
JUDICIAL REVIEW IN PRISON LAW

- Hugh Southey, Hamish Arnott and Adam Straw -

1. What decisions may be challenged

In principle almost any decision of a public authority or inferior court can be challenged unless there is a clear statutory provision preventing a challenge.

The following decisions involving prisoners can be challenged by judicial review:

- To adopt or depart from policy (such as the contents of the prison rules).
- Disciplinary decisions (of governors *R v. Deputy Governor of Parkhurst Prison, ex p Leech* [1988] 1 AC 533 or independent adjudicators).
- Parole board decisions.
- Transfer and segregation: *R v Deputy Governor of Parkhurst Prison ex p Hague, Weldon v Home Office* [1992] 1 AC 58.
- Categorisation: *R v Secretary of State for the Home Department, ex p Duggan* [1994] 3 All ER 277.
- Any other administrative, operational, managerial or disciplinary decisions.

Alternative remedy

The most important limitation on the principle that any decision of a public authority or inferior court can be challenged is that the Administrative Court will normally refuse relief if there is an alternative remedy. However, if there is no statutory provision excluding jurisdiction, this is an exercise of discretion rather than a rigid rule (e.g. *Leech v Deputy Governor of Parkhurst* [1988] AC 533).

The formal complaints process (as described in PSO 2510) applies to many decisions made in a prison, and should be exhausted before a claim is made. However, a letter from

a solicitor amounts to a complaint so the pre-action protocol for judicial review normally satisfy that process. The Senior District Judge at Chief Magistrate's Office can review the punishment imposed at an independent adjudication. These procedures normally need to be exhausted before any claim for judicial review is made.

The alternative remedy must be suitable and effective. An application to the Ombudsman does not normally amount to an alternative remedy because the Ombudsman only has an advisory role. He may not direct action to be taken.

2. The importance of judgment

Whether a claim for judicial review has merit is a difficult question of judgment. As a consequence it is important to discuss a potential claim with at least one person with significant experience in this area. Even if your firm lack such a person, most experienced counsel are willing to discuss the merits of potential judicial review claims on a pro bono basis. Counsel are also able to provide a formal advice under the advice and assistance scheme.

3. Text books

Basic guidebooks on judicial review include *Judicial Review: A Practical Guide*, by Hugh Southey and Sir Adrian Fulford. Simon Creighton and Hamish Arnott have recently published *Prisoners: Law and Practice*.

4. Defendant

The appropriate defendant is the person or body that had the power to make the decision under challenge. The most common options are:

- The prison governor (or in a private prison, the director), for decisions made with the governor's authority, such as decisions involving segregation, categorisation (except category A), transfer, access to documents and correspondence, visits and the Incentives and Earned Privileges Scheme. However, the Secretary of State for Justice has responsibility for the supervision of prisons and should often be named as a defendant.
- The Secretary of State for Justice is responsible for decisions about category A prisoners, transfers of indeterminate sentence prisoners to open conditions and compassionate release, and policy.
- The parole board.
- The relevant probation board or probation trust.

Where there is more than one agency involved in making the decision(s) under challenge, there may be more than one defendant.

5. The potential grounds

Judicial review is a review of the lawfulness of the decision making process, not an appeal on the merits. A claimant may only argue the decision maker should have reached different findings of fact in exceptional cases:

Firstly, a material, irrational finding of fact normally makes the decision unlawful (see below).

The second exception is where there has been a 'clear' error of fact. In *E v Secretary of State for the Home Department* [2004] QB 1044 the Court of Appeal held that mistake of fact could amount to a ground for review in the following circumstances:

“First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been ‘established’, in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.” (para 66)

For example, in *R (on the application of Carman) v Secretary of State for the Home Department* [2004] EWHC (Admin) 2400 a licence condition was flawed because it was made on the basis of an error in the number of offences the released prisoner had been convicted of. See also *R. (Morton) v Parole Board* [2009] EWHC 188 (Admin).

Finally, the Administrative court may make findings of ‘precedent fact’. These are facts which must be established before a public body has the power to make a decision. A court will decide such questions of fact for itself. For example:

R v Governor HM Prison Frankland and ors ex p Russell [2000] Times Aug 31: the randomness of a random drug test was held to be a condition precedent to its legality.

Generally, however, the issue is whether there has been a mistake of law. Lord Diplock gave what is often regarded as the most important statement of the three categories of error of law that allow the court to intervene by way of judicial review, when he stated:

“The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’” (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410D).

A) *Illegality*

Illegality, or ‘unlawfulness’, involves a decision maker failing to direct herself correctly regarding the law.

A decision will be unlawful if the public body acted beyond its prescribed powers. That is, the decision was ‘ultra vires’ (such as in *R v Governor of Winchester Prison, ex p Rodde* [1991] 1 WLR 303, DC).

Misconstruction of a statute or statutory instrument is prima facie grounds for applying for judicial review (*R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106). When considering the scope of a statutory power it will often appear that it is impossible to argue that a decision is unlawful as the statute gives the decision maker a wide discretion. However, any statutory power is likely to be subject to implied statutory limitations.

A decision that breaches common law fundamental rights (such as the right of access to a court: *R v Home Secretary, ex p Leech* [1994] QB 198) may be unlawful. A statute may only interfere with such rights if it makes it clear that Parliament intended to do so: *R v Governor Frankland, ex p Russell* [2000] 1 WLR 2027.

One other factor that is relevant to legality is that a statutory discretion must be exercised in a manner that accords with the purpose of the statute (*Padfield v Minister of Agriculture* [1968] AC 997).

Limitations

There are several important limitations on the scope of this ground of judicial review. Firstly, a statute has often not been misconstrued if a decision maker has reached findings of fact and then applied a statutory provision giving the provision its normal meaning to determine whether the statute is engaged (*Brutus v Cozens* [1973] AC 854).

An error of law will not result in the High Court quashing the decision if it is not “a relevant and material error of law, i.e. an error in the actual making of the decision which

affected the decision itself” (*Per Lord Browne-Wilkinson, R v Hull University Visitor ex p Page* [1993] AC 682 at 702C). But ‘material’ probably only means the error might have affected the outcome. For example, a Parole Board’s decision was quashed for a procedural failure to make documents available to an applicant, where that failure *might* have made a difference in *R v Secretary of State for the Home Department, ex p Georghiades* [1993] 5 Admin LR 457.

Illegal policies

A failure to follow a policy without a good reason, or a misunderstanding of policy, can be challenged in judicial review proceedings. Clear reasons should be given for any departure: *Gransden & Co. Ltd. & anor v Secretary of State for the Environment & anor* [1987] 54 P. & C. R. 86, page 94. However, it is for the decision maker to interpret their policy. (*R v Secretary of State for the Home Department ex p Gangadeen* [1998] INLR 206).

At the same time, there must be adequate flexibility within the policy to ensure the statutory discretion is not unlawfully fettered, and to respond to a particular case (*R v Secretary of State for the Home Department, ex parte Venables* [1998] A.C. 407 page 496G to 487A).

A failure to publish prison service policy may be unlawful: *R (Roberts) v Secretary of State for Justice* [2009] EWHC 2321 (Admin). You should normally be able to obtain a policy by applying under the Freedom of Information Act 2000.

In a prison context there is a wealth of policy covering many aspects of prison life, in particular PSOs and PSIs, to which the above duties probably apply: *R v. Governor of HM Prison Latchmere House, ex p Jarvis* (20th July 1999). The Prison Service is generally entitled to apply these policies with little flexibility as a consequence of the need to treat prisoners consistently.

B) *Procedural impropriety*

The most obvious form of procedural impropriety is a failure to comply with an express procedural requirement such as those contained in the *Prison Rules 1999*. Such a failure may be challenged.

Historically the issue was whether the statutory provisions that impose the procedural requirements actually impose a mandatory procedure or whether they merely direct the decision-maker about the procedure that should normally be adopted.

In *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106 the requirement to lay a charge against a prisoner ‘as soon as possible’ was found to be mandatory, a breach of which should lead to the adjudication being quashed.

The conventional approach has been called into question by the decision of the Court of Appeal in *R v Immigration Appeal Tribunal ex p Jeyeanthan* [2000] 1 WLR 354. That case suggests that three questions should be considered:

1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement?
2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case?
3. And, if it is not capable of being waived or is not waived then what is the consequence of the non-compliance – should/can it be waived?

It is not only a failure to follow express procedural rules that can give rise to a claim for judicial review based on procedural impropriety. There are various common law requirements, such as that the decision-maker or court must act without bias and must give a party a fair hearing (e.g. *Kanda v Government of Malaya* [1962] AC 322 at 337, PC; *O'Reilly v Mackman* [1983] 2 AC 237 at 279G).

Bias

If it is proved that the decision maker was actually biased, that is plain ground to grant relief. If a decision maker has a direct interest in the outcome, such as a financial interest the court will normally quash the decision without looking into the likelihood of bias

(*Locobail v Bayfield Properties Ltd and another* [2000] QB 451). What is necessary is a sufficiently significant interest that the outcome of the case could “realistically” affect the interest of the judge (*ibid*).

More common is apparent bias. A decision will be quashed on grounds of apparent bias if “a reasonable and fair-minded observer would conclude that there was a real possibility that the decision maker was biased:” *Magill v Porter* [2002] 2 AC 357. The assessment must be based on all relevant circumstances, not just those known to the parties at the time the decision was made. This ground of review is based on the principle that it is vital to maintain public confidence in the judicial system.

An example is *R (on the application of Al-Hasan) v Home Secretary* [2005] 1 WLR 688. By the very fact of his presence when a search order was confirmed, a deputy prison governor gave the order his tacit assent and when, thereafter, the order was disobeyed and he had to rule upon its lawfulness, a fair-minded observer could think him biased towards finding the order lawful.

But the decision maker’s qualifications, role and experience may prevent an appearance of bias: *R v. Board of Visitors of Frankland Prison, ex p Lewis* [1986] 1 WLR 130:

Perhaps the most obvious circumstances in which apparent bias has been found by the courts is where the decision maker has made statements that suggest that they favour one of the parties. The decision maker may be required to disqualify themselves if the statements suggest unconscious bias in favour of one of the parties.

Fair Hearing:

There are no universal standards that apply in every situation and determine whether the parties to a decision-making process have had a fair hearing. Instead, the requirements for a fair hearing depend on the circumstances of the case. As Lord Bingham noted in *R v Home secretary, ex p Smith and West* [2005] 1 WLR 350 :

“...the expression ‘procedural fairness’ more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes ... which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations...” (at [28]).

A person is normally entitled to a fair hearing where that person will be directly affected by the decision that is to be made (*Re Hamilton; Re Forrest* [1981] AC 1038 at 1045B).

Express procedural requirements such as those contained in the Parole Board Rules 2004 do not mean that the Administrative Court will not hold that the right to a fair hearing imposes additional procedural requirements on the decision maker (e.g. per Lord Bridge, *Lloyd v McMahon* [1987] AC 625 at 702H).

Where a fundamental right is involved, such as a person’s liberty, more stringent procedural safeguards are required. As stated in *Smith & West*: “the prisoner must have the benefit of a procedure which fairly reflects, on the facts of the particular case the importance of what is at stake for him” namely his liberty, albeit conditional (at para 35).

Examples – Prison Law

In prison law, the right to a fair hearing has been held to confer the following rights:

- *To receive sufficient information about an intended decision.* In some contexts this only means the gist of the case against the prisoner needs be disclosed (such as regarding the categorisation of life sentenced prisoners: *R (on the application of Hirst) v Home Secretary* [2002] EHC 390). But in others something approaching full disclosure is required (such as decisions affecting the length of detention: *R v Secretary of State for the Home Department, ex p Doody* [1993] 1 AC 531). The courts have more recently become more demanding as to the amount of information required. Thus, substantial disclosure is now necessary

- even for category A reviews: *R (on the application of Lord) v Home Secretary* [2003] EWHC 2073 (Admin).
- However, there is no requirement to allow a determinate sentence prisoner to make representations before a re-categorisation decision. This was because the prisoner had a right to an appeal, and such a requirement would place too great a burden on the administration of prisons and would be impractical in a context where decisions must often be made speedily: *R (Palmer) v Home Secretary* [2004] EWHC 1817 (Admin).
 - *To sufficient time to prepare* (*R (on the application of Hirst) v Home Secretary* [2002] EWCA Civ 378).
 - *To make representations: R (SP) v Home Secretary* [2004] EWCA Civ 1750 (segregation in a YOI).
 - *To an oral hearing*. An oral hearing before the Parole Board will often be required for a recalled determinate sentenced prisoner, depending on the issues to be resolved: *R v Secretary of State for the Home Department, ex p Smith and West* [2005] 1 WLR 350 .
 - *To prompt resolution: R v Home Secretary, ex p Roberts* 7 July 1998 unrep.
 - In a different context, *to cross-examine a witness* (*R v Department of Health ex p Gandhi* [1991] 1 WLR 1053 at 1063F, DC).

C) Irrationality

Irrationality that amounts to an error of law is often described as ‘*Wednesbury* unreasonableness’. This comes from the statement of Lord Greene in the *Wednesbury* case that:

“[I]f 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* [1948] 1 KB 223 at 230, CA)

For example, it is irrational to put beyond the prisoner the means of demonstrating progress towards rehabilitation while at the same time demanding such progress from the prisoner before granting him re-categorisation: *R (Falconer) v Secretary of State for Justice* [2009] EWHC 2341 (Admin).

Failing to take account of relevant factors or taking account of irrelevant factors is a ground of challenge that is closely linked to irrationality. Clearly, a decision that ignores a relevant factor might be said to lack logic. Such a decision can be unlawful (*R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 at 751D, HL).

In *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, where a minimum tariff was being set for a child’s detention, public opinion in form of petition was held to be an irrelevant consideration.

In *R (MacKenzie) v Secretary of State for Justice* [2009] EWCA (Civ) 669 a prison Director’s decision not to recategorise the Claimant was unlawful because the Director failed to give proper consideration to the impact on risk of the Claimant’s orchidectomy.

As linked to irrationality is inconsistency, which can also be a ground for judicial review (*Kruse v Johnson* [1898] 2 QBD 91 at 99, CA).

The willingness of a court to interfere with a decision depends on the context. Irrationality challenges to factual findings in prison discipline cases are rarely successful. The courts deem prison governors and adjudicators to be in a far better position than themselves to make the such decisions: *Ex p Ross* [1994] Times 9 June.

Similarly, the courts are very unlikely to interfere in a decision of a Parole Board as to risk, because the board is a specialist tribunal. As the judge put it in *R v Parole Board, ex p Blake* HC [2000] 23 Feb unreported, para 54:

“the panel reached a decision which I would not have reached if I had been in their position. That, however, is not the point. The Parole Board have both the experience and expertise in making decisions of this character which judges lack. Furthermore, the decision in question has been entrusted by Parliament to the Parole Board, not the judiciary”.

D) Legitimate expectation

An application for judicial review can be based on a claim that a decision-maker has failed to fulfil a procedural, or sometimes a substantive, legitimate expectation. This is a developing area of law that has arguably been restricted in recent cases, and which still resists definition. *R v Jockey Club ex p RAM Racecourses* [1993] 2 All ER 225, CA held that the applicant must prove:

“(1) A clear and unambiguous representation..

(2) . . . it was reasonable for the applicant to rely upon it without more . . .

(3) That it did so rely upon it.

(4) That it did so to its detriment. While in some cases it is not altogether clear that this is a necessary ingredient, since a public body is entitled to change its policy if it is acting in good faith, it is a necessary ingredient where, as here, an applicant is saying, ‘You cannot alter your policy now in my case; it is too late’.

(5) That there is no overriding interest arising from [the respondent's] duties and responsibilities . . . which entitled [them] to change their policy to the detriment of the applicant.”

In the particular circumstances of the case of *R v Governor of Pentonville Prison, ex p Lynn* 7th Dec 1999 unrep, the notification to the prisoner that he would be subject to conditional release on a specific date could properly be said to have raised a legitimate expectation. Accordingly it would have been unfair for the applicant to continue to be imprisoned and he was to be released.

E) A failure to give reasons

Reasons may be required by a Statute or Statutory Instrument, such as the Parole Board Rules 2004 (e.g. r20).

Sedley J held in *R v Higher Education Funding Council ex p Institute of Dental Surgery* [1994] 1 WLR 242 at 263A, DC that:

- “(1) [T]here is no general duty to give reasons for a decision, but there are classes of case where there is such a duty.
- (2) One such class is where the subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right.
- (3) Another such class is where the decision appears wrong. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent; (b) it follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgement is such a decision. And (c) Procedurally, the grant of leave in such cases will depend upon prima facie evidence that something has gone wrong”.

In *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 the Court of Appeal held that if the appellate process is to work satisfactorily, the judgment of a lower court must enable the appellate court to understand why the judge reached his decision. That decision gives some guidance on the standard of reasons required.

A lack of reasons may frustrate a claimant’s right to make a challenge to a decision: *R v Parole Board, ex p Lodomez* Times, August 3, 1994, *R (H) v Ashworth Hospital Authority* [2002] EWCA Civ 923. Reasons for fixing a tariff period were required in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 in part because it was important to ensure justice was seen to be done (at 540).

Where a decision needs explanation, in the light of the facts, a failure to give reasons may make the decision irrational: *R v Home Secretary, ex p Pegg* Times, August 11, 1994.

If there is to be a complaint about the absence of reasons, an application must first be made for reasons.

Adequacy of Reasons

Where a certain procedure is fundamental to a decision, such as the balancing of risk, reasons must be full enough to demonstrate that exercise has been properly carried out: *R v Parole Board, ex p Gordon* [2001] ACD 265. Reasons will not be adequate if they fail to address the issues in dispute.

However, the court usually does not prescribe any standard form of decision letter, or require elaborate or impeccable standards of draftsmanship. *R v Parole Board, ex p Oyston* [2000] Independent 17 April, CA.

F) *Proportionality*

At least in relation to cases involving certain articles of the ECHR and EU free movement rights, a disproportionate decision is an unlawful one (*R v Secretary of State for the Home Department ex p Daly* [2001] 2 AC 532). Lord Steyn considered the correct approach to proportionality and concluded that the Human Rights Act 1998 can require the court to engage in a more rigorous form of review. He noted ‘three concrete differences’ which were:

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v

Ministry of Defence, Ex p Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights”.

At common law proportionality is sometimes recognised where fundamental rights are engaged. For example, in *R v. Home Secretary, ex p Simms* [2000] 2 AC 115 the policy of preventing interviews between journalist and prisoners was ‘*unreasonable and disproportionate and cannot be justified as a permissible restraint upon the rights [in particular freedom of expression] of a prisoner*’. See, however, *R (Association of British Civilian Internees) v Secretary of State for Defence* [2003] QB 1397.

In *R v Governor Frankland, ex p Russell* [2000] 1 WLR 2027 the policy restricting prisoners to one meal a day fell foul of test whereby ‘*there must be established a self-evident and pressing need for the power and the interference must be the minimum necessary to fulfil the need*’.

But extent of review of a decision depends on the context. In some cases the appellate body will re-take the decision for itself: *Huang v Secretary of State for the Home Department* [2007] 2 AC 167. In other cases, the appellate body will only assess whether or not the decision maker properly carried out the proportionality balancing exercise. In *R (D) v Home Secretary* [2003] EWHC 155 (Admin) there was a failure to properly address the first stage of the proportionality question, namely whether decision to separate a mother prisoner from her baby breached art 8.

There may be a discretionary area of judgement, where the court will give the decision maker some leeway in its proportionality assessment. The court may do this where the decision maker has some enhanced competence or knowledge over the courts, or on democratic grounds, but will be less likely to do so where the right is of fundamental importance. In *R (ML) v Secretary of State for health* [2001] QB 1067 there was a discretionary area of judgement in restricting child visits to serious offenders.

G) Human Rights

Under section 6 of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with the ECHR rights listed in the schedule to the Act.

Some rights are qualified, which means an interference with that right may not be unlawful if the interference is justified. In most cases an interference may only be justified on specific grounds.

Article 5: the right to liberty

This includes that right for anyone deprived of his liberty by detention to have the lawfulness of that detention decided speedily by a court. Where the reason for the detention is risk to the public, periodic reviews must take place to determine whether there remains a risk: *Weeks v UK* [1988] 10 EHRR 293. This right has been of importance in reforming the parole system.

The review must be carried out by a tribunal that is independent of the judiciary, and has the power to direct release. Article 5(4) requires a fair procedure, including, depending on the context, an oral hearing where witnesses may be questioned. Damages may be awarded for breaches of article 5, and have been given even for very short delays in convening a hearing: *R (on the application of Hirst) v. Home Secretary & anor* [2005] EWHC 1480 (Admin).

Article 6: the right to a fair hearing

Article 6 invokes a range of protections which depend upon whether a decision involves a determination of a criminal charge, or of the applicant's civil rights or obligations.

Where a prison disciplinary offence is serious enough to warrant the imposition of additional days, the full protections of article 6 ECHR normally apply: *Ezeh and Connors v UK* [2004] 39 EHRR 1. However, parole hearings do not involve the 'determination of a criminal charge': *Smith & West* [2005] UKHL 1.

The European Court of Human Rights recognises that prison hearings are distinct from criminal trials, such as with regards to the security considerations. There is therefore no right to a public hearing of an adjudication: *R (on the application of Bannatyne) v. Independent Adjudicator & Anor* 2004 EWHC 1921 (Admin).

Further examples of human rights in prison law include:

- The state comes under a duty to initiate an effective investigation into arguable breaches of article 2, involving death or life-threatening injury (*R (on the application of JL) v Secretary of State for the Home Department* [2008] 3 WLR 1325), or article 3: *Beganovic v Croatia* 25th Sept 2009, appn 46423/06.
- Prison conditions, such as a lack of medical care, may be unlawful under article 3. While the threshold is high, factors that lower the threshold include that the claimant is detained by the state, vulnerable, and a child: *R (C) v Secretary of State for Justice* [2009] 2 WLR 1039.
- A policy that legal correspondence is searched in the prisoner's absence was unlawful under article 8 - the right to respect for private and family life, home and correspondence: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

PROCEDURAL CHECK LIST

This checklist has been drafted on the assumption that the judicial review proceeds according to the normal timetable. It is possible that time periods may be shortened if there is particular urgency.

Requirements for a person to bring a claim for judicial review.	A person must have a sufficient interest. In addition, in a human rights claim a person must be a victim.	Supreme Court Act 1981, section 31(3), Human Rights Act 1998, section 7
	Decision challenged must be a decision of a public body or an inferior court.	
	Decision challenged must be a public law decision.	
When must claim be commenced.	Promptly and in any event within 3 months.	CPR 1998, Part 54.5
Steps to be taken by the claimant before the claim is commenced.	Claimant writes a letter before claim. This must be written promptly and in sufficient time to lodge the claim in time. Other parties should be given 14 days to respond.	Judicial Review Pre-action Protocol
	Before drafting and lodging the claim, the claimant should obtain public funding	

if this is required.

If claimant is a child or mentally ill, consideration needs to be given to the appointment of a litigation friend.

Steps to be taken by other parties before the claim is commenced.

Within 14 days of letter before claim, the other parties should respond to the letter before claim.

Judicial Review Pre-action Protocol

If party is a child or mentally ill, consideration needs to be given to the appointment of a litigation friend.

How is claim commenced?

The claimant must obtain permission to bring the claim.

CPR 1998, Part 54.4

The claim is commenced by lodging the papers set out below unless an urgent out of hours application is made.

Papers to be lodged when seeking permission to apply for judicial review.

The claim form.

Practice Direction 54 paragraph 5.6

Any written evidence.

Practice Direction 54 paragraph 5.7

A copy of any order that the claimant wishes to have quashed.

Practice Direction 54 paragraph 5.7

Where the claim relates to a decision

Practice Direction 54 paragraph 5.7

of a court or tribunal,
an approved copy of
the reasons for the
decision.

Copies of any
documents on which
the claimant wishes
to rely.

Practice Direction 54 paragraph 5.7

Copies of any
relevant statutory
material.

Practice Direction 54 paragraph 5.7

A list of essential
reading.

Practice Direction 54 paragraph 5.7

A notice of issue of
the public funding
certificate.

Two copies of all the
documents submitted
in indexed and
paginated bundles.

Practice Direction 54 paragraph 5.9

A copy of any
certificate granting
public funding.

Court fee

Requirements to be
considered when
drafting and filing.

Claimants are subject
to a duty of
disclosure.

The written evidence
must comply with the
requirements of
practice directions.

Practice Direction 32

Other issues to be
considered when
applying for
permission.

Decide whether there
is a need for urgent
consideration.

Decide whether the
claimant seeks

interim relief.

Decide whether there is a need for an order restricting the reporting of the matter.

Can grounds be amended or additional evidence submitted?

It would appear the Administrative Court has a discretion to permit amendment or service of evidence.

When should application be made to submit amended grounds or additional evidence?

The amended grounds or additional evidence must be submitted at least 7 clear days before the hearing date or warned list date.

Practice Direction 54 paragraph 11.1

Steps to be taken by the claimant after papers have been lodged.

The bundle must be served within 7 days on other parties.

CPR 1998, Part 54.7

A certificate of service must be lodged with the Administrative Court within 7 days of service.

Steps to be taken by parties served by the claimant.

Before drafting and lodging any pleadings, a party should obtain public funding if this is required.

Acknowledgment of service must be filed with the Administrative Court within 21 days.

CPR 1998, Part 54.8

	This must be served on all parties named in claim form within 7 days unless the Court orders otherwise.	CPR 1998, Part 54.8 (2)
Requirements to be considered when drafting and filing.	Defendants are subject to a duty of disclosure.	
Steps to be taken by the claimant after they have been served with the acknowledgment of service.	Claimant can file relevant observations.	
How is the application for permission to apply for judicial review determined?	It will be determined initially on the papers	
	Permission is normally granted if the application is arguable.	E.g. <i>R v Secretary of State for the Home Department ex p Begum</i> [1990] COD 107
Steps to be taken by the claimant if permission is refused	The application for permission can be renewed providing that there is still merit.	
How is application renewed?	Form is filed with Administrative Court within 7 days of receipt of judge's reasons.	CPR 1998, Part 54.12 (4)
How is renewed application for permission considered?	The application is considered following an oral application in open court. Other parties to the judicial review claim may attend this hearing	CPR 1998, Part 54.12 (3)

	The hearing will be listed for 30 minutes unless the parties indicate that a longer hearing is required.	Notes for Guidance produced by the Administrative Court.
Steps to be taken by the claimant if permission is refused at the oral hearing?	In a civil cause or matter, it is possible to appeal to the Court of Appeal.	
	Application for permission to appeal must be made within 7 days.	CPR 1998, Part 52.15 (2)
Steps to be taken by the claimant if permission is granted	The court fee must be paid within 7 days.	Notes for Guidance produced by the Administrative Court.
	Consideration should be given to whether it is necessary to apply for any interim case management orders.	<i>Tweed v Parades Commission</i> [2007] 2 WLR 1
	Public funding will need to be extended to cover trial.	
	A trial bundle must be filed and served. This should be done in sufficient time to permit the skeleton argument to refer to it. The bundle must be paginated and indexed.	Practice Direction 54 paragraph 16.1
	At least 21 working days before the hearing, a skeleton argument must be filed and served on all the other parties.	Practice Direction 54 paragraph 15.1

	In a case where the hearing may take less than 1 day and no party is in receipt of public funding, a statement of costs should be filed.	
Steps to be taken by the other parties if permission is granted	Consideration should be given to settling the claim by consent	
	Detailed grounds of resistance and any evidence must be served within 35 days of the grant of permission.	CPR 1998, Part 54.14
	Consideration should be given to whether it is necessary to apply for any interim case management orders.	
	Public funding will need to be extended to cover trial.	
	At least 14 working days before the hearing, a skeleton argument must be filed and served on all the other parties.	Practice Direction 54 paragraph 15.2
	In a case where the hearing may take less than 1 day and no party is in receipt of public funding, a statement of costs should be filed.	
How will the matter be listed?	In accordance with standard listing arrangements	Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 WLR 810

Matters to be considered at the conclusion of the hearing.

The Administrative Court has a discretion as to whether to grant relief.

The Administrative Court can make a quashing order, a mandatory order or a prohibiting order.

Supreme Court Act 1981, section 31(1) and CPR 1998, Part 54.2

The Administrative Court can also grant an injunction, make a declaration or award damages.

Supreme Court Act 1981, section 31(1) and CPR 1998, Part 54.3

The Administrative Court can vary a sentence

Supreme Court Act 1981, section 43(1)

The Administrative Court can issue an order for costs

The Administrative Court can order the assessment of Legal Services Commission costs.

The Administrative Court can grant permission to appeal. In addition in a criminal cause or matter it can certify a point of law of general public importance.

The approach of the Administrative Court to the award of costs

In general the principle is that the unsuccessful party should pay the costs of the successful

CPR 1998, Part 44.3 (2)

party

Special considerations apply when the unsuccessful party is in receipt of public funding

Special considerations apply when a court is a party

In a criminal cause or matter it may be possible to apply for costs from central funds

Prosecution of Offences Act 1985, sections 16 and 17

Matters to be considered by the unsuccessful party

Whether to appeal

The procedure to be adopted depends on whether the matter is a criminal cause or matter

KEY ADVOCACY PRINCIPLES

- Written pleadings are likely to determine the case
- Know your judge
- Be prepared for the possibility that the judge will have read the papers and has a clear view of the merits of the claim
- Be prepared to be questioned
- Ensure that authorities are available in bundles
- Focus on the law