



Government  
Legal Department

# The judge over your shoulder — a guide to good decision making



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# Foreword

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Since it was first published in 1987, the Judge Over Your Shoulder (JOYS - as this guidance is known) has become an important part of the training and resources provided to administrators in the civil service (and perhaps to others). This 5th edition is intended to continue to support readers in gaining both a good understanding of the legal environment in which decisions in central government are made and an ability to assess the impact of legal risk on their work.

In your role, you may find yourself drafting policy, guidance or perhaps an announcement; or making decisions on behalf of your minister; or preparing submissions and evidence for your minister to consider before making a decision. JOYS will help you to understand the potential legal risks of your actions (by introducing to you some of the legal concepts that a Judge in the High Court or Tribunal will be looking to when considering a challenge to a decision) and the factors you and your minister should be aware of and take into account before acting.

Since its inception (and particularly since the last edition in 2006), information about the work of the civil service has become much more accessible to the public (including information on the procedures, practices and conduct of, and decisions made by, officials). Various changes in legislation and practice have meant our work is subject to much closer scrutiny and almost inevitably increasingly more challenges (whether by consultation procedures, complaints of maladministration or by judicial review). In particular, the number of judicial review claims challenging government decisions, practices and policies, lodged at the Courts has dramatically increased in recent years. Between 2000 and 2013, the number of judicial review applications lodged increased over three fold: there were approximately 4,200 judicial reviews in 2000 to over 15,600 in 2013. In the financial year 2014-15 there have been around 20,000 new or threatened judicial review claims against government decisions alone, the majority of them being immigration related.

If you find your work becomes the subject of challenge (specifically a judicial review claim), I hope JOYS will help you to understand the key litigation procedure, offer you practical advice, and help you to be better placed to anticipate the questions you or your minister will need to respond to or deal with evidence you or your minister will need to provide.

This edition of JOYS refers to a number of major developments in the law since the last edition, using illustrative case examples. It also highlights further pending changes that you should be aware of. JOYS is not just intended to explain the legal issues that you are most likely to encounter in your work, but also to help improve policy development and decision making in government.

I welcome this new edition and thank all those who have contributed to its extensive updating. I hope you will find this guidance invaluable and refer to it regularly, throughout your work.

# Preface

The last (4th) edition of this guidance was produced in January 2006. Since then important changes in law and practice have occurred. For example, the work of the House of Lords in its judicial capacity has now passed to the Supreme Court; the [Equality Act 2010](#) consolidated and expanded on previous anti-discrimination legislation (including the imposition of a public sector equality duty on public authorities); procedural changes have been implemented to the judicial review procedure in Scotland (so that procedure now increasingly mimics the procedure in England and Wales); and in relation to devolution, there has been two references by the Attorney General under [section 112 of the Government of Wales Act 2006](#) to the Supreme Court.

There have also been some changes to the judicial review procedure in England and Wales as a result of the [Criminal Justice and Courts Act 2015](#) (which in turn amends various statutes dealing with procedure). For instance, if there are no reasons of exceptional public interest, and it is highly likely that the outcome for the applicant would not have been substantially different if the breach of law complained of had not occurred, the Court must refuse permission on an application for judicial review. The Criminal Justice and Courts Act 2015 also sets out further amendments to judicial review procedure, which are yet to be implemented (and are discussed in more detail later in this guidance). Further, some legal principles have been clarified and sometimes expanded upon by the Courts in case law in recent years (as set out in some of the updated case examples used throughout this edition).

The purpose of this guidance continues to be to inform and improve the quality of administrative decision making. This includes an understanding of judicial review (as the mechanism of challenging decisions) which is an increasing part of every department's workload. Increases in the number of judicial reviews lodged at the Court vary across departments (with some departments experiencing dramatic increases year on year). This guidance therefore must include proper coverage of judicial review. Our intention is to provide a meaningful and useful overview that can be referred back to, if (or rather when) the reader is involved in a judicial review claim. We intend that readers will have a thorough understanding of the principles of administrative law and the principles underpinning judicial review. We hope that such an understanding will contribute to readers being better placed to advise on and make legally sound decisions.

We've updated this guidance keeping in mind our target audience of reasonably well-informed and interested junior administrators<sup>1</sup> whose task is to make decisions affecting members of the public, or to prepare the material to enable others to make such decisions in departments whose ministers answer to the Parliament at Westminster. Lawyers may find this guidance useful and interesting too!

We hope we've kept this guidance simple and practical. We've emphasised what is best practice in administrative decision making (see for example section 2.56 onwards on recording and giving reasons for decisions) and used illustrative case examples to explain key principles.

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<sup>1</sup> Both male and female: we've only used "he" in this guidance for the sake of brevity, in the legal writing style.

We want this edition to be accurate and useful but to stop short of being an academic textbook (so we have only touched lightly on some areas). Nevertheless, the result is still a sizeable guide. We do not expect you to read this edition in one sitting, but are confident you will find it useful to keep close at hand, as a resource to be referred to when a particular topic arises, such as an aspect of judicial review procedure. We've also created a Quick Guide of the detailed contents of *Judge Over Your Shoulder*, in an easy to reference format which sets out the key principles of which decision makers and their advisers should be aware. Our intention is that the Quick Guide can be read in one sitting and always kept close at hand (for example, to be used at meetings when discussing possible decisions).

# Defined terms

The following abbreviated terms are commonly used throughout this guidance.

Abbreviation	Full term
HRA	Human Rights Act 1998
The Convention or the ECHR	The European Convention on Human Rights
R (oao)...	Regina (on the application of)... This is the terminology used in case names (See the various case examples throughout this guidance).
Anor	Another(s) This abbreviation is often used in case names – often in applications for judicial review (As used in some of the Case Examples or footnotes throughout this guidance).
Article 6	Article 6 of the European Convention on Human Rights: the right to a fair trial See also Appendix 1: A classification of Convention rights in the Human Rights Act 1998, which summarises the rights referred to in this guidance.
Article 8	Article 8 of the European Convention on Human Rights: the right to respect for private and family life See also Appendix 1: A classification of Convention rights in the Human Rights Act 1998, which summarises the rights referred to in this guidance.
s.	“Section” – in the context of a numbered section of an Act For example, “s 48, National Health Service Act 2006” means “section 48, National Health Service Act 2006”.
Ultra vires	This term literally means “beyond the powers” in Latin For example, if a decision maker acts outside his power for a purpose that the power was not created to achieve, that action (often in the form of a decision) will be ultra vires.

# Quick Guide to Judge Over Your Shoulder

This Quick Guide is a companion to Judge Over Your Shoulder, in which full details of the points explained below are set out.

- This Quick Guide provides an easy to reference summary of the key legal principles relating to the work of administrative decision makers within the civil service. Detailed guidance is set out in Judge Over Your Shoulder (JOYS).
- Readers of this Quick Guide who would like to read more detail, such as examples and legal cases which illustrate the principles below, should refer to JOYS.
- The section numbers and page numbers below, refer the reader to the appropriate section of JOYS to allow further reading. The order of the topics covered below mostly mirrors the order of topics as set out in JOYS.

## Good administration and administrative law

[Quick link to full details — sections 1.2-1.6: “What is “administrative law”?” on page 31](#)

- Public bodies should practice ‘good administration’: performing public duties speedily, efficiently and fairly.
- Administrative law and public law are often used to mean the same body of law. Administrative law includes an extensive body of case law in which the Courts have developed legal principles and legislation
- Administrative law governs public bodies in the exercise of their public functions. Sometimes public law applies to private bodies, if they are carrying out public functions. Public functions include making decisions.
- Judicial review is the legal procedure by which the decisions of a public body can be challenged. The Courts ‘review’ the decision being challenged and decide if it is arguable that the decision is legally flawed.
- Judicial review can only be used as a last resort – after all other applicable legal procedures have been pursued (e.g. any rights of appeal to a special tribunal etc.).

## What can be challenged by judicial review?

[Quick link to full details](#) — sections 2.1-2.2 of “What constitutes a decision?” on page 33

Judicial review can challenge:

- direct decisions affecting a particular person or group, e.g. a decision to detain an individual in immigration detention; or a decision to reform legal aid funding
- statutory provisions;
- subordinate legislation;
- policies;
- exercise of a discretion
- reports and recommendations;
- advice or guidance;
- procedures used when making decisions, e.g. a challenge to whether a consultation process has been adequate;
- inaction, e.g. a challenge to a failure to issue guidance; and
- delay, e.g. a challenge to a delay in making a decision regarding an individual’s application for leave to remain in the UK.

## The power to act/make a decision

[Quick links to full details](#) — sections 2.28-2.32 of “Having a “policy”” on page 42, and sections 2.37-2.39 of “Does the power have to be exercised in a particular way? Procedure” on page 47

- The decision maker may have the power to act or a duty to act.
- Duties are mandatory, requiring a particular function to be exercised in a certain way.
- The exercise of a power is always subject to the discretion of a decision maker.
- The power may expressly limit the way in which discretion should be exercised, e.g. by placing a cap on the amount payable under a statutory compensation scheme.
- Even if the power appears to be unlimited, it will be limited by a range of implied factors including but not limited to
  - principles established by the Court - derived from public law cases e.g.
    - the need to exercise the power reasonably;

- the need to exercise the power for the purpose for which it was provided;
- the need to take relevant factors into account when reaching a decision, and not take into account irrelevant factors.
- the obligation to exercise the power in conformity with the [European Convention on Human Rights \(the Convention\)](#) and/or the [EU Treaties](#);
- the duties imposed by the [Equality Act 2010](#).
- The decision maker must use the power for a lawful purpose. If a public body acts outside its power for a purpose that the power was not created to achieve, the action will be ultra vires (beyond its powers).
- The purpose of the power may be expressly set out in legislation, or it may be implied from its objectives.

## Reasonableness (the ‘Wednesbury Principles’)

Quick link to full details — section 2.9 of “Reasonableness (the “Wednesbury Principles”)” on page 35

- A decision made subject to a discretionary power must be ‘reasonable’, i.e. the decision must be rationally open to a reasonable decision maker in possession of all the facts in the case.
- ‘Reasonableness’ includes an implicit recognition that there may be many ways in which a decision maker might exercise a particular discretion, and there may be more than one lawful conclusion that can be reached. That does not mean, however, that a court reviewing it would have reached the same decision.

## Irrationality

Quick link to full details — sections 2.10-2.11 of “Irrationality” on page 36

- ‘Unreasonableness’ or ‘irrationality’ in law is defined by the Courts according to the circumstances and context of the case. In particular, the Courts are more likely to hold that a decision is unreasonable in a case involving fundamental or human rights.

## Is the power being exercised for a lawful purpose?

Quick link to full details — sections 2.12-2.17 of “Is the power being exercised for a lawful purpose?” on page 37

- The decision maker must have the power to act and use the power for a lawful purpose.

- If a public body acts outside its power for a purpose that the power was not created to achieve, the action will be ultra vires.
- The purpose of the power may be expressly set out in legislation, or it may be implied from its objectives.
- A public body has a power to undertake tasks ‘conducive to’ or ‘reasonably incidental to’ a defined purpose.

## Human rights and EU Law

[Quick link to full details — “8. EU law in the United Kingdom” on page 98](#)

- Under the Human Rights Act 1998, any decision which breaches the subject’s rights under the European Convention on Human Rights or under EC law is legally invalid.
- A Minister or a Department will be acting ultra vires if they make subordinate legislation which is incompatible with a Convention right, unless primary legislation requires the subordinate legislation to take that form.

## Proportionality

[Quick link to full details — sections 2.24-2.27 of “Proportionality” on page 40](#)

- The Courts adjust the threshold of ‘reasonableness’ according to the importance of the rights involved.
- The Courts apply a greater intensity of review in particular, where Convention (human) rights are engaged.
- Convention (human) rights or EC law cases use the principle of ‘proportionality’ in decision making. The Courts will consider if the breach of or interference with a Convention right was proportionate (and if so, it may still be legally valid).
- The Courts make a more detailed analysis where a case involves Convention rights and ask the following questions:
  - Whether the legislative objective of a measure is sufficiently important to justify the limitation of a fundamental right;
  - Whether the measure is rationally connected to the objective;
  - Whether a less intrusive measure could have been used or is it no more than necessary to accomplish the objective? and
  - Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

## A “policy” – when can you have a policy and when can it be challenged?

[Quick link to full details — sections 2.28-2.29 of “Having a “policy”” on page 42](#)

- Where a decision maker has a discretionary power conferred on a public body by statute, the decision maker may have to deal with a large number of cases.
- A policy can exist to ensure consistency and administrative efficiency, so that a large number of cases can be dealt with in a standard way: applying the same criteria and attaching the same weight in each case.
- It is lawful for decision makers to have a policy as long as they consider the facts of the particular case and are prepared to make exceptions.
- A policy can be challenged on the basis that it is unlawful; or was applied too rigidly, so that the decision maker’s discretion was fettered or limited unlawfully; or was not applied at all.
- An individual may also challenge a decision on the grounds that as the policy is unlawful so too is the related decision.

## Discretion or duty?

[Quick link to full details — section 2.30 of “Discretion or duty?” on page 43](#)

Even if the language of the statute appears to confer a discretion on the decision maker (i.e. the Minister “may” do something), the decision maker may actually be under a duty (i.e. the Minister “shall” do something). It depends on the statute and its purposes as a whole.

## Delegation of a power

[Quick link to full details — sections 2.31-2.33 of “Delegation of a power” on page 45](#)

- The general rule is that where legislation confers a power on a specified individual or body, the power must be exercised by that individual or body and must not be delegated or “given away”.
- There are exceptions: in particular, the Courts accept that Ministers cannot possibly personally make every decision made in their name, and that officials may act on their behalf. This is known as ‘the Carltona principle’.
- The Carltona principle applies to both statutory and non-statutory powers.
- There are limits to the Carltona principle, e.g.
  - the decision must be taken by an official of appropriate seniority and experience;

- some decisions or their consequences may have a special importance that means that the Minister must exercise the discretion personally; and
- statute may require a Minister to take a particular decision personally.

## Discrimination

[Quick link to full details — sections 2.34-2.36 of “Discrimination” on page 46](#)

- A policy, decision or subordinate legislative instrument may be unlawful if it is incompatible with a person’s right under Article 14 of the Convention to enjoy other, substantive Convention rights without discrimination.
- The Courts can also declare primary legislation incompatible with the Article 14 right.
- Article 21 of the EU Charter widely prohibits discrimination.
- Section 29, Equality Act 2010 prohibits anything to be done in the exercise of public functions or in providing a public service, which discriminates against a person on the basis of the protected characteristics in the Act. A policy or decision violating section 29 may be quashed on the basis of illegality.
- There are two forms of discrimination: direct discrimination (treating one person less favourably than others on the basis of some characteristic); and indirect discrimination (failing to treat differently people whose characteristics call for different treatment, without a proportionate justification).

## Does the power have to be exercised in a particular way? Procedure

[Quick link to full details — section 2.37 of “Does the power have to be exercised in a particular way? Procedure” on page 47](#)

- Following the correct and fair procedure (or ‘due process’) is important because it is not just the substance of a decision that matters.
- If procedural requirements in a decision making process are followed, they are likely to secure a just outcome and demonstrate compliance with the rule of law.

## Mandatory versus directory requirements

[Quick link to full details — sections 2.38-2.39 of “Mandatory versus directory requirements” on page 47](#)

- Does any relevant legislation expressly impose a procedural requirement that must be met before a power can be exercised? For example, consulting with local authority

representatives; publishing the decision in draft; making due inquiry; and considering any objections before making a decision?

- Procedural requirements imposed by legislation are 'mandatory' requirements. Failure to comply with mandatory requirements will usually result in a decision being invalid.
- 'Directory' requirements are minor or technical and the breach of the required procedure would not defeat the purpose of the statute; or the breach of procedure would not damage the public. Failure to comply with directory requirements will not necessarily cause the decision to be invalid but it is best practice to comply with them.

## Procedural fairness

[Quick link to full details — 2.40-2.42 of "Procedural fairness – Common law rules and the Human Rights Act 1998" on page 48](#)

- The decision maker needs to come to a decision in a procedurally 'fair' way. Otherwise, the decision may still be unlawful.
- Procedural fairness or 'due process' is a key principle of just decision making.
- The person affected by a decision ought to know in advance how the process will operate, and so how to prepare for and participate in it.
- In the interests of fairness, the Courts may insist that before a decision is made, additional conditions are placed on the exercise of statutory powers, e.g.
  - the disclosure of the reasons the decision maker intends to rely on;
  - an opportunity for consultation of the persons affected or for the persons affected to make representations; and/or
  - an oral hearing where appropriate.
- and after the decision:
  - the disclosure of material facts; or
  - the disclosure of the reasons for the decision.

## Consultation

[Quick link to full details — sections 2.43-2.44 of "Consultation" on page 50](#)

- The decision maker must allow the person who is the subject of a decision to know the case against him.
- The four key conditions of proper and fair consultation that need to be met are:
  - The consultation must be undertaken when proposals are still at a formative stage;

- Sufficient explanation for each proposal must be given so that consultees can consider them intelligently and respond;
- Adequate time for the consultation process must be given; and
- The consultees' responses must be conscientiously taken into account when the ultimate decision is taken.
- (See the [Government Consultation Principles 2016](#)).
- Where a consultation has taken place and before the decision has been made, proper weight must be given to the representations received. The decision must make it clear that this has been done.

## Bias

[Quick link to full details — sections 2.46-2.47 of "Bias" on page 51](#)

- The decision maker must not have any bias or the appearance of any bias, e.g. the decision maker cannot act if he has a financial or other interest in the outcome of the case.
- The test is whether, in all the circumstances, the Court considers that there appeared to be a "real possibility of bias to the fair-minded and impartial observer".

## Impartiality

[Quick link to full details — sections 2.48-2.49 of "Impartiality" on page 52](#)

- The importance of impartiality is well established in common law and recognised in Article 6, Convention (right to a fair trial).
- Impartiality can have a number of practical implications, e.g. before a decision is made, the Minister's officials may require technical input, or for inspectors to carry out an investigation. To ensure impartiality and reduce the risk of an accusation of bias, it may be necessary to have a separation between the people providing the technical input/carrying out the investigation, and the officials making the decision.

## Independence

[Quick link to full details — sections 2.50-2.51 of "Independence" on page 52](#)

- The 'independence' of a decision maker means independence from external pressure or influence.
- Administrative decision makers are often civil servants appointed to carry out Government policy and therefore are not strictly 'independent'. Even when a decision maker is obliged

to carry out a policy, he must keep an open mind and his lack of independence should be curable by the availability of judicial review by a fully independent court.

- If parties know of a decision maker's interest, they can agree to waive any objection. If the decision maker is aware of any reason why he might be thought to be biased, it is best to declare it at the outset. If the subjects of the decision waive their objection then it is very unlikely that they could take any objection later.

## Legitimate expectation

[Quick link to full details — sections 2.52-2.55 of “Legitimate expectation” on page 53](#)

- A legitimate expectation is an expectation that a person would have received a benefit or experienced another result, either because in the past, a policy or procedure was operated in a particular way (so the person expects that it will continue to be operated in that way); or because the decision maker promised a benefit and then later refuses to grant the benefit.
- Where there is a legitimate expectation, a balance must be struck between the public and the private interest. A public authority can override a person's legitimate expectation (his private interest) if the overriding public interest requires it.
- Whether there is a legitimate expectation depends on a number of factors, e.g.
  - Were the words or conduct ('promise/representation') which gave rise to the expectation unequivocal?
  - Did the person promising the benefit have legal power to grant it, or was it ultra vires?
  - Who made the promise and how many people stood to benefit by it?
  - Did the person to whom the promise was made take action in reliance on it, which placed him in a worse position than he otherwise would have been?
- Any unofficial practice or statement of intention, if expressed in loose terms, may give rise to unintended legitimate expectations or unintentionally breach legitimate expectations.
- Sometimes the Courts may be prepared to give at least some effect to expectations even if the public body which made the promise was acting ultra vires when it made the promise. The Courts are more likely to do so where human rights are involved.

## Giving reasons for your decision

[Quick link to full details — sections 2.56-2.61 of “Notifying your decision: Do you have to give reasons?” on page 55](#)

- Often, reasons for a decision are required by statute or regulation. Even where there is no statutory requirement, the decision maker must still give reasons because:

- there may be an established practice of giving reasons so there is a “legitimate expectation” (that reasons will be provided);
- the decision may appear to be inconsistent with previous policy, or with other decisions in similar cases, so some explanation for the difference is needed;
- the subject matter of the decision may be of such importance – e.g. it may affect human rights – that fairness requires reasons be given;
- the potential for a future judicial review means that reasons should be given in most cases;
- Article 6, Convention (right to a fair trial) has increased the situations in which reasons for a decision must be given;
- the Freedom of Information Act 2000 entitles anyone to request a public authority provides information requested (with limited exemptions). This is an incentive for recording reasons.
- There is no uniform format of recorded reasons, but the record should:
  - be clear about what the applicant is applying for and that you understand the application;
  - set out material findings of fact; it should show that all relevant matters have been considered and that no irrelevant ones have been taken into account;
  - cite and apply any relevant policy statements or guidance;
  - note any representations or consultation responses as having been considered and taken into account; and
  - show by what process of reasoning issues were resolved, and how the various factors were weighed against each other.

## Are any kinds of decision immune from being challenged by judicial review?

[Quick link to full details — sections 2.62-2.64 of “Are any kinds of decision immune from being challenged by judicial review?” on page 58](#)

- There are a limited category of decisions which the Court is reluctant to review, because the Court accepts the decision maker is better qualified than the Court to make a judgment due to specialist knowledge or because political judgment is needed, e.g.
- in the field of foreign affairs, in judging how to negotiate with foreign governments;
- ordering financial priorities, in deciding to spend public money in one way rather than another;
- assessing the needs of national security and public order; or

- setting policy on immigration and deportation.
- Acts of Parliament (and by extension decisions by ministers as to what to propose to Parliament by way of legislation) are not reviewable except in relation to compliance with EC law (or the Human Rights Act 1998 and the European Convention on Human Rights)

## Before making a decision...

- What is the purpose of the power to take the decision?
- Are there any factors that must or may be taken into account, or which must not be considered?
- Are the particular facts relied upon in making the decision accurate and up to date? If not, have you sought input from those who have up to date information?
- Where representations have been made, have you taken account of them and is it appropriate to do so?
- Are any rights under the [Convention](#) engaged?
- Has anything irrelevant been considered?
- Are the reasons for taking the decision in accordance with the power?
- Have the reasons been recorded?

## What are the key legal principles that impact on administrative decision makers?

- A decision maker must act
  - lawfully: i.e. within the limits of the power as given by statute;
  - fairly: i.e. the decision maker must demonstrably use a fair decision making procedure and the decision maker must be free from the appearance of bias;
  - reasonably: i.e. a decision is not legally valid if it is manifestly unreasonable. A decision could be unreasonable because no decision maker would rationally have made it or because the decision maker took account of irrelevant factors or relied on inaccurate information;
  - without breaching human rights: i.e. the decision must comply with the European Convention on Human Rights and the Human Rights Act 1998;
  - without breaching EU law: i.e. the decision must comply with any applicable EU treaties; and

- without discrimination: i.e. the decision must not discriminate against a person or category of persons as set out in the Equality Act 2010.

## Judicial review: parties and venue

[Quick link to full details — 3.2-3.5 of “Standing or sufficient interest – Can anyone challenge a decision?” on page 60](#)

- Only a person with ‘sufficient interest’/‘standing’ is entitled to apply for judicial review.
- A person is not entitled to challenge a decision which does not affect him personally, simply because he disagrees with it.
- A ‘person’ includes legal persons, such as groups or organisations protecting or campaigning for a particular public interest, e.g. a trade union.
- An ‘interested party’ might be joined to a judicial review claim – i.e. this party is not a claimant or defendant but is ‘directly affected’ by the outcome of the judicial review.
- An ‘intervener’ is a third party interested in the outcome of a judicial review claim but who is not directly affected by the outcome of the claim. An intervener applies to the Court for permission to be involved in the claim, in order to submit specialist information, e.g. a charity or a non-governmental organisation applies to be an intervener in order to provide information its area of expertise.
- Depending on the nature of the decision disputed, judicial review claims are pursued in the High Court (e.g. the Planning Court or the Administrative Court) or in the Upper Tribunal (for the majority of immigration related judicial review claims).

## Judicial review: Procedure

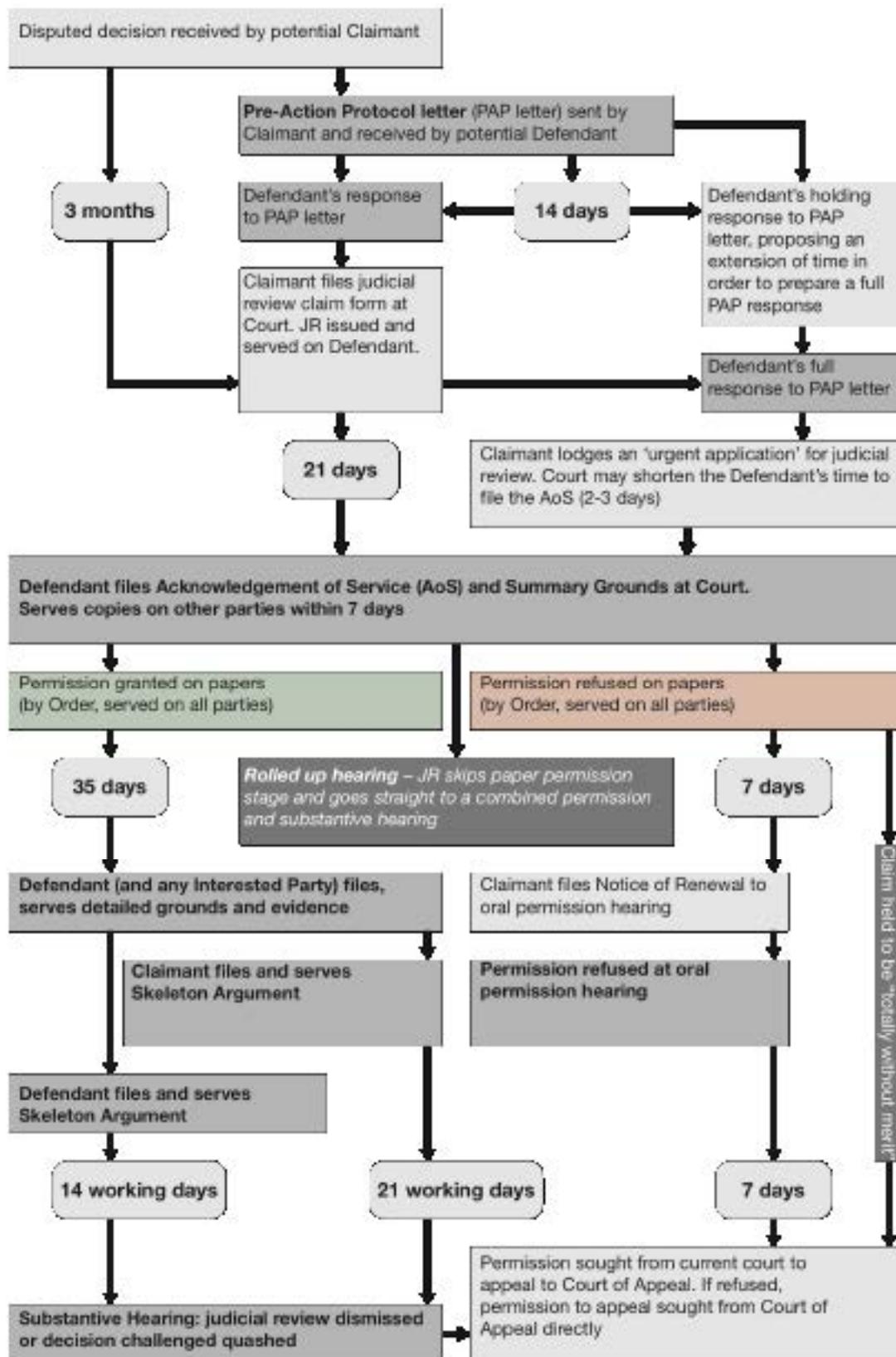
[Quick link to full details — section 3.6 of “The stages of judicial review” on page 62](#)

- Judicial review is a discretionary remedy of last resort – all other appeal options must be exhausted first. This includes any statutory rights of appeal or review; sending and responding to a ‘letter before claim’ (i.e. before a judicial review is initiated); and possible mediation (or another form of alternative dispute resolution).
- Judicial review is not concerned with the merits of a decision but whether or not it was lawfully made.
- Judicial review must be brought promptly and in any event within three months of the decision under challenge.
- The judicial review claim form sets out the details of the complaint with any evidence.
- Whether the claim will be defended or conceded (e.g. by offering to reconsider the disputed decision), the public body must file an acknowledgement of service (AOS). If the decision

maker defends the claim, the AOS should set out a summary of the grounds of defence. The level of detail will depend on legal advice.

- The Courts will make a decision on the papers (the 'permission decision'). The claimant can request an oral hearing if permission is refused.
- The Court can refuse permission on the basis that a claim is totally without merit (meaning "bound to fail"). If it does so, a Claimant loses the right to renew an application to bring a claim for judicial review at an oral hearing. This does not prevent them making a last attempt get permission to bring a claim for judicial review from the Court of Appeal.
- If permission is granted, the defendant public authority must decide whether to continue to defend the claim. If so, further written evidence and arguments must be submitted by both parties and the claim proceeds to substantive hearing (at which the claim will be finally determined by the Court).
- A judicial review claim can be settled at any stage, by agreement between the claimant and the defendant (the public authority).

## The stages of judicial review



## “Duty of Candour” and disclosure

[Quick link to full details — sections 3.19-3.23 of “Duty of Candour” and disclosure” on page 72](#)

- The judicial review procedure obligates both parties to disclose relevant information under the ‘duty of candour’. This includes information that undermines the party’s own case.
- Marking information ‘confidential’, ‘sensitive’ or ‘not for disclosure’ does not necessarily prevent it being disclosable. All case related information must be forwarded to the appropriate legal advisers, who will advise on whether it needs to be disclosed.
- The duty of candour arises from the moment that litigation is anticipated (and so applies before the issue of a judicial review or any other claim).
- Disclosure of information in a judicial review claim is often in the form of producing relevant documents and confirming details by an appropriately knowledgeable person providing a witness statement.
- The duty of candour is separate to the requirement to provide information under the Freedom of Information Act 2000. A party often makes a freedom of information request before starting a judicial review claim.

## Evidence where the decision was taken by the Minister personally

[Quick link to full details — sections 3.28-3.32 of “Evidence where the decision was taken by the minister personally” on page 75](#)

- What were the Minister’s reasons for making a decision?
- Are these reasons recorded, e.g. in a detailed submission prepared by officials given to the Minister before he made the decision?
- The Minister needs to personally get involved in defending the decision at judicial review because his reasoning for the decision challenged is disclosable.
- Who will sign any witness statement in a judicial review? The Minister or one of his officials?
- The Minister must be thoroughly acquainted with all the information in the judicial review and approve what is being said in evidence by him or on his behalf.
- There are strict Court deadlines for presenting evidence in judicial review. Departmental lawyers must be given early access to documents.

## Appeals

[Quick link to full details — the flowcharts and sections 3.10-3.18 of “The stages of the appeals process” on page 68](#)

- After the judicial review is determined, either party can make an application to appeal the decision.
- A party seeking to appeal must first apply to the current court. If permission to appeal is refused, the part can apply directly to the higher court (either the Court of Appeal or in very limited circumstances, the Supreme Court).

## Powers of the Court: remedies

[Quick link to full details — sections 3.33-3.43 of “Powers of the Court: remedies” on page 77](#)

- Interim relief: The process of a judicial review can take a long time. In the event that a claimant’s position might be adversely affected whilst he pursues the claim, a claimant can apply for interim relief pending the outcome of the judicial review, i.e. an injunction ordering a party to do (or not do) something or directions that a party produce certain information.
- Sometimes the defendant public authority may decide to give an undertaking – a formal promise committing to an action, e.g. promising to make a decision within a specified timeframe.
- All of the Court’s remedies are discretionary, which means that a claimant has no absolute right to a remedy.
- Following a successful judicial review, the Court can order:
  - a quashing order, which sets aside or cancels an unlawful decision (or subordinate legislation). (This is the most common remedy ordered by the Court);
  - a prohibiting order, which forbids the public authority from performing an act deemed to be unlawful;
  - a mandatory order, which requires the public authority to perform a particular action;
  - a declaration that declares what the law is, e.g. that a particular decision is unlawful; and
  - damages (in limited circumstances), by which the Court can award financial compensation. Damages cannot be awarded alone – they must be claimed and awarded alongside another remedy. Under the Human Rights Act 1998, damages specifically for a breach of a Convention (human) right are available.

- **Declarations of Incompatibility:** the High Court (or higher court) can grant this Declaration, which confirms primary legislation is incompatible with a Convention (human) right. These declarations are rare.

## Private law in judicial review: negligence and misfeasance in public office

[Quick link to full details](#) — sections 3.44-3.48 of “Private law damages in judicial review” on page 81

- The two main types of private law claims associated with public law decisions are negligence and misfeasance in public office. If proven, a claimant can claim damages for these ‘civil wrongs’ (torts).
- **Negligence:** a public authority has no general immunity from claims in negligence but there is a strong public interest in ensuring public authorities can act without fear of being liable for damages if the Courts found that they should have exercised a discretion in a different manner.
- For negligence to be found, the Court must conclude that a ‘duty of care’ towards the complaining party exists.
- **Misfeasance in public office:** misfeasance in public office is established if the decision maker was not merely negligent, but acted with ‘malice’ (i.e. deliberate or reckless disregard that he acted illegally).
- **Breach of statutory duty:** another potential ground for claiming damages is if the decision maker has breached a statutory duty. A claimant needs to demonstrate that the statutory duty is intended to protect a limited class of the public and that Parliament intended to provide that a right of action is available if that duty is breached.

## Alternative Dispute Resolution (ADR)

[Quick link to full details](#) — sections 3.49-3.50 of “Alternative dispute resolution (“ADR”)” on page 84

- ADR comes in many forms, e.g. mediation. It is often cheaper, less public and more informal than litigation.
- The Judicial Review Pre-Action Protocol requires that the parties consider using ADR. If litigation proceeds, the Courts may penalise the parties for not pursuing ADR when determining liability for the litigation costs.

## The Parliamentary Ombudsman (the Parliamentary Commissioner for Administration)

(Also see sections 3.51-3.53 at pages 60-61 of JOYS)

- The Ombudsman can investigate complaints made via a Member of Parliament and can act as an alternative to litigation.
- The Ombudsman has a wide remit and range of powers. He can investigate a complaint and recommend that a Department pay compensation; issue an apology; or make recommendations for management action within a Department – regardless of whether or not the Department has any legal liability.

## Reforms to the judicial review procedure in England and Wales

Quick link to full details — section 4 of “4. Reforms to judicial review: England and Wales” on page 86

- Criminal Justice and Courts Act 2015 has made a number of amendments to judicial review procedure. (These amendments have been implemented via other Acts).
- The following amendments are in force as of 13 April 2015:
  - Leapfrog appeals (High Court to Supreme Court) – some appeals can ‘leapfrog’, i.e. be heard directly by the Supreme Court, bypassing the Court of Appeal. The scope of leapfrog appeals is now wider: (a) the appeal raises issues of national importance; (b) the result is of particular significance; or (c) the benefit of early consideration by the Supreme Court outweighs the benefit of consideration by the Court of Appeal.
  - Wasted costs orders – the Court now has a duty to consider notifying the various professional legal regulators when making a wasted costs order (i.e. an order that the legal representatives themselves pay some or all the case costs, due to their conduct of the case).
  - No likelihood of a substantially different outcome for the applicant – The Court is now able to ignore a technical breach of the law if it appears to be highly likely that the outcome for the claimant would not have been different if the conduct complained of had not occurred (i.e. the breach would not have made a difference). The Court must refuse permission for a judicial review in these circumstances. The Court can disregard this section where it considers there are “reasons of exceptional public interest”.
  - Interveners and costs – Interveners (a group or individual that has applied for the Court’s permission to participate in the judicial review) can be liable for the case costs they generate if their intervention has not been of significant assistance or they have behaved unreasonably.

- Further reforms: Further amendments to the judicial review procedure haven't yet been implemented. These include provisions:
  - that judicial review claims in the Upper Tribunal can also generate leapfrog appeals;
  - in judicial review claims in the Upper Tribunal, the Tribunal has the power to ignore a technical breach of the law if it appears highly likely that the outcome for the Applicant would not have been different if the conduct complained of had not occurred (i.e. the breach would not have made a difference) and there is no exceptional public interest;
  - requiring the parties to disclose financial information about how the judicial review is financed; and
  - provisions on when the Court can make costs capping orders.

## Reforms to the judicial review procedure in Scotland

[Quick link to full details — section 5 of “5. Reforms to judicial review: Scotland” on page 90](#)

- In Scotland, the grounds for seeking judicial review are substantially the same as the rest of the UK. But there is no distinction between public and private law, so in Scotland judicial review can review any decision where there is a relationship between the decision maker; the person affected by the decision; and a third party from whom the decision making power has been delegated.
- Devolution legislation has given the Court additional remedies to deal with acts that are ultra vires the Scottish Ministers, e.g. acts incompatible with EC law or the Convention rights. (This does not apply to the acts of the UK Government in Scotland).
- As of 22 September 2015, judicial review procedure is amended with the effect that it is more in line with the rest of the UK. Amendments include:
  - a three month time limit to initiate a judicial review claim;
  - a permission stage at which the Court considers (i) whether the applicant has “sufficient interest”; and (ii) whether the application for judicial review has a “real prospect of success” (i.e. more than a merely potentially arguable case). The Court will decide whether to grant permission or order an oral hearing. If permission is refused without an oral hearing, the judge must give reasons and the petitioner (i.e. the applicant) can request a review of the refusal.
  - if permission is granted, a Procedural Hearing is listed to confirm the parties are ready for the Substantive Hearing (at which the petition will be dismissed or granted).
- Procedure: All applications or ‘petitions’ for judicial review must be made to the Court of Session. The petition must describe the facts and circumstances of the decision being challenged, and the Minister will have the opportunity to submit written answers to the claims made by the Petitioner. Broadly, the same remedies are available to the Scottish Court as in the rest of England and Wales (although the terminology differs).

# Public Sector Equality Duty (PSED)

[Quick link to full details — section 6 of “6. The public sector equality duty” on page 92](#)

- Section 149 of the [Equality Act 2010](#) establishes the PSED: a public authority (or anyone) performing a public function must have due regard to the need to:
  - eliminate discrimination, harassment, victimisation prohibited by the Equalities Act;
  - advance equality of opportunity between persons sharing a ‘protected characteristic’ and persons who do not share it;
  - foster good relations between persons with a protected characteristic and persons without it.
- The protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.
- The PSED obliges a public authority to consider relevant matters that may affect a decision and decide what weight to accord to the equality considerations and how to balance them against countervailing factors.
- Decision makers must evidence their consideration of the PSED in the decision making process. Failure to do so can result in the Court quashing a decision and remitting it to the decision maker to be remade with due regard to the PSED.
- Recording consideration of the PSED must be done in compliance with the Bracking Principles and the Brown Principles:
  - The decision maker must be aware of the duty to have “due regard” to the relevant matters;
  - The duty must be fulfilled before and at the time when a particular policy is being considered;
  - The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
  - The duty is non-delegable; and
  - Is a continuing one.
  - It is good practice for a decision maker to keep records demonstrating consideration of the duty.
  - Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

- Record the steps taken by the decision maker in seeking to meet the statutory requirements as evidence.
- The duty is upon the Minister or other decision maker personally – it is what he knew and took into account, not what his officials knew.
- You assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision.
- The Brown principles were confirmed.
- “[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.”
- Officials reporting on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be “rigorous in both enquiring and reporting to them”:
- Provided the court is satisfied that there has been a rigorous consideration of the duty, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

## Devolution

[Quick link to full details — section 7 of “7. Devolution” on page 95](#)

- Devolution gave legislative competence (law making power) in certain policy areas to new territorial legislatures. As a result there are now four legislatures within the UK: Parliament (‘Westminster Parliament’ or the ‘United Kingdom Parliament’); the Scottish Parliament; the Northern Ireland Assembly; and the National Assembly for Wales.
- Ministers take executive responsibility for matters within the legislative competence of each devolved legislature and for certain other matters. Parliament at Westminster retains the constitutional power to legislate in any field throughout the UK, but the convention is that it will not legislate on devolved matters without the agreement of the relevant devolved legislature(s). Such agreement is confirmed by the devolved legislature(s) passing a “legislative consent motion”.
- There is no legislature specifically for England. But in 2015, ‘English Votes for English Laws’ was passed, which affects how Bills or statutory instruments approved, in Parliament if they (a) affect England alone and (b) concern a field in which one or more devolved legislatures have legislative competence. As a result, MPs representing constituencies in England are asked to give their consent to legislation that only affects England and which relates to a topic devolved elsewhere in the UK.
- If a Minister is acting under powers that apply only to England, or to England and Wales, any purported exercise of them beyond those borders may be ultra vires.

- If a Minister has (in strict law) powers applicable throughout the UK, it may not be appropriate for these to be exercised in a territory where there are devolved powers in the same field.
- International relations are not devolved.
- It may be appropriate for devolved administrations to work together or refer to each other to achieve a common approach throughout the UK; or because one administration has already undertaken similar work and therefore can offer useful advice.
- Besides judicial review of ultra vires actions, questions about the powers of the devolved legislatures to legislate, or about UK Ministers exercising functions properly belonging to devolved Ministers, may be referred to the Courts as ‘devolution issues’ and/or in certain circumstances referred to the Supreme Court by the Law Officers in Whitehall or in the devolved jurisdictions.
  - There is scope for the Courts to review the Acts passed by a delegated legislature on other grounds too, although this scope may be limited.
  - The Cabinet Office is responsible for cross-cutting devolution issues generally from the viewpoint of the UK Government. See guidance notes at: <https://www.gov.uk/guidance/guidance-on-devolution>.
  - Every Whitehall department has a Devolution Co-ordinator. There are also territorial offices within the UK Government (the Scotland Office, the Wales Office and the Northern Ireland Office), which specialise in the detailed arrangements affecting the devolved territory.

## EU law in the UK

Quick link to full details — section 8 of “8. EU law in the United Kingdom” on page 98

- The law of the European Union derives from the EU Treaties and forms part of the legal system of the UK. The doctrine of the supremacy of EU law means EU law takes precedence over domestic law.
- Nothing the Government does can conflict with EU law. Where there is a conflict, the Courts have the power to set aside domestic law to allow EU law to prevail, including Acts of Parliament.
- There is no single requirement of EU law. A helpful starting point is to recall that EU Treaties give the EU the power to act in the areas of the four “fundamental freedoms”: the free movement of goods, services, capital and people. To achieve these fundamental freedoms, the Treaties also give the EU the ability to act in other areas too.
- In some cases, the EU Treaties provide ‘directly effective’ rights – i.e. without the need for secondary legislation to give effect to the Treaty provisions. An individual may bring judicial review proceedings against the Government on the basis that a provision of domestic law breaches their rights conferred directly by the Treaties.

- Often there is EU secondary legislation governing a particular issue. The EU legislature (usually the Council and the European Parliament) will 'adopted' a piece of legislation, relying on a power contained in the Treaties for the EU to act in a particular area. The most common forms of EU secondary legislation are:
  - Directives bind Member States (including the UK) to act in a particular way, e.g. to establish national laws to achieve a particular result. Directives must be 'implemented' before they take effect in a Member State. It may be possible to rely on a provision of a directive before a national court, even where the directive has not been implemented, provided the terms are clear, precise and unconditional. Such rights are described as having "direct effect";
  - Regulations are directly applicable and enforceable without the need for any national measures to implement them.
- The [Court of Justice of the European Union](#) (CJEU) rules on the interpretation and application of EU law. Where a point of EU law is unclear, any national court in any Member State may refer the issue to the CJEU for a ruling on the meaning and scope of the EU legal issue under consideration. Rulings of the CJEU are binding on all Member States.
- The Commission can also take the UK directly to the CJEU if it considers we've breached EU law – known as infraction proceedings.
- If a domestic court finds that domestic legislation, a policy or an exercise of executive breaches EU law, the domestic court has the power to dis-apply the legislation or set aside the policy or decision.
- Breaches of EU law can have financial consequences. In some circumstances, the Government can be liable to pay damages to an individual for breaching EU law. This applies where:
  - the EU rule was intended to confer a right on an individual,
  - where there was a "manifest and grave disregard" of EU law by the Government, and
  - where there is a link between the breach of EU law and the loss sustained.

# 1. Good administration — and administrative law

1.1 All public bodies should aim to practise “good administration”: aiming to perform their public duties speedily, efficiently and fairly. The approach used in this guidance is not to directly focus on what “good administration” is, but to describe the body of law developed by the Courts to supervise public bodies in carrying out their public functions. The need to reduce law to a set of standard rules means administrative law is not identical with the principles of good administration. But understanding the requirements of good administration often gives a good idea of what administrative law will say on the same point. Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked.

## What is “administrative law”?

1.2 Administrative law is the branch of law that governs public bodies<sup>1</sup> in the exercise of their public functions. Public law includes both constitutional law and administrative law. The terms “public law” and “administrative law” are often used synonymously. In contrast, private law governs the relationships between private individuals or private bodies (e.g. companies) acting in their private capacity. Examples of private law include the law of contract and tort (a civil wrong, e.g. negligence).

1.3 The term “public bodies” describes a range of bodies exercising public, often statutory, functions. Examples include: central government departments, non-ministerial departments, non-departmental public bodies (NDPBs), executive agencies, and tribunals.

1.4 Administrative law includes an extensive body of case law in which the Courts have developed legal principles and legislation.

## Administrative law can apply to private bodies too

1.5 There is no clear dividing line between public law and private law. The activities of private bodies may sometimes be governed by public law if the bodies carry out public functions. Generally all bodies (including private bodies) are said to be performing public functions when they act, and have the authority to act, for the collective benefit of the general public (and are thus governed by administrative law).

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<sup>1</sup> A comprehensive list of “Public Authorities” for the purposes of the [Freedom of Information Act 2000](#) is contained within schedule 1 of the Act – to be read with section 3. Further information on [public bodies is provided on the .GOV. UK website](#). [Schedule 19 of the Equality Act 2010](#) also sets out a list of public authorities.

1.6 Sometimes bodies which are obviously public bodies, like government departments, engage in activities which are governed by private law. For example, if a government department enters in a contract for the provision of IT equipment, the contract with a supplier will be governed by the terms and law of the contract. But the decision of the department to put the contract out to tender, or some aspect of the tendering procedure, may well be governed by public law. It is not always easy to see where private law ends and public law begins. The Court will examine each case to see how far public law functions are involved (for example where a process is set out in regulations<sup>2</sup>, it is more likely that managing the process is a public law function).

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<sup>2</sup> Regulations are normally in the form of a [Statutory Instrument](#).

# 2. Decisions and decision making

## What constitutes a decision?

2.1 Administrative law governs the making of decisions by public bodies and the application of decision making procedures. Decisions by public bodies may be challenged through the Court procedure known as judicial review - a mechanism by which decisions of public authorities may be challenged and their powers confined or confirmed.

2.2 "Decision" is a wide concept. Through judicial review proceedings, direct decisions affecting a particular person, group or thing may be challenged. For example:

- a decision to detain an individual in immigration detention;
- a decision to allocate a school place; or
- a decision to assign a security categorisation to a prisoner.

The Courts have also held that judicial review extends to, amongst other things, the following:

- statutory provisions, e.g. a declaration of incompatibility with the [HRA](#) (see section 3.39 onwards for more detail on such declarations);
- subordinate legislation;
- exercise of discretionary powers;
- policies;
- reports and recommendations;
- advice or guidance;
- procedures used when making decisions, e.g. a challenge to whether a consultation process has been adequate;
- inaction, e.g. a challenge to a failure to issue guidance; and
- delay, e.g. a challenge to a delay in making a decision regarding an individual's application for leave to remain in the UK.

(See also [Civil Procedure Rule \(CPR\) 54.1](#), which sets out the scope of judicial review.)

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## Case Example

The appellants petitioned the Secretary of State to hold a public inquiry into the alleged unlawful killings of unarmed civilians by UK troops in 1948 (when the UK was the colonial power in the then Federation of Malaya.) The Secretary of State refused to do so. The appellants applied for judicial review of the refusal to hold a public inquiry.

The Supreme Court held that there “is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions. Where a member of the executive, such as ... in this case, is given a statutory discretion to take a particular course or action, such as ordering an inquiry under section 1 [of the Inquiries Act 2005], the court has jurisdiction to overrule or quash the exercise of that discretion.”

In this instance and on these facts, the Court held that the refusal to hold a public inquiry was reviewable (i.e. could be challenged by judicial review) - but (by a majority decision) not unreasonable (and therefore not challengeable). [Keyu and others v Secretary of State for Foreign and Commonwealth Affairs \[2015\] UKSC 69](#).

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## Decisions – the exercise of discretion

2.3 The government, comprising each of its ministers and the departments under their control, governs by virtue of the powers and duties invested in it. Today, most of those powers and duties are derived from [statute](#), whilst a smaller category stem from the Monarch’s vestigial [Royal Prerogative](#). Powers are different to duties. The exercise of a power is always subject to the discretion of a decision maker. Duties are mandatory, requiring a particular function to be exercised in a certain way: they lack the discretionary element of a power. The principles of administrative or public law underpin the lawful exercise of power by government. Those principles have been developed over centuries by the Courts, in the form of a body of legal decisions dealing with how ministers (or their officials) might lawfully exercise their discretion as decision makers.

2.4 When considering whether a minister is able to exercise discretion in a particular way, the starting point will always be to look at the power itself, for example, a provision in an Act of Parliament. The power may expressly limit the way in which discretion should be exercised (for example, by placing a cap on the amount that may be payable under a statutory compensation scheme). But even where a power appears to be unlimited, its lawful exercise will be subject to a range of implied factors, including but not limited to:

- principles established by the Court - derived from public law cases e.g.
- the need to exercise the power reasonably;
- the need to exercise the power for the purpose for which it was provided;
- the need to take relevant factors into account when reaching a decision, and not to take into account irrelevant factors;

- other express limits contained in other statutes (e.g. the [Human Rights Act 1998](#) and the [Equality Act 2010](#));
- an obligation to exercise the power in accordance with [EU Law](#).

2.5 When construing the limits of a power, the language used in setting out the power should bear its natural English meaning. Sometimes the language used can support different interpretations, in which case it will be necessary to consider how those providing the power (e.g. Parliament) intended it to be used. This may require research on the general purposes of the statutory scheme in question, or even consulting [Hansard](#) to see what was said in Parliament when the provision was enacted. Additionally, there may already be Court decisions (in addition to those generally applicable principles referred to above) which deal with the interpretation of the specific provision.

2.6 Importantly, the [Human Rights Act 1998](#) adds a further dimension to interpreting legislation. So far as it is possible to do so, legislation must be read and given effect to in a way which is compatible with the [Convention Rights](#) (i.e. rights under the European Convention on Human Rights).

2.7 In considering whether a decision is lawful where Parliament has conferred the discretion on a particular decision maker, the Court will respect the fact that the discretion remains the decision maker's; and it is not for the Court to exercise that discretion in his stead. The practical effect of this approach is that where the Court finds that the decision was unlawful (on any of the grounds explained below) and that it has to be remade, the Court will not generally substitute its own view on how the power should have been exercised. Instead, the Court will "quash" the faulty decision and order it to be remade by the decision maker. In doing so, the sovereignty of Parliament is respected.

2.8 Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers:

- Legality – acting within the scope of any powers and for a proper purpose. To act lawfully, the department must have the legal power to do what it intends to do. If it does not, it will be acting *ultra vires*, or outside its powers. It will be acting illegally. Where the power does exist, it will usually be found in primary legislation (an Act of Parliament) or subordinate or secondary legislation (a statutory instrument etc.);
- Procedural fairness – e.g. to give the individual an opportunity to be heard;
- Reasonableness or Rationality – following a proper reasoning process and so coming to a reasonable conclusion;
- Compatibility with the Convention rights and EC law.

## Reasonableness (the "Wednesbury Principles")

2.9 A decision made subject to a discretionary power must be "reasonable". "Reasonableness" includes an implicit recognition that there will be many ways in which a decision maker might exercise a particular discretion: and there is more than one lawful conclusion that might

be reached (reasonableness does not mean, therefore, that a court reviewing it would have reached the same decision). Provided that the decision was rationally open to a reasonable decision maker in possession of all the facts in the case, if challenged, the Courts should uphold it as lawful. The Courts have recognised that when two reasonable persons are faced by the same set of facts, it is possible for them to come to different conclusions – i.e. a range of lawful decisions may lie within the discretion of the decision maker. At the same time, the Courts have defined a category of decisions which lie outside that range of discretion:

- “a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it”; or
- “beyond the range of responses open to a reasonable decision maker”.

These principles of reasonableness are called the “Wednesbury Principles”, after the case in which they were formulated ([Associated Provincial Picture Houses Ltd v Wednesbury Corporation \[1948\] 1 KB 223](#)).

## Irrationality

2.10 The above definitions of unreasonableness (or “irrationality”) are expressed in such extreme terms, that it might seem that the Courts would hardly ever find ministers to have acted “unreasonably”. However over time, the Courts have developed their approach to the question of whether a decision is reasonable, calibrating the threshold for unreasonableness according to the circumstances and context of the case. In particular, the Courts are more likely to hold that a decision is unreasonable in a case involving fundamental or human rights.

2.11 The Courts look at all the facts and circumstances surrounding a decision under challenge, when considering if it is irrational. An example of an irrational decision might be where the decision maker has attached wholly disproportionate weight to a particular factor or made some other logical blunder, which renders his whole reasoning process unlawful.

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### Case Example

Under [Schedule 7, Counter-Terrorism Act 2008](#), the Treasury made a direction against Bank Mellat (an Iranian bank) which restricted its access to the UK’s financial markets. The Treasury made the direction because of Bank Mellat’s alleged financial connection to Iran’s nuclear weapons programme. Bank Mellat sought to have the direction set aside.

The Supreme Court allowed the appeal (by majority decision) for a number of reasons, including that the direction did not justify why the Treasury had singled out Bank Mellat. The risk of Bank Mellat financially assisting Iran’s weapons programme was applicable to other Iranian banks operating in the UK financial markets. Singling out Bank Mellat (to be the subject of the direction) was arbitrary, irrational, and disproportionate to what could rationally be expected to meet to the direction’s objective.

“...the distinction between Bank Mellat and other Iranian banks which was at the heart of [the reasons for the direction] was an arbitrary and irrational distinction and that the measure as a

whole was disproportionate. This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy...The direction was irrational in its incidence and disproportionate...I conclude that that it was unlawful." [Bank Mellat v Her Majesty's Treasury \[2013\] UKSC 39](#).

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## Is the power being exercised for a lawful purpose?

2.12 As well as having the power to act, the decision maker must use the power for a lawful purpose. If a public body acts outside its power for a purpose that the power was not created to achieve, the action will be ultra vires (beyond its powers). The purpose of the power may be expressly set out in legislation, or it may be implied from its objectives.

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### Case Example

[Section 124, Finance Act 2008](#) contained the power to make provision in connection with appeals against HMRC decisions, and in particular to make provision "about the circumstances in which an appeal may be made", included the power to abolish a statutory right of appeal to the Upper Tribunal from the First-tier Tribunal.

The Court of Appeal held that a provision which revoked or removed a right of appeal could not properly be described as a provision about the circumstances in which an appeal could be made. The Court of Appeal held therefore that the abolition of a right of appeal to the Upper Tribunal through statutory instrument was ultra vires the statute under which it was made. [R \(ToTel Ltd\) v First-Tier Tribunal \(Tax Chamber\) \[2012\] EWCA Civ 1401](#).

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2.13 The Courts have accepted that a public body has a power to undertake tasks "conducive to" or "reasonably incidental to" a defined purpose. For example, a power for a decision maker to hold a public hearing to assist in reaching his decision will extend to a power to hire accommodation for that hearing as it is reasonably incidental to that purpose.

2.14 The use of a power may be unlawful if the effect of the decision is to contravene the subject's [Convention](#) rights or his rights under EU law. Section 6, [HRA](#) provides: A minister or a department will be acting ultra vires (i.e. beyond the legal limits of its powers) if they make subordinate legislation which is incompatible with a [Convention](#) right<sup>3</sup>, unless primary legislation requires the subordinate legislation to take that form. If the effect of the decision is discriminatory it may be unlawful because it breaches the subject's Convention rights, and/or his rights under EU law; or under domestic equality law under the [Equality Act 2010](#). Equality issues are considered further in section 6 of this guidance.

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<sup>3</sup> A classification of the [Convention](#) Rights is contained in Appendix 1 below.

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## Case Example

GC gave samples (fingerprints and DNA) during police investigations. He was not convicted of any offence and subsequently sought destruction of the samples. The Police Commissioner refused his request pursuant to the guidelines of the Association of Chief Police Officers (ACPO) to retain such samples for an indefinite period save in exceptional circumstances. The policy was adopted further to section 64(1A), [Police and Criminal Evidence Act 1984](#). Following the European Court of Human Rights decision in [S and Marper v United Kingdom \(2008\) 48 EHRR 1169](#) that the indefinite retention of DNA samples breached Article 8 of the [Convention](#) - the Supreme Court considered that section 64(1A) could be read in a way that was compatible with the Convention but that the ACPO guidelines implemented under the section were unlawful. [R \(oao\) GC v Commissioner of Police of the Metropolis \[2011\] UKSC 21](#).

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2.15 In the case example above, the terms of the legislation were compatible with the [Convention](#). However, the particular exercise and interpretation of the power under the Act were incompatible with a Convention right. This case is a good illustration of the subtle way in which the [HRA](#) has impinged upon and modified pre-existing law, and may require older existing policies to be reviewed.

2.16 The GC case was focused on [Article 8](#) (protection of the right to respect for private and family life). Article 8 is a “qualified” right, which means that it is subject to legal restrictions deemed to be necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.17 The indefinite retention of GC’s fingerprints and DNA certainly interfered with his [Article 8](#) right to a “private life”. Therefore the Court had to be satisfied that this restriction on GC’s private life was no greater than was necessary in a democratic society to prevent disorder and crime, etc. For this purpose, the Court was entitled to look at all the facts to see whether a blanket retention policy that took no account of the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances, was “proportionate” to the intended aim.

## What factors should inform the decision?

2.18 In addition to the above, for a decision to be lawful, the decision maker must:

- not have exercised his discretion on the basis of irrelevant factors; and
- have taken into account relevant factors.

Failure to follow either above rule will usually lead to a decision being held to be invalid.

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## Case Example

The Secretary of State for Justice exercised powers under the [Access to Justice Act 1999](#), to restrict the availability of legal aid for judicial reviews brought in the public interest where there was no direct benefit to the claimant. E, a civil liberties campaigner, challenged that decision. A consultation considering the relevant amendment stated that limited legal aid funds should not be spent on such cases. However, the proposed savings were only estimated at £50,000-£100,000 and it did not refer to concerns expressed by the Ministry of Defence that adverse results in cases challenging military intervention in Iraq (such as an earlier case brought by E) could negatively impact defence, security and foreign policy interests.

The Court held that while it was open to the Secretary of State for Justice to make the changes for proper reasons, it was not open to him to deny funding to avoid the consequences of an adverse finding. The Secretary of State for Justice had improperly taken into account the concerns of the Secretary of State for Defence, and those concerns were material to his decision to make the amendments to the availability of legal aid for this category of judicial review. The amendments were quashed. [Evans v Lord Chancellor \[2011\] EWHC 1146 \(Admin\)](#).

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2.19 If a decision maker is exercising statutory powers, the statute may set out the matters which the decision maker should take into account. For example, [s.13, Children and Families Act 2014](#) sets out that before providing certain types of expert evidence in child proceedings, the Court's permission is required and:

“when deciding whether to give permission...the court is to have regard in particular to –

- (a) any impact which giving permission would be likely to have on the welfare of the children concerned...;
- (b) the issues to which the expert evidence would relate,
- (c) the questions which the court would require the expert to answer,
- (d) what other expert evidence is available...”

These are matters that the Court should have regard to “in particular”. The statute does not provide an exhaustive list and there may be other relevant matters in the particular circumstances.

2.20 If the statute is silent on what is relevant to a decision maker, it is necessary to deduce what is relevant from the purpose of the power. But if the decision is challenged, it is the Court which will decide what factors should have been taken into account.

2.21 If a decision or action will touch on a [Convention](#) right, you must consider if what is proposed is compatible with that right. If it is not, the decision or action will be unlawful unless the duty under primary legislation means a different course of action is impossible. Failure to recognise that a Convention right is affected may itself be a failure to take account of a relevant factor.

2.22 The facts on which the decision or action are based must be accurate and up to date. Further, the factors that influenced the decision should be recorded.

2.23 In summary, things to think about when taking a decision include<sup>4</sup>:

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Power to take the decision	What is the purpose of the power to take the decision? Are the reasons for taking the decision in accordance with the power? Is this decision ultra vires?
Influencing factors	What factors must be taken into account? What factors may be taken into account? Are the facts relied upon accurate? Have you sought input from those with up to date information? Have you consulted appropriately? Where representations have been made, have you taken account of them and is it appropriate to do so? Has anything irrelevant been considered?
Making the decision	Procedural correctness: Is the decision free from bias, or the appearance of bias? Is the decision maker impartial and independent?
Additional duties	Has the <a href="#">Equality Act 2010</a> been complied with? Is there any foreseeable conflict with EU law (e.g. are any rights under the <a href="#">Convention</a> engaged)? Does this decision breach any legitimate expectation? Has discretion been appropriately and proportionately applied?
Recording the process	Have the above points been recorded?

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## Proportionality

2.24 In considering whether a decision is “reasonable”, the Courts have always been prepared to adjust the threshold of unreasonableness according to the importance of the rights involved. It is sometimes said that the Courts apply a “greater intensity of review” where (in particular) the [Convention](#) rights are engaged: in other words, the Courts lower the threshold. This is because Convention jurisprudence has imported the principle of “proportionality” into decision making. Proportionality is separate from “Wednesbury reasonableness” and is applied only in cases involving the Convention rights (or EU law).

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<sup>4</sup> See also the checklist set out in Appendix 3.

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## Case Example

The Secretary of State introduced a new prison cell search policy. The policy stated searches should take place in the prisoner's absence and should include an examination (without reading) of the prisoner's correspondence with his legal advisers (to ensure nothing had been written or secreted in it which endangered security). D sought judicial review of the decision to examine his legally privileged correspondence in his absence.

The House of Lords held that the possibility that prison officers might read D's legal correspondence was an infringement of the legal privilege which he enjoyed at common law; and the application of the blanket policy to him without evidence of misconduct on his part was an intrusion that was greater than was justified. Further, the policy was a breach of D's Article 8 rights under the [Convention](#). Article 8 (right to private life) was not an absolute right but any interference had to be no greater than was necessary in the interests of public safety and the prevention of disorder or crime. The interference in this case was held to be "disproportionate" to the aims of public safety and prevention of crime. [R v SSHD ex parte Daly \[2001\] 2 AC 532](#).

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2.25 In the above case, on either basis (i.e. under both the Wednesbury reasonableness principle and the proportionality principle), the Prison Rule which incorporated the search policy was unlawful and was quashed. The application of Wednesbury reasonableness and proportionality principles were applied in parallel and produced the same result:

- The interference with the [Convention](#) right was disproportionate because it was greater than was necessary in the interests of public safety and the prevention of disorder and crime.
- The Court said that although the same result was arrived under both principles in this case that would not always be so, because the intensity of review was greater under the proportionality approach.

2.26 Following [Daly](#), the Courts have developed the principle of proportionality as applied to [Convention](#) rights and as distinct from Wednesbury reasonableness, in a number of landmark cases<sup>5</sup>. The Court has shown that where Convention rights are concerned, it is willing to carry out a more detailed analysis of the facts in a case, in order to determine the answers to four central questions:

- (i) Whether the legislative objective of a measure is sufficiently important to justify the limitation of a fundamental right;
- (ii) Whether the measure is rationally connected to the objective;
- (iii) Whether a less intrusive measure could have been used or is it no more than necessary to accomplish the objective? and

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<sup>5</sup> [R v Shayler \[2003\] 1 AC 247](#) at paras 57-59 (Lord Hope of Craighead), [Huang v Secretary of State for the Home Department \[2007\] 2 AC 167](#) at para 19 (Lord Bingham of Cornhill) and [R \(Quila\) v Secretary of State for the Home Department \[2012\] 1 AC 621 at para 45](#).

(iv) Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

2.27 This approach remains short of a merits review. However it is clear that the Courts' approach to an issue of proportionality under the [Convention](#) goes beyond that traditionally adopted in judicial review in a domestic setting. The intensity of review is greater than was historically appropriate and the Courts will now make a value judgment of the decision or measure under challenge by reference to the circumstances prevailing at the relevant time.

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## Case Example

R (an Iranian dissident politician) was excluded from the UK. The appellants wanted R to attend Westminster to discuss Iranian policy issues and asked the Secretary of State to lift the ban, so as to allow R to enter the UK. The Secretary of State took advice from the Foreign Office and concluded that Iran would view allowing R to enter the UK as an aggressive political move; and would be likely to engage in reprisals risking British nationals. The appellants challenged the refusal allow R to enter the UK on the basis that it violated their right to freedom of expression in breach of their rights under Article 10 of the [Convention](#).

The Supreme Court confirmed that R's exclusion amounted to an interference with Article 10 and considered whether the interference was justified as a proportionate response to the predicted threat (to the interests of Britain and its nationals). The Supreme Court held the following:

- Interference with a Convention right was justified if it was made in order to protect the democratic values of British society from the actions of a repressive regime.
- The Courts would not usually undermine the decisions of the executive. But the effect of the [Human Rights Act 1998](#) is that any arguable allegation that a person's Convention rights had been breached means the Courts can review the relevant decision. This includes reviewing the compatibility of executive decisions with the Convention.
- The Court was not entitled to substitute its own view for that of the decision maker. The degree of judicial scrutiny when reviewing whether a decision is compatible with Convention rights depends on the significance of the Convention right, the degree of interference with the right, and the factors capable of justifying the interference.

In this instance, the Supreme Court concluded that the interference with Article 10 was proportionate. [R \(oao\) Lord Carlile v SSHD \[2014\] UKSC 60](#).

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## Having a "policy"

2.28 Where decision makers may have to deal with a large number of cases, there may be a policy in place intended to ensure that cases can be dealt with in a standard way: applying the same criteria and attaching the same weight in each case, and so ensuring consistency and administrative efficiency. The Courts have held that while it is lawful and essential for

fairness and consistency in decision making for decision makers to have a policy<sup>6</sup>, they should nevertheless direct their minds to the facts of the particular case and be prepared to make exceptions. This is particularly important in cases involving human rights.

2.29 A policy can be challenged on the basis that it is unlawful or unpublished; or an individual may challenge a decision on the grounds that as the policy is unlawful so too is the related decision. An individual may also bring a challenge on the basis that the policy was applied too rigidly, so that the decision maker's discretion was fettered or limited unlawfully.

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### Case Example

The Secretary of State maintained an unpublished policy for over two years which set out a presumption in favour of the detention of foreign national offenders (FNOs) pending deportation, after their term of imprisonment ended. This ran contrary to the published policy and resulted in a near blanket ban on the release of FNOs.

Following a challenge by two FNOs to the legality of their detention, the Supreme Court held that the particular decisions to maintain detention under that policy were unlawful. Further, the Court found the unpublished policy itself to be unlawful. [R \(Lumba & Anor\) v Secretary of State for the Home Department \[2011\] UKSC 12](#).

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Or the challenge might be on the basis that the policy was not applied at all.

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### Case Example

The Secretary of State's published immigration detention policy stated that officials should review detention: weekly in the first month of detention and once a month thereafter.

The Supreme Court found that failure to comply with this policy was a public law error which rendered the ongoing detention unlawful. [Kambadzi v SSHD \[2011\] UKSC 23](#).

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## Discretion or duty?

2.30 If statute appears to confer a discretion (that the Secretary of State "may" do something), but all the circumstances point to the power being exercised in a particular way, it may be interpreted as a duty (i.e. the Secretary of State "shall" do something). For example, a public body with the power to grant licences may be obliged to do so where an applicant fulfils all the prescribed requirements. The statute and its purposes as a whole must be considered to determine whether there is discretion or a duty.

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<sup>6</sup> [R \(Alconbury Developments Ltd\) v Secretary of State for the Environment, Transport and the Regions \[2001\] UKHL 23](#) at 143, [R v Southwark LBC, ex parte Udu \[1996\] E.L.R. 390](#) at 391, [R v Secretary of State for the Home Department, ex parte Venables \[1998\] A.C. 407](#) at 432.

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## Case Example – The Court held that there was a duty

Under a previous statutory provision, the Secretary of State for Health (SSH) “may require an NHS foundation trust to provide the Secretary of State with such information as the Secretary of State considers it necessary to have for the purposes of the functions of the Secretary of State in relation to the health service.” The Home Office could refuse an application for leave to enter or remain in the UK if the applicant had incurred NHS debts totalling at least £1,000. The Home Office made such refusals on the basis of information passed to it by the SSH, who in turn, had received that information from the relevant NHS bodies. The appellants argued (amongst other points) that NHS bodies did not have the power to pass the information to the SSH, and the SSH did not have the power to pass it to the Home Office.

The Court of Appeal dismissed the appeal and held that the SSH had a duty the relevant statutory provision to require NHS bodies to transmit the information to him. Therefore NHS bodies had a statutory duty to comply with that requirement. Under s.2 of the relevant Act, the SSH was permitted to do anything to facilitate the discharge of any duty imposed on him by the Act. If he could lawfully require NHS bodies to provide information to him to facilitate the recovery of charges, then he could lawfully pass that information on to the Home Office for the same reason – i.e. to facilitate the discharge of the same statutory duty (to “secure the provision of services by facilitating the recovery of charges”). [R \(oao\) W v Secretary of State for Health \[2015\] EWCA Civ 1034](#).

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## Case Example – The Court held that there was a discretion

[Section 143, Police Reform and Social Responsibility Act 2011](#) provides: “A constable or authorised officer who has reasonable grounds for believing that a person is doing, or is about to do, a prohibited activity may direct the person— (a) to cease doing that activity, or...” [emphasis added]. This section conferred powers on the police and authorised local authority officers to stop protesters pitching tents in Parliament Square. When this power was enforced against G (an anti-war campaigner) she challenged the way this power was exercised and argued that in ordering her to remove her tent the police had failed to exercise the element of discretion in section 143(1). This was incompatible with Article 6 (right to a fair trial); Article 10 (freedom of expression); and Article 11 (right of assembly) of the [Convention](#).

The Court of Appeal looked at the policy and objectives of the Act and held that it was to put an end to the prohibited activities defined in section 143 and, in particular, to stop the use of tents and other structures designed to facilitate sleeping in Parliament Square. The Court of Appeal also held that “if Parliament had intended that a direction should be given in all cases, it would have used the word “shall” (our emphasis). That is the obvious way of giving effect to an intention to impose an obligation. As a matter of ordinary language, the word “may” connotes the existence of a discretion. If constables and authorised officers routinely refused to exercise the power conferred by section 143(1), they would not be exercising the power in accordance with the intention of Parliament: they would be frustrating the policy and objects of the 2011 Act”. But by giving a discretion (rather than imposing a duty), Parliament intended that it might be appropriate in exceptional circumstances for the power not to be exercised. [R \(oao\) Gallastegui v Westminster City Council \[2013\] EWCA Civ 28](#).

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## Delegation of a power

2.31 The general rule is that where legislation confers a power on a specified individual or body, the power must be exercised by that individual or body and must not be delegated or “given away”. There are a number of exceptions to this general position. In particular, so far as departments of central government are concerned, the Courts accept that ministers cannot possibly personally make every decision made in their name, and that officials may act on their behalf. This is known as “the Carltona principle” after the leading case ([Carltona Ltd v Commissioners of Works \[1943\] 2 All ER 560](#)). Theoretically, legally and constitutionally, there is no unlawful delegation because the acts of officials are the acts of their ministers. The Carltona principle applies to both statutory and non-statutory powers.

2.32 There are limits to the Carltona principle, for example:

- the decision must be taken by an official of appropriate seniority and experience;
- some decisions or their consequences may have a special importance that means that the minister must exercise the discretion personally; and
- statute may require a minister to take a particular decision personally.

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### Case Example

B and H were prisoners. At different times and for different reasons, B and H were segregated under the [Prison Act 1952](#), [rule 45 of the Prison Rules 1999](#), and the non-statutory [Prison Service Order 1700](#) [note: link is to the full PSO list, including PSO 1700] issued by the Secretary of State. [Rule 45](#) restricted segregation to 72 hours without the authority of the Secretary of State. PSO 1700 gave authority for operational managers to renew segregation month by month or for 14 days. B’s segregation was reviewed after 72 hours and thereafter at 14 day intervals, by a Segregation Review Board (SRB). The senior prison officer who chaired the SRB authorised the continued segregation, purportedly in compliance with rule 45. H’s segregation was authorised by the “residential governor” of the prison, again purportedly in compliance with r.45. Both B and H challenged the legality of their segregation by judicial review.

The Supreme Court considered whether the segregation was unlawful, because it was ordered by staff members without the authority of the Secretary of State as required by r.45. The Secretary of State for Justice argued that the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560 applied whereby a departmental official’s decision was constitutionally that of the Secretary of State. The Supreme Court held that r.45 was clear that segregation was to be arranged and continued by “the governor”; and that a maximum of 72 hours segregation was permitted without the Secretary of State’s authority. Prison governors and officials held an independent statutory office, and as such exercised powers vested in them personally by virtue of their office. They were constitutionally responsible for the manner of its discharge and the Carltona principle could not apply to them while they were so acting. Any purported performance of the Secretary of State’s function under r.45 by a governor or other prison official could not be treated as performance by the Secretary of State. The Secretary of State’s purported delegation of his function under r.45 to the chairman of the SRB

under PSO 1700 was unlawful. [R \(oao Bourgass & Anor\) v Secretary of State for Justice \[2015\] UKSC 54](#).

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2.33 Any decision taken by an official on behalf of his minister must be subject to the appropriate level of scrutiny and consideration so it is taken with regard to all relevant circumstances. For example, if advice is received from outside the department, it should be properly considered when making a decision on the minister's behalf and not simply rubber-stamped.

## Discrimination

2.34 A policy, decision or subordinate legislative instrument may be unlawful if it is incompatible with a person's right under Article 14 of the Convention to enjoy other, substantive [Convention](#) rights without discrimination. The Courts can also declare primary legislation incompatible with the Article 14 right. (For more detail on the Court's power to grant Declarations of Incompatibility, see section 3.39 of this guidance).

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### Case Example

Primary legislation passed in 2004 required persons subject to immigration control to obtain the Home Secretary's consent before marrying in the UK under the Superintendent Registrar's Certificate procedure. This procedure was not required for couples marrying by the rites of the Church of England, who could instead rely on the publication of banns. Thus migrants whose religious outlook permitted them to marry in a Church of England church could avoid these controls. This outcome was successfully challenged by judicial review on the basis that the legislative procedure effectively qualified the right to marry (Article 12, Convention) on the basis of religion (thus violating Article 14). The House of Lords held that the statutory requirement was incompatible with [Convention](#) rights. (The statutory requirement was modified by a Remedial Order). [R \(Baiai\) v Secretary of State for the Home Department \[2008\] UKHL 53](#).

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### Case Example

Housing benefit related regulations were applied so that occupation need was assessed using a comparator against able-bodied people. Under the Regulations, carers for disabled recipients of housing benefit did not qualify as "occupiers". The effect of this was that no extra payment was made to disabled recipients who needed a separate bedroom for their carers to stay overnight (because carers were not "occupiers") and disabled recipients' occupation need was calculated on a single bedroom rate. The severely disabled appellants argued that their Article 14 rights were breached when read in conjunction with their [Article 8 rights](#) and/or their rights under Article 1 of the First Protocol. (Article 8 protects the right to a private and family life, home and correspondence; and [Article 1 of the First Protocol](#) protects the right to property).

The Court of Appeal held that the Regulations did not adequately provide for the additional accommodation needs of the severely disabled; and that the Regulations were applied on a

discriminatory basis, therefore breaching Article 14. [Burnip v Birmingham City Council \[2012\] EWCA Civ 629](#).

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2.35 Article 21 of the [EU Charter](#) contains a widely expressed prohibition of discrimination. [Section 29, Equality Act 2010](#) forbids anything to be done in the exercise of public functions or

in providing a service to the public, which discriminates against a person on account of any of the protected characteristics in the Act (age, disability, gender reassignment, marriage or civil partnership, race, religion or belief, sex, pregnancy and maternity or sexual orientation). In this context, a policy or decision violating s.29 may be quashed on the basis of illegality. (Section 6 of this guidance sets out in more detail the impact of the Equality Act 2010 and the public sector equality duty on decision making).

2.36 There are two forms of discrimination:

- direct discrimination - which means treating one person less favourably than others on the basis of some characteristic (in an [Equality Act](#) claim - a “protected characteristic”); and
- indirect discrimination - which means failing to treat differently people whose characteristics call for different treatment, without a proportionate justification.

## Does the power have to be exercised in a particular way? Procedure

2.37 Following the correct procedure (or “due process”) is very important in public law because it is not just the substance of a decision that matters. There are a number of procedural requirements in a decision making process which, if followed, are likely to secure a just outcome and demonstrate compliance with the rule of law.

## Mandatory versus directory requirements

2.38 Due process requires you to consider if any relevant legislation expressly imposes a procedural requirement that must be met before a power can be exercised. Examples of legislative imposed procedural requirements include:

- consulting with local authority representatives;
- publishing the decision in draft;
- making due inquiry; and
- considering any objections before making a decision.

These are “mandatory” requirements. Failure to comply with mandatory requirements will usually result in a decision being invalid. Complying with a mandatory requirement is not a “tick-box” exercise: the requirement must be complied with in spirit as well as literally.

2.39 There is a presumption that a statutory requirement is “mandatory”. Occasionally, the presumption can be rebutted: for example, if the requirement is minor or technical; or the breach of the required procedure would not defeat the purpose of the statute; or the breach of procedure would not damage the public. In such a case, the requirement is “directory”. Failure to satisfy a directory requirement will not necessarily cause the decision to be invalid. For example, a statute requires a public body to carry out a function within a certain time limit but the public body performed the function slightly late. The Court might find that there had been substantial compliance with the procedure and that the breach could therefore be overlooked. However, it is best practice to comply with the time limit, “directory” or otherwise. The categories “mandatory” and “directory” are not rigid. These labels do not matter, but rather the Court’s view of the effect of non-compliance and any prejudice caused as a result.

## Procedural fairness – Common law rules and the [Human Rights Act 1998](#)

2.40 The decision maker also needs to come to a decision in a procedurally “fair” way. Otherwise, even if the decision maker is acting within the limits of his legal powers, the decision may still be unlawful. The common law recognises procedural fairness as part of “due process” - a key principle of just decision making. Fairness is a concept drawn from the “constitutional principle of the rule of law, which requires regularity, and predictability and certainty in government’s dealings with the public”<sup>7</sup>. It is an important feature of a fair decision making process (“due process”) that the person affected by it will know in advance how the process will operate, and so how to prepare for and participate in it. The same principle is reflected in the [European Convention on Human Rights](#). The [HRA](#) has added statutory requirements to the common law requirements of fairness, because it incorporates these Convention rights. For example, if you are taking decisions which will determine a person’s civil rights and obligations<sup>8</sup>, you will need to ensure that the procedural requirements of Article 6 of the Convention (the right to a fair trial) are met.

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### Case Example

Returning to the example of Bank Mellat (page 30), under counter-terrorism legislation, the Treasury made a direction against Bank Mellat (an Iranian bank) which restricted its access to the UK financial markets. The Treasury made this direction because it concluded that Bank Mellat posed a significant risk to national security by providing banking services that aided Iran’s nuclear weapons programme.

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<sup>7</sup> DeSmith Woolf & Jowell, *Judicial Review*.

<sup>8</sup> “Civil rights and obligations” is a complicated concept, but broadly it includes personal, private or economic rights and obligations.

The Supreme Court held (in a majority decision) that the direction was unlawful for a number of reasons, including on procedural grounds. Bank Mellat ought to have been given notice of the Treasury's intention to make the direction and ought to have been given an opportunity to make representations, in compliance with the oldest principles of public law. The only ground on which the Treasury could argue that it had no duty to consult the Bank was if such a duty was excluded by statute. Whilst the counter-terrorism legislation included a statutory right of recourse to the courts (by which a bank could apply to have a direction set aside), the legislation did not exclude common law requirements of fairness. Common law requirements of fairness meant that Bank Mellat should have been consulted before the direction was made and given an opportunity to make representations as to why the direction should not be made.

The Treasury's direction was unlawful because there was no prior notice of the direction, nor any procedure to hear it in advance. The Court did not consider if a duty of prior consultation arose because of Article 6, Convention (because it was unnecessary in this instance, having already concluded that the duty arose under public law principles). [Bank Mellat v HM Treasury \[2013\] UKSC 39](#).

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2.41 The Courts may find that in the interests of fairness, additional conditions should be placed on the exercise of statutory or other executive powers. For example, the Courts may insist that before a decision is made, any of the following are required:

- the disclosure of the reasons the decision maker intends to rely on;
- an opportunity for consultation of the persons affected or for the persons affected to make representations; and/or
- an oral hearing where appropriate.

and after the decision:

- the disclosure of material facts (which were material to the decision); or
  - the disclosure of the reasons for the decision.
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### Case Example

Under [section 6\(2\), British Nationality Act 1981](#), the Secretary of State has a discretion to grant a certificate of naturalisation ("if he thinks fit"). He has to be satisfied of, among other things, the applicant's good character. The Secretary of State refused a certificate to F and declined to give any reason for his decision; nor was there any process of consultation or for representations to be made. There were no procedural requirements in the Act; [s.44\(2\)](#) provided that the Secretary of State was not "required to assign any reason for the grant or refusal of any application"; and [s.44\(3\)](#) that decisions should not be subject to appeal or review in any Court.

Nevertheless and in the face of express statutory words, the Court of Appeal held that, particularly in view of the requirement of good character, fairness obliged the Secretary of

State to notify F of the matters causing him concern. [R v Secretary of State for the Home Department ex parte Al Fayed \[1998\] 1 WLR 763 CA](#).

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## “Hear the other side’s case”

2.42 The Al Fayed case pre-dates the [HRA](#) and is a good illustration of the principle that a decision maker must allow the person who is the subject of a decision to know the case against him. If the subject doesn’t know the case against him, he cannot properly defend himself, cannot effectively persuade the decision maker that his information is inaccurate or exaggerated, or at any rate does not justify an adverse decision. The operation of this principle can be seen in diverse situations, for example:

- the practice (prescribed in Prison Rules) of disclosing the parole dossier to prisoners seeking release on licence; or
- notifying in advance persons likely to be criticised by a public inquiry of the area of criticism, so that they know the substance of the case against them.

This principle is set out in both the [HRA](#) and Article 6 of the [Convention](#) (the right to a fair trial).

## Consultation

2.43 Consultation with the persons likely to be affected by the decision, is an aspect of “hearing the other side’s case” (and often part of the decision making process). Consultation helps to make the process a fair one; and helps to ensure that the decision maker is in possession of all the relevant information, so that the decision is a “rational” one. Where consultation is undertaken, whether or not strictly required, it has to be conducted properly to satisfy the requirement for procedural fairness. The four key conditions that need to be met are:

- The consultation must be undertaken when proposals are still at a formative stage;
- Sufficient explanation for each proposal must be given so that consultees can consider them intelligently and respond;
- Adequate time for the consultation process must be given; and
- The consultees’ responses must be conscientiously taken into account when the ultimate decision is taken.

These principles are taken from case law and are codified for government departments and their agencies in the [Consultation Principles 2016](#).

2.44 Where a consultation has taken place and before the decision has been made, proper weight must be given to the representations received. The decision must make it clear that this has been done. The representations do not need to be recited in full, but you must show that the main points have been grasped and taken into account.

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## Case Example

The central government cut the amount it would reimburse local authorities for providing council tax relief to residents. This left local authorities with a shortfall. H (a local authority) proposed to deal with its shortfall by amending its relief scheme to cut the amount of council tax relief it offered eligible residents. H consulted its residents about the proposed relief scheme amendments, by sending a consultation document to 36,000 households. The document contained no reference to alternative options for meeting that shortfall. The only option set out was the proposed cut to council tax relief. A resident legally challenged H's consultation.

The Supreme Court considered the specific statutory duty of consultation applicable to H, which stated H should "consult such other persons as [the authority] considers are likely to have an interest in the [amendments to the relief scheme]". The purpose of this particular statutory duty to consult was to ensure public participation in H's decision making process. The general public could not be expected to be familiar with the context of the relief scheme. Therefore, H was required to provide the consultees with information about the draft scheme changes; an outline of the realistic alternatives; and the main reasons for H's adoption of the draft changes.

A duty to consult will not always need to include information on any rejected options. It will depend on the context and the relevant statutory provisions. The statutory provisions may leave the scope of the consultation open without clarification. If so, the question is in that context, is information on the rejected options necessary in order for the consultees to express meaningful views on the proposal? In this instance, the Court concluded that the residents could not meaningfully participate in the decision making process unless they had an idea of all the realistic options available to H to meet the financial shortfall. The consultation document presented the proposed cuts in council tax relief as the only option. Therefore, there was no consultation on the fundamental basis of the scheme. [R \(oao\) Moseley v Haringey LBC \[2014\] UKSC 56.](#)

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## "It wouldn't have made any difference"

2.45 When a failure to consult or a failure in due process forms the basis of a challenge to the decision, the decision maker cannot say "it was an open and shut case. Consultation [or an oral hearing; or full disclosure of reasons] would have made no difference. The decision would inevitably have been the same." That may be true, but the Court is unlikely to be sympathetic because the principle is that only a fair procedure will enable the merits to be determined with confidence and must therefore come first.

## Bias

2.46 The rule against bias on the part of the decision maker is a rule of natural justice: "no man shall be the judge in his own case". If the decision maker has a financial or other interest in the outcome of the case, he will not be, or be seen to be, impartial. The rule against bias applies not only to actual bias but also to the appearance of bias: "Justice must not only be done,

but be seen to be done". Nobody should be able to allege that the decision was a fix because the decision maker was biased, whether or not there is any truth in that allegation. Ruling out actual or potential bias ensures that the decision making process is not a sham because the decision maker's mind was always closed to the opposing case. You must observe the rule against actual or perceived bias strictly to maintain public confidence in the decision making process.

2.47 Actual bias is rare: most cases are concerned with the appearance of bias. The test is whether, in all the circumstances, the Court considers that there appeared to be a "real possibility of bias to the fair-minded and impartial observer". The "real possibility" of bias excludes a remote or insignificant risk of bias. If there was an appearance of a real possibility of bias to such an observer, the decision will be set aside. The decision maker must not act if there is a real danger his impartiality might be open to question.

## Impartiality

2.48 The importance of impartiality is a well established common law principle and is also recognised in the [Convention](#): Article 6 (right to a fair trial) requires a tribunal be impartial and independent. The rule against bias applies to administrative decision making as well as to Court procedure and decisions. For example, if an applicant for a benefit is known personally to the decision maker; or the decision maker has dealt with the applicant before and had decided against him; or has expressed a view adverse to the applicant in other circumstances indicating that his judgment is affected, then it may be appropriate to refer the application to a different (and impartial) official.

2.49 The principle of impartiality can have practical implications. For example, when statute requires that the "Secretary of State" makes a decision on an application, he (or the officials acting in his name) may require more information before making a decision. This might include some sort of technical input, or requiring inspectors to carry out an investigation. In order to ensure as much impartiality as possible, it may be necessary to have a separation between the people providing the technical input/carrying out the investigation, and the officials making the decision or submitting the matter to the Secretary of State (when his personal decision is required). This separation reduces the risk of an unsuccessful applicant claiming that the decision maker was not impartial because he was too involved in the case or had pre-determined the application.

## Independence

2.50 The "independence" of a decision maker is different but closely linked to impartiality. It means the independence of the decision maker from external pressure or influence. Independence is more directly relevant to judges (e.g. the way they are appointed) or the Courts than it is to administrative decision makers (who are often civil servants appointed to carry out government policy and therefore are not strictly "independent" in this sense). Even when an administrative decision maker is obliged to carry out a particular government policy, he must keep an open mind and the view that he is not strictly independent (given he acts

on behalf of the government) should be curable by the availability of judicial review by a fully independent court.

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## Case Example

An urban development corporation (UDC) granted outline planning permission for the redevelopment of rugby club land as a retail site. A local campaign group sought judicial review on the grounds that members of the UDC had undeclared financial interests in the scheme. The Court found on the facts that there was no real danger of bias or appearance of bias. But the principle that a person is disqualified from participation in a decision if there is a real danger that he would be influenced by a financial or personal interest in the outcome was of general application in public law - and not limited to judicial bodies or proceedings. It was likely that persons elected to a UDC would be people who were familiar with the locality who might have publicly stated their views beforehand.

The Court would have to distinguish between legitimate prior stances and experience, and illegitimate ones. Where a member of a planning authority had a financial or personal interest in a planning decision, he should declare that interest and not participate in the decision, unless the interest were too remote or insignificant. [R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd \[1996\] 3 All ER 304](#).

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If it had been established that the decision maker(s) in the Kirkstall case did have a financial or other “proprietary” interest in the decision, the Court would not have inquired into whether they were in fact biased. The decision makers’ disqualification would have been automatic, on the basis that they could not be “judge in their own case”.

2.51 If the decision maker is aware of any reason why he might not be considered to be independent (either by himself or others), it is best to declare this to all the parties to the decision at the outset. The parties may agree to waive their right to object to that decision maker continuing with the decision making process. If they waive their right to object, it is very unlikely that they could take any objection later. In rare circumstances, a decision maker who might otherwise be disqualified can still act, if the decision needs to be made and cannot be made without that particular person. You should not decide to act in these circumstances without seeking advice on whether there is some way round the difficulty.

## Legitimate expectation

2.52 Where a decision maker either expressly, or through custom or previous conduct, suggests that a particular outcome is likely and an individual relies on this to their detriment - this is known as legitimate expectation. If the Court accepts that a legitimate expectation has arisen in a case it may rule that in breaching that promise or legitimate expectation the decision maker acted unfairly and unlawfully.

2.53 In cases where a legitimate expectation may have arisen, a balance has to be struck between the public and the private interest. A public authority can override a person’s

legitimate expectation if the overriding public interest requires it. Whether a legitimate expectation has arisen will depend on a number of factors, for example:

- Were the words or conduct (“promise/representation”) which gave rise to the expectation clear and unequivocal?
- Did the person promising the benefit have legal power to grant it, or was it ultra vires?
- Who made the promise and how many people stood to benefit by it?
- Did the person to whom the promise was made take action in reliance on it, which placed him in a worse position than he otherwise would have been?

2.54 The factors listed above are not generally decisive on their own.

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### Case Example

Under the Immigration Rules (which are deemed to be part of law), international medical graduates (IMGs) were eligible to apply for a Highly Skilled Migrant Programme (HSMP) visa to work in the UK, subject to meeting specified criteria. A number of IMGs successfully obtained HSMP visas and entered the UK to work for various NHS trusts. At a later date, the Secretary of State for Health (SSH) issued guidance to NHS trusts. The guidance set out that IMGs whose HSMP visas would expire before the end date of any training post, could only be offered the post if there was no alternative qualified UK or European Economic Area national applicant (i.e. the guidance introduced a residency test for NHS medical employees). B claimed that the guidance was an abuse of governmental power because it sought to impose a restriction on the employability of IMGs which had no foundation in the Immigration Rules or in the general law. The SSH argued that the guidance was simply advice to NHS trusts as to how they should treat certain candidates for training posts; and it was a matter of private law to enter into contracts (not public law).

The House of Lords held that the guidance was unlawful. The grant of HSMP visas to IMGs who subsequently entered the UK, had given those individuals a legitimate expectation that they would be able to obtain employment. Before the guidance was issued, it was generally straightforward and common for IMGs with HSMP visas to renew that status easily (as long as they continued to meet the relevant criteria). The IMGs’ expectation (of finding work and being able to renew their HSMP visas once they were in the UK) was undermined by the introduction of the residency test for potential NHS trust employees. The guidance was inconsistent with the IMGs’ legitimate expectation as created by the Immigration Rules. That inconsistency and its effects were so fundamental it rendered the guidance invalid and unlawful. [R \(oao\) BAPIO Action Ltd v SSHD \[2008\] UKHL 27](#).

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This example illustrates the potentially far-reaching consequences for administrative decision makers and policy drafters if the Courts find that a legitimate expectation exists, and is undermined (by the policy or decision). Documents such as preliminary announcements of new schemes or policies should be carefully drafted, to minimise the risk that it can later be said to

have given rise to an expectation or to undermine an existing expectation. You should bear in mind that any unofficial practice, decision, or statement of intention may, if expressed in loose or imprecise terms, give rise to unintended consequences.

2.55 Where there is an intention to change a policy or a procedure (e.g. to change a practice of accepting late applications), practical steps can be taken to meet potential claims of legitimate expectation that the policy or procedure would continue:

- by careful explanation as to why the change is necessary; and
- by consultation on the timing of any change or on the new procedure to be adopted.

Sometimes the Courts may be prepared to give at least some effect to expectations even if the public body which made the promise or representation was acting unlawfully (*ultra vires*) when it made the promise. The Courts are more likely to consider giving effect to an *ultra vires* promise where [Convention](#) rights (such as the right to enjoy property) are in operation. The law is still developing in this area, but this is another reason to be careful when exercising public law powers.

## Notifying your decision: Do you have to give reasons?

2.56 It may still be true that there is no general rule requiring reasons to be given for administrative decisions. However, the circumstances in which they are not required are becoming rare. Do you still need to give reasons for your decision where there is no requirement to do so in statute or regulation? Yes - the need to provide reasons for decisions stems from different legal principles:

- there may be an established practice of giving reasons in the particular type of case that you are dealing with. Failure to give reasons may therefore disappoint a “legitimate expectation” (that reasons will be provided).
- the decision may appear to be inconsistent with previous policy, or decisions in similar cases, so that a decision unsupported by reasons may appear irrational. It may be necessary to explain why there has been a departure from previous policy.
- the subject matter of the decision may be of such importance – e.g. it may affect human rights – that fairness requires the decision to be supported by reasons.
- The general availability of judicial review as a remedy makes it inevitable that fairness requires that reasons should be given in most cases.
- Article 6 of the [Convention](#) (right to a fair trial) in particular has built on existing case law to increase the number of situations in which the Courts are likely to conclude that reasons must be given for decisions.
- Decisions involving human rights are likely to be scrutinised even more intensely, and that means that they will have to be more fully reasoned.

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## Case Example

A compulsory purchase order (CPO) was made to regenerate a market. The planning inspector recommended that the CPO should not be confirmed because the proposed safeguards were inadequate. The Secretary of State nevertheless confirmed the CPO, stating that planning conditions provided sufficient safeguards. That decision was challenged by judicial review. The Court of Appeal considered whether the Secretary of State had correctly identified the principal issues and had provided adequate reasons for disagreeing with the inspector. The Secretary of State argued that his decision letter was for parties who knew the issues well and so he did not need to provide detailed clarification.

The Court of Appeal held: (i) there was no formal standard to apply when disagreeing with the inspector's conclusions; and (ii) there was no duty to provide a detailed paragraph by paragraph response to the inspector's report. But there was some legal authority suggesting that if a decision maker disagrees with an inspector's reasoned recommendation, he should give full reasons. Further, a higher standard was expected from the Secretary of State's decision (compared to a local authority's summary of reasons). In this instance, the decision letter only had two sentences on the inspector's views and did not make it clear why the Secretary of State came to a different conclusion. The Court held that the decision letter failed to provide an appropriate level of reasoning. (The Court also commented that it was important that the reasons were explained in plain English in terms an affected member of the public could understand). [Horada v Secretary of State for Communities & Local Government \[2016\] EWCA Civ 169](#).

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2.57 Another important factor in giving detailed reasons with the decision is the [Freedom of Information Act 2000](#) (see section 3.24 onwards below).

2.58 [Section 1, Freedom of Information Act 2000](#) provides that

“any person making a request for information to a public authority is entitled

a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

b) if that is the case, to have that information communicated to him.”

2.59 If, in making the decision, the decision maker had his reasons and recorded them, any person will be entitled to request that “information” under the [Freedom of Information Act](#). Under the Act, unless an exemption applies, that information must be disclosed. There are exemptions for certain categories of information which may be relevant to your decision, but the presumption is in favour of disclosure. The Act is therefore an incentive for decision makers to ensure careful reasoning and good record keeping. Not every decision must be accompanied by copious reasoning: it depends on the subject matter and the importance of the interests at stake. There will also be some cases where the issue to be decided is more a matter of subjective judgment.

2.60 It may seem onerous to record reasons for disclosure but it encourages careful decision making. The record should show that the decision maker addressed his mind to the relevant

issues and followed the principles of good administration. There is no uniform standard for the quality or format of recorded reasons, but they must at least be intelligible and address the substance of the issues. The record should

- set out material findings of fact; it should show that all relevant matters have been considered and that no irrelevant ones have been taken into account;
- cite and apply any relevant policy statements or guidance;
- note any representations or consultation responses as having been considered and taken into account;
- show by what process of reasoning issues were resolved, and how the various factors were weighed against each other; and
- (if applicable) be clear about what the applicant is applying for and that you understand the application.

2.61 Recording the above points (or as much as suits the case) provides a framework for the decision letter. The reasons given in the decision letter must correspond with those recorded on file: although there is some scope for elaborating or explaining the reasons in the decision letter (or subsequently). It is bad practice and unlawful to make your decision first and construct your reasons only when challenged (a practice known as “ex post facto rationalisation”).

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## Case Example

The appellants (M and D) lived between nationalist and loyalist areas in Belfast. D’s home had been affected by sectarian violence and she once found a bullet in her hallway. M and D claimed to have suffered mental health injuries as a result of their living situation. They applied to the Chief Constable for a certificate under the Northern Ireland Housing Executive’s Special Purchase of Evacuated Dwellings (SPED) scheme. (Under the scheme, applicants can receive financial help to find a new home). The Chief Constable considered that the circumstances for issuing a SPED certificate were not met, because M and D were not at risk of serious injury or death as a result of being directly threatened. M and D challenged the refusal by judicial review.

The Court of Appeal held that (1) the issue was the extent to which there was an obligation to give reasons in the determination of scheme applications. The applicable test is whether the giving of reasons is required for the effective implementation of domestic law protecting the relevant [Convention right](#) (in this case, Article 8: the right to a private and family life). In cases where Article 8 might be engaged, judicial review alone is unlikely to be adequate as a means of effectively implementing the laws protecting the Article rights. That is why it is necessary to give reasons for the relevant decision. (2) The refusal decision made no mention of the bullet incident and there was no explanation as to how the incident and the related risk had been assessed. M and D were entitled to be given reasons so that they could understand the assessment of the threat and the related risk in order to ascertain whether their case had been properly dealt with under the scheme. The scheme refusal was an administrative decision with no appeal; the only remedy was judicial review. This case concerned the safety of a person

within their own home. Therefore, it was important that there should be an effective means of checking for errors in the decisions made by giving reasons. [Re: Cooley's Application for Judicial Review \[2014\] NICA 18](#).

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## Are any kinds of decision immune from being challenged by judicial review?

2.62 No. The nature of the decision in question will determine the extent to which it can be reviewed by the Courts. Acts of Parliament (and by extension decisions by ministers as to what to propose to Parliament by way of legislation) are not reviewable except in relation to compliance with EC law (or the Human Rights Act 1998 and the European Convention on Human Rights). However, other than this, if the decision or action falls within the field of "public law" then in principle the Court is entitled to review. There are a handful of types of decision with which the Court is reluctant to concern itself, e.g. the making of treaties and the award of honours. These categories are increasingly restricted, and in the future, if for example, the honours system is placed upon a statutory footing setting out procedures, consultation and so on, the Court would no doubt be entitled to supervise at least procedural aspects. Even where statute has attempted to place a category of decision beyond the reach of effective review, the Court still found a means of reviewing it (see *Al Fayed* case example at section 2.41).

2.63 There remains a class of decision where the Court accepts that, because of the subject matter of the decision, the decision maker is better qualified than the Court to make a judgment. For example, the Court is likely to "defer" to or recognise a "demarcation of functions" with the decision maker:

- in the field of foreign affairs, in judging how to negotiate with foreign governments;
- ordering financial priorities, in deciding to spend public money in one way rather than another;
- assessing the needs of national security and public order; or
- setting policy on immigration and deportation.

2.64 The above list could be broadened to include any topic requiring specialist knowledge or experience, but what the above topics have in common is that they all concern policy and require a "political" judgement to be made. In the demarcation of functions, that political judgement should be left to the decision maker, who understands the policy and has the experience of its operation to inform his decision. In this kind of area, the Court should defer to the decision maker, or recognise the demarcation of functions between the Executive and the Judiciary; the Court should allow the decision maker a "margin of discretion" or "discretionary area of judgement".

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## Case Example

Al-Haq, a non-governmental human rights organisation based in Ramallah, documented alleged violations of the individual and collective right of Palestinians by the Government of Israel. Al-Haq sought a declaration that the UK was in breach of its international obligations and for a mandatory order that the UK Government use its best endeavours to meet those obligations. The Secretary of State for Foreign and Commonwealth Affairs argued that the Court "...should not enter the forbidden areas of decisions affecting foreign policy...and should not embark on a course that would require the court to determine the merits of an international dispute involving foreign governments".

The Court refused permission for the judicial review and ruled:

"Constitutionally, the conduct of foreign affairs is exclusively within the sphere of the executive... While there may, exceptionally, be situations in which the court will intervene in foreign policy issues, this case is far from being one of them... the nature of the underlying claim, that is condemnation of Israel, and the nature of the claim against the government, that is a direction or declaration as to what foreign policy it should follow, operate together to demonstrate that the court should not be prepared to consider it." [R \(oao Al-Haq\) v Secretary of State for Foreign and Commonwealth Affairs \[2009\] EWHC 1910 \(Admin\)](#).

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# 3. Judicial review

3.1 This section sets what happens in a typical judicial review case in England, Wales and Northern Ireland, and what you might expect as a civil servant involved in a ministerial or departmental decision under challenge. The procedure in Scotland differs from other parts of the UK and is dealt with separately in section 5 of this guidance.

## Standing or sufficient interest – Can anyone challenge a decision?

3.2 The short answer to the above question is: No. In order to be entitled to apply for judicial review of a decision, a person must have a “sufficient interest” (sometimes called “standing”) in the decision<sup>9</sup>. A person is not entitled to challenge a decision which does not affect him personally, simply because they disagree with it. For example, a prisoner whose application for release on parole has been refused has “sufficient interest” to challenge the refusal by judicial review.

3.3 In this context, “person” includes legal persons, such as groups or organisations protecting or campaigning for a particular public interest. These groups (e. g. a trade union or a group such as Amnesty International UK) may have standing/sufficient interest to challenge a decision by judicial review, on the basis that they represent the interests of the persons directly affected.

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### Case Example

The government introduced a modified scheme of criminal injuries compensation. The changes meant that in many cases, the amount of compensation payable to victims was reduced. This decision was challenged by an alliance of trade unions. Their members were potential victims of crimes of violence and so the unions had standing to challenge the new scheme. [R v Secretary of State for the Home Department ex parte Fire Brigades Union and Others \[1995\] 2 AC 513](#).

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3.4 This case was a “representative” case – a case in which the applicants were not individuals “with a direct, personal interest in the decision under challenge” but representatives of those individuals. The rule that a person must have a sufficient interest is applied liberally by the Court. If the person challenging the decision can say that (i) he is affected by it; (ii) there is no more appropriate challenger; and (iii) there is substance in his challenge, the Court will not usually let technical rules on whether he has sufficient interest stand in its way. In comparison, there is a more restrictive test for sufficient interest in a judicial review claim based on the

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<sup>9</sup> [section 31\(3\), Senior Courts Act 1981](#)

breach of a [Convention](#) right. Such judicial reviews can only be brought by a “victim” of the Convention right breached.

3.5 The Court’s decision on standing is primarily a procedural matter, but is mixed up with the merits of the case and therefore depends on the legal and factual context in each case.

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### Case Example

Returning to the example of the case of Al-Haq (see page 49) the Court also considered the issue of standing and held:

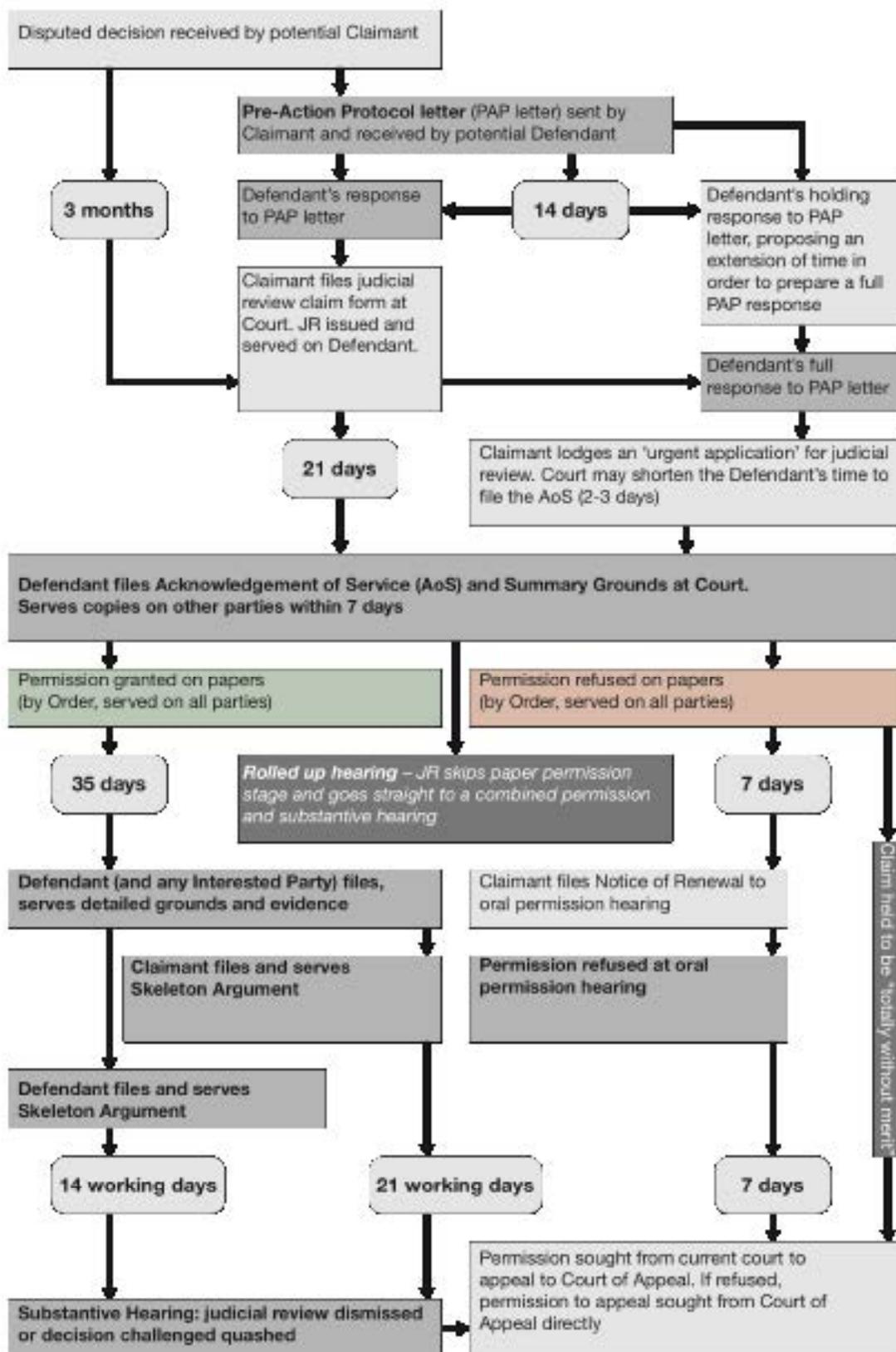
“Standing should not be treated as a preliminary issue but must be taken in the legal and factual context of the whole case... In [an earlier case] Simon Brown LJ also linked the grant of standing to the issue of exercise of jurisdiction... Standing to claim a right must, in my judgment, be considered in the context of the right being claimed. In the present case, there is no right even arguably to be claimed and the claimants should not be granted standing to make the claim they seek to make...

The courts apply a liberal standing test to responsible, expert groups, and that applied to this claimant.

... as a matter of principle it seems to me that if declaring an act or decision to be unlawful will affect a particular individual or group, and if none of them decides to challenge it, the courts must generally refuse to permit someone more remote from the act or decision to do so. In this case no one in the United Kingdom has sought judicial review of [the] United Kingdom foreign policy regarding Israel’s actions in Gaza. Then, as a practical matter, there is the Secretary of State’s argument that if the claimant is correct, it would follow that any NGO, anywhere in the world, would have standing to bring a claim for judicial review in similar circumstances... the claimant should not be granted standing to bring this action. [R \(oao Al-Haq\) v Secretary of State for Foreign and Commonwealth Affairs \[2009\] EWHC 1910 \(Admin\)](#).

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## The stages of judicial review



3.6 The flowchart summarises the stages of a typical judicial review application but does not cover every possible development. The time limits set out in the flowchart are all subject to change, for example because one of the parties applies and secures the Court’s permission to shorten or lengthen a timeframe; or because the Court directs a timeframe to be shortened or lengthened<sup>10</sup>. Time limits differ according to which procedure rules apply (i.e. whether the judicial review is lodged at Court or at the Upper Tribunal). Judicial review procedure is governed largely by the relevant rules of the Court/Tribunal before which the claim has been commenced. (Those rules are The [Civil Procedure Rules, Part 54](#); the [Tribunal Procedure \(Upper Tribunal\) Rules 2008](#); and [Practice Directions](#) and Practice Statements issued under both sets of Rules).

.....  
Decision: See section 2.1 onwards for more detail on what constitutes a decision; and what else is vulnerable to challenge by an application for judicial review.  
.....

Pre-Action Protocol letter (PAP letter): The actual judicial review claim is often preceded by correspondence, in which the person affected by the decision tries to persuade the decision maker to change the decision or not to make it. This is the pre-action stage and should provide the parties with opportunities to resolve the dispute without resorting to judicial review.

The PAP letter from the (potential) claimant should include the following:

- the issue(s) in dispute;
- the date and details of the decision, act or omission being challenged;
- a clear summary of the facts on which the claim is based;
- details of any relevant information that the claimant is seeking and an explanation of why this is considered relevant.

If the claimant does not comply with the Pre-Action Protocol<sup>11</sup>, the Court may make adverse costs rulings against him – even if he wins the judicial review (i.e. permission is granted). The Court may also make an adverse costs ruling against the defendant public body for failing to respond to a PAP letter).

.....  
Reconsideration by the decision maker: Normally a decision maker can reconsider a disputed decision and perhaps withdraw it. That might be in response to a PAP letter or other general pre- litigation correspondence. Reconsideration does not prevent the decision maker from making the same decision as before – rather, it requires that the decision making process is repeated (ideally, without any flaw this time).

The complaining claimant may be satisfied with confirmation from the defendant that the defendant will reconsider the disputed decision or action; or the claimant may be satisfied with an explanation from the defendant of why a reconsideration will not be offered and further explanation as to why the disputed decision was made originally. If the claimant is satisfied

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10 The flowchart refers to “Court” but some judicial review claims are filed at and pursued via the Upper Tribunal.

11 The [Protocol](#) includes a model letter before the claim (setting out the complaint) and a model reply.

by the defendant's response (whatever it is), he may not go on to lodge a judicial review claim form. This is another important reason for defendant public bodies to respond to PAP letters – responding may easily prevent a judicial review claim.

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Judicial review claim issued (i.e. claim form lodged by the claimant and sealed at Court/Tribunal): Certain types of judicial review claims are filed in the Upper Tribunal (including but not limited to judicial reviews disputing immigration decisions but not alleging unlawful detention): other claims are filed in the Administrative Court (part of the High Court)<sup>12</sup>.

A judicial review claim form must set out the claimant's grounds of claim. Once filed, the claim form is 'sealed' (stamped) by the Court/Tribunal, and a copy must then be served on (delivered to) the public body which has to defend the claim. Since the Treasury Solicitor and his staff in the Government Legal Department usually act for Ministers of the Crown in litigation, the default position is that claims are served on GLD. But some departments have alternative published arrangements for service. If a claim form is received at the wrong address this may not constitute 'good service', but it is always sensible to forward such claims immediately to the correct destination so that the relevant department can take action in response.

Some departments have a policy to take no further action in respect of the disputed decision/course of action if a judicial review is served and whilst the claim is ongoing. When you become aware of a claim -

- you need to notify any colleagues affected by such a policy;
- you need to notify any colleagues whose specific responsibility it is to handle litigation. Either you or they will need to remain closely involved in the handling of the case alongside the department's lawyers who are defending the claim.
- you are very likely to have to locate and provide copies of relevant documents to your lawyers. The claimant may not have annexed all the relevant documents to the claim and you cannot assume that you can rely on the documents in the claim bundle. You are very likely to be asked to provide copies of missing and other documents to your lawyers and will have to do so promptly because the time limit for filing a defence is short (and your lawyers will need time to formulate their advice).

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Acknowledgement of Service (summary of defence): If the claim is defensible, the public body's defence is set out in summary form (as part of the Acknowledgment of Service document filed at Court/Tribunal). This AoS must be filed within 21 days from service of the claim (the Court/Tribunal has a discretion to extend this and all other deadlines. Similarly, the Court/Tribunal can direct that the AoS is filed in a shorter timeframe, e.g. where either party has successfully applied for the claim to be 'expedited' – i.e. determined urgently).

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<sup>12</sup> Since 1 November 2013 immigration judicial reviews that were previously dealt with in the Administrative Court are now largely dealt with by the Upper Tribunal of Immigration and Asylum Chamber. See the [Lord Chief Justice's Direction \(dated 21 August 2013\)](#) and [further Direction \(dated 24 October 2013\)](#) for details of all the types of judicial reviews transferred to the Upper Tribunal.

Your lawyers will advise you on how detailed the defence should be at this stage: i.e. whether a summary defence or a detailed defence is appropriate. Your lawyers should identify if the claimant appears to lack 'standing' (see section 3.2 above); is late with his challenge; has failed to exhaust alternative remedies; or has not complied with the Pre-Action Protocol (PAP) (which are points that can possibly be relied on to persuade the Court/Tribunal to strike out the claim).

Many claims are publicly funded and the claimant has an obligation to update the Legal Aid Agency on new information bearing on the continuation of funding. The LAA funding code also allows other parties to make representations that funding should be discontinued. You and your lawyers should consider if it is appropriate to make such funding representations after your defence is filed (as part of the AoS) – i.e. because the AoS demonstrates new information that means the claim should not be pursued or funded further.

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Agreed withdrawal of judicial review (by Consent Order): The first legal advice you receive should contain an opinion about whether the claim is defensible. Sometimes it is clear the claimant's claim is well-founded and the challenged decision is likely to be held flawed by the Court/Tribunal. In response, you may agree to settle the claim, for example by offering to reconsider the disputed decision or to confirm a timeframe within which to take action that has been delayed until this point. If an offer to settle is made, there is likely to be no need for the judicial review claim to continue and the claimant will be invited to withdraw the judicial review. The Court's/Tribunal's permission to withdraw is needed and can be sought by submitting a signed draft order, signed by all the parties (a 'Consent Order'). The Court/Tribunal can withhold its approval of a draft Consent Order; but that is rare. Once the Consent Order is sealed, the judicial review is at an end.

.....

Permission decision: After the AoS is filed at Court/Tribunal (and served on the other parties), the case is passed to a judge for consideration on the papers. The judge will grant permission (on all or some of the grounds argued) or refuse permission to proceed. The judge's decision is set out in an Order.

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Permission refusal: If permission is refused and the claimant chooses not to proceed further, the judicial review ends and the challenged decision stands. Alternatively the claimant can (usually) renew the judicial review application to an oral permission hearing at which he can present his arguments again (he cannot usually make new arguments). You and your lawyers will decide whether it is appropriate to instruct Counsel to appear at this hearing.

In some cases the judge may certify that a claim is 'totally without merit'<sup>13</sup> (meaning "bound to fail"), which prohibits renewal to an oral hearing. But the claimant can still make a last attempt with the Court of Appeal. If an oral hearing takes place but permission is refused, an appeal again lies to the Court of Appeal. In the majority of cases, refusal of permission to seek judicial review is the end of the judicial review.

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Permission granted: If permission to seek judicial review is granted either on the papers or at an oral permission hearing, you and your lawyers will need to again assess the case and consider if it is appropriate to continue to defend it. The permission stage is only a filter. A

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13 CPR 54.12(7)

permission grant means the judge thinks there is an arguable case that may ultimately be defensible.

If you opt to continue to defend the judicial review, you must prepare for a substantive hearing. This usually requires very detailed grounds of defence to be filed at the Court/Tribunal, drafted by counsel. These grounds will set out the decision maker's position in full with evidence in the form of witness statements explaining the history of the case; the procedure followed; the reasoning process and so on (see section 3.25 below on witness statements). By or at this stage, most of the case related information under your control should have been disclosed under the duty of candour and/or the Freedom of Information or Data Protection Acts. Remember – the duty of candour is ongoing so as new information comes to light, you must refer it to your lawyers for disclosure. (See section 3.19 for more detail on the duty of candour.)

All parties are required to prepare in advance an outline (“skeleton”) argument for the Court/Tribunal at the substantive hearing. It is rare for witnesses who have made statements to be called to give oral evidence and to be cross-examined on their statements at the hearing. The Court/Tribunal has the power to order it but it is rarely exercised. This is another reason why the duty of candour must be met.

Where permission is granted the Court may make directions for the conduct and management of the case, setting out time limits - for example for the filing and serving of any evidence on which the parties wish to rely, sometimes in respect of a particular point raised in the claim.

Matters may be expedited with the Court's permission: for example, the permission and the substantive hearing may be “rolled up” so that both are considered at the same hearing. Sometimes the parties may invite the Court to dispense with the paper permission stage and invite the Court to hold a hearing on permission.

.....  
Substantive hearing: At the substantive hearing, the case will normally be heard by a single judge in the Administrative Court; and a single judge or panel of judges in the Upper Tribunal. The judges will have read the papers beforehand. The judge(s) will consider the oral arguments presented by the parties' Counsel (or the claimant himself, if he opts to represent himself) and deliver a decision immediately or after taking time for consideration (a “reserved judgment”).

If the claimant has not made out his case, the judicial review will be dismissed. Otherwise it is likely that the challenged decision will be quashed, i.e. the effect will be as if the flawed decision had never been taken. This does not remove the public authority's power to take a fresh decision, having regard to the law as established by the case. A range of other remedies are also available – see section 3.33 onwards.

.....  
Permission to appeal to the Court of Appeal: Either party may seek to appeal against an unfavourable decision. Whether you appeal is a matter of both legal advice and policy consideration. Neither a litigant nor a public body can appeal as of right: the first stage is to make a case for permission to appeal. This is done to the Court/Tribunal whose decision is to be challenged (the Administrative Court or Upper Tribunal). If the Court/Tribunal refuses permission to appeal, a single Lord Justice of Appeal at the Court of Appeal can be asked to grant permission. (This is a more complex procedure, which requires filing of grounds of appeal and a skeleton argument – see section 3.10 onwards).

## Timing of an application for judicial review

3.7 Someone wishing to challenge an administrative decision only has a limited time to do so – in terms of both the Court procedure and pragmatically. The decision maker may have made other decisions consequential upon the first decision and other persons may have been affected by the decision and relied upon it, e.g. the allocation of limited school places involves consequential decisions that other persons will rely on. In other words, the world may have moved on, and a late challenge may be “detrimental to good administration”. The Court procedural rules ([CPR Part 54.5](#)) provide that:

“(1) [T]he claim form must be filed –

(a) promptly; and

(b) in any event not later than three months after the grounds to make the claim first arose...<sup>14</sup>”

3.8 Claimants sometimes interpret this Rule as meaning they have up to three months to start a claim for judicial review. This is not correct: the claimant must start the claim “promptly”, which in all the circumstances of the case, may mean less than three months. The Court has power to extend the claim filing time<sup>15</sup> but requires a “good reason” to be shown. The Court applies the power to extend time liberally, particularly where there appears to be a strong case on the merits and there is no detriment to any other person. As with decisions on standing (see paragraph 3.2 above) decisions on delay are primarily a procedural matter, but are mixed up with the merits of the case. A claimant cannot argue that a good reason for a late judicial review claim is his compliance with the Pre-Action Protocol steps (e.g. sending a letter before initiating the judicial review claim). However, the claimant’s exploration of “alternative procedures” may strike the Court as a “good reason” to extend time and allow a late judicial review claim.

3.9 In summary, when facing the prospect of an application for judicial review consider the following:

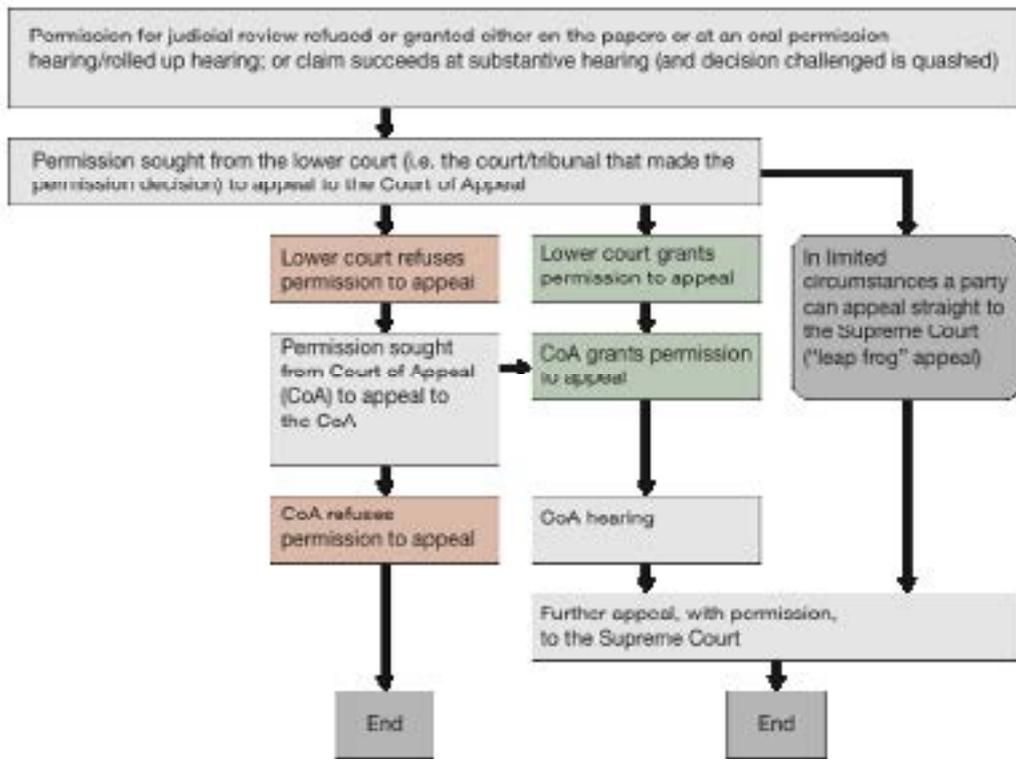
- Does the claimant have “standing”? (If the judicial review alleges a breach of [Convention](#)/ human rights – is the claimant a “victim”)?
- Has the claimant brought his challenge promptly and within the relevant time limit?
- Has the claimant tried all alternative remedies to judicial review (deemed to be a “last resort”)?
- Can the matter be settled without the need for litigation? Is alternative dispute resolution appropriate? (See section 3.49 onwards for more detail on alternative dispute resolution).

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14 [Rules 54.5\(5\) and \(6\)](#) set out that the claim form for certain planning judicial reviews must be filed within 6 weeks and the claim form for certain procurement judicial reviews must be filed within 30 days.

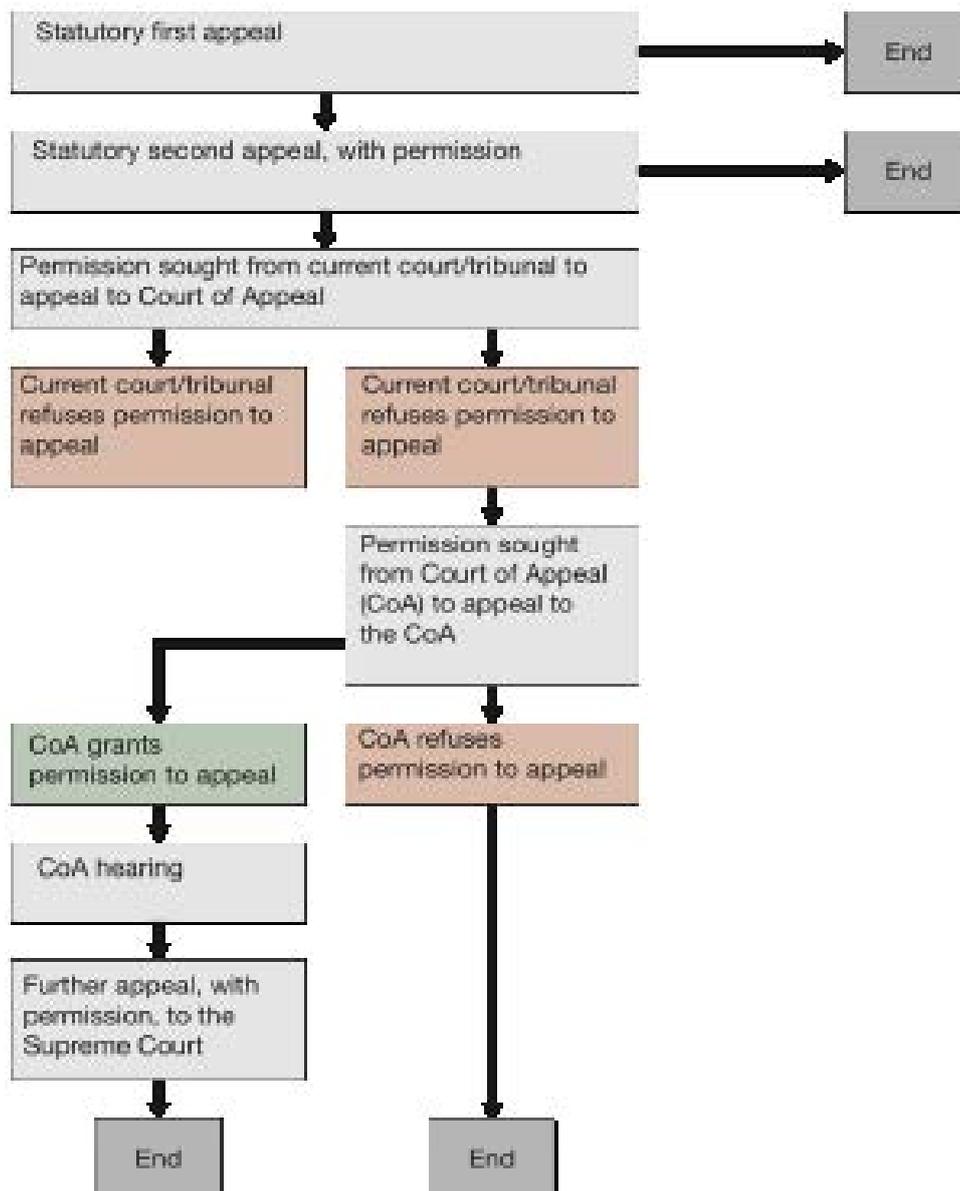
15 [Rule 3.1\(2\)\(a\)](#) – the Courts have wide case management powers under Rule 3.

## The stages of the appeals process



## The stages of the appeals process: Statutory appeals

A statutory appeal is a distinct type of appeal because it is a right to challenge administrative decision making or action specifically provided for by statute. In very limited circumstances, it is possible to judicially review a refusal to grant permission to appeal in a statutory appeal.



## Has the judicial review ended? Appeals to the Court of Appeal and the Supreme Court

3.10 At the end of the judicial review procedure (detailed above), either party may apply for permission to appeal the Court's decision at the Court of Appeal<sup>16</sup> or in some limited circumstances, directly to the Supreme Court<sup>17</sup>. The applying party must either secure the current Court's permission to apply for an appeal at the Court of Appeal; or if such permission is refused, apply directly to the Court of Appeal. If the Court of Appeal (or the Supreme Court) grants permission to hear the appeal, its findings will be significant and the conclusions reached will create binding case law.

### What can be appealed?

3.11 Appeals are limited to a review of the decision of the lower court unless the appeal court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. This means that usually, if the appeal court concludes that the lower court erred in its decision, it will not "re-make" the decision but will order that the case goes back to the original court for the case to be reheard and the decision to be remade (i.e. the case is ordered to be "remitted" back to the lower court). The appeal court will not normally make an order allowing an appeal unless satisfied that the decision of the lower court erred in law or was wrong or unjust because of a serious procedural or other irregularity.

### Procedure: Seeking permission to appeal: Court of Appeal<sup>18</sup>

3.12 A party seeking permission to appeal to the Court of Appeal (the appellant) must set out his argument in the appropriate Appellant's Notice. In that Notice, the appellant seeks to persuade the Court his appeal has a realistic prospect of success. If he succeeds, the Court will grant permission to appeal. This first stage essentially acts as a filter, to allow the Court to dismiss weak appeals or appeals that do not set out any legal argument (for example, because they simply disagree with the lower court's decision without any proper argument).

3.13 The other party (the respondent) usually has an opportunity to respond to the appellant's Notice in the form of a Respondent's Notice. The Court then usually determines whether or not to grant permission to appeal based on these Notices; the Skeleton Arguments of each party (which detail their respective legal arguments and are drafted by senior Counsel); and any other

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16 or the Court of Session in Scotland.

17 These are known as "leapfrog appeals" (because they bypass the Court of Appeal). The procedure for [leapfrog appeals are set out in the relevant Supreme Court Practice Direction](#) and are subject to forthcoming amendment in the [Criminal Justice and Courts Act 2015](#).

18 See [CPR 52](#) and the related [Practice Direction](#) for the detailed procedure.

supporting documents. Sometimes the Court opts to schedule a hearing to determine whether or not to grant permission to appeal.

## Procedure: Permission to appeal refused

3.14 If the Court refuses permission to appeal based on the papers alone, the appellant can opt to renew his application at an oral hearing. The respondent is not normally invited to the permission hearing, but can attend (in the hope of persuading the Court to continue to refuse permission). Even if the respondent attends the permission hearing, he is not necessarily allowed to make arguments to the Court or recover his costs of attending. The permission hearing is primarily intended to serve as the stage at which the appellant attempts to submit his best arguments to the Court as to why he should be allowed permission to appeal. If the Court refuses permission, that ends the matter.

## Procedure: Permission to appeal granted

3.15 If permission is granted, the appeal will be heard in full. After a grant of permission but before the subsequent hearing is scheduled, the respondent can attempt to settle the appeal (for example by offering to reconsider the disputed decision that led to the appeal and/or committing to amending the disputed policy). If the hearing proceeds, the Court may give its decision at the conclusion of the hearing (“on the spot”) or usually, deliver it in detailed written form at a later date. After the judgment, either party can apply for permission to appeal to the Supreme Court (which is very rarely granted).

3.16 Strict Court deadlines apply to each of the stages briefly summarised above (set out in the relevant Practice Directions) and the Court does not often grant any extensions of time for filing mandatory documents (such as the appellant’s or Respondent’s Notice). This means appeals often generate a lot of work for departments and should be accorded the appropriate resources to be dealt with properly. If you are involved in responding to an appeal or pursuing an appeal (often via a specialist government litigation team that will deal with instructing the lawyers), make sure you have enough time and support to be able to respond to queries; assist in drafting witness statements about policies or how the department makes decisions and so on.

## Supreme Court

3.17 The Supreme Court is limited by legislation as to which types of appeals it can consider: for example, the Supreme Court cannot hear a challenge to the Court of Appeal’s refusal to grant permission to appeal<sup>19</sup>. If a party applies to the Supreme Court for permission to appeal, the “Appeals Panel” of some of the Supreme Court Justices<sup>20</sup> will decide whether or not to grant permission to appeal. Permission is rarely granted and usually only where the case

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19 See the [Rules of the Supreme Court 2009](#); and [The Supreme Court Practice Directions](#) for detailed appeals procedure.

20 The number of Supreme Court Justices that make up the Panel varies according to the case.

involves an important point of principle. The other party may be asked to submit observations to the Appeals Panel to better assist it to reach a decision. The Supreme Court may opt to schedule a short oral hearing in order to better consider the application for permission to appeal. If permission is granted, a full hearing will be scheduled.

## Statutory appeals<sup>21</sup>

3.18 A statutory appeal is a distinct type of appeal because it is a right to challenge administrative decision making or action specifically provided for by statute. The legislation setting out the details of the decision making or action usually also sets out the right to the related statutory appeals. In very limited circumstances, it is possible to judicially review a refusal to grant permission to appeal in a statutory appeal.

## “Duty of Candour” and disclosure

3.19 Disclosure in judicial review is made under the duty of candour. This is an onerous duty (more than the statutory disclosure regime in private law litigation) placed by the Courts on all parties. It puts particular onus on the decision maker to ensure he is able to explain (and evidence) fully to the Court and parties what the process was that resulted in the decision and why that process was followed. The department concerned in the decision under challenge will be responsible for explaining to the Court the processes followed and advice given that led to the decision. It will hold all the information about why a particular decision making process was followed, how that process was followed and what the result of that process was, leading to a final decision.

3.20 Neither a claimant nor the Court will be aware of the internal workings that led to the final decision under challenge. Therefore the onus is on the decision maker to explain it honestly and frankly so that it can assist the Court in reaching the correct decision. This may not necessarily be an agreement that the process leading to the decision was fair or that the decision is a rational one. The duty of candour arises from the moment that litigation is anticipated (and so applies before the issue of a claim).

3.21 Disclosure made under the duty of candour should be of all material that is “...necessary in order to resolve the matter fairly and justly.” ([Tweed v Parades Commission for Northern Ireland \[2007\] 1 AC 650](#)). Material that falls to be disclosed should be relevant to the decision and the claim pleaded. Disclosure is often made by way of a witness statement setting out the narrative of the decision making process and exhibiting contemporaneous, relevant material.

3.22 The decision maker should not set out to win litigation at all costs but aim to assist the Court in reviewing the process that led to the decision. This includes the need to disclose information that potentially undermines the decision maker’s defence to a claim. Be aware that marking a document “not for disclosure”, “confidential” or similar does not automatically prevent it being disclosable. You should refer all relevant material to your lawyers,

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<sup>21</sup> See [CPR 52](#) and [Practice Direction 52D](#).

who will advise on you what is disclosable. The Court's development of the duty of candour over the years has been an attempt to ensure the highest standards of public administration are maintained. Failure to comply with the duty of candour can undermine the Court's faith in whether a decision has been reached fairly and can result in the decision being quashed on that basis, with heavy criticism of the way the decision maker has dealt with disclosure in defence of a claim.

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## Case Example

Al-Sweady concerned judicial reviews brought by a number of Iraqi nationals against the Secretary of State for Defence. The claims concerned allegations about British forces murdering and ill-treating Iraqi detainees during the Gulf War. The claimants asserted breaches of the [European Convention on Human Rights](#). The Court became very concerned and critical about how disclosure under the duty of candour had been carried out during the case, finding that the Secretary of State had "consistently and repeatedly failed to comply with his disclosure obligations".

The case was stayed and (over two judgments in July and October 2009) the Secretary of State was ordered to pay the costs of the proceedings (over £2 million). The Court gave guidance on how disclosure should be carried out in respect of judicial review. ([R \(oao Al-Sweady and Ors\) v Secretary of State for Defence \[2009\] EWHC 1687 \(Admin\)](#) and [R \(oao Al-Sweady and Ors\) v Secretary of State for Defence \[2009\] EWHC 2387 \(Admin\)](#)).

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3.23 In response to the Court's guidance in Al-Sweady, the Treasury Solicitor issued his guidance in respect of discharging the duty of candour<sup>22</sup>.

## The Freedom of Information Act 2000 and the Environmental Information Regulations 2004<sup>23</sup>

3.24 The duty of candour is separate to the disclosure regimes established by the [Freedom of Information Act 2000](#) (FOIA) and the [Environmental Information Regulations 2004](#) (EIRS). Although the duty of candour is a separate consideration for a decision maker involved in (or anticipating) litigation: the disclosure regimes established under FOIA and the EIRS can be applied to run in tandem. It is common for claimants to make requests for disclosure as part of their pre-action correspondence under the duty of candour as well as under FOIA and/or the EIRS, which then have to be considered alongside the duty of candour disclosure exercise. The statutory exemptions applied to disclosure under the FOIA and EIRS are not all applicable to disclosure under the duty of candour (the test, as set out above, is one of relevance) and the use a claimant can make of material disclosed under the duty of candour is far more narrow than that which he/ she can under disclosure made under FOIA/EIRS.

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22 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/285368/Tsol\\_discharging\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf)

23 See Appendix 2.

## Witness statements

3.25 Witness statements are the most common form in which decision makers and their lawyers present evidence in a judicial review. Sometimes it will be obvious who should be the witness (and sign the witness statement) e.g. where a decision has been made by an expert assessor, the decision was his and his alone, and only he can be a witness in its defence. Usually however the situation is more complex, because several people were involved in the decision making and there will be questions of seniority and responsibility to consider. Generally, the most senior responsible official who is able to speak to the issues concerned from his own knowledge would be the appropriate witness. Sometimes it will be appropriate for someone more junior to sign the statement; sometimes it may be necessary to take statements from more than one official. Sometimes the person who makes a witness statement in judicial review may have to give oral evidence and be cross-examined on his statement – therefore you should take care to nominate the right person to make the statement. The Court has the power to direct such a witness to give oral evidence but rarely does so.

## Preparation for litigation

3.26 In a judicial review (particularly a potentially significant case or a big case, i.e. where several judicial reviews are joined together because they deal with identical or related issues), it is essential to have a departmental point of contact for the department lawyers. The lawyers need to know who they should contact for instructions and who they should funnel their requests for further information through. If you are the department point of contact, you should make your working hours and contact details clear from the outset; and confirm who your alternate contact is when you are out of the office or otherwise unavailable. The judicial review process includes a number of Court mandated deadlines which means the lawyers often have to request instructions (such as getting client approval of Court documents) or further information on an urgent basis.

3.27 If there is a judicial review hearing, either someone from the department will attend in person or will have to be available for the duration of the hearing (so that the department lawyers can confirm instructions or get further information as required by the Court). If you're attending the hearing remember to:

- discuss with your lawyers and managers beforehand what the possible outcomes of the hearing will be and what instructions you will give in each situation. This should put you in a better position to quickly provide instructions to your lawyers on the day, whatever circumstances arise;
- confirm the extent of your authority in giving instructions to the lawyers (for example, do you have authority to settle the judicial review by confirming a decision will be reconsidered within a specified timeframe? Do you have authority to agree to pay the claimant's legal costs up to an agreed threshold as part of a settlement?). Who will you need to contact to get authority for such decisions? Is that manager/colleague available on the day of the hearing?

- if you are attending Court, arrange to have a colleague in the office on standby who can provide any documents requested by the Court (sometimes the judge will ask for further documents at the hearing itself) or check any facts on your behalf. Make sure your colleague knows where to find the case related documents;
- make yourself familiar with the relevant department documents being referred to in the case so you can assist your lawyers by quickly referring them to relevant documents;
- have all the likely contact details of colleagues and your lawyers that you will need with you; and
- if you are attending Court, ensure you have all the equipment you are likely to need outside of the office (e.g. laptop, phone, chargers etc.).

## Evidence where the decision was taken by the minister personally

- What were the minister's reasons for making a decision?
- Are these reasons recorded, e.g. in a detailed submission prepared by officials given to the minister before he made the decision?
- The minister needs to personally get involved in defending the decision at judicial review because his reasoning for the decision challenged is disclosable.
- Who will sign any witness statement in a judicial review? The minister or one of his officials?
- The minister must be thoroughly acquainted with all the information in the judicial review and approve what is being said in evidence by him or on his behalf.
- There are strict Court deadlines for presenting evidence in judicial review. Departmental lawyers must be given early access to documents.

3.28 The majority of administrative decisions are taken below ministerial level, often by junior officials. However, sometimes the minister has made the decision personally (because

he is required by statute to do so, or because officials have referred a particular decision to him because of its sensitivity). In any judicial review where the minister has made the decision personally, it may still be acceptable for the witness statement to be signed by an official on his behalf, but special care is required in the preparation of the evidence. The minister may have made his decision on the back of a detailed submission prepared for him by officials. It may be necessary to show that submission to the Court in order to demonstrate that the minister was properly briefed and was in possession of all relevant information when he made the decision.

3.29 The potential problems in establishing evidence where the minister made the decision challenged includes:

- The minister’s reasons for making the decision – whether he accepted all or only some the arguments presented to him; or had other reasons.
- There is no general principle of confidentiality: It is a mistake to think that the minister who made the decision need not personally be involved in defending it at judicial review; or that his reasoning or documents recording it are immune from disclosure.

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## Case Example

The department avoided disclosing the submission before the minister (before he signed the challenged Order) in line with its general policy not to disclose ministerial submissions. Instead, the department summarised the submission in a witness statement signed by an official. The Court of Appeal rejected this approach (even though the appellant didn’t object) and made it clear that where there was no question of public interest immunity, it was “entirely inconsistent to tender and rely on a secondary account instead. The Courts would not allow a private litigant to do this, and in a legal system in which the state stands before the Courts on an equal footing with its citizens there is no good reason to allow government to do it” because “[w]hat a witness perfectly honestly makes of a document is frequently not what the Court makes of it.” [R \(oao National Association of Health Stores & Anor\) v Department of Health \[2005\] EWCA Civ 154.](#)

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3.30 Whether the minister or one of his officials signs the witness statement, it is imperative that:

- the minister is thoroughly acquainted with all the information in the case and approves what is being said in evidence by him or on his behalf; and
- the evidence is supported by the documents in the case.

These warnings also apply when the decision maker is a very senior official and the witness statement is being made below that level.

3.31 Preparation of the evidence in general (whether the decision was made by the minister himself or, more usually, at a lower level) is a collaborative process between departmental officials and their lawyers. It is essential that officials ensure that the lawyers are given early access to all the potentially relevant documentation. The lawyer handling the litigation for the department is responsible for the presentation of the evidence to the Court; and he must receive support and cooperation – nothing must be withheld from the lawyer. The defendant (i.e. the public authority or the department) must normally file his evidence within 35 days after service of the Order granting permission in the judicial review (although in urgent cases the Court can shorten this time). In view of the interests which may have to be consulted, there is no time to be lost.

3.32 At the outset of the judicial review claim, you should review the case and your prospects of defending it (with your lawyers). Judicial review litigation often operates on a tight timetable with numerous short-term pressures and perhaps a perceived political imperative to be seen to be fighting the case. However, it is important to consider what the long view is. What are the possible consequences of the case and should the defendant concede? Remember that

an adverse judgment after a contested judicial review hearing may do more lasting damage to departmental policy than an early concession in the particular case (see case example at section 2.28 above - the Lumba case). It is debatable how far it is proper to defend a challenge for purely presentational reasons, but it is usually counter-productive. If the case is to be conceded (if necessary, the challenged decision can be quashed by consent of the litigating parties), then the sooner this is done the better. When the evidence has been assembled; served on the claimant; and filed with the Court, it is appropriate for the defendant and his legal advisers to again review the case and the prospects of continuing to defend it.

## Powers of the Court: remedies

3.33 Interim relief: The power of the Court to grant interim relief is an important power in any case, not least in judicial review. The road to a substantive hearing can be a long one, and the challenge to the decision of a public authority may not necessarily stop the disputed decision being implemented. The implementation of the decision may be practically irrevocable (e.g. a disputed place at a school is awarded to another child). If so, the claimant would be prejudiced by a delay in receiving a final decision from the Court. When an application for judicial review is filed, the claimant must confirm what remedies they seek, including any request for interim relief. Interim relief orders normally take the form of an injunction (e.g. to temporarily stop a foreign citizen being removed from the country, pending a substantive hearing or pending a further decision on permission if permission is refused). An injunction can also be mandatory, e.g. directing the defendant to ensure that the claimant is given suitable accommodation within a particular timeframe. The Court is not bound to simply grant or refuse the request for interim relief. It can instead make directions to the parties (e.g. the claimant might be directed to file further documents to clarify issues raised in the claim; or the government lawyers might be directed to provide an Acknowledgment of Service in a shorter period of time than normal).

3.34 The Court will not usually grant interim relief, if one or more of the following applies:

- the grounds for seeking it are meritless;
- granting interim relief would effectively grant judicial review and it is not clear that the grounds of claim, whilst not meritless, are convincing enough for this to happen (e.g. where both the claim for interim relief and the application for judicial review seeks the return of a passport); and
- the public authority is willing to not implement the decision - either because of its policy in dealing with applications for judicial review or because permission has been granted and it would be dangerous to implement the decision only for it to later be found unlawful.

3.35 On some occasions, the defendant (i.e. the public authority) may decide to give an undertaking promising to temporarily not implement the disputed decision. The undertaking may or may not require the claimant to perform some action, such as agreeing to an amended timetable for the claim's progress. You may have to urgently consider whether or not to give an undertaking and its terms, at the beginning of a judicial review claim. You should consult your legal advisers before making this decision. It may be preferable to offer an undertaking if it is considered likely that interim relief will be granted. This will give you (the defendant) more

control over the relevant terms that apply. But if an application for interim relief has already been lodged, the Court's order may supersede this.

3.36 Remedies following a successful challenge: All of the Court's remedies are "discretionary", which means that the claimant has no absolute right to a remedy – although normally, the Court will at least make a declaration regarding the legality of the decision under challenge. In deciding whether to grant a remedy, the Court will consider factors such as:

- any delay by the claimant in bringing the case that is prejudicial to the defendant;
- whether the claimant has suffered substantial hardship;
- any impact the remedy may have on third parties;
- whether a remedy would have any practical effect or whether the matter has become academic;
- the merits of the case; and
- whether the remedy would promote good administration.

3.37 The remedies which the Court may grant following a successful judicial review are:

- a quashing order, which sets aside or cancels a decision (or subordinate legislation) found to be unlawful;
- a prohibiting order, which forbids the public authority from performing an act found to be unlawful;
- a mandatory order, which requires the public authority to perform a particular action;
- a declaration that declares what the law is, for example that a particular decision is unlawful; and
- damages (in limited circumstances), by which the Court can award financial compensation.

3.38 The most common remedy granted to a successful claimant is a quashing order. If a decision is quashed, the matter will normally be returned to the decision maker to make a fresh decision in the light of the judgment of the Court. Therefore it is unlikely the Court will have to make a prohibiting order as well, because there will at that time be no decision to be implemented against the claimant. The Court has the right, subject to certain conditions and statutory provisions, to substitute its own decision for the decision under challenge, under [s.31, Senior Courts Act 1981](#). However, it is rare for the Court to do so.

## Declarations of incompatibility

3.39 The Administrative Court also has the power to grant a declaration of incompatibility. Section 4, [HRA](#) gives the Court (i.e. any senior court, including the Administrative Court) the power to declare a "provision of primary legislation" incompatible with a [Convention](#) right. A

declaration does not have the effect of making primary legislation invalid, but the government may take remedial action to remove the incompatibility. Since the introduction of the HRA, declarations of incompatibility have been relatively rare (indicating a restrained approach by the Court to the exercise of this remedy).

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## Case Example

Section 23, Anti-Terrorism, Crime and Security Act 2001 gave the Secretary of State power to detain indefinitely, without charge or trial, non-British nationals whom he suspected of international terrorist activity, but whom he could not deport. The House of Lords granted a declaration of incompatibility in these terms:

“Section 23 of the Anti-Terrorism, Crime and Security Act 2001 is incompatible with Articles 5 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status”. [A and Others v Secretary of State for the Home Department House of Lords \[2005\] 2 WLR 87](#).

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3.40 The [Anti-Terrorism, Crime and Security Act 2001](#) continued in force despite this Declaration, while the government considered the means of amending it. Subordinate legislation declared incompatible can be quashed by a higher Court. The Court will exercise its interpretive power to “read down” the incompatible provision, if that is possible, before making a declaration of incompatibility. (See section 8 “EU law in the United Kingdom” for more detail).

3.41 Recent examples of cases in which a request was made for a declaration of incompatibility under s.4, [HRA](#) and considered by the Court include:

- the failure to provide exceptions to the law in Northern Ireland prohibiting abortion in respect of fatal foetal abnormality at any time and pregnancies due to sexual crime up to the date when the foetus becomes capable of an existence independent of the mother, was contrary to Article 8 of the [Convention](#). ([Re Northern Ireland Human Rights Commission’s Application for Judicial Review \[2015\] NIQB 96](#));
- the requirement in s.3(3), [Gender Recognition Act 2004](#) that an applicant for a gender recognition certificate who had undergone, or planned to undergo, treatment to modify sexual characteristics had to provide a medical report giving details of such treatment was argued to be incompatible with Articles 8 and 14 of the [Convention](#) ([Carpenter v Secretary of State for Justice \[2015\] EWHC 464 \(Admin\)](#));
- the passage of the [Jobseekers \(Back to Work Schemes\) Act 2013](#) unlawfully interfered with the notion of a fair trial contained in Article 6 of the [Convention](#). The Act retrospectively applied to the claims that were the subject of ongoing legal appeals in which regulations passed by the Secretary of State had been declared ultra vires ([R \(oao Reilly\) v Secretary of State for Work and Pensions \[2014\] EWHC 2182 \(Admin\)](#)).

## When can the Court award damages?

3.42 A claimant may include a claim for damages in his claim for judicial review. However, the claim for damages must be additional to one of the other main remedies, e.g. additional to a request for a quashing order. A claim for damages cannot stand alone. Further, the fact that the defendant has made an unlawful decision or otherwise breached public law does not give an independent right to financial compensation. For example, if a business was refused a licence and this caused it loss, the fact that it subsequently successfully challenged the decision would not automatically grant it the right to damages. There is only an entitlement to damages when a claimant could have made a private law claim, for example for unlawful detention, or under s.8, [HRA](#).

## Damages under section 8, [Human Rights Act 1998](#)

3.43 The [HRA](#) added an important head of damages that was not previously available in judicial review. Under the HRA, the Court has the power to award damages if it finds that a public authority has acted in a way that is incompatible with a [Convention](#) right. However, not every breach of a [Convention](#) right will entitle a claimant to damages - only where "the court is satisfied that the award is necessary to afford just satisfaction" ([s.8\(3\)\(b\), HRA](#)). Sometimes the mere finding that there has been a breach of a [Convention](#) right will be enough to vindicate that right. Where the breach has caused actual financial loss to the victim, an award of damages is more likely.

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### Case Example

G was serving a term of imprisonment and was charged under Prison Rules with a drugs offence against prison discipline. The charge was heard by the Deputy Controller of the prison who refused G legal representation at the adjudication, and found the charge proved. He awarded G 21 additional days imprisonment. It was subsequently accepted by the Home Office that the proceedings involved the determination of a criminal charge; that the Deputy Controller was not independent; and that G was entitled to legal representation, so that a breach of [Article 6](#) (right to a fair trial) had occurred. G claimed damages for breach of the [Convention](#) right.

The House of Lords noted the Convention's focus is the protection of human rights and not the award of compensation. The House of Lords reviewed the facts of the case and the adjudication – and was not prepared to speculate on what the outcome might have been if the breach had not occurred. They concluded that there was no special feature in the case warranting an award of damages. [R \(Greenfield\) v Secretary of State for the Home Department \[2005\] 1WLR 673](#).

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## Private law damages in judicial review

3.44 Breaches of public law do not automatically lead to a claim for financial compensation, except in cases involving breaches of EU law and claims under [s.8, HRA](#). Damages may be awarded against public bodies in judicial review, if a claimant can show a recognised cause of action in tort (civil wrong). There is no restriction on the kinds of tort which can be used. Two particularly important areas are discussed below – negligence and misfeasance in public office.

### Negligence

3.45 A public authority has no general immunity from claims in negligence. However, public policy issues arise if a claimant alleges that a public authority has been negligent in the exercise of its public law duty towards him. There is clearly a strong public interest in ensuring that public authorities can carry out their activities without fear of being held liable for damages if the Courts found that they should have exercised a discretion in a different manner. The Courts have shown they are sympathetic towards this position. They have previously held that the police are immune from negligence claims with respect to their investigation of crime (although the case of [Osman v UK \[1998\] EHRR 101](#) also confirmed that the police have positive duties to act).

3.46 The Courts recognise that the public purse is finite and funded by the taxpayer. The Courts have therefore been reluctant to impose the burden of paying compensation for private financial loss resulting from the necessary exercise of public duties, unless it can be inferred from the statute that Parliament intended to create that right alongside the statutory duty. Therefore, the Courts have been cautious in finding that a “duty of care” exists (which has to be established in a claim in negligence), if the claim is in respect of the negligent breach of a public law duty. The Courts do not go so far as to conclude that there can never be a private law “duty of care” in performing a public law function because to do so, would convey a kind of immunity on the decision maker. The practical considerations referred to above that argue against a duty of care existing are not legal arguments. The Courts will always judge each case on its merits and claims for damages may be made subject to close examination alongside the requirements of the [HRA](#). Therefore it is always important for decision makers to be thorough and make robust decisions.

### Breach of statutory duty

3.47 A further potential ground for raising a claim for damages in public law proceedings can be in respect of an allegation that a decision maker has acted in breach of a statutory duty. Such claims are difficult to sustain because a claimant would need to demonstrate that the duty in which the decision maker is alleged to be in breach of was imposed to ensure the protection of a limited class of the public and that Parliament intended to provide for a right of action in respect of a breach of that duty (*X (Minors) v Bedfordshire County Council and Others* [1995] 2 AC 633). It is rare for a statute to confer such a private law right, but it is not impossible that circumstances may arise in which a claimant could claim that a constitutional right had been affected by a breach of a statutory duty.

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## Case Example – The Court held that there may be a duty of care in respect of negligence

This case consisted of different claims arising from the deaths of, and serious injuries to, a group of soldiers whilst they served in Iraq. The first set of claims arose from a “friendly fire” incident. These appellants claimed that the MoD was negligent because it failed to properly equip the tanks used and failed to provide appropriate training. The second set of claims arose from the death of soldiers on patrol. Their families (also appellants) claimed that the MoD was negligent because it failed to provide suitable armoured vehicles for patrol, and instead reintroduced the use of Snatch Land Rovers after they had been withdrawn following the death of an occupant.

The Supreme Court considered whether (i) the MoD could rely on the concept of ‘combat immunity’ (which excludes liability for negligence for the acts of those engaged in active operations against the enemy); and (ii) whether it was fair, just or reasonable to impose a duty of care in negligence on the MoD in the circumstances. The Court unanimously held that both sets of claims should not be struck out on either ground. The doctrine of combat immunity should be construed narrowly and therefore arguably did not apply in these claims (in which the alleged acts of negligence were arguably removed from active operations against the enemy). The Court was not prepared to strike out the negligence claims at this stage because the issues needed to be determined after further argument and more evidence at a full hearing. Similarly, the question of whether it was fair, just and reasonable to impose a duty of care on the MoD (or whether such a duty would mean the MoD was unrealistically burdened), needed to be determined after further argument and evidence at a full hearing. The effect of the Court’s decision is that the negligence claims are deemed to be arguable and therefore can proceed to a full hearing. [Smith and others v The Ministry of Defence \[2013\] UKSC 41](#).

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## Case Example – The Court held that there was no duty of care in respect of negligence

J owned a registered nursing home. The health authority concluded that the conditions were unsatisfactory and obtained a statutory order for the immediate cancellation of J’s registration. It gave J no notice of its intention to seek this order. As a result of the order, the residents were removed and the home closed. J successfully appealed the order at the relevant tribunal; and went on to claim negligence against the health authority for their economic loss whilst the home was closed. The issue was whether in applying for the order, the health authority had owed J a duty of care in negligence.

The House of Lords concluded that where a state authority took action under statutory powers designed for the protection of a particular class of persons, the state authority did not owe a duty of care to others whose interests might be adversely affected by the exercise of the statutory power. If it was otherwise (and a duty of care was imposed on the state authority), it might inhibit the exercise of the statutory powers. This would have a potentially adverse effect on the class of persons the powers were designed to protect. In this instance, the purpose of the statutory power was to protect the interests of nursing home residents. J’s interests were in potential conflict with those interests. (The House of Lords also commented that if these events had occurred after the [HRA](#) came into force, J would probably have had a good

case for a remedy under that Act. It was strongly arguable that the health authority had acted incompatibly with [Convention](#) rights). [Trent Strategic Health Authority v Jain \[2009\] UKHL 4](#).

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### Case Example

The claimant, a life sentence prisoner, sought judicial review of the decisions of the Secretary of State for the Home Department to move him from open to closed conditions on two separate occasions. His claim included one for damages for the negligent performance of a breach of statutory duty.

In dismissing his claim the High Court held that since the statute did not give rise to a cause of action for breach of statutory duty (following the House of Lords decision in *R v Deputy Governor of Parkhurst Prison Ex p Hague* (1992) 1 AC 58 HL - a prisoner could not bring an action for damages for breach of the Prison Rules 1964/388 which were regulatory in character for the prison regime and not intended to protect prisoners against loss, injury and damage), it could not give rise to a course of action for the negligent performance of the statutory duty.

*Peter Davies v Secretary of State for Justice* (2008) EWHC 397 (Admin)

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## Misfeasance in public office

3.48 “Misfeasance in public office” is a tort (a civil wrong), which could give rise to a private law claim for damages. “Misfeasance in public office” is established if it can be shown that the decision maker was not merely negligent, but acted with “malice”. In this context, acting with “malice” includes:

- proof of the decision maker’s spite or ill-will (in the sense of an act intended to do harm to a particular individual), e.g. where a prison officer unjustifiably penalises a prisoner out of spite; or
  - proof the decision maker knew he was acting unlawfully and that this would cause injury to some person; or
  - proof the decision maker was recklessly indifferent to the fact that he had no power to do the act complained of and that act would probably injure some person.
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### Case Example

The claimants were parents of 8 children. The police visited the family home and considered that it was not in a fit state to accommodate the children. They issued a police protection order under the [Children Act 1989](#) (under which the local authority could hold the children for 72 hours). The defendant local authority made emergency foster care arrangements. The claimants signed a form of agreement under [section 20](#) of the Act, on which the defendant relied to keep the children in foster care for a further 2 months before they were returned to live with the claimants. When the claimants signed the s.20 consent, they had not been fully informed of its effects as they should have been – i.e. they had not given a valid s.20 consent.

It followed that although the defendant had honestly believed a valid s.20 consent existed, it actually had no lawful authority to accommodate the children after expiry of the protection order, yet had done so. The claimants claimed damages for misfeasance in public office alleging the defendant acted unlawfully by keeping their children in foster care after the expiry of the order.

The Court concluded that the defendant did not have the claimants' valid consent to keep the children in foster care. Nevertheless, the Court was satisfied that the 2 individual decision makers at the defendant local authority (i) had honestly believed that they did have legal authority to keep the children in foster care and (ii) were not recklessly indifferent either to the need for legal authority for their actions or the possibility of harm to the claimants. The Court highlighted that the defendant's legal department was involved at many of the critical case management stages, and there was no evidence that the legal department was other than supportive of the decision makers' actions. [Williams v Hackney LBC \[2015\] EWHC 2629 \(QB\)](#).

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## Alternative dispute resolution (“ADR”)

3.49 At the outset of judicial review (and at any later stage) you should give consideration as to whether the challenge can be dealt with by some form of ADR. ADR comes in many formats. It is a generally more informal process than litigation. A common form of ADR is mediation - with a mediator facilitating a dialogue in which the parties seek to resolve their differences without resorting to litigation. It avoids confrontation and encourages reconciliation and cooperation. It may also be cheaper and less public than judicial review. The [Pre-Action Protocol for Judicial Review](#) states:

“The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution (‘ADR’) or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs.”

3.50 Whether ADR is appropriate to the case will depend on the nature of the decision being challenged; the extent to which there is any room for manoeuvre; what other parties are affected by the decision challenged or complained about and so on – it may not always be a viable option. For example, where a tribunal has made a decision after a hearing according to statutory procedures, there may be no scope for voluntary concessions at all. However, remember the Pre-Action Protocol encourages opportunities (including ADR) for settling disputes without recourse to litigation, and it will be to your advantage as a decision maker to grasp these opportunities<sup>24</sup>. ADR can be pursued after a judicial review claim is initiated.

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<sup>24</sup> Particularly as a party can be at risk for costs penalties in litigation, if ADR was offered and he refused to take it up. Both the claimant and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered.

The three month time limit within which a judicial review claim must be brought may mean a claimant has initiated the claim in order to ensure he has the option to pursue it, but is nevertheless potentially open to settling his challenge by ADR.

## The Parliamentary Ombudsman (the Parliamentary Commissioner for Administration)

3.51 The Parliamentary and Health Service Ombudsman comprises the offices of the Parliamentary Commissioner for Administration and the Health Service Commissioner for England. There are some situations in which a person may have been badly affected by some administrative error or abuse yet have no remedy, or the remedy may be disputed. In some circumstances the Parliamentary Commissioner for Administration (the Ombudsman) may be able to provide redress. A complaint to the Ombudsman must be made via a Member of Parliament. On receipt of a complaint, the Ombudsman may carry out an investigation and may:

- recommend that a department pay compensation;
- recommend that a department issue an apology; or
- make recommendations for management action within a department or some other action; despite the fact that there may be no (or disputed) legal liability.

3.52 The Ombudsman can intervene where there has been a complaint by a member of the public (via his MP) who claims to have sustained injustice in consequence of maladministration because of the actions of a department. The Ombudsman's recommendations (following a complaint) are not legally binding but Parliament generally complies with them.

"Maladministration" is not defined in the [Parliamentary Commissioner Act 1967](#), but has been interpreted in various cases investigated to include a wide range of bureaucratic bad practice, including delay; misleading advice; loss of documents; and failure to follow procedures or government guidance.

3.53 There is a separate Public Services Ombudsman for Wales who deals with complaints about public services and independent care providers in Wales; and complaints that members of local government bodies have broken their authority's code of conduct (including the Welsh Assembly Government and National Assembly for Wales Commission). There is a corresponding Scottish Public Services Ombudsman.

# 4. Reforms to judicial review: England and Wales

4.1 In response to the increased number of judicial reviews in the last few years and to reduce administrative burdens (such as litigation costs and delays to new policies), reforms were made to the judicial review procedure (implemented in the [Criminal Justice and Courts Act 2015](#)). The CJC Act implements various amendments to the [Administration of Justice Act 1969](#), the [Senior Courts Act 1981](#) and the [Tribunals, Courts and Enforcement Act 2007](#) – all of which relate to the judicial review procedure. Not all of these amendments have been implemented yet and there is currently very limited case law where implemented amendments have been applied.

## Criminal Justice and Courts Act 2015 amendments in force

4.2 The following amendments introduced by the CJC Act (in the form of amendments to the other Acts referred to below) are in force as of 13 April 2015:

- Leapfrog appeals (High Court to Supreme Court) – Part 2, [Administration of Justice Act 1969](#): This amendment widens the scope of appeals that can leapfrog, i.e. be heard directly by the Supreme Court, bypassing the Court of Appeal. There are now new conditions in addition to the existing ones<sup>25</sup>: an appeal can leapfrog where (a) the appeal raises issues of national importance; (b) the result is of particular significance; or (c) the benefit of early consideration by the Supreme Court outweighs the benefit of consideration by the Court of Appeal. This could be particularly relevant for judicial reviews raising policy points on new or controversial legislation. (This section currently only applies to judicial reviews conducted in the High Court and has not been extended to those in the Upper Tribunal yet).
- Wasted costs orders – [s.51, Senior Courts Act 1981](#): The Court now has a duty to consider notifying the various professional legal regulators when making a wasted costs order (i.e. an order that the legal representatives themselves pay some or all the case costs, due to their conduct of the case e.g. perhaps failing to comply with Court deadlines without proper reasons or misleading the Court about facts).
- No likelihood of a substantially different outcome for the applicant – [s.31\(2A\), Senior Courts Act 1981](#): The Court is now able to ignore a technical breach of the law if it appears to be highly likely that the outcome for the claimant would not have been different if the conduct complained of had not occurred (i.e. the breach would not have made a difference). The Court must refuse permission for a judicial review in these circumstances. The Court

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<sup>25</sup> The existing conditions for a leapfrog appeal are that the case raises statutory interpretation issues or the High Court is bound by the judgment of a higher Court on an issue.

can disregard this section where it considers there are “reasons of exceptional public interest”. This provision might be important in cases raising consultation or public sector equality duty issues (see section 6 below) where the government department has breached a procedural requirement, but if had not made that breach, it would have been likely to have reached the same outcome. (This provision currently only applies to judicial reviews conducted in the High Court and has not been extended to those in the Upper Tribunal yet).

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## Case Example

The claimants challenged the Council’s decision to close two primary schools, arguing that the Council had failed to properly assess the impact of the decision. They alleged the Council had not taken into account the closure costs (in particular, staff redundancy costs), as it was required to do under a code of practice.

The Court accepted that the actual figure of redundancy entitlements could not be known in advance and noted that the Council had not responded to the questions raised on this topic. The Court concluded that it was required to consider whether, if the redundancy costs had been taken into account, it was highly likely that the decision would not have been substantially different. The Court concluded that on the facts, the worst case figure (i.e. the highest amount of redundancy entitlements payable), showed that there would still have been savings as a result of the proposed school closure. Therefore, the Court accepted the Council’s argument that it was highly likely that the outcome for the claimants would not have been substantially different [even if the Council had properly complied with the consultation code of practice by setting out the highest possible redundancy payment amounts before concluding the school closures would be cost effective and generate savings]. The Court refused to grant permission for judicial review. [R \(on the application of Wiggins & Anor.\) v Neath Port Talbot County Borough Council \[2015\] EWHC 2266 \(Admin\)](#).

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## Case Example

A disabled man brought a judicial review challenging a council tax scheme. Under the scheme a former council tax rebate of 100% for council tax payers with the same level of income and disability of the claimant was reduced to a rebate of 85%. The Council prepared an Equality Impact Assessment (an “EIA” – prepared in order to consider the impact of the policy in line with the public sector equality duty) that was annexed to the report into the scheme. However, neither the report nor the EIA was circulated to the Council members (although it was available electronically) when the scheme was recommended and ultimately adopted by the Council.

The Court held that although the EIA was not defective, there was insufficient evidence that the Council had given due regard to the EIA. The Court considered [s.31\(2A\)](#) and held: “In the end, I do not propose to refuse relief on the basis of a conclusion that these indicators when taken alongside the other evidence before me made it ‘highly unlikely’ that the full Council would have done other than adopt the recommendation of the cabinet.” The Court went on to conclude it had the power to make a declaratory judgment regarding [s.31\(2A\)](#), but observed that if the power under [s.31\(2A\)](#) had been invoked at the permission stage, then the outcome might have been different. [R \(oao Logan\) v London Borough of Havering \[2015\] EWHC 3193 \(Admin\)](#).

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## Case Example

The issue of whether s.31(2A) prevented a declaratory judgment being made arose in a later case concerning the public sector equality duty (PSED) involving married claimants. The husband was a serving prisoner. His wife lived far away and suffered from a debilitating illness that made travel to visit her husband difficult. Their request to transfer him to a closer prison was refused. In passing judgment, the Court found that no regard had been given to the PSED when the decision to place the husband in his current prison was made. The Court noted that “neither claimant has suffered any loss as a result, since even if the Secretary of State for Justice or his staff or officials had fully and duly discharged their duties under that section, the outcome would have been, and will still be, the same”. The Court refused all relief, but for a declaratory judgment of the type made in Logan. The Court went on to give a further warning:

“If even after a ‘declaratory judgment’ a public authority persisted in failing to discharge its public sector equality duty under section 149, then there may come a time when, on proof of that failure, a claimant may be able successfully to persuade the court that enough is enough and that the exceptional public interest under subsection [31] (2B) has become engaged. Alternatively (without in any way deciding the point), it may be that if a body such as the Equality Commission, which has very express responsibilities in this field, reached a considered decision that a public authority was in such continuing breach of the public sector equality duty that it was necessary to obtain a formal declaration from the court, then such a body may be able to persuade the court that the exception in subsection [31] (2B) is engaged, even though, by the nature of the body, it would not be able to show that the outcome for it would have been substantially different.” [R \(oao Hawke\) v Secretary of State for Justice \[2015\] EWHC 3599 \(Admin\)](#).

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- Interveners and costs – [section 87, CJC Act 2015](#) (see also paragraph 3.2 on standing in judicial reviews): Interveners (a group or individual that has applied for the Court’s permission to participate in the judicial review) can be liable for the case costs they generate in certain circumstances (essentially, where their intervention has not been of significant assistance or they have behaved unreasonably).

## Pending Criminal Justice and Courts Act 2015 amendments

4.3 Further sections of the [CJC Act](#) are not yet in force. These include:

- widening which tribunals can generate a leapfrog appeal to the Supreme Court;
- amendments to the [Tribunals, Courts and Enforcement Act 2007](#) to mirror section 31(2A), Senior Courts Act 1981 – so that in judicial reviews conducted in the Upper Tribunal, it too will have the power to ignore a technical breach of the law if it appears highly likely that the outcome for the Applicant would not have been different if the conduct complained of had not occurred (i.e. the breach would not have made a difference) and there is no exceptional public interest;

- requiring the parties to disclose financial information about how the judicial review is financed; and
- provisions on when the Court can make costs capping orders.

# 5. Reforms to judicial review: Scotland

5.1 The grounds on which judicial review may be sought in Scotland are substantially the same as those described for the rest of the UK. The Scottish Court of Session will consider relevant case law from the Courts of England, Wales and Northern Ireland – and vice versa. However, the scope of judicial review in Scotland is different because it does not depend on any distinction between public and private law. (In comparison, there is a clear distinction between public and private law in England, Wales and Northern Ireland). Judicial review in Scotland is a means by which to correct errors or abuses by any person or body which has jurisdiction or authority stemming from “statute, agreement or any other instrument” ([West v Secretary of State for Scotland \[1992\] SC 385](#)). The Scottish Court can judicially review any decision if there is what has been described as a “tripartite relationship”, i.e. a relationship between the decision maker; the person affected by the decision; and a third party from whom the decision making power has been delegated. This means that judicial review of ‘domestic tribunals’ is possible in Scotland, for example the judicial review of golf club committee decisions.

5.2 The devolution legislation has given the Court additional remedies to deal with acts that are ultra vires the Scottish Ministers. Ultra vires acts include acts incompatible with EU law or the [Convention](#) rights (this does not apply to the acts of the UK Government in Scotland).

5.3 Changes to procedure as of 22 September 2015: As part of the reforms to Scottish court procedure, changes have been made to the judicial review procedure in Scotland (with the effect that it is more in line with the rest of the UK). The key changes are that now:

- there is a three month time limit (from the date on which the grounds for challenge arose) within which the judicial review should be lodged; and
- there is a permission stage at which the Court considers (i) whether the applicant has “sufficient interest”; and (ii) whether the application for judicial review has a “real prospect of success” (i.e. more than a merely potentially arguable case). The Court will decide whether to grant permission or order an oral hearing. If permission is refused without an oral hearing, the judge must give reasons and the petitioner (i.e. the applicant) can request a review of the refusal.
- if permission is granted, a Procedural Hearing is listed to confirm the parties are ready for the Substantive Hearing (at which the petition will be dismissed or granted).

5.4 Judicial review petitions lodged before 22 September 2015 will follow the previous procedure. Before this date, there was no permission stage in Scotland and judicial reviews went straight to a Procedural First Hearing, which is similar to a case management hearing. If the petition is considered to have merit, there is a “First Hearing” which is the substantive hearing to determine the merits of the judicial review petition.

5.5 Procedure: All applications or “petitions” for judicial review must be made to the Court of Session. The petition will describe the facts and circumstances of the decision being challenged in the petition, and the minister will have the opportunity to submit written answers to the claims made by the petitioner. As in England and Wales, there will not normally be any oral evidence. Procedure at the hearing is much as described for the rest of the UK (albeit with differing terminology).

5.6 Section 3.33 above sets out the remedies available to the Court in England and Wales. Broadly the same powers are available to the Court in Scotland (although the terminology differs) including an injunction (called an “interdict” or an “interim order”).

# 6. The public sector equality duty

6.1 [Section 149 of the Equalities Act 2010](#) establishes the public sector equality duty (PSED) – which requires that a public authority (as listed in [Schedule 19 to the Act](#)) in carrying out its functions (or anyone performing a public function), has to have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equalities Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

6.2 As of the date of publication, the relevant protected characteristics referred to in the Act are:

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

6.3 The PSED does not compel a particular substantive outcome but obliges a public authority to consider relevant matters that may affect a decision and decide what weight to accord to the equality considerations and how to balance them against countervailing factors. It is important that in making decisions you pay due regard to the PSED and clearly evidence this in the decision making process. Failure to comply (or being unable to demonstrate compliance) with the PSED can result in the Court quashing a decision, and remitting it to the decision maker to be remade once due regard to the PSED has been paid. It is also important to note that the PSED arises at the earliest possible phase of the decision making process – namely when the policy is being considered.

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## Case Example

Two Romany Gypsies brought a judicial review claim against the Secretary of State for Communities and Local Government's decision to personally decide planning applications concerning the development of traveller sites in the Green Belt. Planning applications are usually dealt with by the Planning Inspectorate, but there are circumstances in which the Secretary of State can personally decide applications in place of the Planning Inspectorate. In respect of all traveller site applications in the Green Belt, this is what the Secretary of State did. This resulted in a delay in decisions being made in respect of these applications, as opposed to applications for other non-traveller developments. The High Court held that no regard had been paid to the PSED (and Article 6 of the [Convention](#) – right to a fair trial) and held:

"These are not to be dismissed as technical breaches. Although the issue of unlawful discrimination was put before the minister by his officials, no attempt was made by the minister to follow the steps required of him by statute, nor was the regard required of him by s 149 of the [Equality Act 2010](#) had to the matters set out there."

The Court quashed the decision to recover the two appeals. [Moore and Coates v Secretary of State for Communities & Local Government and LB Bromley and Dartford BC and ECHR Intervener \[2015\] EWHC 44 \(Admin\)](#).

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## Compliance (and evidencing compliance) with the duty

6.4 The Courts have provided comprehensive guidance on how a decision maker should consider the PSED and what the Courts expect to see by way of evidence to enable them to consider whether due regard has been paid to the PSED. These are referred to as the Bracking Principles (which draw on from the Brown Principles).

## Brown and Bracking Principles

6.5 In [R \(Brown\) v Secretary of State for Work and Pensions \[2008\] EWHC 3158 \(Admin\)](#) the Court set out the principles by which a decision maker was to consider the PSED:

- The decision maker must be aware of the duty to have "due regard" to the relevant matters;
- The duty must be fulfilled before and at the time when a particular policy is being considered;
- The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
- The duty is non-delegable; and

- Is a continuing one.
- It is good practice for a decision maker to keep records demonstrating consideration of the duty.

These principles were confirmed (and expanded) in the case of Bracking ([R \(oao Bracking\) v SSWP \[2013\] EWCA Civ 1345](#)).

- Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- Record the steps taken by the decision maker in seeking to meet the statutory requirements as evidence.
- The duty is upon the minister or other decision maker personally – it is what he knew and took into account, not what his officials knew.
- You assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision.
- The Brown principles were confirmed.
- “[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.”
- Officials reporting on matters material to the discharge of the duty, must not merely tell the minister/decision maker what he/she wants to hear but they have to be “rigorous in both enquiring and reporting to them”:
- Provided the court is satisfied that there has been a rigorous consideration of the duty, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

It is important to note that it is not enough for officials to simply append (or web link) a report detailing research into the effect a proposed decision may have on those with relevant protected characteristics. There must also be an explicit instruction that the decision maker read that report in order to satisfy the Court that the material was before the decision maker.

# 7. Devolution

7.1 The devolution process has given legislative competence (law making power) in certain policy areas to three new territorial legislatures created in 1998. (Common interests such as defence and foreign policy have not been devolved). As a result there are now four legislatures within the UK:

- Parliament (colloquially referred to as “the Westminster Parliament” or “the United Kingdom Parliament”).
- The Scottish Parliament.
- The Northern Ireland Assembly.
- The National Assembly for Wales.

7.2 Ministers take executive responsibility for matters within the legislative competence of each devolved legislature and for certain other matters. They form the Scottish Government, Welsh Government and Northern Ireland Executive. Although Parliament at Westminster retains the constitutional power to legislate in any field throughout the UK, the convention (stated in the Memorandum of Understanding<sup>26</sup>) is that it will not legislate on devolved matters without the agreement of the relevant devolved legislature(s). Such agreement is indicated by the devolved legislature(s) passing a “legislative consent motion”.

7.3 There is no legislature specifically for England. Primary legislation for England normally takes the form of an Act of Parliament. Ministers responsible to Parliament exercise their role in relation to English as well as UK affairs. But a step was taken in 2015 to give MPs representing the constituencies affected by new legislation a fairer say. This change (known as ‘English Votes for English Laws’) was made by amendment to the Standing Orders of the House of Commons relating to Public Business. It affects how Bills or provisions within them are passed, or statutory instruments approved, in Parliament if they (a) affect England alone and (b) concern a field in which one or more devolved legislatures have legislative competence. As a result, MPs representing constituencies in England are now asked to give their consent to legislation that only affects England and which relates to a topic devolved elsewhere in the UK<sup>27</sup>. The exact boundaries of legislative competence differ between the three devolution settlements. Some common features are that no devolved legislature can legislate contrary to EU law, incompatibly with [Convention](#) rights, or to amend its own constitutional relationship with Parliament.

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26 The Memorandum of Understanding between the UK Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive is periodically updated and available at [Devolution: memorandum of understanding and supplementary agreement - Publications - GOV.UK](#).

27 Standing Orders prescribe an analogous procedure for legislation affecting (a) England and Wales or (b) England, Wales and Northern Ireland.

## Implications for civil servants

7.4 This guide is written for 'Whitehall' officials (civil servants responsible to UK Ministers), for whom the political and legal implications of devolution include the following:

- If your minister is acting under powers that apply only to England, or to England and Wales, any purported exercise of them beyond those borders may be ultra vires<sup>28</sup>.
- Even if your minister has (in strict law) powers applicable throughout the UK, it may not be appropriate for these to be exercised in a territory where there are devolved powers in the same field.
- If your work concerns international relations (which are not devolved) its outcome may have implications in a devolved field (e.g. a proposed EU regulation may affect road transport).
- The devolved administration may be undertaking similar work in parallel to yours, or you may wish them to do so in order to achieve a common approach throughout the UK.
- Even if your work only affects England, the devolved administrations may have undertaken similar work earlier and have useful insights to share.

For any or all of these reasons and others, if your work affects a devolved territory you may need to communicate, consult or co-operate with officials of its administration. If you are working on legislation relating to a devolved subject that will apply in one of the devolved territories you may need a Legislative Consent Motion from the relevant devolved legislature(s).

## Devolution issues and Supreme Court references

7.5 You may also be concerned that actions taken by devolved institutions encroach upon reserved (Scotland) or non-devolved (Wales, Northern Ireland) functions which properly belong to your own minister. Besides judicial review of ultra vires actions, questions about the powers of the devolved legislatures to legislate, or conceivably about UK Ministers exercising functions properly belonging to devolved ministers, may be referred to the Courts as "devolution issues" and/or in certain circumstances referred to the Supreme Court by the Law Officers in Whitehall or in the devolved jurisdictions. For example, references to the Supreme Court have been made over the question whether farm workers' wages can properly be regulated under a devolved power to legislate for 'agriculture'; when 'employment relations' are not devolved; and whether 'funding the National Health Service' in Wales can include provisions to recover from employers the costs of treating an industrial disease ([Re Agricultural Sector \(Wales\) Bill 2013 \[2014\] 4 All ER 789](#); [Re Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill \[2015\] UKSC 3](#)).

7.6 There is scope for the Courts to review the Acts passed by a delegated legislature on other grounds too, although this scope may be limited. For example, in [Axa General Insurance Ltd v](#)

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<sup>28</sup> i.e. the powers are being exercised outside their legal limits.

[Lord Advocate \[2011\] UKSC 46](#), the Supreme Court made clear that challenges to legislation of the Scottish Parliament based merely on 'irrationality' are likely to fail; but the Recovery of Medical Costs Bill (above) would have infringed [Convention](#) rights as well as exceeding legislative competence.

## Further guidance

7.7 The Cabinet Office is responsible for cross-cutting devolution issues generally from the viewpoint of the UK Government, and has produced fuller guidance notes at: <https://www.gov.uk/guidance/guidance-on-devolution>. Further information on English Votes for English Laws is available at <https://www.gov.uk/government/publications/english-votes-for-english-laws-proposed-changes>.

Every Whitehall department has a Devolution Co-ordinator. There are also territorial offices within the UK Government (the Scotland Office, the Wales Office and the Northern Ireland Office), which specialise in the detailed arrangements affecting the relevant devolved territory.

# 8. EU law in the United Kingdom

8.1 The law of the European Union derives from the EU Treaties. Through the [European Communities Act 1972](#), EU law forms part of the legal system of the UK. The doctrine of the supremacy of EU law underpins everything about the way EU legal principles apply in our domestic legal system. Put simply, EU law takes precedence over domestic law. Under the terms of the European Communities Act 1972, nothing the government does can conflict with EU law. Where there is a conflict, the Courts have the power to set aside domestic law to allow EU law to prevail, including Acts of Parliament. Therefore, EU law can affect many areas of government policy and operational decision making. It is important to be aware of the potential impact of EU law to the area you are working on and ensure that your policy, decision, or even any legislation you are working on is compatible with the UK's EU obligations.

## What are the requirements of EU law?

8.2 EU law covers a variety of areas. A helpful starting point is to recall that EU Treaties cover the areas of the four “fundamental freedoms” upon which the EU is founded: the free movement of goods, services, capital and people. The Treaties cover other areas too, such as justice and home affairs, agriculture, environment, consumer protection, transport and energy. The EU also has the ability to enter into international agreements with non-Member States or international organisations.

## How does EU law work in practice?

8.3 In some cases, the EU Treaties provide what are known as “directly effective” rights – i.e. without the need for EU secondary legislation to give effect to the Treaty provisions. For example, an individual may bring judicial review proceedings against the government on the basis that a provision of domestic law breaches their rights conferred directly by the Treaties.

8.4 In fact, often there is EU secondary legislation governing a particular issue. The EU legislature (usually the Council and the European Parliament) will have “adopted” a piece of legislation, relying on a power contained in the Treaties for the EU to act in a particular area. The most common forms of EU secondary legislation are:

- Directives bind Member States (including the UK) to act in a particular way, for example to establish national laws to achieve a particular result. Directives must be “implemented” before they take effect in a Member State. It may be possible to rely on a provision of a directive before a national court, even where the directive has not been implemented, provided the terms are clear, precise and unconditional. Such rights are described as having “direct effect”;

- Regulations are directly applicable and enforceable without the need for any national measures to implement them.

8.5 The [Court of Justice of the European Union \(CJEU\) rules](#) on the interpretation and application of EU law. Where a point of EU law is unclear, any national court in any Member State may refer the issue to the CJEU for a ruling on the meaning and scope of the EU legal issue under consideration. Rulings of the CJEU are binding on all Member States. This “preliminary reference” procedure is contained in [Article 267 of the Treaty on the Functioning of the European Union](#). The Commission can also take the UK directly to the CJEU if it considers we’ve breached EU law – known as infraction proceedings – and the CJEU has power to impose significant fines if it finds that the breach has not been rectified.

## Implications of EU law

8.6 If a domestic court finds that domestic legislation, a policy or an exercise of executive breaches EU law, the domestic court has the power to dis-apply the legislation or set aside the policy or decision. This is a significant power and it highlights the need to ensure that legislation, policy and decisions are consistent with the UK’s EU obligations.

8.7 Breaches of EU law can have financial consequences too. In some circumstances, the government can be liable to pay damages to an individual for breaching EU law. This applies where:

- the EU rule was intended to confer a right on an individual,
- where there was a “manifest and grave disregard” of EU law by the government, and
- where there is a link between the breach of EU law and the loss sustained.

The availability of damages for breaches of EU law is an exception to the normal principle that damages are not payable for breaches of public law. Damages for breach of EU law are sometimes named after a lead case on the topic: [Francovich](#) damages.

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### Case Example

In 1988 the UK passed the Merchant Shipping Act 1988 to impose nationality requirements on fishing vessels seeking to register in the UK. This was to prevent the UK’s allocation of fishing quotas under EU law being used by vessels registered in the UK but without any real connection to the UK. A series of legal challenges were brought by fishermen unable to satisfy the nationality requirements, including a Spanish firm: Factortame Ltd. The case reached the CJEU, which upheld the principle of the supremacy of EU law and ordered the UK to suspend the application of the nationality requirements in the relevant sections of the 1988 Act. The Court confirmed its view that as a matter of EU law, where there is a conflict between EU law and UK law, including an Act of Parliament, then EU law prevails. [R \(Factortame Ltd\) v Secretary of State for Transport Case C-213/89](#).

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# Appendix 1: A classification of Convention rights in the Human Rights Act 1998

## Unqualified Rights

### A. Absolute rights (no restriction)

- Right to life (Article 2) (except in case of death from lawful act of war)
- Prohibition of torture (Article 3)
- Prohibition of slavery and forced labour (Article 4.1 only; 4.2 is limited)
- No punishment without law (Article 7)

### B. Limited rights (restricted only to the extent indicated in the Convention)

- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- Right to marry (Article 12)
- Prohibition of discrimination (Article 14)
- Protection of property (Article 1 of the First Protocol)
- Right to education (Article 2 of the First Protocol)
- Right to free elections (Article 3 of the First Protocol)

## Qualified rights

(restriction if within “margin of appreciation” and “proportionate”)

- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to property (Article 1 of First Protocol)

# Appendix 2: How to find more information

## Useful reference books

De Smith, Woolf & Jowell: Judicial Review of Administrative Action Wade & Forsyth: Administrative Law

Michael Fordham: Judicial Review Handbook

Francis Bennion: Statutory Interpretation

Lester & Pannick (Editors): Human Rights Law and Practice Clayton and Tomlinson: The Law of Human Rights

Wyatt and Dashwood: European Union Law

## Official publications

The Administrative Court - Judicial review and costs: <https://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review>

The Human Rights Act 1998: Guidance for Departments 3rd Edition – DCA: <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf>

Human Rights in Scotland: <http://www.gov.scot/Topics/Justice/policies/human-rights>

Freedom of Information guidance: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

Devolution guidance: <https://www.gov.uk/guidance/guidance-on-devolution>

Equality Act 2010 guidance: <https://www.gov.uk/guidance/equality-act-2010-guidance>

“right first time - A practical guide for public authorities in Scotland to decision making and the law”, produced by The Scottish Government, Edinburgh 2010: <http://www.gov.scot/resource/doc/303683/0095190.pdf>

## Official internet websites

Her Majesty's Courts and Tribunals Service: [www.gov.uk/government/organisations/hm-courts-and-tribunals-service](http://www.gov.uk/government/organisations/hm-courts-and-tribunals-service)

Ministry of Justice: <http://www.justice.gov.uk/>

Home Office [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)

Government Legal Department: <https://www.gov.uk/government/organisations/government-legal-department>

National Assembly for Wales: [www.wales.gov.uk](http://www.wales.gov.uk)

Northern Ireland Assembly: [www.niassembly.gov.uk/](http://www.niassembly.gov.uk/)

Northern Ireland Court Service: [www.Courtsni.gov.uk](http://www.Courtsni.gov.uk)

Scottish Parliament: [www.scotland.gov.uk](http://www.scotland.gov.uk)

Scottish Court Service: [www.scotCourts.gov.uk](http://www.scotCourts.gov.uk)

European Court of Justice: [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm)

European Court of Human Rights: [www.echr.coe.int](http://www.echr.coe.int)

Council of Europe, Human Rights Directorate: <http://www.coe.int/en/web/human-rights-rule-of-law/human-rights-directorate>

## Training Courses

There are frequent courses organised either within departments or on a central basis by the Civil Service College on administrative law, judicial review, EU law, devolution and human rights law. Your training section will be able to give you details.

# Appendix 3: Checklist for making decisions

## Step 1 | Prepare: Getting ready to decide

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. Am I complying with human rights and European law?
8. How has equal opportunities legislation affected the power?
9. Am I handling data in line with Data Protection or Freedom of Information obligations?

## Step 2 | Investigate: Investigation/evidence gathering process

10. Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?
11. Have I consulted properly?
12. Will I be acting with procedural fairness towards the persons who will be affected? 13. Could I be, or appear to be, biased?

## Step 3 | Decide: Taking the decision

14. Have I taken necessary considerations into account, and is my decision reasonable? 15. Does the decision need to be, and is it, proportionate?
16. Are there decisions where the Court is less likely to intervene?

## Step 4 | Notify: Notifying others of the decision

17. To what extent should I give reasons for the decision?

(This checklist is taken from [“right first time - A practical guide for public authorities in Scotland to decision making and the law”](#), produced by The Scottish Government, Edinburgh 2010).



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