



REFORM OF CHALLENGES TO ENGLISH GOVERNMENT DECISIONS

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One of the main procedures by which decisions of English government may be challenged is known as Judicial Review. As the name suggests the challenge is through the Court. This also applies to decisions of other entities carrying out public law functions. The procedure has grown up over a number of years.

In addition, judicial review can sometimes be the only way of making a challenge to legislation made at the EU level, with a realistic prospect of success.

With the growth of the powers of the Executive and an increase in regulation, Judicial Review has increased in importance and the volume of such claims has grown considerably. This among other matters has led to calls for reform.

It will be appreciated that often the subject matter of the decisions in question are of major effect and in some cases business critical. For example, the writer acted for a number of claimants regarding the EU REACH Regulation governing the regime for import, production, registration and distribution of chemicals within the EU. The clients included a U.S. corporation and a multinational.

In brief, decisions can be challenged by way of judicial review on the following grounds:

- Irrationality: the decision was one that no reasonable authority would have made (known as the *Wednesbury* test following the case of that name);
- Illegality: the decision was made by the exercise of a power wrongly or the decision was ultra vires (beyond the powers of the body);
- Procedural unfairness: the executive or body did not follow the correct procedure, for example failing to consult or give reasons; and
- That there was a legitimate expectation the executive or entity would act in another way: it would be unusual to rely on or succeed on this basis.

The claim for judicial review has to be issued at Court within a very short time period of the decision being made. The usual rule is that the Court proceedings are issued promptly and in any event within three months from when the grounds of claim arose. The Court takes a strict approach. There are cases in which the Court has decided that issuing proceedings within the three-month time period was too late.

In 2013, the time limit was shortened for planning matters to within six weeks. Claims regarding procurement decisions follow a different procedure and have to be made within 30 days.

Once issued, Judicial Review claims can only be pursued with the permission of the Court. The first stage is that the Court considers if there is an arguable case on the claim documents on

their own. This is designed to filter out the weaker cases. If the Court does not give permission, a party can request a hearing to ask the Court for permission again.

Once permission to pursue the claim is granted, the case proceeds as normal with the defendant being allowed to serve a defence and the parties serving such further documents and taking part in a substantive hearing as the Court directs. The Court retains a wide discretion as to how each case is managed and for example may dispense with disclosure of documents or limit it.

The Government expressed unhappiness about the great increase in the number of judicial review claims in recent years. The general consensus is that much of this increase was due to claims in connection with immigration and those seeking asylum. Those claims are now dealt with in other ways including by other tribunals.

Following a consultation process, the Government proposed further changes to the judicial review procedure in its Criminal Justice and Courts Bill. The Bill also proposes a number of changes to the British justice system not connected to Judicial Review.

The Bill proposes changes to limit the scope of judicial review including the following:

1. On an application for permission to pursue judicial review proceedings, the Court must refuse permission if it appears "highly likely" that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
2. When dealing with the substantive judicial review application and deciding whether any remedy should be granted, the Court should refuse to make an order if it appears the outcome for the party making a claim would not have been substantially different if the conduct complained of had not occurred.

The aim is to try and filter out claims where there was what might be regarded as a minor technical breach and to save costs.

The proposals have attracted substantial criticism from a broad spectrum, including former leading judges and leading Queens' Counsel. It is feared that the changes will encourage decision makers not to act fairly, reasonably or comply with the rule of law. Further it allows the Court to impose its view on what would have been if the claim had not arisen. This will necessarily involve the Court in speculating on what might have happened.

It is felt this will mean that parties will

make their Claim documents longer to try and avoid any problem arising from the above. This will add to the work and cost involved.

A further proposed change is that a party will not be able to apply for permission for judicial review at a hearing, if on the documents at the preliminary permission stage the Court decides that the application is totally without merit.

Other suggested measures include:

1. Changing the current rules so that on a second application for permission to pursue a claim at a hearing, a defendant can seek its costs of its defence.

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2. Details of financial backers of claims are to be provided, so that the Court has these when deciding whether costs orders should be made.

3. Parties joining in others' claims (quite a frequent occurrence) will not have their costs paid by other parties and risk costs orders being made against them if they cause others to incur greater costs. It is suggested this will discourage a number of smaller parties grouping together to challenge a decision and affect the quality of the process. Affected but more de-

tached parties (such as trade associations) can often assist the Court, but it is felt this step will discourage this.

4. A large increase in Court fees to commence judicial review claims (which has already been brought into effect);

As a result of the prior consultation the Government did not include in the Bill proposed changes to limit the judicial review procedure to those who could show sufficient legal standing (i.e. that they were affected) as opposed to being part of a campaign, for example, in order to raise their profile.

Amongst all the reform activity the Government did not take an opportunity to clarify one of the areas of uncertainty in the law, on when the time for bringing a claim starts to run, which as mentioned above can be very short.

As at the end of July 2014 the Bill has passed through the House of Commons unchanged in this respect. It has reached the House of Lords where there has been some debate and detailed scrutiny has commenced. A number of criticisms have been made by the House of Lords (including by former Judges, now sitting as Lords). The Bill will undergo further detailed examination by the House of Lords later this year.

If the reforms are voted through, it is said much will depend on how they are implemented in the Court rules and by the Judges themselves. However, from the above it will be seen that if the changes are brought about, pursuing judicial review claims will become difficult, more costly and expose those bringing them to greater risk of a costs order being made against them if they are unsuccessful.

This makes it more important for clients and advisers to continue to keep ahead of relevant proposed decisions to be taken by public bodies or those exercising a public function and devote greater input into consultations, as this is likely to be the best way to avoid adverse decisions and have account taken of their views.



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