# MAKING A SUCCESSFUL CLAIM FOR JUDICIAL REVIEW

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"...a somewhat labile and subjective concept"

1. A *'somewhat labile and subjective concept'* is how Sir Stephen Sedley (as he now is) described the term 'common sense'.

2. The best piece of advice I ever received from a judge was from Mr Justice Sedley (as he then was) at a mess in Bristol when he said to me (in the context of making an application for leave (as it then was) to apply for Judicial Review) – *"if you can't set out the relevant facts and your arguments (grounds) in no more than four pages of A4 then you should not be making the application (claim)."*

3. *"Common Sense is neither common nor sensical. Much of what passes for common sense is not based on any underlying principle it's just anecdotes that have worked for the current situation."* - Benjamin Franklin

4. For legal advisers with little experience of Judicial Review advising a client as to the availability and desirability of making a claim can be difficult. The obvious points to consider are the classic questions:

   Who (twice)? What (twice)? Why? When? How? Where?

   - Who is your client? Does he have sufficient interest to make a challenge?
   - What is it that the client wishes to challenge?
   - What is the nature of the complaint?
   - Who made the decision? Is the decision maker open to challenge?
   - Why is a claim for Judicial Review necessary or worth pursuing? Is there any other way to resolve the dispute?
   - When was the decision made?
   - How is the challenge to be funded?
   - Where should the case be heard?

**Understanding the Nature of Judicial Review**

5. Judicial Review is the main means by which the courts supervise the exercise by public bodies of their public law functions. The courts should ensure that those bodies act lawfully and fairly; that they do not abuse their powers. As Sedley J said:

   *"Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power."*

   (*R v Somerset County Council ex parte Dixon* [COD] 1997 323 QBD)

6. It is the exercise of those functions with which the courts are concerned, not the merits of the decisions made.

7. In *Reid v Secretary of State for Scotland* [1999] 2 AC 512 Lord Clyde said:

   *"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency as, for example,*

*through the absence of evidence, or of sufficient evidence to support it, or through account being taken of an irrelevant matter, or through failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear in a case of review, as distinct form an ordinary appeal, the court may not set about forming its own preferred view of the evidence."*

8. The use of the court's powers (sanctions) is discretionary. So, for example, if the reality is that had the decision-maker acted properly the decision would have been the same then no relief will be granted.

9. It is expected that all others remedies would have been sought before resorting to a claim for Judicial Review.

10. There is a filter system whereby a Claimant for Judicial Review has, first, to get the court's permission to make the application (pursue the claim).

**WHO? (1)**

11. Who may apply for Judicial Review?

12. In the context of a public law function/decision - the applicant (Claimant) has to have sufficient interest in the matter for the court to grant permission to apply for Judicial Review. The court appears to adopt a wide construction of the sufficient interest test.

13. If there are doubts about the standing of the Claimant it is likely that the importance of the subject matter of the challenge will be the predominant factor.

14. If a decision interferes with someone's personal rights (s)he will obviously have the standing to bring a claim. A direct financial interest or legal interest is not required. Sometimes a decision relating to a third party will have an important indirect consequence sufficient to accord standing to a Claimant.

**WHO? (2)**

15. Who made the decision? Was it a public body or some other body exercising a public function? Is the decision maker subject to Judicial Review? Reviewability.

16. The Civil Procedure Rules define reviewability by referring to *"a decision, action or failure to act in relation to the exercise of a public function."* That definition focuses on the nature of the function being performed rather than the nature of the decision maker.

17. It is not just public bodies that perform pubic functions. There are many examples of charities and private companies performing public functions, often on behalf of public bodies.

18. The courts have developed several tests for determining whether or not the decision making body is amenable to Judicial Review:

3

(a) The "but for" test – i.e. whether but for the existence of a non-statutory body, the functions exercised by that body would inevitably have been regulated by statute (e.g. The Advertising Standards Authority and Takeover Panel compared with The Football Association and The Jockey Club).

(b) Statutory underpinning – where the government has encouraged the activities of an organisation by providing underpinning for its work, or the body was established under the authority of the government.

(c) Extensive or monopolistic powers.

(d) Carrying out the functions of a public body.

19. Examples of private bodies susceptible to Judicial Review are:

- A registered social housing landlord
- Professional Conduct Committee of the Bar Council
- Trustees of a Catholic Diocese
- An independent school (regarding assisted places)
- An airport operator
- A private adoption agency
- A farmers' markets operator

20. Examples of bodies found to be not reviewable:

- BBC's disciplinary tribunal
- The Insurance Ombudsman
- The Football Association
- The Court of the Chief Rabbi
- Great Western Trains
- Association of British Travel Agents

21. In *R v London Beth Din (Court of Chief Rabbi) ex p Michael Bloom* [1998] COD 131, Lightman J said:

> *"The stage presently reached is that for a decision to be judicially reviewable (so far as relevant) it must be a decision reached by a body exercising a statutory or (de facto or de jure) governmental function: and [judicial review] is not available in case of a decision by a body whose legal authority arises from some consensual submission to its jurisdiction and has no such function."*

22. Is not just the function of the public body but the nature of the decision that must be reviewable? In *R (Hopley) v Liverpool Health Authority* [2002] EWHC 1723 (Admin) Pitchford J said:

> *"There is a need to identify; first, whether the defendant is a public body exercising statutory powers ...; second, whether the function being performed in exercise of those powers was a private or public one; and third whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration."*

23. Are there any interested parties?

    If the decision challenged affected the interests of other parties then they have to be identified and included in the claim form to start the proceedings. The claim form and all documents must also be served on those Interested Parties who will be entitled to join in the proceedings at the risk of exposing themselves to orders for costs.

**WHAT? (1)**

24. What is it that your client is aggrieved about? What does (s)he wish to challenge?

25. Identification of the precise nature of the grievance is really important at an early stage.

26. Usually it is a decision against your client's interests. But it may also be primary or secondary legislation; policies; schemes, proposals and guidance.

27. The matter must have substance. The court will rarely deal with a claim which is or has become academic.

28. Challenges to decision of superior courts will not be allowed and challenges to decisions relating to trials on indictment before the Crown Court are statutorily barred.

**WHAT? (2)**

29. What is the nature of the challenge? What are the grounds?

30. The following are the grounds most commonly argued in Judicial Review claims:

- Illegality
- Irrationality
- Procedural impropriety

31. There are subtle variations on these three main grounds. For example:

- Legitimate expectation (as a form of procedural impropriety)
- Breach of Human Rights (as a form of illegality)
- Restrictions on or fettering of an exercise of discretion (as a form of irrationality)

32. And if, for example, the public body decides to consult, even though it did not need to, that consultation must be carried out properly – in accordance with the Sedley principles:

(i) Consultation must take place when the proposal is still at a formative stage;

(ii) Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;

(iii) Adequate time must be given for consideration and response; and

(iv) The product of consultation must be taken into account conscientiously.

(The 'Sedley principles' were first propounded by Stephen Sedley QC and adopted by Mr Justice Hodgson in *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168).

**WHY?**

33. Why is a claim for Judicial Review needed? Have all other ways of dealing with the grievance been tried? Is the proposed claim worth pursuing?

34. If an appeal is available it is unlikely that the High Court will grant a remedy. Although there are certain circumstances where relief will be granted even though an appeal was available, e.g. to ensure that the initial court hearing was a fair hearing. (See, for example, *R v Hereford Magistrates' Court ex parte Rowlands* [1998] QB 110).

35. If, for example, a desired result could be achieved by making a new or further application a claim for Judicial Review may both be unnecessary and too costly.

36. This is where the Pre-action Protocol is so important. Has the decision–maker been sent a letter setting out the grievance, the grounds for a Judicial Review challenge and been given the opportunity to put matters right.

37. The Pre-action Protocol for Judicial Review cases is included on the memory stick.

38. **What are the available remedies**? Will they do?

39. The remedies open to the court are:

(a) a mandatory order (the court ordering the public body to do something);

(b) a prohibiting order (preventing the body from doing something);

(c) a quashing order – (that is quashing an act or decision of a public body so that it may be taken again);

(d) an injunction (restraining a person or body from doing something); and

(e) a declaration (that a particular act or decision was lawful or unlawful).

40. In addition damages can be awarded if truly associated with the claim for Judicial Review.

41. If necessary the court has the powers to grant temporary injunctions or stays.

**WHEN?**

42. When was the decision made?

43. There are time limits in Judicial Review proceedings. CPR r 54.5(1) provides that the claim form must be filed promptly and, in any event, not later than 3 months after the grounds to make the claim first arose.

44. Any extension of time is governed by the court's general power under CPR r. 3.1(2)(a). An extension can not be agreed by the parties.

45. In addition, and quite separately the court has a discretion to refuse relief, if it considers that the granting of the relief sought would be:

- likely to cause substantial hardship to, or substantially prejudice the rights of, any person or
- would be detrimental to good administration.

(Section 31(6) Senior Courts Act 1981).

46. In planning cases a limit of 6 weeks has been applied.

47. There are now doubts, however, in the context of European Law cases as to whether the "promptness" requirement meets the demand for certainty in the law.

**HOW?**

48. How is the challenge to be funded?

The average cost of mounting a straight-forward basic Judicial Review claim is about £5,000 - £10,000 (to include counsel's fees). If the case is lost the costs of the other side will be about the same.

49. If your client does not have the means to meet such costs that will be the end of the matter unless public funding is available. Funding decisions by the Legal Services Commission are governed by the Funding Code which is made up of Criteria and Procedures. The criteria contain a merits test that must be met to obtain an offer of public funding. The Code also refers to 'Decision-Making Guidance'.

50. Section 7 of the Funding Code Criteria and section 16 of the Decision-Making Guidance apply to claims for Judicial Review. Both can be accessed through the LSC's website.

51. The Code sets out different criteria for Judicial Review applications for the before and after permission stages. The general approach fits with the approach that any competent solicitor would adopt when advising a client with private means as to the questions set out above (who, what, why, when etc). To this is added a special proportionality test for funding Judicial Review claims. Are the likely costs proportionate to the likely benefits of the proceedings having regard to the prospects of success and all other circumstances?

52. If funding is granted it will only be available at first up to the permission stage. A further opinion on the likelihood of success and the cost benefits will be required for the hearing stage.

53. If the prospects of success are 'borderline' public funding may still be available if the case falls into one of the following three categories:

- Significant wider public interest
- Overwhelming importance to the client
- Significant breach of human rights

54. Where, initially, the prospects of success are uncertain funding may be available for the investigative stage. This could be particularly important in helping to obtain funding for specialist advice.

55. In appropriate cases the Pre-action Protocol must be followed. The Protocol can be found on the memory stick. It is important to note that engagement in a pre-action process does not stop time from running.

56. Use of forms N46, N462, N463. N464 and N465.

There are forms for use on the Court Service/Ministry of Justice websites (copies are included on the memory stick).

The forms are in pdf format attached to the websites and cannot be saved (unless you have some expensive software). This means that you have to complete them on-line and print them off. Then you spot the errors and omissions and do it all over again.

The easiest approach is to identify the parties and the decision challenged, tick the necessary boxes but leave the main sections to be completed as separate word documents to be attached to the forms.

57. Do not forget the Interested Parties.

**Costs**

58. The general rule in Judicial Review proceedings is that costs follow the event, although getting costs from a legally aided Claimant remains near impossible. The fact that a successful Claimant is legally aided should not prevent the court making a costs order in his favour.

59. Even if proceedings do not reach completion, because they are settled for example, there are now well settled rules for the court to follow in assessing costs (see *R (Boxall) v Waltham Forest London Borough Council* (2001) 4 CCLR 258 approved in *R (Scott) v London Borough of Hackney* [2008] EWCA Civ 217).

60. Whilst attendance at court of a Defendant at the permission stage is not required any Defendant doing so successfully may seek his costs for preparation of the acknowledgment of service but not attendance at a permission hearing.

61. There are powers to make protective costs orders or cost capping orders where to do so is in the interests of justice. These are rare in public law cases and more likely to be made if the Claimant's lawyers are acting pro bono.

**WHERE?**

62. Where is the case to be heard? There are now regional Administrative Court centres in Cardiff, Birmingham, Leeds and Manchester. As of 6th November 2012 the Cardiff centre will manage hearings in Bristol.

63. Claims can be issued at any Administrative Court office and if issued in the regional offices will usually be heard locally. Proceedings may be transferred by order of a judge.

64. There are certain excepted classes of claim which must be issued in London – see Practice Direction 54D. (The Practice Direction is on the memory stick)

65. In the Upper Tribunal. The Tribunals Courts and Enforcement Act 2007 introduced a new tow-tier tribunal system with a statutory right of appeal from a decision of the First-Tier Tribunal to the Upper Tribunal. That means that many decisions that would have been the subject of judicial review claims may now be appealed to the Upper Tribunal.

66. In addition to that appeal jurisdiction the Upper Tribunal now has a Judicial Review jurisdiction over:

    (i) A decision of the First-Tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries compensation Scheme; and

    (ii) Any decision of the First Tier Tribunal made under the Tribunal Procedure Rules of section 9 of the 2007 Act where there is no right of appeal to the Upper Tribunal and the decision is not excluded by subsections 11(5)(b), (c) or (f) of the 2007n Act

67. Different forms must be used for Judicial Review claims to the Upper Tribunal.

**MAKING A SUCCESSFUL CLAIM**

68. Having found a way through this maze you should now be in a position to

    (i) Identify the decision challenged as a decision made in the exercise of a public function by a public body

    (ii) Identify clear ground(s) for the challenge

    (iii) Be able to set out both in no more than 4 pages of A4 (in a decent size font)

    (iv) Identify the remedies sought

    (v) Ensure that the procedural requirements have been met, and

    (vi) Ensure that proper funding is in place

69. It should go without saying, therefore, that

    - Quick and accurate identification of issues;
    - accurate gathering of information; and
    - very early access to an administrative law specialist, is important in these cases.

**RECOMMENDED MATERIALS and READING**

**Judicial Review: A Practical Guide [Paperback]**
Hugh Southey QC, Amanda Weston and Jude Bunting – Published by **Jordans ISBN-10: 1846612950**

**Judicial Review Handbook [Hardcover]**
Michael Fordham QC - 6th Revised edition (25 Oct 2012) **Publisher: Hart Publishing; ISBN-**10: 1849461597

**Judicial Review : A Quarterly Journal** – published by **Hart Publishing: Editors Michael Fordham QC and James Maurici**

**Licensing Law Reports** – quarterly – published by **Jordans**
**Editor – Kerry Barker**

**AND FINALLLY**

70. The Sedley Laws of Documents

*First Law*: Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.

*Second Law*: Documents shall in no circumstances be paginated continuously.

*Third Law*: No two copies of any bundle shall have the same pagination.

*Fourth Law*: Every document shall carry at least three numbers in different places.

*Fifth Law*: Any important documents shall be omitted.

*Sixth Law*: At least 10 percent of the documents shall appear more than once in the bundle.

*Seventh Law*: As many photocopies as practicable shall be illegible, truncated or cropped.

*Eighth Law*:

1. At least 80 percent of the documents shall be irrelevant.

2. Counsel shall refer in court to no more than 10 percent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.

*Ninth Law*: Only one side of any double-sided document shall be reproduced.

*Tenth Law*: Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.

*Eleventh Law*: Documents shall be held together, in the absolute discretion of the solicitor assembling them, by:

1. a steel pin sharp enough to injure the reader;

2. a staple too short to penetrate the full thickness of the bundle;

3. tape binding so stitched that the bundle cannot be fully opened, or

4. a ring or arch-binder, so damaged that the two arcs do not meet.

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