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Defending judicial review proceedings: Pre proceedings

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Defending judicial review proceedings series

Today's seminar: Pre proceedings – good public law decision making and avoiding challenge

Upcoming seminars:

- 22/06/23: Post issue, pre-permission: preparing your defence
- 12/07/23: Post permission: Preparing for trial

Today's agenda

- What types of decisions are we talking about?/ Amenability to judicial review
- Principles of good decision making
- Analysing the pre action letter and preparing the pre action response

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When will a decision be amenable to judicial review?

Senior Courts Act 1981, s31

Establishes the judicial review process, including:

- That the court must grant permission to bring judicial review proceedings with reference to whether the claimant has standing;
- That even if permission is granted, remedy is discretionary;
- That permission and/or remedy may be refused if it appears to the court that notwithstanding the defendant's conduct, the outcome for the applicant would have been substantially the same.

Senior Courts Act 1981, s31

- Subsection (1) defines judicial review as an application to the High Court for a mandatory, prohibiting or quashing order made in accordance with rules of court and qualifies the right to claim, noting that claimants must have "sufficient interest in the matter to which the application relates"

- It confirms that, in specified circumstances, parties making an application for Judicial Review may also seek a declaration or an injunction.

- **Neither the SCA, nor the CPR, explain what can be judicially reviewed.**

De Smith's Judicial Review 3-017

"the main touchstones…are now (a) that the source of the decision maker's authority is a statutory provision or prerogative power and (b) that the function has a public character"

Source of authority is statute

Where "*a body is a creature of statute all powers are ultimately derived from Acts of Parliament and the existence of a general power of competence does not alter this*" (De Smith's Judicial Review 8th edn §3-045).

Local Authorities provide an example:

1. Section 1(1) of the Localism Act 2011 "(1) A local authority has power to do anything that individuals generally may do."

2. Section 111(1) Local Government Act 1972 "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

Source of authority is prerogative power

What are prerogative powers? The following explanation can be derived from *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5:

1. At 40: The UK does not have a "*single coherent code of fundamental law which prevails over all other sources of law.*" It has developed pragmatically as much as principally. "*Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as "the most flexible polity in existence" - Introduction to the Study of the Law of the Constitution (8th ed, 1915), p 87.*"
2. At 41: "*Originally, sovereignty was concentrated in the Crown, subject to limitations which were ill-defined and which changed with practical exigencies…over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges).*"
3. Judicial review can be used to challenge whether exercise of the prerogative power is lawful (as in Miller), the scope of Judicial Review can however depend upon the type of power being exercised e.g there is a prerogative power for the Crown to decide on the terms of service of its servants and it can alter those terms. This is subject to Judicial Review. By way of contrast, the power to make or unmake treaties without legislative authority is not reviewable by the Courts (see Miller at [52] and [55]).

Decision of a public character/is public in nature

In *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin) Lord Justice Holroyde expressed the following key points at [55]:

1. Whether a decision has a "*sufficient public law element*" to make it amenable to judicial degree is a question of degree (there is no universal test).
2. In deciding whether a decision is public or private in nature (and so amenable to Judicial Review) "*the court must have regard not only to the nature, context and consequences of the decision, but also to the grounds on which the decision is challenged"* The nature may disclose the extent to which the decision is public or private in nature.
3. Exercise of a statutory power will not, in of itself, be a conclusive indication that there is a sufficient public law element: "*A government body may negotiate commercial contracts without inevitably becoming subject to judicial review.*" The inverse is also true. The fact that a decision "*relates to payments to be made by a public authority pursuant to a contract will not in itself be a conclusive indication that there is no sufficient public law element...It will be necessary to consider whether the challenged decision is one which is necessarily involved in the performance of a public function, or is merely incidental or supplementary to a public function.*

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Principles of good decision making

This section

1. Checklist for decision making that decision makers and those advising them can use to check the legality of decisions.

2. Policies.

Checklists for making decisions

"The Judge Over Your Shoulder" guidance produced by the GLD for public sector decisions makers.

4 steps in decision making:

- Preparing to make the decision
- Investigating and gathering evidence
- Taking the decision
- Notification

Checklist - Preparing to make the decision

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?

Checklist - Investigating and gathering evidence

1. Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?
2. Have I consulted properly?
3. Have I obtained enough primary evidence from the individual concerned?
4. Will I be acting with procedural fairness towards the persons who will be affected?
5. Could I be, or appear to be, biased?
6. Am I handling data in line with Data Protection and Freedom of Information obligations?

Checklist - Taking the decision

1. Have I taken necessary considerations into account, and is my decision reasonable?
2. Does the decision need to be, and is it, proportionate?
3. Are there decisions where the courts are less likely to intervene? / What's the risk of challenge?

Checklist - Notification

1. To what extent should reasons for the decision be given?
2. Are there specific persons/bodies that must be notified and, if so, are there are mandatory requirements?

What to do when there's a policy?

Not unusual in larger organisations such as Central or Local Government for there to be policies in place to assist decision makers ensure consistency of decision making.

Policies must themselves be lawful, rational and consistent with human rights law.

What to do when there's a policy?

Key point is that decision makers do not fetter their discretion in decision making through rigid adherence to the policy, nor that the policy itself is unlawful by fettering a decision makers discretion.

If assisting advise on/draft a policy check there is an "exceptional circumstances" caveat to provide for circumstances where the policy can be departed from.

What to do when there's a policy?

Sometimes you will be asked to review policies. Check:

- Fettering discretion as already mentioned
- If they contain statements of the law check they are accurate and up to date to avoid the suggestion that the policy sanctions unlawful actions
- Common sense check the policy
- Make sure the client understands the effect of the policy, for instance, does it give rise to legitimate expectations?
- How does the policy sit alongside other legal obligations i.e. EQA
- Is a consultation required for any changes?

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Analysing and responding to the letter before claim

Analysis of the threatened claim

Consider procedural issues to see if there is a mandatory or discretionary bar to proceedings:

- Is the issue one that is justiciable?
- Amenability / challenging the correct decision
- Standing
- Time limits
- Suitable alternative remedy
- Academic issues

Analysis of the threatened claim

Consider the substantive challenge – does the letter make out and evidence:

- Illegality
- Irrationality
- Procedural impropriety

Is the decision otherwise defensible?

Analysis of the threatened claim

Consider extraneous factors:

- Is it worth the time/resources of defending?
- What is the potential big picture impact of conceding/defending and would it set a precedent?
- Reputational impact?
- Other reasons you might want to defend e.g. duty of candour might result in disclosure of helpful information.

Preparing the pre action response

- Follow the Pre-Action Protocol for Judicial Review. Particularly pertinent are (a) the aims (at para 3) (b) that the Defendant should ordinarily reply to a pre-action protocol letter within 14 days (para 20) or else seek an extension (para 21) and (c) that there is a template letter of response which should be used at Appendix B.

- Key elements to consider

    - Investigate substance of the complaint and ensure that any relevant documents that have not been considered by the complainant are noted.

    - Push back where there are grounds to do so.

    - Consider the cost/inconvenience of simply remaking the decision.

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Q&A session

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