts are required to be independent of the executive (government) and legislature (Parliament), and not subject to influence from either. This is an aspect of the constitutional principle of separation of powers, and the process for judicial appointments reflects this requirement of independence. Administrative decision makers, such as ministers or civil servants, are appointed to carry out government policy and therefore are not strictly independent in this sense.

**2.89** If the decision maker is aware of any reason why they might not be considered to be impartial or independent or may be considered to have actual or apparent bias (either by themselves or others), it is best to declare this to all the parties to the decision at the outset. The parties may agree to waive their right to object to that decision maker continuing with the decision-making process. If they waive their right to object, it is very unlikely that they could take any objection later. In rare circumstances, a decision maker who might otherwise be disqualified can still act, if the decision needs to be made and cannot be made without that particular person.

**2.90** You should not decide to act in these circumstances without seeking advice on whether there is some way round the difficulty.

## CASE EXAMPLE

***In London Historic Parks And Gardens Trust v Secretary of State for Housing Communities And Local Government [2020] EWHC 2580 (Admin), the claimant sought judicial review of the handling arrangements for the determination of a planning application made by the Secretary of State.***

These arrangements were that where a planning authority, or the Secretary of State, had put forward a planning proposal and would be responsible for determining its own proposal, it had

to ensure that there was a functional separation, between the persons bringing forward a development proposal and the persons responsible for determining it.

The court found that the requirements for independence did not require that an independent body be set up but gave the following guidance that in the present context, independence required that there should not be inappropriate discussion or communication between those applying for and deciding the application and no undue pressure should be applied.



## Legitimate expectation

**2.91** Where a decision maker expressly, or through custom or previous conduct, gives a person reason to believe that a particular outcome will result, that person may have a 'legitimate expectation' that it will occur. This is a legal test and can be a difficult one, so you should always seek advice from your departmental lawyers about conduct or promises that have been made.

**2.92** The expectation may be that a particular procedure will be followed (for example, that the person will be consulted before a change in policy) or that a substantive benefit will be conferred (for example, that a policy will continue to be applied).

**2.93** If the court accepts that a legitimate expectation has arisen, it may rule that in breaching that legitimate expectation the decision maker acted unfairly and unlawfully.

**2.94** In considering whether a breach of a legitimate expectation is unlawful, a balance has to be struck between the public and the private interest. A public authority can override a person's legitimate expectation if the overriding public interest requires it.

**2.95** Whether a legitimate expectation has arisen will depend on a number of factors. For example:

- were the words or conduct (the promise or 'representation') which gave rise to the expectation clear and unequivocal?
- did the person promising the benefit have the legal power to do so?
- was the promise directed to the person seeking to enforce it?

- was the promise made by the same authority against which a person is seeking to enforce it?
- did the person to whom the promise was made take action in reliance on it, which placed him in a worse position than he otherwise would have been? (This is not always necessary.)

**2.96** Whether the court will conclude that it was unfair and unlawful for a decision maker to breach a legitimate expectation will similarly depend on a number of factors. For example:

- how important was the promised benefit to the individual and did it relate to their fundamental rights?
- was the promise directed to a particular individual or a particular set of individuals, or was it directed to the public at large, and how firm and clear was it?
- did the person to whom the promise was made take action in reliance on it, which placed him in a worse position than he otherwise would have been (as above)?
- how strong was the public interest in departing from the promise?



## CASE EXAMPLE

**In *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, under the Immigration Rules, international medical graduates (IMGs) could apply for a Highly Skilled Migrant Programme (HSMP) visa to work in the UK.**

Under the scheme, the IMGs were able to remain in the UK if they continued to meet specified criteria, including being able to maintain themselves without recourse to public funds. A number of IMGs successfully obtained HSMP visas and entered the UK to work for various NHS trusts. At a later date, the Secretary of State for Health issued guidance to NHS trusts stating that the IMGs whose HSMP visas would expire before the end date of any training post could only be offered the post if there was no alternative qualified UK or European Economic Area national applicant.

The House of Lords (now the Supreme Court) held that the guidance was unlawful. The grant of HSMP visas to IMGs had given those individuals a legitimate expectation that they would be able to obtain employment and therefore have a fair chance of meeting the scheme's conditions.

Before the guidance was issued, it was generally straightforward and common for IMGs with HSMP visas to renew that status easily (as long as they continued to meet the relevant criteria). The IMGs' expectation (of finding work and being able to renew their HSMP visas once they were in the UK) was undermined by the introduction of the residency test for potential NHS trust employees.

The inconsistency between the terms of the scheme and the guidance and its effects were so fundamental that it rendered the guidance invalid and unlawful.

**2.97** This example illustrates the potentially far-reaching consequences for decision makers and policy drafters if the courts find that a legitimate expectation exists and is undermined (by the policy or decision). Documents such as preliminary announcements of new schemes or policies should be carefully drafted. You should bear in mind that any unofficial practice, decision or statement of intention may, if expressed in loose or imprecise terms, give rise to unintended consequences.

**2.98** Where there is an intention to change a policy or procedure (for example to change a practice of accepting late applications), practical steps can be taken to meet potential claims of legitimate expectation that the policy or procedure would continue, for example:

- by careful explanation as to why the change is necessary
- by giving reasonable notice of or consulting on the timing of the change or adopting transitional arrangements for those particularly affected by the change

**2.99** Even if the public body which made a promise or representation was acting unlawfully (*ultra vires*), there may still be legal consequences, including in some cases an obligation to pay compensation. This is particularly the case where ECHR rights (such as the right to peaceful enjoyment of possessions) are engaged. The law is still developing in this area, which underlines the need for care when making promises and representations.





### **Notifying your decision: do you have to give reasons?**

**2.100** It is good practice to accurately record the reasons for a decision. There is no general duty on public bodies to give reasons for their actions or decisions but there are a number of circumstances where reasons must be given.

**2.101** A duty to give reasons may arise in statute, in common law or as part of a right to a fair procedure under the European Convention on Human Rights.

**2.102** Some of the legal principles that give rise to the duty to give reasons are:

- there may be an established practice of giving reasons in the particular type of case that you are dealing with. Failure to give reasons may therefore disappoint a legitimate expectation (that reasons will be provided)
- the decision may appear to be inconsistent with previous policy, or decisions in similar cases, so that a

decision unsupported by reasons may appear irrational. It may be necessary to explain why there has been a departure from previous policy

- the subject matter of the decision may be of such importance — for example, it may affect human rights — that fairness requires the decision to be supported by reasons
- the general availability of judicial review as a remedy makes it inevitable that fairness requires that reasons should be given in most cases
- Article 6 of the Convention (right to a fair trial) in particular has built on existing case law to increase the number of situations in which the courts are likely to conclude that reasons must be given for decisions
- decisions involving human rights are likely to be scrutinised even more intensely, and that means that they will have to be more fully reasoned.

## **DEFINED TERM**

### **Ultra vires**

This term literally means ‘beyond the powers’ in Latin. For example, if a decision maker acts outside their power for a purpose that the power was not created to achieve, that action (often in the form of a decision) will be *ultra vires*.

### **The Convention, or the ECHR**

The European Convention on Human Rights.

### **Judicial review**

Judicial review is the procedure by which people or organisations can apply to ask the Administrative court or Upper Tribunal to review decisions of a public body and the court decides if they are lawful (more detail is given in Chapter 3 about the procedure).

## CASE EXAMPLE

***In R. (on the application of Manchester Airports Holdings Ltd) v Secretary of State for Transport [2021] EWHC 2031 (Admin)*, the owner and operator of three airports in England applied for judicial review of amendments made to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (the International Travel Regulations).**

The International Travel Regulations were brought into force on 17 May 2021 in an attempt to reduce the transmission of COVID-19. They imposed the so called 'traffic light system' whereby countries from outside the common travel area were categorised as being on the red, amber or green list according to their level of risk.

The airport operator argued that the Secretary of State was under a legal obligation to publish reasons for the decisions to amend the regulations, including the methodology used and all the data relied on when those decisions were made. The obligation existed, it claimed, by reason of the common law duty to give reasons; an obligation of transparency; a legitimate expectation arising from comments made by the Secretary of State at a press conference; and by reason of their rights under European Convention on Human Rights

Article 1 Protocol 1, the right to peaceful enjoyment of possessions.

These arguments were not successful, and the court found that there was no express statutory obligation to give reasons for amending these regulations.

The court confirmed that it was well-established that where secondary legislation was challenged on grounds of alleged procedural error not arising from any procedure prescribed in the primary legislation, the common law would not ordinarily intervene to supplement the provision made in the primary legislation.

In relation to the International Travel Regulations, the amendments were made by the Secretary of State and laid before Parliament so there was no other requirement to give reasons. Such an obligation would impose an unreasonable burden in the circumstances of the case. It would slow the decision-making process, hamper effective public administration, and would risk jeopardising the supply of information from overseas.

In any event, what the Secretary of State said when announcing the amendments was sufficient to discharge any obligation to give reasons that could arise at common law.



**2.103** Even without a legal duty to give reasons, as in the case above, the decision maker will have to give a full explanation of their reasons if a judicial review claim is brought.

**2.104** If, in making the decision, the decision maker records their reasons, they must do so accurately. Any person will be entitled to request that information under the Freedom of Information Act 2000 (FOIA) and — unless an exemption applies — that information must be disclosed.

**2.105** There are exemptions for certain categories of information which may be relevant to your decision, but the presumption is in favour of disclosure. FOIA is therefore an incentive for decision makers to ensure good record keeping.

**2.106** Not every decision must be accompanied by copious reasoning; it will depend on the subject matter and the importance of the interests at stake.

### **Are any kinds of decision immune from being challenged by judicial review?**

**2.107** Courts will only consider issues that are **justiciable** — other things are left for political decision making. As a general rule, most decisions and actions of the executive (government) are not

immune from judicial review and are therefore justiciable. There are however, some decisions and actions which are of a subject matter which do not raise any legal question for the court to determine. If this is the case, then the decision or action will be non-justiciable.

**2.108** Issues are regarded as non-justiciable if they are inherently unsuitable for judicial determination by reason of their subject matter. This may be because the issue is beyond the constitutional competence of the courts under the conception of the separation of powers that applies in the UK, or because there are no legal standards against which the courts can judge the issue. Examples of matters which are likely to be non-justiciable include proceedings in Parliament (see the section on Parliamentary privilege below) and some matters of high political judgment (e.g. a decision by the Prime Minister to appoint or dismiss a minister).

**2.109** Sometimes Parliament seeks to prevent judicial review of certain decisions through the inclusion in legislation of ‘ouster clauses’, which state that the jurisdiction of the courts is ousted. The courts construe such clauses very narrowly.

## **DEFINED TERM**

### **Justiciable**

‘Justiciable’ means something which is appropriate for examination before the courts. Some things are described as ‘non-justiciable’ because they are not examined by the courts: for example, decisions that are for political determination.



## CASE EXAMPLE

**The case *R. (on the application of the FDA) v Prime Minister* [2021] EWHC 3279 (Admin) concerned the justiciability or otherwise of issues relating to the Ministerial Code.**

The Court said that many issues relating to the Ministerial Code would be non-justiciable, since they concern matters intended to be subject to the political judgment of the Prime Minister, e.g. decisions about whether to dismiss or retain a minister in office. However, the

specific issue in this case was justiciable.

The issue was the proper interpretation of the words “Harassing, bullying or other inappropriate or discriminating behaviour” in paragraph 1.2 of the Ministerial Code. The court held that the proper interpretation of those words was a matter that the court itself could determine, and that it was not so closely connected to questions of political judgment as to render the claim non-justiciable.

## Parliamentary privilege

**2.110** Article IX of the Bill of Rights (1689), which is the codification of a long-established common-law principle, provides (in modern English) that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”

**2.111** As a statutory provision containing no express exceptions, the privilege is absolute and cannot be waived. In practice, this means that in the majority of cases proceedings in Parliament are inadmissible as evidence. In addition to the absolute privilege which attaches to proceedings in Parliament, there is a wider principle of ‘exclusive cognisance’, which is the principle that it is for the two Houses of Parliament to regulate their own affairs. The case law also refers repeatedly to a “wider principle” that “the courts and Parliament are both astute to recognise their respective constitutional roles” (*Prebble v Television New Zealand Ltd* [1994] UKPC 4).

**2.112** Proceedings in Parliament obviously include what is said or done in the formal

proceedings of either House or the committees of either House, together with conversations, letters and other documentation directly connected with those proceedings. In practice, the most obvious example of this is words spoken during the course of a debate or a select committee hearing, but proceedings in Parliament also encompass written reports of, and evidence presented to, select committees, written ministerial statements, and in certain cases, other documents laid before Parliament (such as reports laid by unopposed return).

**2.113** The protection applies to all proceedings in a court, including both civil proceedings against individuals (e.g. defamation) or judicial review proceedings. Article IX refers to a court or “other place”: this clearly includes a tribunal, and it is likely that it also extends to other bodies with powers similar to those of a court, such as a statutory public inquiry. You should consult with your departmental lawyers about parliamentary privilege, and they will contact the Office of the Speaker’s Counsel where appropriate.



## CASE EXAMPLE

**A number of key exceptions have developed as a result of a number of cases on Article IX privilege. Those exceptions were summarised in *R. (Heathrow Hub & Another) v Secretary of State for Transport* [2020] EWCA Civ 213 (the Heathrow Hub case), which held that any of the following material that was within the scope of “proceedings in Parliament” could be admitted:**

- where the material is the words of a minister in setting out the intended purpose or meaning of ambiguous legislative provision, it can be used as an interpretative aid in relation to that provision (known as the *Pepper v Hart* rule)
- to demonstrate as a factual matter that a statutory requirement has been complied with (such as a requirement to lay a report)
- if that material is only being used as an uncontested record of what was said (and is therefore not being impeached or questioned)
- to evaluate ECHR compliance
- the courts may have regard to parliamentary proceedings in the context of the scope and effect of parliamentary privilege, on which it is important for Parliament and the courts to agree if possible

The Court of Appeal in *Heathrow Hub* also recognised that there is a sixth exception, namely that in some circumstances ministerial statements may be used in judicial review proceedings. The Court of Appeal, however recognised that “the scope and nature of this exception has not yet been the subject of detailed judicial analysis.”

# 3. JUDICIAL REVIEW



**3.1** Your departmental lawyers in the Government Legal Profession will advise you on legal risk in relation to your decision making under administrative law, to help you as civil servants, and to help ministers make the best decisions. This will include finding solutions and mitigations on areas where legal risk is identified, and, importantly, advising on the likelihood and impact of a judicial review claim being made. This section sets out what happens in a typical judicial review case in England, Wales and Northern Ireland, and what you might expect as a civil servant involved in a ministerial or departmental decision under challenge. The procedure in Scotland differs from other parts of the UK and can be found in the guide entitled [Right First Time: a practical guide for public authorities to decision-making and the law](#), produced by the Scottish Government.

**Standing or sufficient interest — can anyone challenge a decision?**

**3.2** The short answer to the above question is: No. In order to be entitled to apply for judicial review of a decision, a person must have a ‘sufficient interest’ (sometimes called ‘standing’) in the decision. A person may not be entitled to challenge a decision which does not affect them personally, simply because they disagree with it.

**3.3** For example, a prisoner whose application for release on parole has been refused has ‘sufficient interest’ to challenge the refusal by judicial review. However, the Mayor of London was found not to have standing in a judicial review against the Parole Board about their decision to release the “Black cab rapist”, as there were other challengers (the victims and Secretary of State) and the mayor’s statutory functions did not directly relate to the decision (*R. (on the application of DSD) v Parole Board for England and Wales* [2018] EWHC 694).

**3.4** In this context, ‘person’ includes legal persons, such as groups or organisations protecting or campaigning for a particular public interest. These groups (e.g. a trade union or a group such as Amnesty International UK) may have standing/ sufficient interest to challenge a decision by judicial review, on the basis that they represent the interests of the persons directly affected, and/or the decision falls within the group’s field of interest.

**3.5** The court’s decision on standing is primarily a procedural matter, but is mixed up with the merits of the case and therefore depends on the legal and factual context in each case. Arguments about standing can be an important part of a defence to a judicial review claim.

**DEFINED TERM**

**Standing**

Someone is described as having ‘standing’ in a judicial review claim if they have a sufficient interest in the matter to which the claim relates. This may not be a personal interest, e.g. if they can show that they are acting in the public interest

and that the issue directly affects the section of the public that they seek to represent that may be enough.

If you do not have ‘standing’ the court may refuse permission for you to bring a judicial review claim.



## CASE EXAMPLE

**The government introduced a modified scheme of criminal injuries compensation. The changes meant that in many cases, the amount of compensation payable to victims was reduced.**

In *R. v Secretary of State for the Home Department ex parte Fire Brigades Union and Others* [1995] 2 AC 513, this decision was challenged by an alliance of trade unions. Their members were potential victims of crimes of violence and so the unions had standing to challenge the new scheme.

This case was a ‘representative’ case — a case in which the applicants were not individuals “with a direct, personal interest

in the decision under challenge” but representatives of those individuals.

The rule that a person must have a sufficient interest is applied widely by the court. If the person challenging the decision can say that they are affected by it, there is no more appropriate challenger, and there is substance in their challenge, the court will not usually let technical rules on whether they have sufficient interest stand in its way.

In comparison, there is a more restrictive test for sufficient interest in a judicial review claim based on the breach of an ECHR right. Such judicial reviews can only be brought by a ‘victim’ of the ECHR right breached.





## CASE EXAMPLE

***In R. (on the application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin), Al-Haq, a nongovernmental human rights organisation based in Ramallah, documented alleged violations of the individual and collective right of Palestinians by the government of Israel.***

Al-Haq sought a declaration that the UK was in breach of its international obligations and a mandatory order that the UK Government use its best endeavours to meet those obligations. The Secretary of State for Foreign and Commonwealth Affairs argued that the Court "...should not enter the forbidden areas of decisions affecting foreign policy...and should not embark on a course that would require the court to determine the merits of an international dispute involving foreign governments".

The court refused permission for the judicial review and ruled:

"Constitutionally, the conduct of foreign affairs is exclusively within the sphere of the executive... While there may, exceptionally, be situations in which the court will intervene in foreign policy issues, this case is far from being one of them... the nature of the underlying claim, that is condemnation of Israel, and the nature of the claim against the government, that is a direction or declaration as to what foreign policy it should follow, operate together to

demonstrate that the court should not be prepared to consider it."

The court also considered the issue of standing and held:

"Standing should not be treated as a preliminary issue but must be taken in the legal and factual context of the whole case... In [an earlier case] Simon Brown LJ also linked the grant of standing to the issue of exercise of jurisdiction... Standing to claim a right must, in my judgment, be considered in the context of the right being claimed. In the present case, there is no right even arguably to be claimed and the claimants should not be granted standing to make the claim they seek to make...The courts apply a liberal standing test to responsible, expert groups, and that applied to this claimant.... as a matter of principle it seems to me that if declaring an act or decision to be unlawful will affect a particular individual or group, and if none of them decides to challenge it, the courts must generally refuse to permit someone more remote from the act or decision to do so. In this case no one in the United Kingdom has sought judicial review of [the] United Kingdom foreign policy regarding Israel's actions in Gaza. Then, as a practical matter, there is the Secretary of State's argument that if the claimant is correct, it would follow that any NGO, anywhere in the world, would have standing to bring a claim for judicial review in similar circumstances... the claimant should not be granted standing to bring this action."



**CASE EXAMPLE**

**The Technology and Construction Court considered standing in the context of a procurement-related judicial review in the case of *R. (on the application of The Good Law Project) v Minister for the Cabinet Office* [2021] EWHC 1569 (TCC). The court found that the Good Law Project had sufficient interest to establish standing, for the following reasons:**

“179. Firstly, the Claimant is a non-governmental organisation with expertise and experience in holding the government to account in respect of its public procurement decision. It has a sincere interest in promoting good public administration, including compliance with the [Public Contracts Regulations 2015] and lawful conduct of the public procurement regime. It has no ulterior motive in pursuing the challenge.

180. Secondly, the current claim is not one

that an economic operator can realistically be relied on to bring. The context is the award of a public contract in circumstances where, for justifiable reasons, there has been no competition. Therefore, unlike most public procurements, there is no disgruntled bidder, who could be expected to challenge any perceived failings in the procurement process that were sufficiently serious potentially to affect the outcome. Any attempt by another economic operator to bring a challenge would face a very high hurdle to establish financial loss and therefore another economic operator would be unlikely to risk the cost of legal proceedings.

181. Thirdly, the gravity of the issues raised, concerning the Defendant’s public law obligations against the background of an unprecedented public health crisis, justify the scrutiny of the court and, where appropriate, the grant of a public law remedy.

**CASE EXAMPLE**

**The High Court considered, among other things, the issue of standing in the case of *R (on the application of (1) Good Law Project Limited and (2) Runnymede Trust) v The Prime Minister and Secretary of State for Health and Social Care* [2022] EWHC 298 (Admin).**

The divisional court noted that the question of standing is able to be considered following the permission stage. The court said (reflecting earlier authorities) that “the test for standing is discretionary and not hard-edged” and that “the issue of standing is one that goes to the court’s jurisdiction and therefore the parties are not entitled to confer jurisdiction on the

court by consent where it does not have such jurisdiction”. The court also noted that, when considering standing, one relevant consideration is whether there are or would be “obviously better-placed challengers”.

The court concluded that, in relation to some parts of the claim, neither claimant had standing, and that any challenge on those grounds should have been brought by a directly-affected individual. In relation to other parts of the claim, the court concluded that, while the Runnymede Trust had standing, the Good Law Project did not, since the Runnymede Trust was better-placed to bring a challenge on the relevant grounds.



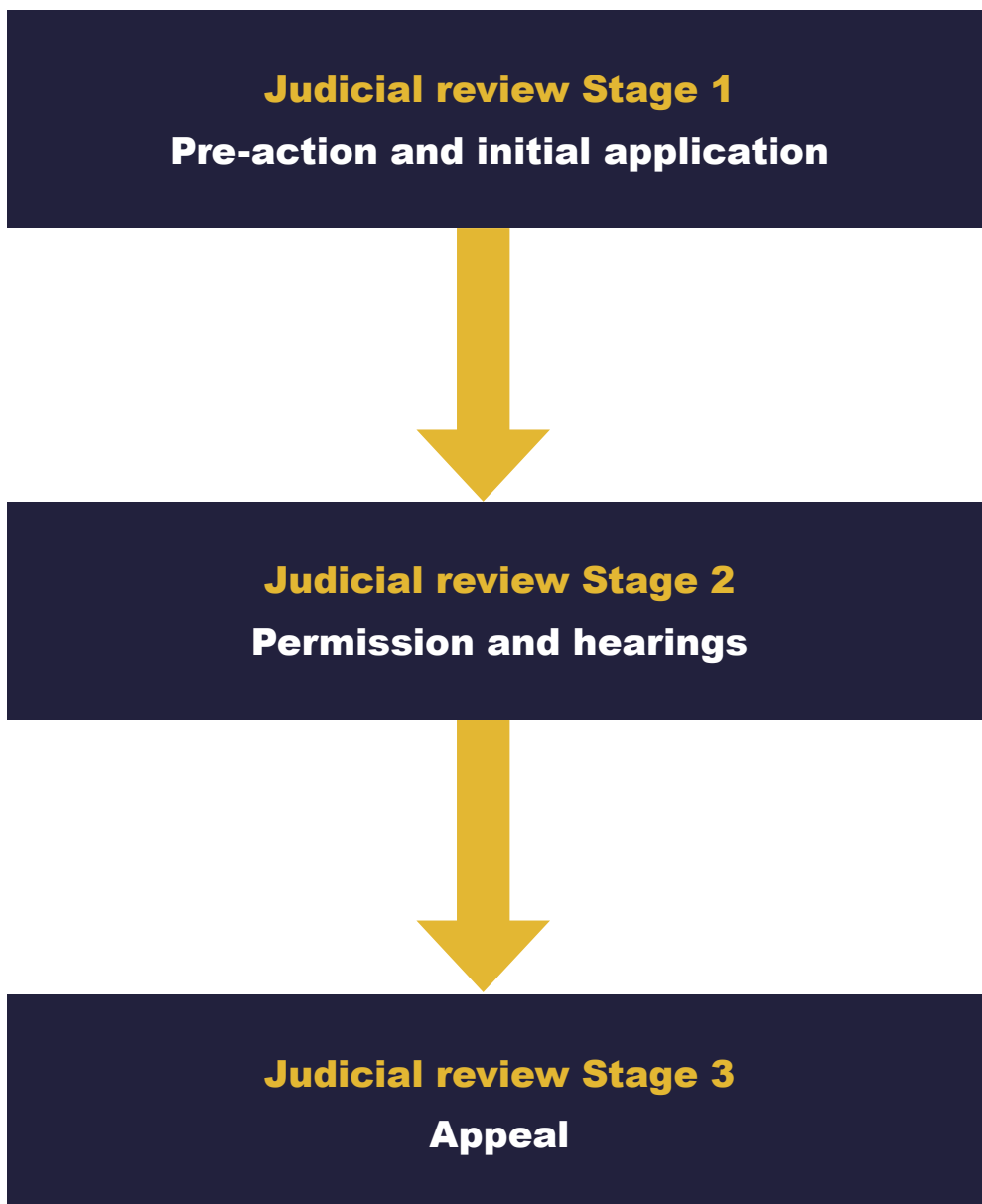
## The stages of judicial review

**3.6** The flowcharts which follow summarise the stages of a typical judicial review application but do not cover every possible development.

## Judicial review procedure: overview of the stages

**3.7** A judicial review has 3 distinct stages:

[View accessible description of 'Judicial review — overview of stages' flow chart](#)



## Judicial review — Stage 1: Pre-action and initial application

[View accessible description of 'Judicial review — Stage 1' flow chart](#)



### DEFINED TERM

#### **Pre-action protocol**

The pre-action protocol accompanies the Civil Procedure Rules, i.e. the rules that litigants in the civil courts have to comply with.

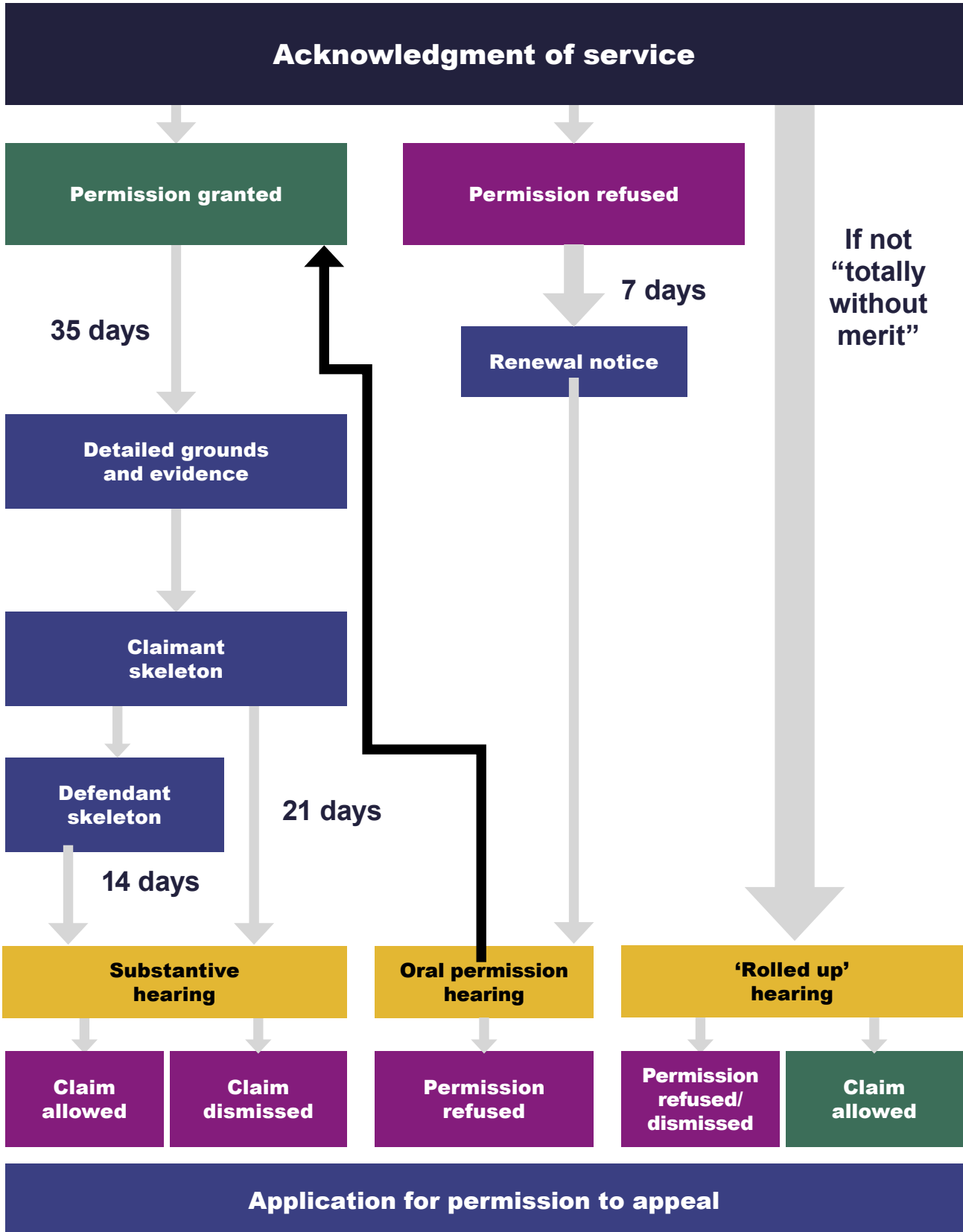
This protocol is called the 'pre-action'

protocol because it concerns things that should be done before a claim is started at court.

A failure to comply with the pre-action protocol can have various consequences, including costs sanctions.

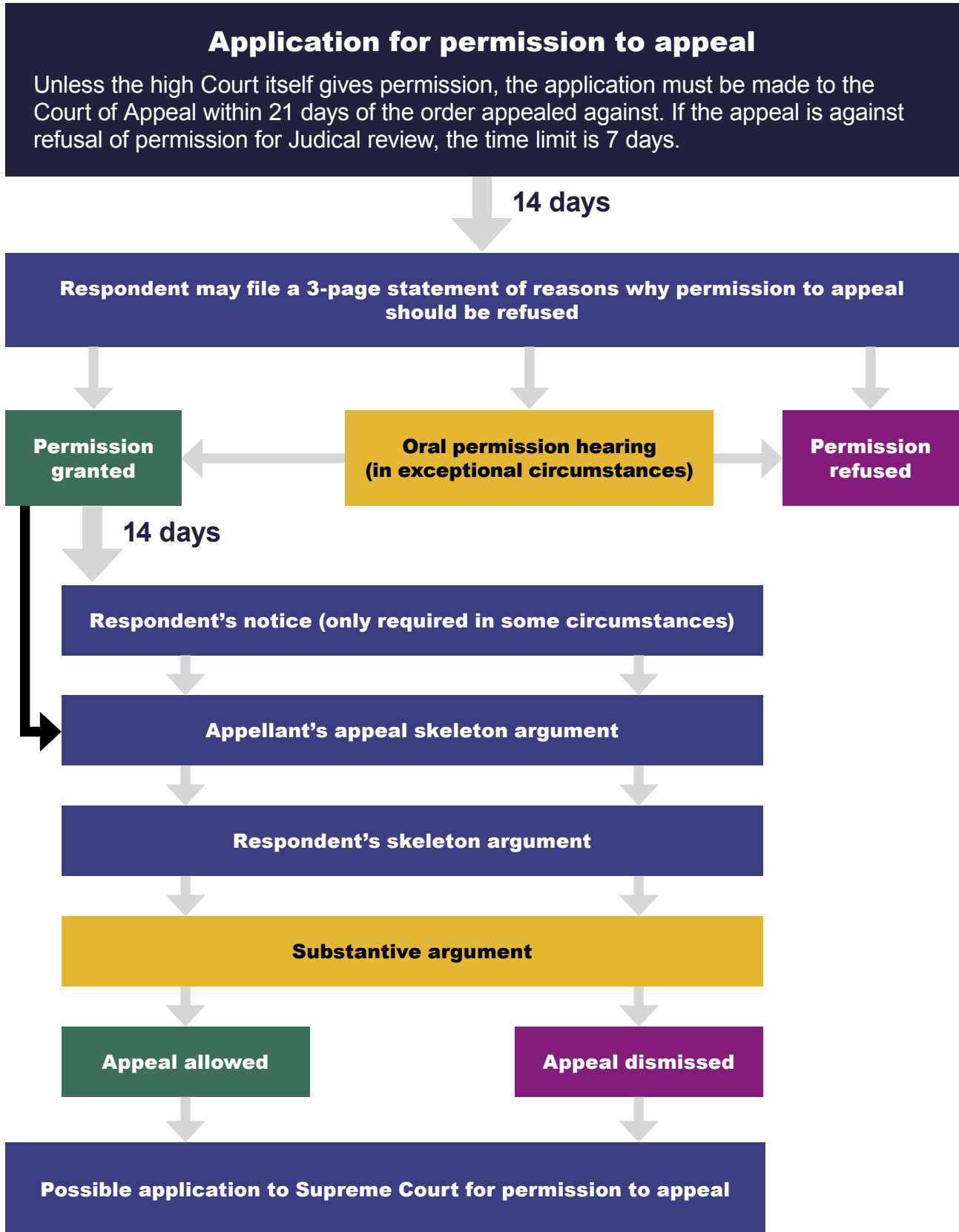
**Judicial review — Stage 2: Permission and hearings**

[View accessible description of 'Judicial review — Stage 2' flow chart](#)



### Judicial review — Stage 3: Appeal

[View accessible description of 'Judicial review — Stage 3' flow chart](#)



## Elements of the judicial review

### Time limits

**3.8** The time limits set out in the flowcharts are all subject to change, for example because one of the parties applies and secures the court's permission to shorten or lengthen a timeframe; or because the court directs a timeframe to be shortened or lengthened.

3.9 Time limits differ according to which procedure rules apply (i.e. whether the judicial review is lodged at court or at the Upper Tribunal). Judicial review procedure is governed largely by the relevant rules of the court/tribunal before which the claim has been commenced. (Those rules are The Civil Procedure Rules (CPR), Part 54; the Tribunal Procedure (Upper Tribunal) Rules 2008; and Practice Directions and Practice Statements issued under both sets of rules). Some types of decisions have a shorter timescale for judicial review applications, for example for planning, procurement or public inquiry decisions.

### Decision

**3.10** You can refer to the earlier chapter entitled **2 Decisions and decision making** for more detail on what constitutes a decision; and what else is vulnerable to challenge by an application for judicial review.

### Pre-action protocol letter (PAP letter)

3.11 The actual judicial review claim is often preceded by correspondence, in which the person affected by the decision tries to persuade the decision maker to change the decision or not to make it. This is the pre-action stage and should provide the parties with opportunities to resolve the dispute without resorting to judicial review.

**3.12** The PAP letter from the (potential) claimant should include all the following:

- the issue(s) in dispute
- the date and details of the decision, act or omission being challenged
- a clear summary of the facts on which the claim is based
- details of any relevant information that the claimant is seeking and an explanation of why this is considered relevant

**3.13** If the claimant does not comply with the pre-action protocol, the court may make adverse costs rulings against them — even if they win the judicial review. The court may also make an adverse costs ruling against the defendant public body for failing to respond to a PAP letter.

**3.14** There is an Annex at the end of the pre-action protocol which sets out what should be included in a PAP letter. You can find it on the [justice.gov.uk](https://www.justice.gov.uk) website, on the page entitled [Pre-Action Protocol for Judicial Review](#).

### Reconsideration by the decision maker

**3.15** Normally a decision maker can reconsider a disputed decision and perhaps withdraw: you should always seek legal advice about reconsideration. That might be in response to a PAP letter or other general pre-litigation correspondence. Reconsideration does not prevent the decision maker from making the same decision as before — rather, it requires that the decision-making process is repeated. Sometimes the PAP process will make you realise not everything is perfect and you can retake the decision.

**3.16** The complaining claimant may be satisfied with confirmation from the defendant that the defendant will



reconsider the disputed decision or action; or the claimant may be satisfied with an explanation from the defendant of why a reconsideration will not be offered and further explanation as to why the disputed decision was made originally. If the claimant is satisfied by the respondent's response (whatever it is), they may not go on to lodge a judicial review claim form. This is another important reason for defendant public bodies to respond to PAP letters — a response may show the claimant that the decision taken was actually a lawful one. Even if a claimant remains unsatisfied by the decision, a reasoned response may show them that a judicial review claim would be unlikely to be successful.

### **Judicial review claim issued**

**3.17** This is a claim form lodged by the claimant and sealed at court/tribunal.

**3.18** Certain types of judicial review claims are filed in the Upper Tribunal (including but not limited to judicial reviews disputing immigration decisions but not alleging unlawful detention); other claims are filed in the Administrative Court (part of the High Court).

**3.19** A judicial review claim form must set out the claimant's grounds of claim. Once filed, the claim form is 'sealed' (stamped) by the court/tribunal, and a copy must then be 'served on' (delivered to) the public body which has to defend the claim. Since the Treasury Solicitor and staff in the Government Legal Department (GLD) usually act for ministers of the Crown in litigation, the default position is that claims are served on GLD, however some departments have alternative published arrangements for service. If a claim form is received at the wrong address this may not constitute 'good service', but it is always sensible to forward such claims immediately to the

correct destination so that the relevant department can take action in response.

**3.20** Some departments have a policy to take no further action in respect of the disputed decision/course of action if a judicial review is served and whilst the claim is ongoing.

**3.21** When you become aware of a claim, all the following apply:

- you need to notify any colleagues affected by such a policy
- you need to notify any colleagues whose specific responsibility it is to handle litigation. Either you or they will need to remain closely involved in the handling of the case alongside the department's lawyers who are defending the claim
- you are very likely to have to locate and provide copies of relevant documents to your lawyers. The claimant may not have annexed all the relevant documents to the claim and you cannot assume that you can rely on the documents in the claim bundle. You are very likely to be asked to provide copies of missing and other documents to your lawyers, and will have to do so promptly because the time limit for filing a defence is short (and your lawyers will need time to formulate their advice)

### **Acknowledgement of Service (summary of defence)**

**3.22** If the claim is to be defended, the public body's defence is set out in summary form as part of the Acknowledgment of Service (AoS) document filed at court/tribunal. This AoS must be filed within 21 days from service of the claim; the court/tribunal has a discretion to extend this and all other deadlines. Similarly, the court/tribunal can



direct that the AoS is filed in a shorter timeframe, e.g. where either party has successfully applied for the claim to be ‘expedited’ — i.e. determined urgently).

**3.23** Your lawyers will advise you on how detailed the defence should be at this stage: i.e. whether a summary defence or a detailed defence is appropriate. Your lawyers should identify if the claimant appears to lack ‘standing’; is late with their challenge; has failed to exhaust alternative remedies (which are points that can possibly be relied on to persuade the court/tribunal to refuse permission to proceed with the claim); or has not complied with the pre-action protocol (PAP).

**3.24** Many claims are publicly funded and the claimant has an obligation to update the Legal Aid Agency (LAA) on new information bearing on the continuation of funding. The LAA funding code also allows other parties to make representations that funding should be discontinued. You and your lawyers should consider if it is appropriate to make such funding representations after your defence is filed (as part of the AoS) — e.g. because the AoS demonstrates new information that means the claim should not be pursued or funded further.

**Agreed withdrawal of judicial review (by ‘consent order’)**

**3.25** The first legal advice you receive should contain an opinion about whether the claim should be defended. Sometimes it is clear the claimant’s claim is well-founded and the challenged decision is likely to be held flawed by the court/tribunal. In response, you may agree to settle the claim, for example by offering to reconsider the disputed decision or to confirm a timeframe within which to take action that has been delayed until this point. If an offer to settle is made, there is

likely to be no need for the judicial review claim to continue and the claimant will be invited to withdraw the judicial review.

**3.26** The court’s/tribunal’s permission to withdraw is needed and can be sought by submitting a signed draft order, signed by all the parties (a **consent order**). The court/tribunal can withhold its approval of a draft consent order; but that is rare. Once the consent order is sealed, the judicial review is at an end.

**Permission decision**

**3.27** After the AoS is filed at court/tribunal (and served on the other parties), the case is passed to a judge for consideration on the papers. The judge will grant permission (on all or some of the grounds argued) or refuse permission to proceed. The judge’s decision is set out in an **order**.

**Permission refusal**

**3.28** If permission is refused and the claimant chooses not to proceed further, the judicial review ends and the challenged decision stands. Alternatively the claimant can (usually) renew the judicial review application to an oral permission hearing before a judge, at which they can present their arguments again (they cannot usually make new arguments). You and your lawyers will decide whether it is appropriate to instruct counsel to appear at this hearing.

**3.29** In some cases the judge may certify that a claim is ‘totally without merit’ (meaning ‘bound to fail’), which prohibits renewal to an oral hearing. But the claimant can still make a last attempt with the Court of Appeal. If an oral hearing takes place but permission is refused, an appeal again lies to the Court of Appeal. In the majority of cases, refusal of permission to seek judicial review is the end of the judicial review.



**Permission granted**

**3.30** If permission to seek judicial review is granted either on the papers or at an oral permission hearing, you and your lawyers will need to again assess the case and consider if it is appropriate to continue to defend it. The permission stage is only a filter.

**3.31** If the judge grants permission for the judicial review to proceed, this means that the judge thinks that the claimant has an ‘arguable’ case. That does not mean that the claimant is bound to win: it simply means that their case is sufficiently well argued so as to merit more detailed consideration by the court. However, your lawyers will advise you as to how best to proceed at this stage.

**3.32** If you opt to continue to defend the judicial review, you must prepare for a substantive hearing. This usually requires very detailed grounds of defence to be filed at the court/tribunal, drafted by counsel. These grounds will set out the decision maker’s position in full

with evidence in the form of witness statements explaining the history of the case; the procedure followed; the reasoning process and so on (see the section below, headed Witness statements).

**3.33** By or at this stage, most of the case related information under your control should have been disclosed under the duty of candour. Remember: the duty of candour is ongoing, so as new information comes to light, you must refer it to your lawyers for disclosure (see the section below, headed Duty of candour and disclosure for more detail).

**3.34** All parties are required to prepare in advance an outline (‘skeleton’) argument for the court/tribunal at the substantive hearing. It is rare for witnesses who have made statements to be called to give oral evidence and to be cross-examined on their statements at the hearing. The court/tribunal has the power to order it but it is rarely exercised. This is another reason why the duty of candour must be met.

**DEFINED TERM**

**Substantive hearing**

The substantive hearing is where the courts look at the full details of the claim and make a decision on the facts or merits of the case.

Other hearings, sometimes called case management or preliminary hearings, are

where the court is considering preparation needed before that substantive hearing takes place, or is making decisions about only certain aspects of a case — for example, permission hearings where the court decides whether to give permission for the claim to go ahead.



**CASE EXAMPLE**

**In the case of *R. (on the application of Gardner) v Secretary of State for Health and Social Care* [2021] EWHC 2422, the claimant sought an order for cross-examination of the defendant’s witnesses, alongside an order for extensive further disclosure (‘specific disclosure’).**

The court held that cross-examination was required only in the “most exceptional” of judicial review proceedings, such as certain human rights cases in which there were “hard-edged questions of fact”, or where the conduct of the defendant in the discharge of its duty of candour meant that cross-examination was required in order for the claim to be determined fairly and justly.

The court was not minded to order cross-examination in this case because:

“The issues identified do not suggest the same kind of hard-edge factual dispute... Moreover, to the extent that there are

disputes that are other than differences of opinion or judgment, the factual foundations for the different views expressed are stated, with the relevant source.. referenced in the witness statements that are filed. Where it is said that any such view is irrational or perverse or that there was a failure to take reasonable and proportionate measures in response, those are points that can be made good in submission. There is, furthermore, a risk that cross-examination would seek to unpick the decisions made and to encourage the court to remake those decisions for itself...

...The evidence disclosed by the defendants is extensive and the witness statements filed provide a detailed narrative of the history, explaining the bases of the decisions reached at various stages. This is not a case where the defendants conduct to date would itself provide grounds for permitting cross-examination.

**3.35** Where permission is granted the Court may make directions for the conduct and management of the case, setting out time limits; for example, for the filing and serving of any evidence on which the parties wish to rely, sometimes in respect of a particular point raised in the claim.

**3.36** Matters may be expedited with the court’s permission: for example, the permission and the substantive hearing may be ‘rolled up’ so that both are considered at the same hearing. Sometimes the parties may invite the court to dispense with the paper permission stage and invite the court to hold a hearing on permission.



### Substantive hearing

**3.37** At the substantive hearing, the case will normally be heard by a single judge in the Administrative Court; and a single judge or panel of judges in the Upper Tribunal. The judges will have read the papers beforehand. The judge(s) will consider the oral arguments presented by the parties' counsel (or the claimant themselves, if they opt to represent themselves) and deliver a decision immediately or after taking time for consideration (a **reserved judgment**).

**3.38** If the claimant has not made out their case, the judicial review will be dismissed. Otherwise it is likely that the challenged decision will be quashed, i.e. the effect will be as if the flawed decision had never been taken. This does not remove the public body's power to take a fresh decision, having regard to the law as established by the case. A range of other remedies are also available (see the section below, headed Powers of the court: remedies).

### Judgments

**3.39** Judgments can be read out at the end of a hearing or can be 'reserved'. If a judgment is reserved then it is handed down at a later date. Before that date an 'embargoed' copy of the judgment is given to the parties' lawyers to check for accuracy and any material that should not be made public. There is a legal requirement not to publish, disseminate or retain material, including online, that has been obtained from embargoed court judgments. Practice Direction 40E of the Civil Procedure Rules and the case of *Baigent v Random House Group* [2006] EWHC 1131 (Ch) confirm that publication of an embargoed judgment, or the substance contained therein, may be viewed as a contempt of court. Once a

judgment is handed down it can be made public and may be reported in the media.

### Permission to appeal to the Court of Appeal

**3.40** Either party may seek to appeal against an unfavourable decision. Whether you appeal is a matter of both legal advice and policy consideration.

**3.41** Neither a claimant nor a public body can appeal as of right: the first stage is to make a case for permission to appeal. This is done to the court/tribunal whose decision is to be challenged (the Administrative Court or Upper Tribunal). If the court/tribunal refuses permission to appeal, a single Lord Justice of Appeal at the Court of Appeal can be asked to grant permission: this is a more complex procedure, which requires filing of grounds of appeal and a skeleton argument (see the section below, headed Procedure: Seeking permission to appeal: Court of Appeal).

### Timing of an application for judicial review

**3.42** Someone wishing to challenge an administrative decision only has a limited time to do so, in terms of both the court procedure and pragmatically.

**3.43** The decision maker may have made other decisions consequential upon the first decision and other persons may have been affected by the decision and relied upon it, e.g. if the decision being challenged is for admission to a certain school, the limited school places may already have been given to other pupils who have started at the school. In other words, the world may have moved on, and a late challenge may be "detrimental to good administration".



**3.44** The Court procedural rules (Civil Procedure Rules Part 54.5) provide that:

“(1) [T]he claim form must be filed —

(a) promptly; and

(b) in any event not later than three months after the grounds to make the claim first arose...”

**3.45** Civil Procedure Rules Part 54.5 (5) and (6) set out that the claim form for certain planning judicial reviews must be filed within 6 weeks and the claim form for certain procurement judicial reviews must be filed within 30 days.

**3.46** Claimants sometimes interpret this rule as meaning they have up to 3 months to start a claim for judicial review. This is not correct: the claimant must start the claim “promptly”, which in all the circumstances of the case, may mean less than 3 months. Some types of decisions have less than 3 months for judicial review applications, for example for planning, procurement or public inquiry decisions.

**3.47** The court has power to extend the claim filing time but requires a “good reason” to be shown. The court applies the power to extend time widely, particularly where there appears to be a strong case on the merits and there is no detriment to any other person. As with decisions on standing (see the section above, headed Standing or sufficient interest) decisions on delay are primarily a

procedural matter, but are mixed up with the merits of the case. A claimant cannot argue that a good reason for a late judicial review claim is compliance with the pre-action protocol steps (e.g. sending a letter before initiating the judicial review claim). However, the claimant’s exploration of ‘alternative procedures’ may strike the court as a good reason to extend time and allow a late judicial review claim.

**3.48** In summary, when facing the prospect of an application for judicial review consider the following:

- does the claimant have standing? (If the judicial review alleges a breach of human rights, is the claimant a ‘victim’?)
- has the claimant brought his challenge promptly and within the relevant time limit?
- has the claimant tried all alternative remedies to judicial review (deemed to be a last resort)?
- can the matter be settled without the need for litigation? Is alternative dispute resolution appropriate? (See the section below, headed Alternative dispute resolution.)

## DEFINED TERM

### Standing

Someone is described as having ‘standing’ in a judicial review claim if they have a sufficient interest in the matter to which the claim relates. This may not be a personal interest, e.g. if they can show that they are acting in the public interest

and that the issue directly affects the section of the public that they seek to represent that may be enough.

If you do not have ‘standing’ the court may refuse permission for you to bring a judicial review claim.



## Has the judicial review ended? Appeals to the Court of Appeal and the Supreme Court

**3.49** At the end of the judicial review procedure (detailed above), either party may apply for permission to appeal the court's decision at the Court of Appeal or in some limited circumstances, directly to the Supreme Court.

**3.50** The applying party must either secure the current court's permission to apply for an appeal at the Court of Appeal; or if such permission is refused, apply directly to the Court of Appeal. If the Court of Appeal (or the Supreme Court) grants permission to hear the appeal, its findings will be significant and the conclusions reached will create binding case law.

### What can be appealed?

**3.51** Appeals are limited to a review of the decision of the lower court unless the appeal court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. The appeal court will not normally make an order allowing an appeal unless satisfied that the decision of the lower court erred in law or was wrong or unjust because of a serious procedural or other irregularity.

### Procedure: Seeking permission to appeal: Court of Appeal

**3.52** A party seeking permission to appeal to the Court of Appeal (the appellant) must set out their argument in the appropriate Appellant's Notice. In that notice, the appellant seeks to persuade the court their appeal has a realistic prospect of success. If they succeed, the court will grant permission to appeal. This first stage essentially acts as a filter, to

allow the court to dismiss weak appeals or appeals that do not set out any legal argument (for example, because they simply disagree with the lower court's decision without any proper argument).

**3.53** The other party (the respondent) may file a 3-page statement of reasons why permission to appeal should be refused.

**3.54** The court then usually determines whether or not to grant permission to appeal based on these documents and will only order an oral permission hearing in exceptional circumstances. (The Civil Procedure Rules (CPR), Part 52 and related Practice Directions govern the appeal procedure.)

### Procedure: Permission to appeal refused

**3.55** If the court refuses permission, that ends the matter.

### Procedure: Permission to appeal granted

**3.56** If permission is granted, the appeal will be heard in full. After a grant of permission but before the subsequent hearing is scheduled, the respondent can attempt to settle the appeal (for example by offering to reconsider the disputed decision that led to the appeal and/or committing to amending the disputed policy). If the hearing proceeds, the court may give its decision at the conclusion of the hearing ('on the spot') but it usually delivers it in detailed written form at a later date. After the judgment, either party can apply for permission to appeal to the Supreme Court (which is rarely granted).

**3.57** Strict court deadlines apply to each of the stages briefly summarised above (set out in the relevant Practice Directions) and the court does not often grant any extensions of time for filing mandatory



documents (such as the Appellant's Notice). This means appeals often generate a lot of work for departments and should be accorded the appropriate resources to be dealt with properly.

**3.58** If you are involved in responding to an appeal or pursuing an appeal (often via a specialist government litigation team that will deal with instructing the lawyers), make sure you have enough time and support to be able to respond to queries.

### Supreme Court

**3.59** The Supreme Court is limited by legislation as to which types of appeals it can consider: for example, the Supreme Court cannot hear a challenge to the Court of Appeal's refusal to grant permission to appeal. If a party applies to the Supreme Court for permission to appeal, the Appeals Panel of some of the Supreme Court Justices will decide whether or not to grant permission to appeal.

**3.60** Permission is rarely granted and usually only where the case involves an important point of principle. The other party may submit observations to the Appeals Panel to better assist it to reach a decision.

**3.61** The Supreme Court may opt to schedule a short oral hearing in order to better consider the application for permission to appeal, but this is rare. If permission is granted, a full hearing will be scheduled.

### Statutory appeals

**3.62** A statutory appeal is a distinct type of appeal because it is a right to challenge administrative decision making or action specifically provided for by statute. The legislation setting out the details of the decision making or action usually also sets out the right to the related statutory appeals. In very limited circumstances, it

is possible to judicially review a refusal to grant permission to appeal in a statutory appeal.

### Duty of candour and disclosure

**3.63 Disclosure** in judicial review is made under the **duty of candour**. It is different because public bodies are trusted by the court to put their 'cards face up on the table'. It is really important to retain that trust.

**3.64** This is an onerous duty (more than the standard disclosure regime in private law litigation) placed by the courts on all parties. It puts particular onus on the decision maker to ensure they are able to explain (and evidence) fully to the court and parties what the process was that resulted in the decision and why that process was followed. There can be serious consequences if the duty is not complied with, so you should always seek legal advice from your departmental lawyers about the duty of candour.

**3.65** The department concerned in the decision under challenge will be responsible for explaining to the court the processes followed and advice given that led to the decision. It will hold all the information about why a particular decision-making process was followed, how that process was followed and what the result of that process was, leading to a final decision.

**3.66** Neither a claimant nor the court will be aware of the internal workings that led to the final decision under challenge. Therefore the onus is on the decision maker to explain it honestly and frankly so that it can assist the court in reaching the correct decision. This may not necessarily be an agreement that the process leading to the decision was fair or that the decision is a rational one.



**3.67** The duty of candour requires the parties “to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide”, and to disclose those materials “which are reasonably required for the court to arrive at an accurate decision” *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd.* [2002] EWCA Civ 1409). Material that falls to be disclosed should be relevant to the decision and the claim pleaded. Disclosure is often made by way of a witness statement setting out the narrative of the decision-making process and exhibiting contemporaneous, relevant material.

**3.68** There is a need to disclose information that potentially undermines the decision maker’s defence to a claim. Be aware that marking a document ‘not for disclosure’, ‘confidential’ or similar does not automatically prevent it being disclosable. You should refer all relevant material to your departmental lawyers for advice.

**3.69** The court’s development of the duty of candour over the years has been an attempt to ensure the highest standards of public administration are maintained. Failure to comply with the duty of candour can undermine the court’s faith in whether a decision has been reached fairly and can result in the decision being quashed on that basis, with heavy criticism of the way the decision maker has dealt with disclosure in defence of a claim.



## CASE EXAMPLE

**In *R. (on the application of Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, a judicial review was brought by Citizens UK (a non-governmental organisation) against the Home Secretary.**

The claim concerned the expedited process adopted to assess the eligibility of unaccompanied asylum-seeking children to be transferred to the UK from France after it was decided that a camp they were at in Calais was to be demolished.

The court found that there was a serious breach of the duty of candour in the case, and that the expedited process was unfair and unlawful as a matter of common law.

**The court summarised the rules about the duty of candour as follows:**

1. Disclosure — in the sense of disclosure of documents — is not automatic in judicial review proceedings. When, before the Civil Procedure Rules 1998 were brought into force in 2000, courts used to make reference to “the duty of the respondent to make full and fair disclosure” (see e.g. the seminal case of *R v Lancashire County Council, ex p. Huddleston* [1986] 2 All ER 941, at 945, in the judgment of Sir John Donaldson MR), that should not be misunderstood as being a reference to “disclosure” in the modern sense of disclosure of documents. This is because, before 2000, disclosure of documents used to be called “discovery”.

2. One of the reasons why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with

the court. This is a “self-policing duty”. A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.

3. The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in *Hoareau* at para. 20:

“... It is the function of the public authority itself to draw the Court’s attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify ‘the good, the bad and the ugly’. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”

4. The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for “spin”.

5. The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the nondisclosure of a material document or fact or by failing to identify the significance of a document or fact.



## **The Freedom of Information Act 2000 (FOIA), Environmental Information Regulations 2004 (EIR), UK General Data Protection Regulations (UK GDPR) and the Data Protection Act 2018 (DPA)**

**3.70** The duty of candour is separate to the disclosure regimes established by the FOIA, EIR, UK GDPR and DPA. Although the duty of candour is a separate consideration for a decision maker involved in (or anticipating) litigation, the disclosure regimes established under FOIA, EIR, UK GDPR and DPA can be applied to run in tandem. Careful coordination is required to ensure you comply with the duty of candour and these other disclosure regimes.

**3.71** It is common for claimants to make requests for disclosure as part of their pre-action correspondence under the duty of candour as well as under FOIA and EIR or to access their personal data in accordance with their rights under the UK GDPR which then have to be considered alongside the duty of candour disclosure exercise.

### **Witness statements**

**3.72** Witness statements are the most common form in which decision makers and their lawyers present evidence in a judicial review.

**3.73** Sometimes it will be obvious who should be the witness (and sign the witness statement), e.g. where a decision has been made by an expert assessor, the decision was theirs and theirs alone, so only they can be a witness in its defence. Usually however the situation is more complex, because several people were involved in the decision making and there will be questions of seniority and responsibility to consider.

**3.74** Generally, the most senior responsible official who is able to speak to the issues concerned from their own knowledge would be the appropriate witness. Sometimes it will be appropriate for someone more junior to sign the statement; sometimes it may be necessary to take statements from more than one official. Sometimes the person who makes a witness statement in judicial review may have to give oral evidence and be cross-examined on their statement — therefore you should take care to nominate the right person to make the statement. The court has the power to direct such a witness to give oral evidence but rarely does so.

### **Preparation for litigation**

**3.75** In a judicial review (particularly a potentially significant case or a big case, i.e. where several judicial reviews are joined together because they deal with identical or related issues), it is essential to have a departmental point of contact for the department lawyers. The lawyers need to know who they should contact for instructions and who they should funnel their requests for further information through.

**3.76** If you are the department point of contact, you should make your working hours and contact details clear from the outset; and confirm who your alternate contact is when you are out of the office or otherwise unavailable. The judicial review process includes a number of court mandated deadlines which means the lawyers often have to request instructions (such as getting client approval of court documents) or further information on an urgent basis.

**3.77** If there is a judicial review hearing, either someone from the department will attend in person or will have to be available for the duration of the hearing (so that the department lawyers can



confirm instructions or get further information as required by the court).

**3.78** If you're attending the hearing, remember to address all the following:

- discuss with your lawyers and managers beforehand what the possible outcomes of the hearing will be and what instructions you will give in each situation. This should put you in a better position to quickly provide instructions to your lawyers on the day, whatever circumstances arise
- confirm the extent of your authority in giving instructions to the lawyers (for example, do you have authority to settle the judicial review by confirming a decision will be reconsidered within a specified timeframe? Do you have authority to agree to pay the claimant's legal costs up to an agreed threshold as part of a settlement?). Who will you need to contact to get authority for such decisions? Is that manager/colleague available on the day of the hearing?
- if you are attending court, arrange to have a colleague in the office on standby who can provide any documents requested by the court (sometimes the judge will ask for further documents at the hearing itself ) or check any facts on your behalf. Make sure your colleague knows where to find the case related documents
- make yourself familiar with the relevant department documents being referred to in the case so you can assist your lawyers by quickly referring them to relevant documents
- have all the likely contact details of colleagues and your lawyers that you will need with you

- if you are attending court, ensure you have all the equipment you are likely to need outside of the office (e.g. laptop, phone, chargers etc)

**3.79** If the judicial review hearing takes place remotely then, in addition to the considerations set out in the paragraph above, you will need to ensure that all the following are met:

- you agree a method of communicating with your legal team and colleagues during the hearing
- you restrict the number of attendees from the department to a sensible level: the courts generally require the parties to provide a list of attendees in advance
- your video and audio remain off throughout the hearing. Only the judges and barristers should speak

### **Evidence where the decision was taken by the minister personally**

**3.80** While there is no general principle of confidentiality for the minister where they were the decision maker, an exception is made for material which engages the principle of Cabinet collective responsibility.

**3.81** Briefly, this recognises the public interest in ministers being able to express their views frankly in the expectation that these will remain private, while maintaining a united front once a decision has been collectively agreed as government policy.

**3.82** If you are in any doubt about how to preserve collective responsibility while meeting your disclosure obligations, you should raise this point with your legal adviser and the Cabinet Office.



**3.83** You may need to consider the following points:

- what were the minister’s reasons for making a decision?
- are these reasons recorded, e.g. in a detailed submission prepared by officials given to the minister before they made the decision?
- the minister needs to personally get involved in defending the decision at judicial review because their reasoning for the decision challenged is disclosable
- who will sign any witness statement in a judicial review? The minister or one of their officials?
- the minister must be thoroughly acquainted with all the information in the judicial review and approve what is being said in evidence by them or on their behalf
- there are strict court deadlines for presenting evidence in judicial review. Departmental lawyers must be given early access to documents

**3.84** The majority of administrative decisions are taken below ministerial level, often by junior officials. However, sometimes the minister has made the decision personally (because they are required by statute to do so, or because officials have referred a particular decision to them because of its sensitivity). In any judicial review where the minister has made the decision personally, it may still be acceptable for the witness statement to be signed by an official on their behalf, but special care is required in the preparation of the evidence. The minister may have made their decision on the back of a detailed submission prepared for them by officials.

**3.85** It may be necessary to show that submission to the court in order to demonstrate that the minister was properly briefed and was in possession of all relevant information when they made the decision.

**CASE EXAMPLE**

***In R. (on the application of National Association of Health Stores & Another) v Department of Health [2005] EWCA Civ 154, the department avoided disclosing the submission before the minister (before he signed the challenged order) in line with its general policy not to disclose ministerial submissions.***

Instead, the department summarised the submission in a witness statement signed by an official.

The Court of Appeal rejected this approach (even though the appellant did

not object) and made it clear that where there was no question of public interest immunity, it was “entirely inconsistent to tender and rely on a secondary account instead. The courts would not allow a private litigant to do this, and in a legal system in which the state stands before the courts on an equal footing with its citizens there is no good reason to allow government to do it” because “what a witness perfectly honestly makes of a document is frequently not what the court makes of it.”



**3.86** The potential problems in establishing evidence where the minister made the decision challenged includes:

- the minister’s reasons for making the decision — whether they accepted all or only some the arguments presented to them; or had other reasons
- there is no general principle of confidentiality: It is a mistake to think that the minister who made the decision need not personally be involved in defending it at judicial review; or that their reasoning or documents recording it are immune from disclosure

**3.87** Whether the minister or one of their officials signs the witness statement, it is imperative that both the following are met:

- the minister is thoroughly acquainted with all the information in the case and approves what is being said in evidence by them or on their behalf
- the evidence is supported by the documents in the case

**3.88** These warnings also apply when the decision maker is a very senior official and the witness statement is being made below that level.

**3.89** Preparation of the evidence in general (whether the decision was made by the minister themselves or, more usually, at a lower level) is a collaborative process between departmental officials and their lawyers.

**3.90** It is essential that officials ensure that the lawyers are given early access to all the potentially relevant documentation. The lawyer handling the litigation for the department is responsible for the presentation of the evidence to the court; and they must receive support and cooperation — nothing must be withheld from the lawyer.

**3.91** The defendant (i.e. the public body or the department) must normally file their evidence within 35 days after service of the order granting permission in the judicial review (although in urgent cases the court can shorten this time). In view of the interests which may have to be consulted, there is no time to be lost.

**3.92** At the outset of the judicial review claim, you should review the case and your prospects of defending it (with your lawyers). Judicial review litigation often operates on a tight timetable with numerous short-term pressures and perhaps a perceived political imperative to be seen to be fighting the case.

**3.93** However, it is important to consider what the long view is. What are the possible consequences of the case and should the defendant concede? Remember that an adverse judgment after a contested judicial review hearing may do more lasting damage to departmental policy than an early concession in the particular case.

**3.94** It is debatable how far it is proper to defend a challenge for purely presentational reasons, but it is usually counter-productive. If the case is to be conceded (if necessary, the challenged decision can be quashed by consent of the litigating parties), then the sooner this is done the better.

**3.95** When the evidence has been assembled; served on the claimant; and filed with the Court, it is appropriate for the defendant and their legal advisers to again review the case and the prospects of continuing to defend it.



## Powers of the court: remedies

### Interim relief

**3.96** The power of the Court to grant interim relief is an important power in any case, not least in judicial review.

**3.97** The road to a substantive hearing can be a long one, and the challenge to the decision of a public body may not necessarily stop the disputed decision being implemented.

**3.98** The implementation of the decision may be practically irrevocable (e.g. a disputed place at a school is awarded to another child). If so, the claimant would be prejudiced by a delay in receiving a final decision from the court.

**3.99** When an application for judicial review is filed, the claimant must confirm what remedies they seek, including any request for interim relief. **Interim relief orders** normally take the form of an **injunction** (e.g. to temporarily stop a foreign citizen being removed from the country, pending a substantive hearing or pending a further decision on permission if permission is refused).

**3.100** An injunction can also be **mandatory**, e.g. directing the defendant to ensure that the claimant is given suitable accommodation within a particular timeframe. The court is not bound to simply grant or refuse the request for interim relief; it can instead

make directions to the parties (e.g. the claimant might be directed to file further documents to clarify issues raised in the claim; or the government lawyers might be directed to provide an Acknowledgment of Service in a shorter period of time than normal).

**3.101** The court will not usually grant interim relief, if one or more of the following applies:

- the grounds for seeking it are meritless
- granting interim relief would effectively grant judicial review and it is not clear that the grounds of claim, whilst not meritless, are convincing enough for this to happen (e.g. where both the claim for interim relief and the application for judicial review seeks the return of a passport)
- the public body is willing to not implement the decision, either because of its policy in dealing with applications for judicial review or because permission has been granted and it would be dangerous to implement the decision only for it to later be found unlawful

**3.102** On some occasions, the defendant (i.e. the public body) may decide to give an undertaking promising to temporarily not implement the disputed decision. The **undertaking** may or may not require the claimant to perform some action, such as agreeing to an amended timetable for the claim's progress.

## DEFINED TERM

### Interim relief

This is an order that the court can make before it considers the whole case at a final hearing.

### Injunction

This can be an order requiring a person (including a public body) to do something or not to do something.

**3.103** You may have to urgently consider whether or not to give an undertaking and its terms, at the beginning of a judicial review claim. You should consult your legal advisers before making this decision. It may be preferable to offer an undertaking if it is considered likely that interim relief will be granted. This will give you (the defendant) more control over the relevant terms that apply. But if an application for interim relief has already been lodged, the court's order may supersede this.

### Remedies following a successful challenge

**3.104** All of the court's remedies are **discretionary**, which means that the claimant has no absolute right to a remedy — although normally, the court will at least make a declaration regarding the legality of the decision under challenge.

**3.105** In deciding whether to grant a remedy, the court will consider factors such as:

- any delay by the claimant in bringing the case that is prejudicial to the defendant
- whether the claimant has suffered substantial hardship
- any impact the remedy may have on third parties
- whether a remedy would have any practical effect or whether the matter has become academic
- the merits of the case
- whether the remedy would promote good administration.

**3.106** The remedies which the court may grant following a successful judicial review are:

- a **quashing order**, which sets aside or cancels a decision (or subordinate legislation) found to be unlawful
- a **prohibiting order**, which forbids the public authority from performing an act found to be unlawful
- a **mandatory order**, which requires the public authority to perform a particular action
- a **declaration** that declares what the law is, for example that a particular decision is unlawful
- **damages** (in limited circumstances), by which the court can award financial compensation, e.g. a human rights claim

**3.107** The most common remedy granted to a successful claimant is a **quashing order**. If a decision is quashed, the matter will normally be returned to the decision maker to make a fresh decision in the light of the judgment of the court. Therefore it is unlikely the court will have to make a prohibiting order as well, because there will at that time be no decision to be implemented against the claimant. The court has the ability to suspend quashing orders, meaning that an order will only come into effect after a specified period of time. This will allow any concerned parties to make transitional arrangements to manage the impact of the order. The court may remove or limit the retrospective effect of quashing orders, meaning that a court may prohibit an unlawful decision from being employed in the future (or from a specified date) without invalidating any prior actions based on that decision. This may mitigate any detrimental effects on concerned parties whose affairs had relied on the decision until that point.

**3.108** The court has the right, subject to certain conditions and statutory provisions, to substitute its own decision for the decision under challenge, under section 31, Senior Courts Act 1981. However, it is rare for the court to do so.

**Powers of the court: no likelihood of a substantially different outcome**

**3.109** As stated earlier (in the section headed “It wouldn’t have made any difference”) under section 31(2A), Senior Courts Act 1981, the court is now able to refuse to grant a remedy where there is a technical breach of the law but it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred (i.e. the breach would not have made a difference).

**3.110** The court must refuse permission for a judicial review in these circumstances. The court can disregard section 31(2A) where it considers there are “reasons of exceptional public interest”. This provision might be important in cases raising consultation or public sector equality duty issues (covered in the next chapter, entitled 4 The public sector equality duty) where the government department has breached a procedural requirement, but if had not made that breach, it would have been likely to have reached the same outcome.

**CASE EXAMPLE**

***In R. (on the application of Logan) v London Borough of Havering [2015] EWHC 3193, a disabled man brought a judicial review challenging a council tax scheme. Under the scheme a former council tax rebate of 100% for council tax payers with the same level of income and disability of the claimant was reduced to a rebate of 85%.***

The council prepared an Equality Impact Assessment (EIA) in order to consider the impact of the policy in line with the public sector equality duty that was annexed to the report into the scheme. However, neither the report nor the EIA was circulated to the council members (although it was available electronically) when the scheme was recommended and ultimately adopted by the council.

The court held that there was insufficient evidence that the council had given due regard to the EIA. The Court considered section 31(2A) and held: “In the end, I do not propose to refuse relief on the basis of a conclusion that these indicators when taken alongside the other evidence before me made it ‘highly unlikely’ that the full council would have done other than adopt the recommendation of the cabinet.”

The court went on to conclude it had the power to make a declaratory judgment regarding section 31(2A), but observed that if the power under s.31(2A) had been invoked at the permission stage, then the outcome might have been different.





## CASE EXAMPLE

***In R. (on the application of Hawke) v Secretary of State for Justice [2015] EWHC 3599, the issue of whether section 31(2A) prevented a declaratory judgment being made arose in a case concerning the public sector equality duty involving married claimants.***

The husband was a serving prisoner. His wife lived far away and suffered from a debilitating illness that made travel to visit her husband difficult. Their request to transfer him to a closer prison was refused.

In passing judgment, the court found that no regard had been given to the public sector equality duty when the decision to place the husband in his current prison was made. The court noted that “neither claimant has suffered any loss as a result, since even if the Secretary of State for Justice or his staff or officials had fully and duly discharged their duties under that section, the outcome would have been, and will still be, the same”.

The court refused all relief, but for a declaratory judgment of the type made in

Logan. The court went on to give a further warning:

“If even after a ‘declaratory judgment’ a public authority persisted in failing to discharge its public sector equality duty under section 149, then there may come a time when, on proof of that failure, a claimant may be able successfully to persuade the court that enough is enough and that the exceptional public interest under subsection [31] (2B) has become engaged.

Alternatively (without in any way deciding the point), it may be that if a body such as the Equality Commission, which has very express responsibilities in this field, reached a considered decision that a public authority was in such continuing breach of the public sector equality duty that it was necessary to obtain a formal declaration from the court, then such a body may be able to persuade the court that the exception in subsection [31] (2B) is engaged, even though, by the nature of the body, it would not be able to show that the outcome for it would have been substantially different.

## Declarations of incompatibility

**3.111** The courts also have the power to grant a declaration of incompatibility under Section 4 of the Human Rights Act. That is the power to declare a **provision of primary legislation** incompatible with an ECHR right.

**3.112** A declaration does not have the effect of suspending the continuing operation or enforcement of the legislation. The government may take remedial action to remove the

incompatibility. Since the introduction of the Human Rights Act, declarations of incompatibility have been relatively rare: they are to be used as a last resort.

**3.113** The court will exercise its interpretive power to ‘read down’ the incompatible provision, if that is possible, before making a declaration of incompatibility. From the 2 October 2000 (when the Human Rights Act came into force) until the end of July 2021, only 44 declarations of incompatibility had been made.

## DEFINED TERM

### ECHR rights

These are rights from the European Convention on Human Rights as incorporated into UK law and set out in Schedule 1 to the Human Rights Act 1998. These rights are not affected by our exit from the EU. For more details, see Appendix 1.

### Human Rights Act

The Human Rights Act 1998 brought the rights from the European Convention on Human Rights into domestic law and gave people the right to bring claims in UK courts for breach of human rights.

## CASE EXAMPLE

### The Right to Rent Scheme requires landlords and agents and homeowners to check the immigration status of tenants and other occupiers before entering into a tenancy agreement.

In *R. (on the application of Joint Council for The Welfare of Immigrants) v Secretary of State for the Home department* [2020] EWCA Civ 542, a challenge was brought on the basis that the scheme allegedly causes landlords to commit race discrimination against those who are entitled to rent with the

unintended effect that non-British citizens are less likely to be able to find homes.

The High Court made an order declaring that sections 20 to 37 of the Immigration Act 2014 were incompatible with Article 14 in conjunction with Article 8.

The Court of Appeal, overturned the decision of the High Court, determining that the scheme is lawful and does not breach human rights. The legislation did strike a fair balance between the rights of the individual and the interests of the community.

## When can the court award damages?

**3.114** A claim for judicial review may include a claim for damages. However, the claim for damages must be additional to one of the other main remedies, for example in addition to a request for a declaration. A claim for damages cannot stand alone.

**3.115** An unlawful decision or other breach of public law does not give an independent right to financial compensation. For example, if a business was refused a licence and this caused it loss, the fact that it subsequently successfully challenged the decision would not automatically grant it the right to damages.

**3.116** There is only an entitlement to damages when a claimant could have made a private law claim, for example for unlawful detention, or under section 8 of the Human Rights Act.

## Damages under section 8, Human Rights Act 1998

**3.117** The Human Rights Act added an important way to claim damages that was not previously available in judicial review. Under the Human Rights Act, the court has the power to award damages if it finds that a public authority has acted in a way that is incompatible with an ECHR right.

**3.118** However, not every breach of an ECHR right will entitle a claimant to damages — only where “the court is satisfied that the award is necessary to afford just satisfaction” s8(3)(b), Human Rights Act. Sometimes the mere finding that there has been a breach of an ECHR right will be enough.

**3.119** Where the breach has caused actual financial loss to the victim, an award of damages is more likely.

### DEFINED TERM

#### Damages

Damages is a sum of money claimed or awarded in compensation.

### CASE EXAMPLE

***In R. (on the application of Infnis plc), v Gas and Electricity Markets Authority [2013] EWCA Civ 70* it was found that the Gas and Electricity Markets Authority’s decision to refuse accreditation for two power stations on the basis that they fell within exclusions for non-fossil fuel generating stations was unlawful. The decision was based on a mistaken interpretation of the relevant legislation.**

The power stations’ owners were able to show that the decision had caused them a financial loss, and they were entitled to damages under section 8 of the Human Rights Act 1998 as a result of the violation of their rights under Article 1 of Protocol 1 the European Convention on Human Rights 1950 (the right to peaceful enjoyment of possessions).



## Private law damages in judicial review

**3.120** “Our law does not recognise a right to claim damages for losses caused by unlawful administrative actions” (Baroness Hale in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57) so breaches of public law do not automatically lead to a claim for financial compensation (except for claims under section 8, Human Rights Act as set out above).

**3.121** Damages may only be awarded against public bodies in judicial review if a claimant can show a recognised cause of action for breach of statutory duty or in common law. Two particularly important areas are discussed below — **negligence** and **misfeasance in public office**.

### Negligence

**3.122** A public body may owe a duty of care to people and if it is breached then they may be liable for claims in negligence. However, public policy issues arise if a claimant alleges that a public authority has been negligent in the exercise of its statutory duties to them.

**3.123** There is a strong public interest in ensuring that public bodies can carry out their activities without fear of being held liable for damages. The courts have shown they are sympathetic towards this position. They have been cautious about the extent to which police forces may owe duties of care with respect to their

investigation of crime (although there may be positive duties to act to protect the right to life under the Human Rights Act 1998). This is not a blanket immunity and the courts may find a duty of care towards someone who experienced direct harm from a positive action.

**3.124** Recognising that the public purse is funded by the taxpayer, the courts have been reluctant to impose the burden of paying compensation for private financial loss resulting from the necessary exercise of statutory duties, unless it can be inferred from the statute that Parliament intended to create that right alongside the statutory duty. Therefore, the courts have been cautious in finding that a **duty of care** exists in order for a claim that a breach of statutory duty was negligent to succeed.

**3.125** The courts do not go so far as to conclude that there can never be a private law duty of care in performing a public law function, because to do so would convey a kind of immunity on the decision maker. The practical considerations referred to above that argue against a duty of care existing are not legal arguments. The courts will always judge each case on its merits and claims for damages may be made subject to close examination alongside the requirements of the Human Rights Act 1998. Therefore it is always important for decision makers to be thorough and make robust decisions.

## DEFINED TERM

### Damages

Damages is a sum of money claimed or awarded in compensation.



## Breach of statutory duty

**3.126** A further potential ground for raising a claim for damages in public law proceedings can be include an allegation that a decision maker has acted in breach of a statutory duty.

**3.127** To succeed in such a claim, a claimant would need to demonstrate that the duty of which the decision maker is

alleged to be in breach was imposed to ensure the protection of a limited class of the public and that Parliament intended to provide for a right of action in respect of a breach of it. It is relatively rare for statutes to confer such a private law right, but they do so in some cases.

## CASE EXAMPLE

### **The court held that there may be a duty of care in respect of negligence**

**This case of *Smith and others v The Ministry of Defence* [2013] UKSC 41 consisted of different claims arising from the deaths of, and serious injuries to, a group of soldiers whilst they served in Iraq.**

The first set of claims arose from a 'friendly fire' incident. These appellants claimed that the MoD was negligent because it failed to properly equip the tanks used and failed to provide appropriate training.

The second set of claims arose from the death of soldiers on patrol. Their families (also appellants) claimed that the MoD was negligent because it failed to provide suitable armoured vehicles for patrol, and instead reintroduced the use of Snatch Land Rovers after they had been withdrawn following the death of an occupant.

The Supreme Court considered whether (i) the MoD could rely on the concept of 'combat immunity' (which excludes liability for negligence for the acts of those engaged in active operations against

the enemy); and (ii) whether it was fair, just and reasonable to impose a duty of care in negligence on the MoD in the circumstances.

The court unanimously held that both sets of claims should not be struck out on either ground. The doctrine of combat immunity should be construed narrowly and therefore arguably did not apply in these claims (in which the alleged acts of negligence were arguably removed from active operations against the enemy).

The court was not prepared to strike out the negligence claims at this stage because the issues needed to be determined after further argument and more evidence at a full hearing. Similarly, the question of whether it was fair, just and reasonable to impose a duty of care on the MoD (or whether such a duty would mean the MoD was unrealistically burdened), needed to be determined after further argument and evidence at a full hearing.

The effect of the court's decision is that the negligence claims are deemed to be arguable and therefore can proceed to a full hearing.

**CASE EXAMPLE**

**The court held that there was no duty of care in respect of negligence**

**In *Poole Borough Council v GN (through his litigation friend “The Official Solicitor”)* and another [2019] UKSC 25, in May 2006, a mother and her children were placed by the council in a house on an estate in Poole next to a family who, to the council’s knowledge, persistently engaged in anti-social behaviour.**

The family became the target of harassment and abuse at the hands of their neighbours. This included vandalism of the mother’s car, attacks on the family home, threats of violence, verbal abuse, and physical assaults. As a result, the children suffered physical and psychological harm. During the period in question, the children were identified by the council as children in need, as defined

in the Children Act 1989, and had social workers allocated to them. The children brought their claim on the basis that the council had been negligent in the exercise of both its housing functions and its functions under the 1989 Act.

The Supreme Court concluded public bodies do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm. However, they can come under a common law duty to protect someone from harm in circumstances where the principles applicable to private individuals or bodies would also impose such a duty, as for example where the authority has created the source of danger or assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.

**Misfeasance in public office**

**3.128** Misfeasance in public office is a tort (a civil wrong), which could give rise to a private law claim for damages.

**3.129** Misfeasance in public office is established if it can be shown that the decision maker was not merely negligent, but acted with malice. In this context, acting with ‘malice’ includes any one of the following:

- proof of the decision maker’s spite or ill-will (in the sense of an act intended to do harm to a particular individual), for example where a prison officer unjustifiably penalises a prisoner out of spite

- proof the decision maker knew they were acting unlawfully and that this would cause injury to some person
- proof the decision maker was recklessly indifferent to the fact that they had no power to do the act complained of and that act would probably cause harm to a person or group of people



**CASE EXAMPLE**

**In *Brent London Borough Council v Davies* [2018] EWHC 2214, two school governors of a maintained school were found to have committed the tort of misfeasance in public office when they breached their duty to the local education authority, when they acted**

**with knowledge that they had no power to authorise significant payments to senior staff to which they were not entitled.**

The local education authority were entitled to recover the overpayments.

**CASE EXAMPLE**

**Claims of misfeasance have been made against Secretaries of State.**

**In *Weir v Secretary of State for Transport* [2005] EWHC 2192, a claim was made against the Secretary of State for Transport relating to the decision to put Railtrack into administration.**

In light of the Secretary of State's past opposition to rail privatisation, it was

claimed that they deliberately engineered Railtrack's insolvency intending to cause financial loss to the shareholders.

The court held that there had been good reasons of public policy for making the decisions they made, that they had been properly advised by officials, and that there was no direct evidence that they had acted with any other motivation.

The claim of misfeasance was dismissed.

**Alternative dispute resolution (ADR)**

**3.130** At the outset of a proposed judicial review challenge (and at any later stage) you should give consideration as to whether the challenge can be dealt with by some form of ADR.

**3.131** There are many different types of ADR, such as **mediation**, **arbitration** and **conciliation**. All of these ADR mechanisms involve resolving a dispute outside of court. They can be **binding**, meaning that the outcome is final and can be enforced (generally, by the courts or through arbitration), or **non-binding**, which means that the parties can proceed with litigation to resolve the dispute if they are not satisfied with the outcome of the process.

**3.132** The potential advantages and disadvantages of ADR depend to a large extent on the specific mechanism used but generally the main advantages of using ADR to resolve a dispute are that it:

- is often a more informal and flexible process than litigation that gives greater control to the parties
- encourages reconciliation and cooperation
- may also be cheaper
- can be confidential in nature unlike litigation



**3.133** However, some of the perceived drawbacks of ADR include that:

- it can result in wasted time and cost for the parties if a settlement is not reached and litigation is ultimately pursued
- not all ADR mechanisms are binding, which means it can result in unenforceable outcomes
- some disputes may be unsuitable to ADR given their particular circumstances

**3.134** The pre-action protocol for Judicial Review states:

“The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution (‘ADR’) or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs.”

**3.135** Whether ADR is appropriate to the case will depend on the nature of the decision being challenged; the extent to which there is any room for manoeuvre; what other parties are affected by the decision challenged or complained about, and so on — it may not always be a viable option.

**3.136** For example, if the relationship is so broken down between parties or if either side has a very strong case, there may be little room for negotiation, and ADR is unlikely to be beneficial.

**3.137** However, remember the pre-action protocol encourages opportunities (including ADR) for settling disputes without recourse to litigation. It will be to

your advantage as a decision maker to grasp these opportunities, particularly as a party can be at risk for costs penalties in litigation if ADR was offered and they refused to take it up. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered.

**3.138** ADR can be pursued after a judicial review claim is initiated. The 3 month time limit within which a judicial review claim must be brought may mean a claimant has initiated the claim in order to ensure they have the option to pursue it, but is nevertheless potentially open to settling their challenge by ADR.

## The Parliamentary and Health Service Ombudsman

**3.139** The Parliamentary and Health Service Ombudsman (the Ombudsman) operates under the Parliamentary Commissioner Act 1967. The Ombudsman can investigate ‘any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority’.

**3.140** There are some situations in which a person may have been badly affected by some administrative error or abuse yet have no remedy, or the remedy may be disputed. In some circumstances the Ombudsman may be able to provide redress.

**3.141** The Ombudsman does not always agree to carry out an investigation. Following an investigation, the Ombudsman may:

- recommend that a department pay compensation
- recommend that a department issue an apology





- make recommendations for management action within a department or some other action; despite the fact that there may be no (or disputed) legal liability

**3.142** The Ombudsman can intervene where there has been a complaint by a member of the public who claims to have sustained injustice in consequence of maladministration because of the actions of a department. The Ombudsman's recommendations (following a complaint) are not legally binding.

**3.143** 'Maladministration' is not defined in the Parliamentary Commissioner Act 1967, but has been interpreted in various cases investigated to include a wide range of bureaucratic bad practice, including:

- delay
- misleading advice
- loss of documents
- failure to follow procedures or government guidance

**3.144** Each of the devolved administrations have its own Ombudsman:

- the **Public Services Ombudsman for Wales** deals with complaints about most public bodies in Wales, including the Welsh Government and Senedd Cymru (Welsh Parliament)
- the **Scottish Public Services Ombudsman** deals with complaints about public bodies in Scotland, including the Scottish Government and Scottish Parliament
- the **Northern Ireland Public Services Ombudsman** investigates complaints about public bodies in Northern Ireland, including the Northern Ireland Assembly and Northern Ireland departments

# 4. THE PUBLIC SECTOR EQUALITY DUTY



## Understanding the public sector equality duty

**4.1** The public sector equality duty (PSED) aims to bring equality issues into the mainstream of policy consideration. This means that public bodies have to consider how their policies, programmes and service delivery will affect people with particular protected characteristics. It is an essential component of public decision making.

**4.2** Section 149 of the Equality Act 2010 ('the act') sets out the PSED, which requires a public authority, in the exercise of its functions, have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the act
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it

**4.3** These are sometimes referred to as the **three aims or limbs of the PSED**. The act provides more details as to how the three aims of the PSED may be met in section 149(3) to (6) of the act.

**4.4** The relevant protected characteristics referred to in the act are:

- age

- disability
- gender reassignment
- pregnancy and maternity
- race (colour, nationality, ethnic or national origins)
- religion or belief
- sex
- sexual orientation

**4.5** Marriage and civil partnership is not a 'relevant' protected characteristic, which means it only has to be considered in relation to the first limb of the duty (and discrimination because of marriage and civil partnership is only prohibited in relation to work).

**4.6** Schedule 18 to the act sets out **exceptions to the PSED**, including judicial functions, functions relating to Parliament, the security services, children, and immigration and nationality functions.

### Who does the PSED apply to?

**4.7** The PSED applies to the public authorities listed in Schedule 19 to the act, when carrying out all their functions (unless otherwise specified). This includes all ministers of the Crown and government departments, including their executive agencies. The PSED also applies to other public and private sector bodies, not listed in Schedule 19, where they are performing a public function (when exercising that function).

## DEFINED TERM

### Equality Act 2010

Equality Act 2010 — this brought together all previous equality legislation and includes prohibitions on discrimination and a duty to have due regard to the public sector equality duty.



## What does having ‘due regard’ mean?

**4.8** The PSED is a duty to have **due regard** to the need to achieve the goals identified in the Act. It is not a duty to achieve any particular outcome. The duty to have due regard obliges a public authority to consider relevant matters that may affect a decision, then decide what weight to accord to the equality considerations. The level of due regard considered sufficient in any particular context depends on the facts.

### CASE EXAMPLE

**Bracking is one of the key cases on PSED.**

***In R. (on the application of Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345, the claimants in this case challenged the closure of the Independent Living Fund, which was a non-departmental government body funded by the Department for Work and Pensions and set up to combat social exclusion on the grounds of disability. It provided discretionary cash payments to disabled people to assist them to lead independent lives.***

Following consultation, the Secretary of State had proposed to close the fund on the basis that its existing arrangements were financially unsustainable.

The Court of Appeal held that the Act imposed a heavy burden on public authorities in discharging the PSED and in ensuring that the steps taken by the decision maker in seeking to meet the statutory requirements were recorded. In this case, the evidence, which included an equality impact assessment, was not

enough to demonstrate compliance with the PSED.

The “sketchy references” in the documents before the minister as to the impact on fund users did not demonstrate that focused regard had been had to the potentially very grave impact upon individuals in the relevant group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.

The material before the minister had not given them an adequate flavour of the responses received, which indicated that independent living could be put seriously in peril for a large number of people. There was nothing to identify a focus on the precise provisions of the Act, what precise impact had been envisaged to persons potentially affected, and what conclusion had been reached in the light of those matters.

As the decision had been reached without due regard to the PSED, it was unlawful and would be quashed.

**4.9** The following case law principles have been summarised in Bracking:

- **knowledge** — decision makers (including ministers) making decisions that do (or might) have an impact on equality, must be aware of their duty to have ‘due regard’
- **sufficient information** — decision makers must consider what information they have and what further information may be needed in order to give proper consideration (this may include consultation with key stakeholders, for example)
- **timeliness** — having ‘due regard’ must be fulfilled “before and at the time that a particular decision is being considered”, not after the decision has been made
- **real consideration** — consideration must form an integral part of the decision-making process, and be exercised fully, rigorously, and with an open mind. Decision makers should be aware of the potential negative impacts of a decision
- **specific regard** — a conscious approach to the statutory criteria rather than general regard to issues of equality
- **weight** — if the court is satisfied that there has been a rigorous consideration of the duty, then it is for the decision maker to decide how much weight should be given to the various factors informing the decision. The PSED does not mean that decisions cannot be taken which disadvantage some people (provided this does not constitute unlawful discrimination), but the decision maker should be aware of the equality impacts of these decisions
- **no delegation** — the decision maker must personally have due regard and

cannot delegate the duty; public bodies may need to supervise compliance by any third parties acting on their behalf

- **recording** — it is good practice for a decision maker to keep records demonstrating consideration of the duty
- **review** — public bodies must have ‘due regard’ when a policy is developed and decided upon, implemented and reviewed: it is a continuing duty

**4.10 A proportionate approach** should be taken to the intensity of PSED assessment depending on the circumstances of the case and the seriousness of the potential equality impacts on those with protected characteristics.

**4.11** PSED allows a minister to adopt a policy that has a detrimental impact on people with protected characteristics, provided the decision is taken in the knowledge that it has this impact, and that mitigating action has been considered. Of course, if the detrimental impact amounts to unlawful discrimination, the policy would be unlawful. The weight attached to the various factors is a matter for the public body, subject to review by the courts on irrationality grounds.

### Practical tips for compliance with PSED

**4.12** There is no legal requirement for a PSED assessment (sometimes known as an **equalities impact assessment**) to be recorded in a specific format, or at all, but the document is evidence of the PSED having been considered. Departments will usually have their own assessment guidance and templates and it is good policy practice to consult these to ensure that impacts are not overlooked.

**4.13** In addition, as the duty is on the decision maker personally (it cannot be delegated), the equality impacts must

be drawn to their attention. This means that it is not enough for officials to simply append their PSED assessment to a decision-making document. There must also be an explicit reference to the outcome of the assessment within the substantive decision-making document in order to satisfy the Court that the material was before the decision maker.

### Impact and consequences of non-compliance

**4.14** Alleged breaches of the PSED may be challenged by way of **judicial review proceedings**. If an applicant for judicial review establishes a breach of the PSED, the appropriate remedy is at the court's discretion. The court may quash the decision, which means that the decision will be remitted to the decision maker to retake the decision. Such an outcome

would inevitably have cost implications, could delay the implementation of the policy and cause reputational damage.

**4.15** In addition, if the matter concerns secondary legislation, the court may set aside the legislation if there has been a breach of PSED. Alternatively, the court may consider it appropriate to make a declaration that PSED has been breached, if a quashing order would serve no useful purpose.

**4.16** Finally, the Equality and Human Rights Commission (EHRC) has powers to assess compliance with the PSED. In November 2020, the EHRC used its powers to assess PSED compliance in relation to the Home Office's 'hostile environment' policies. Engagement with such enforcement action may be time consuming and resource intensive.

### CASE EXAMPLE

***In R. (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058, a civil liberties campaigner challenged the legality of the use by a police force of automated facial recognition technology (AFR). Using AFR involved processing the facial biometric data of members of the public.**

The technology had been used by the police force in a pilot project, which involved deployment of surveillance cameras to capture digital images of people, which were then processed and compared with images of persons on police watchlists. If no match was made, the image was immediately and automatically deleted.

The claimant had challenged the lawfulness of AFR generally, and

specifically regarding two occasions when his own image had been captured. The claimant submitted that AFR created a greater risk of false identifications in the case of women and people from black, Asian and other minority ethnic backgrounds (BAME).

The Court of Appeal held that the police force had not done all it reasonably could to fulfil the PSED. Public concern about the relationship between the police and BAME communities had not diminished and the duty was important to ensure that a public authority did not inadvertently overlook the potential discriminatory impact of a new, seemingly neutral, policy. The police force had never investigated whether AFR had an unacceptable bias on grounds of race or gender. The fact that the technology was being piloted made no difference to the duty.

# 5. DEVOLUTION



**5.1** The devolution process gave legislative competence (law making power) in certain policy areas to three territorial legislatures created in 1998. (Common interests such as defence and foreign policy have not been devolved). As a result there are now four legislatures within the UK:

- **Parliament** (colloquially referred to as “the Westminster Parliament” or “the United Kingdom Parliament”)
- **The Scottish Parliament**
- **The Northern Ireland Assembly**
- **Senedd Cymru** (the Welsh Parliament, more commonly known as ‘the Senedd’). Prior to 6 May 2020, the Welsh legislature was called the National Assembly for Wales

**5.2** Parliament at Westminster retains the constitutional power to legislate in any field throughout the UK, including in respect of devolved matters.

However, the convention known as the **Sewel Convention** (stated both in the Memorandum of Understanding and, since 2017, in the Scottish and Welsh devolution legislation) is that it will ‘not normally’ legislate on devolved matters without the agreement of the relevant devolved legislature(s). (Although note the case of *R. (on app. of Miller and another) v. the Secretary of State for Exiting the EU* [2017] UKSC 5 made clear that the inclusion of the convention in the settlements did not create a legal rule, but was a statement of the political convention.)

**5.3** Such agreement by a devolved administration is indicated by their legislature(s) passing a **legislative consent motion**. It is extremely rare for the UK Parliament to legislate in a devolved area without consent, with significant exceptions being the European Union (Withdrawal) Act 2018, and the United Kingdom Internal Market Act 2020.

## DEFINED TERM

### **Sewel Convention**

This Memorandum of Understanding (known as the Sewel Convention) is between the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive. It is periodically updated, and is available online at [Devolution: memorandum of](#)

[understanding and supplementary agreement.](#)

The key principles of the working relationship between the UK Government and the devolved administrations are **communication, consultation, co-operation, exchange of information and respect for confidentiality.**





**5.4** Ministers take executive responsibility for matters within the legislative competence of each devolved legislature and for certain other matters. There are provisions in each of the settlements that limit the devolved government from exercising functions that would not be within the scope of their legislatures to confer upon them.

**5.5** The devolution settlements, in their different ways, have transferred many of the powers previously exercisable by ministers of the UK Government, in relation to devolved areas, to devolved ministers.

**5.6** Where there is scope for agreement between the devolved administrations and the UK Government about a particular policy area and how functions should be exercised, then there is a mechanism for agency agreements to be agreed between the relevant devolved administrations and the UK Government. Under these arrangements, UK ministers may exercise functions that are legally the functions of the devolved governments (and vice versa). Such arrangements exist, for example, where it is easier to administer schemes on a UK-wide basis, such as the administration of the COVID-19 testing regime.

**5.7** There is no legislature specifically for England. This has given rise to a concern about the perceived unfairness of MPs from Scotland, Wales and Northern Ireland being able to vote on matters that affect only England, whilst MPs from England are unable to vote on matters devolved to the devolved legislatures. In 2015 steps were taken to attempt to resolve this imbalance. This change, known as **English Votes for English Laws** (or **EVEL**), was made by amendment to the Standing Orders of the House of Commons relating to Public Business. On 13 July 2021, the House of

Commons agreed to rescind the English Votes for English Laws Standing Orders to remove this complex procedure from the legislative process.

**5.8** The exact boundaries of legislative competence differ between the three devolution settlements. Some common features are that no devolved legislature can legislate incompatibly with rights under the European Convention on Human Rights, or to amend its own constitutional relationship with the UK Parliament. All 3 settlements now operate on the basis of the **reserved model**, such that the devolved legislatures can pass legislation in areas that are not expressly reserved to the UK Parliament.

**5.9** The Welsh model was formerly a **conferred powers** model, such that the National Assembly for Wales (as it was at that time) only had the power to legislate in areas expressly conferred upon it. The Wales Act 2017 amended the Government of Wales Act 2006 to switch the Welsh model to a reserved model in line with the other two settlements.

**5.10** In the Northern Ireland Act 1998, matters within the competence of the NI Assembly and NI Executive are **transferred**, those which can be exercised with consent from UK ministers are **reserved**, and those within the sole competence of the UK Parliament are **excepted**.

**5.11** For civil servants who are responsible to UK ministers, the political and legal implications of devolution include the following:

- if your minister is acting under powers that apply only to England, or to England and Wales, any purported exercise of them beyond those borders may be *ultra vires*

- you will want to consider, with your minister, the consequences of your policy for the Union, and whether it is appropriate or desirable to legislate across the whole of the UK. Early engagement with the Territorial Offices will assist in understanding the implications of legislating or not legislating on a UK-wide basis
- if you are working on legislation relating to a devolved subject that will apply in one of the devolved territories, you will need to seek a **Legislative Consent Motion** from the relevant devolved legislature(s)
- if your work concerns international relations (which are not devolved), its outcome may have implications in a devolved field (e.g. an obligation in a treaty may affect agriculture)
- the devolved administration may be undertaking similar work in parallel to yours, or you may wish them to do so in order to achieve a common approach throughout the UK. There are areas where the devolved administrations and the UK Government may have common interests and positive and early engagement with officials in the devolved administrations can assist in identifying these areas
- even if your work only affects England, the devolved administrations may have undertaken similar work earlier and have useful insights to share

**5.12** For any or all of these reasons and others you may need to communicate, consult or co-operate with officials of each administration.

## Devolution issues and Supreme Court references

**5.13** You may also be concerned that actions taken by devolved institutions encroach upon reserved (Scotland,

Wales) or non-transferred (Northern Ireland) functions which properly belong to your own minister. Besides judicial review of *ultra vires* actions, questions about the powers of the devolved legislatures to legislate, or conceivably about UK ministers exercising functions properly belonging to devolved ministers, may be referred to the courts as ‘devolution issues’ and/or in certain circumstances referred to the Supreme Court by the Law Officers in Whitehall or in the devolved jurisdictions.

**5.14** For example, reference to the Supreme Court was made over the question of whether farm workers’ wages can properly be regulated under a devolved power to legislate for ‘agriculture’, when ‘employment relations’ are not devolved (Re Agricultural Sector (Wales) Bill 2013 [2014] UKSC 43, which held that this was within competence of the National Assembly for Wales, as it was at that time).

**5.15** More recently, the Supreme Court considered that it was outside competence for the Scottish Parliament to pass legislation which would have modified the UK Parliament’s EU (Withdrawal) Act 2018 (which is a ‘protected enactment’), and required UK ministers to obtain the consent of Scottish ministers for certain regulations made in devolved areas; and in *Re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, that it was outside the competence of the Scottish Parliament to confer certain functions on a court in relation to acts of the UK Parliament as this would undercut the sovereignty of the UK Parliament.

**5.16** There is scope for the courts to review the acts passed by a delegated legislature on other grounds too, although this scope may be limited. For example, in *Axa General Insurance Ltd v Lord*



*Advocate* [2011] UKSC 46, the Supreme Court made clear that challenges to legislation of the Scottish Parliament based merely on 'irrationality' are likely to fail; but in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, that bill would have infringed ECHR rights as well as exceeding legislative competence.

### Further guidance

**5.17** The Department for Levelling Up, Housing and Communities is responsible for cross-cutting devolution issues generally from the viewpoint of the UK Government, and has produced fuller notes online in the [Guidance on devolution](#).

**5.18** Every Whitehall department has a devolution co-ordinator. There are also territorial offices within the UK Government (the Scotland Office, the Wales Office and the Northern Ireland Office), which specialise in the detailed arrangements affecting the relevant devolved territory.

## 6. EU AND EU RELATIONS



## Continued impact of EU and EU-derived law

**6.1** The UK is no longer a member of the EU, so EU law does not apply. However, there will be some cases where EU law remains relevant, so it is important to be aware of the EU-related legal environment and to seek legal advice when developing policy, considering legislative proposals or making decisions.

**6.2** As EU law does not apply, the devolved institutions are now no longer restricted, and have competence to modify retained EU law relating to devolved matters (see also the chapter entitled [5 Devolution](#)).

## Retained EU Law — residual impact of EU law on the domestic legislative framework

**6.3** In order to ensure continuity in the law and to avoid creating regulatory gaps, the European Union (Withdrawal) Act 2018 (the 2018 act) created a new body of domestic law called **retained EU law**.

**6.4** The 2018 act did this by essentially taking a snapshot of the EU law as it applied in the UK on 31 December 2020 immediately before the end of the transition period: this body of law was incorporated into UK law and any UK legislation which implemented EU law obligations was also preserved. The 2018 Act contains special rules about how retained EU law should be interpreted and applied to ensure legal certainty and continuity.

**6.5** Retained EU law is intended to provide a baseline of rights and obligations which can be amended or replaced by domestic legislation made in the usual way. As of 2022, HM Government plans to reform the approach to retained EU law, and you should check the position with your departmental lawyers.

## Continued application of EU law in limited circumstances under the terms of the Withdrawal Agreement

**6.6** The UK–EU Withdrawal Agreement, including the Northern Ireland Protocol, was concluded to settle the terms of the UK’s withdrawal from the EU. The Withdrawal Agreement provides that certain EU law, including the jurisdiction of the Court of Justice of the European Union (CJEU), continues to apply in the UK in limited circumstances.

**6.7** In most cases the continuing application of EU law is time limited. Where required, the Withdrawal Agreement (and the EU law applied by it) are given direct effect in UK law by section 7A of the European Union (Withdrawal) Act 2018 (inserted by the European Union (Withdrawal Agreement) Act 2020). Section 7A provides that the provisions of the Withdrawal Agreement take priority over anything in UK domestic legislation, including anything in retained EU law.

# APPENDICES 1-4



# APPENDIX 1: THE ECHR RIGHTS IN THE HUMAN RIGHTS ACT 1998

## The following ECHR rights are protected by the Human Rights Act 1998:

- Right to life (Article 2)
- Prohibition of torture (Article 3)
- Prohibition of slavery and forced labour (Article 4)
- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- No punishment without law (Article 7)
- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to marry (Article 12)
- Prohibition of discrimination (Article 14)
- Protection of property (Article 1 of the First Protocol)
- Right to education (Article 2 of the First Protocol)
- Right to free elections (Article 3 of the First Protocol)
- Abolition of the death penalty (Article 1 of the Thirteenth Protocol)

Some of the ECHR rights (e.g. Articles 8 and 10) are 'qualified', which means that interference with such rights is permissible in certain circumstances.

## APPENDIX 2: HOW TO FIND MORE INFORMATION

The main source for further information is your departmental lawyers. This guide is a general statement of principles and not a replacement for specific legal advice.

Much more detailed legal guidance for civil servants is available on [gld.digital](#) which has sections on working with lawyers, changing the law and legal powers. The 'working with lawyers' section includes guidance about when to involve lawyers.

As well as our advisory and litigation teams, the Government Legal Department has specialist teams to advise on employment and commercial decisions. These decisions are also subject to the general principles set out above. There are also specialist teams in the wider Government Legal Profession.

All **legislation** referred to is available at [www.legislation.gov.uk](http://www.legislation.gov.uk) and full **judgments** for most cases are available at <https://caselaw.nationalarchives.gov.uk/>

### Official publications

- The Administrative Court — Judicial review and costs: <https://www.justice.gov.uk/courts/rcjrolls-building/administrative-court/applying-for-judicial-review>
- Freedom of Information guidance from the Information's Commissioner's Office: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>
- Devolution guidance: <https://www.gov.uk/guidance/guidance-on-devolution>
- Equality Act 2010 guidance: <https://www.gov.uk/guidance/equality-act-2010-guidance>
- European Court of Human Rights: <https://www.echr.coe.int>
- *Right first time: a practical guide for public authorities in Scotland to decision making and the law*, produced by The Scottish Government, 2021: <https://www.gov.scot/publications/right-first-time-practical-guide-public-authoritiesscotland-decision-making-law-second-edition/>
- *Making good decisions: guidance for public authorities*, produced by Welsh Government, 2017: <https://gov.wales/making-good-decisions-guidance-publicauthorities>

### Training Courses

There are frequent courses organised either within departments or on a central basis by the Civil Service College on administrative law, judicial review, retained EU law, devolution and human rights law. The Government Legal Profession provides regular client legal awareness training. Your training section will be able to give you details.





# APPENDIX 3: ACCESSIBLE DESCRIPTIONS OF JUDICIAL REVIEW FLOW CHARTS

## Judicial Review Procedure Flow Charts

### Overview of stages

The overview flow chart shows the three stages: **Judicial review Stage 1** Pre-action and initial application, with an arrow which leads to **Judicial review Stage 2** Permission and hearings, which in turn has an arrow which leads to **Judicial review Stage 3** Appeal.

[Return to main page about stages of judicial review](#)

### Stage 1 — pre-action and initial application

The first flow chart shows the disputed decision at the top with an arrow to 3 months later when an application for judicial review is made. Between this is two other steps: firstly the pre-action protocol letter and then after an arrow for 14 days later to the pre-action response. After the application for judicial review there is an arrow to 21 days later when the acknowledgement of services is due.

[Return to main page about stage 1 of judicial review](#)

### Stage 2 — permission and hearings

At the start of this second flow chart is the acknowledgement of service. This has three arrows from it which go to the next possible routes for the judicial review claim.

The first route is that permission is granted, which then has an arrow showing 35 days to the detailed grounds and evidence. After this, there is a further arrow to the claimant's skeleton argument which is 21 days before the hearing. The next arrow is to the defendant's skeleton argument, which is due 14 days before the hearing. These both lead to the substantive hearing which has arrows to the two possible outcomes of either the claim being allowed or the claim being dismissed.

The second route from the acknowledgement of service is that permission is refused, which then has an arrow showing 7 days to apply for a renewal notice if the claim is not 'totally without merit'. The next arrow goes to the oral permission hearing. Following that, the arrows lead either to permission being refused or to permission being granted, the latter leading back to that step in the first route as set out above.

The third route from the acknowledgement of service is an arrow straight to a 'rolled up' hearing. From this, there are two arrows, either to the claim being refused or dismissed or the claim being allowed.

Underneath all three routes is the application for permission to appeal.

[Return to main page about stage 2 of judicial review](#)



# APPENDIX 3: ACCESSIBLE DESCRIPTIONS OF JUDICIAL REVIEW FLOW CHARTS

## Stage 3 — appeal

The third flow chart starts with the application for permission to appeal. Unless the High Court has given permission to appeal against its own decision, an application for permission to appeal must be made to the Court of Appeal within 21 days of the date of the order appealed against. If the appeal is against refusal of permission for judicial review, the time limit is 7 days.

After this, the respondent has 14 days in which they may (if they choose) file a 3-page statement of reasons why permission to appeal should be refused.

After this, there are three routes. The first is that permission is granted. The second is that permission is refused. The third is that, exceptionally, the court may hold an oral hearing before deciding whether to grant or refuse permission.

If permission is granted, the respondent has 14 days in which to file a respondent's notice, although this is only required in some circumstances. Whether or not a respondent's notice is filed, the grant of permission is followed by the appellant's appeal skeleton argument, then the respondent's skeleton argument, then the substantive hearing. There are two possible outcomes to the substantive hearing, i.e. either the appeal is allowed or the appeal is dismissed.

At the end of the flow chart the possibility of an appeal to the Supreme Court is noted.

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# APPENDIX 4: SUMMARY OF DEFINED TERMS

## The Convention, or the ECHR

The European Convention on Human Rights.

## Damages

Damages is a sum of money claimed or awarded in compensation.

## Delegation

‘Delegation’ is where the person who has power to make a decision gives that power to someone else to make the decision, instead of making it themselves.

## ECHR rights

These are rights from the European Convention on Human Rights as incorporated into UK law and set out in Schedule 1 to the Human Rights Act 1998. These rights are not affected by our exit from the EU. [For more details, see Appendix 1.](#)

## Equality Act

Equality Act 2010 — this brought together all previous equality legislation and includes prohibitions on discrimination and a duty to have due regard to the public sector equality duty.

## Fettering discretion

When a public body is given a discretion to make a decision, (that is, to choose from different options before making a decision) but somehow binds themselves so they cannot use that discretion, for example by rigidly adhered to a policy it has formulated rather than considering decisions based on the circumstances.

## Hansard

The official report of all Parliamentary debates.

The courts sometimes refer to Hansard when they interpret Acts of Parliament (the circumstances in which the courts can use Hansard to interpret legislation are set out in what is sometimes called the [Pepper v Hart rule](#), and there are more details in the [Parliamentary privilege case example](#)).

## Human Rights Act

The Human Rights Act 1998 brought the rights from the European Convention on Human Rights into domestic law and gave people the right to bring claims in UK courts for breach of human rights.



# APPENDIX 4: SUMMARY OF DEFINED TERMS

## **Injunction**

This can be an order requiring a person (including a public body) to do something or not to do something.

## **Interim relief**

This is an order that the court can make before it considers the whole case at a final hearing.

## **Judicial review**

Judicial review is the procedure by which people or organisations can apply to ask the Administrative court or Upper Tribunal to review decisions of a public body and the court decides if they are lawful.

## **Justiciable**

'Justiciable' means something which is appropriate for examination before the courts. Some things are described as 'non-justiciable' because they are not examined by the courts: for example, decisions that are for political determination.

## **Legitimate expectation**

A legitimate expectation is where a public body acts in a way or says that it will act in a way that means that people are entitled to rely on them acting that way, for example a promise may be made that consultation will be carried out before a decision is made or it may be that the public body has always consulted in the past before certain decisions are made and so they expect that to happen again.

## **Pre-action protocol**

The pre-action protocol accompanies the Civil Procedure Rules, i.e. the rules that litigants in the civil courts have to comply with.

This protocol is called the 'pre-action' protocol because it concerns things that should be done before a claim is started at court.

A failure to comply with the pre-action protocol can have various consequences, including costs sanctions.

# APPENDIX 4: SUMMARY OF DEFINED TERMS

## Public body

A comprehensive list of 'public authorities' for the purposes of the Freedom of Information Act 2000 is contained within schedule 1 of the act, to be read with section 3. Schedule 19 of the Equality Act 2010 also sets out a list of public authorities for the purposes of that Act.

The lists of public bodies in FOIA 2000 and EA 2010 are not comprehensive lists of all bodies whose decisions may be subject to judicial review.

Further information on public bodies is provided on the [gov.uk website](https://www.gov.uk).

## Quash

When the courts reject a decision as legally invalid. Where a decision is quashed, the decision is treated as if it had never been made.

## Royal Prerogative

These are powers which are exercised by ministers. They were described in the case of R. (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5 as follows:

“The Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation.”

## Sewel Convention

This Memorandum of Understanding (known as the Sewel Convention) is between the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive. It is periodically updated, and is available online at [Devolution: memorandum of understanding and supplementary agreement](#).

The key principles of the working relationship between the UK Government and the devolved administrations are communication, consultation, co-operation, exchange of information and respect for confidentiality.

## Standing

Someone is described as having 'standing' in a judicial review claim if they have a sufficient interest in the matter to which the claim relates. This may not be a personal interest, e.g. if they can show that they are acting in the public interest and that the issue directly affects the section of the public that they seek to represent that may be enough.

If you do not have 'standing' the court may refuse permission for you to bring a judicial review claim.

# APPENDIX 4: SUMMARY OF DEFINED TERMS

## Statute

A statute is an act of Parliament — for example the Ivory Act 2018. We use the term ‘statutory’ to describe something that is in a statute — for example, the Ivory Act 2018 include statutory powers to make regulations about the exceptions to the prohibition on dealing in Ivory.

## Statutory

‘Statutory’ refers to things set out in legislation, which include Acts of Parliament and regulations, orders, etc.

## Substantive hearing

The substantive hearing is where the courts look at the full details of the claim and make a decision on the facts or merits of the case.

Other hearings, sometimes called case management or preliminary hearings, are where the court is considering preparation needed before that substantive hearing takes place, or is making decisions about only certain aspects of a case — for example, permission hearings where the court decides whether to give permission for the claim to go ahead.

## Ultra vires

The term *ultra vires* literally means ‘beyond the powers’ in Latin. For example, if a decision maker acts outside their power for a purpose that the power was not created to achieve, that action (often in the form of a decision) will be *ultra vires*.





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