

insideinformation – fact sheet

Judicial Review

Information courtesy of Rachael Congdon of Parlby Solicitors Plymouth

INTRODUCTION

Judicial Review (JR) is a type of administrative court proceeding in which a High Court Judge reviews the lawfulness of a decision or action that has been made by a public body.

This process is certainly different to that of a court appeal as an appeal will assess the rights and wrongs of the conclusion that has been reached, whereas a JR looks specifically at the way in which that decision has been reached.

JR is concerned with whether the public body has used the correct procedures in formulating a decision. The Court will not substitute the decision that has been made with what it thinks is the correct decision.

Examples of the type of prison law decisions, which may fall within the range of JR, include:

- Parole Board decisions Independent Adjudicator decisions
- Decisions made by the Probation Service regarding the recommendation of Licence conditions
- Decisions made by the prison in the exercise of their duties and implementation of policies

Before any JR action can take place, it is necessary to ensure that all complaint procedures have been exhausted. It is unlikely that the Administrative Court will accept an application for JR where, for example, the claimant has not referred the matter to the Prison and Probation Ombudsman regarding a complaint about prison procedure.

It is important to note that in terms of Independent Adjudicators decisions and Parole Board decisions the only way to review the procedures in which those decisions have been made is via JR.

THE PRINCIPALS OF JUDICIAL REVIEW

As indicated within the introduction, JR is a system by which the Administrative Court examines the decisions and the functions of a public body. The Administrative Court has the power to quash those decisions, such as a finding of guilt at an Adjudication, to award compensation, to direct the public body to refrain from doing something which it intends to do, to direct a public body to do something which it is not doing but should do, to clarify a function, or to direct a public body such as the Parole Board to reconsider a matter once again. It should be noted that the Administrative Court always has discretion it making a decision.

In the past, prisoners were deemed to have no right to seek JR. However, it is now accepted that the Administrative Court have jurisdiction to intervene in decisions made by the Prison Service, the Parole Board and any other public body who act in the decision making process in regard to prisoners. Further, in addition to challenging individual decisions such as an Independent Adjudication decisions, it is now sometimes possible to challenge the policy decisions that are made by the Prison Service.

Judicial Review

THE BASIC GROUNDS FOR JUDICIAL REVIEW

In order to mount a successful challenge to a decision made by a public body, it is necessary to show that the decision was unlawful, irrational/unreasonable, perverse, improper or against natural justice. These are the heads of challenge in JR proceedings.

In order for the decision to be unlawful it is necessary to disclose an error of law. A public body must always act lawfully and a decision made in breach of law, whether this be deliberately or accidentally, will be considered to be unlawful and the Administrative Court will be in a position to intervene.

In order for the decision to be perverse, it will be necessary to show that the decision making body had identified certain facts and made a decision that was not in accordance with those identified facts.

For a decision to be considered to be improper, it would be necessary to identify procedural irregularities in the decision making process. For instance there is specific procedure that needs to be followed for Parole Applications. If procedural irregularities can be identified in a particular case, the decision of the Parole Board may be open to JR.

In order for the Administrative Court to uphold a challenge on the ground of irrationality or unreasonableness, it is necessary to show that the decision was “flying in the face of reasonableness”. In other words, it is necessary for the Administrative Court to find that no reasonable decision maker would have made the same decision on the material placed before it.

The traditional test in such matters, which can be used by the Administrative Court is the “Wednesbury” unreasonableness test, after the case of **AP Picture House Ltd –v- Wednesbury Corporation (1947) to all.e.r.680**. The Administrative Court said that they would not interfere with administrative decision on the grounds of unreasonableness unless it was so unreasonable that no reasonable authority would have made it.

Since the Human Rights Act of 1998 in any case which raises a Convention issue, the Administrative Court will focus on the substance and not just the form of the decision, which shifts this test somewhat.

A very high threshold needs to be passed to Mount a successful challenge under the ground of irrationality/unreasonableness. Generally if there is some material upon which the public body can base its decision, an irrationality/unreasonableness challenge will fail. This is because of the discretionary nature of the decision making process. It is accepted that a public body is under a duty to make a decision on the material that is placed before it however, the decision that they make is ultimately up to them so long as it is reasonable. In order for it to be reasonable it must be supported by some evidence and it is necessary for the public body to show that they have carried out a balancing act.

Finally, it is necessary for all procedures to be fair and for there to be natural justice in the decision making process. Any prisoner is entitled to a fair hearing as per Articles 5 and 6 of the European Convention of Human Rights. What is considered to be fair often depends on the context (RV Parole Board ex-parte Smith and West (2005) UK HL).

THE JUDICIAL REVIEW PROCEDURE

As above, it is necessary, in regard to the majority of public body decisions, to ensure that all levels of complaint have been exhausted before a JR can proceed. Once all lines of complaint have been exhausted, it will be necessary for Instructed Solicitors or for the Claimant themselves to provide a letter before action to the Defendant. The Administrative Court provide a detailed pre-action protocol, which should be followed in all JR matters.

Judicial Review

Once the pre-action protocol has been completed it is necessary for an application to be made to the Legal Services Commission (LSC) to provide funding for JR.

It will be necessary for the claimant to complete a CLS APP1 and a CLS Means 1, which will then be sent to the LSC with any supporting documentation regarding the JR. The LSC will assess whether the matter has merit (a good likelihood of success) and whether the Claimant is suitable to claim legal funding, dependent on their individual means.

If the LSC award a Certificate, this Certificate will allow funding for the preparation of the bundle of papers, including the application for JR forms and it will cover costs for the initial permission hearing which is held on paper or orally dependent upon the urgency of the matter. At the permission hearing the High Court Judge will consider whether a substantive hearing is required and if not full reasons will be provided at this stage.

Once permission has been granted by the Court, it will be necessary to make a further application to the LSC for an extension in funding. The matter will then proceed to a full substantive oral hearing within the Administrative Court where the High Court Judge will make a decision and a court order where necessary.

If it is clear at the permission stage of the proceedings that the Claimant has an extremely good case, the Defendant may concede and provide a Consent Order to allow the remedy sought by the Claimant to proceed.

If a decision is considered to be urgent, separate processes should be followed in regard to securing LSC funding and in regard to lodging the JR and seeking the permission hearing with the Administrative Court.

THE VALUE AND PURPOSE OF JUDICIAL REVIEW PROCEEDINGS

The value and purpose of JR can vary dependent upon the decision that is being reviewed. In terms of an Independent Adjudication decision, a Quashing Order would generally be sought for the finding of guilt and the removal of any additional days which have been awarded as a sentence to the prisoner. In certain circumstances where a decision of the Independent Adjudicator has been made close to a prisoner's release, JR proceedings are vital, as if the decision is deemed to be unlawful within the Administrative Court the prisoner will not have to serve the additional days.

In terms of Parole Board decisions JR proceedings can once again be vital as the Court can order the Parole Board to reconsider the matter once again if the decision is found to be contrary to a head for JR. However, even if Judicial Review proceedings are successful and a public body is ordered to reconsider a matter, it does not mean that the public body will not be able to make the same decision again. So long as the subsequent decision is made lawfully it will not be open to Judicial Review proceedings.

IMPORTANT NOTICE

Information is given on a strictly 'without-liability' basis, and should be considered for use as guidance only. If you propose taking further action based upon this information you are strongly advised to take further and more specific legal advice before doing so.

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