

Judicial Review Availability

.....Amenability.....

General rule: Only **public law decisions** are amenable to JR.

Public law decisions: A claim to review the **lawfulness** of a decision, action or failure to act in relation to the **exercise of a public function**.

JR is mostly appropriate when the decision relates to a **public body** carrying out a **public function**.

Public bodies include: central government departments

local authorities

inferior courts

statutory tribunals

statutory bodies, e.g. the Highway Agency

Decisions taken in the exercise of **prerogative powers** are amenable to JR.

Non-public bodies performing public law functions may be amenable to JR: Decisions of **regulatory authorities** are generally found to be amenable to JR if the functions they are carrying out have a **sufficiently public and governmental** character.

But for that body's existence, would **Parliament have to intervene** and regulate the activity in question?

Decisions of some regulatory authorities that are **public but not governmental** are **not** likely to be amenable to JR.

e.g. sport and religion.

Contracted out services: Policies may **contract out** services to **private service providers**.

To be amenable to JR, these providers' services must be under a **statutory** duty and not just a **contractual** one derived from the commercial relationship.

.....Procedural Exclusivity.....

Only **public law** decisions can be applied for in the administrative court.

Private matters must go to a **private court** as a private action, unless **both parties agree to public** actions or there is a **mixed claim**.

Bringing a public law challenge in any other way than by JR would amount to an **abuse of court process**.

Mixed claims: Where a claim involves both public and private law rights the courts may allow JR..

Note: public law grounds can also potentially be used as a defence in private law proceedings.

.....Standing.....

The applicant must have **sufficient interest** in the decision.

Initial permission stage: Here, the standing test is designed to **turn away** those with **little hope of success or troublesome** litigants.

Busybodies, cranks and other mischief-makers.



Judicial Review Availability (cont)

Full hearing stage: Standing can be **reconsidered**.

Here, the court could consider in **more detail** whether the applicant can show a **strong enough case** on the merits, considering the proximity of their connection to the case issue.

Individuals who are **directly affected** by a public law decision should have little difficulty satisfying the sufficient interest test.

Associations of individuals who **all** have sufficient interest may be allowed standing to challenge a matter of **communal interest**.

Pressure groups are unlikely to have **all members** directly affected so may not satisfy the sufficient interest test.

Pressure groups may be given standing considering their **expertise, reputation, role** and **genuine concerns**.

The **absence** of another **responsible challenger** and the **amount of directly affected members** is relevant.

Concerned citizens may be allowed standing but **not** where there are **other better placed challengers**.

.....Time Limits.....

A claim must be filed **promptly** and **without undue delay**.

In any event **no later than 3 months** after the grounds to make the claim first arose.

Time limits can be **extended** by the court.

.....Ouster Clauses.....

Ouster clause: A legislative provision which appears to **exclude the jurisdiction of the Administrative Court to conduct a JR**

Such clauses are **rare**.

The judiciary take a **very strong presumption** that Parliament does **not** intend to exclude JR.

Leading cases: *Anisminic*: 'shall not be called into question in any court of law'

This ouster clause did not take effect.

Privacy International: 'shall not be subject to appeal or be liable to be questioned in any court'

This clause was held to **not** exclude JR. JR can only be excluded by **clear or explicit words**.

Time limit ousters: This are **partial ouster clauses**.

They that excludes the jurisdiction of the court once **atime limit has expired**.

Since they do not it remove access to JR entirely, the courts tend to**enforce** them.

The **normal time limit does not apply** when any other enactment **specifies a shorter time limit** for making a JR claim.



Judicial Review: Preliminaries

.....Reform.....

The courts must now **refuse to grant relief** on a JR application if they deem it **highly likely** that the applicant's outcome would not have been *that* different had the conduct complained of not occurred.

.....Exhaustion of Alternatives.....

JR will only be appropriate if there is **no suitable alternative** remedy, or **alternative remedies** have been **exhausted**.

If alternative remedies are available, the court can **refuse permission** to bring the claim or **refuse a remedy**.

Alternatives include:

- statutory right of appeal
- internal complaints or appeal procedures
- complaint to an ombudsman

.....JR Claim: Procedure.....

1. *Ex parte* **application** for permission
2. Permission granted where there is **sufficient interest** and an **arguable case**
3. Full *inter partes* **hearing**

.....Remedies.....

The Administrative Court is **not about compensating C** but about acting as a **check on exec power**.

Quashing order: Most common remedy.

Invalidates the impugned decision.

Usually means the public(/private) body will need to take the decision again, applying the correct law or following a fair procedure.

Prohibitory order: **Prevents** a public body from acting or continuing to act **unlawfully**.

Mandatory order: **Compels** the public body to **perform** a public law duty imposed by law.

Declaration: Court may declare what the **legal position** is or the **rights of the parties**.

This does **not** question the body's exercise of power.

Declarations can be made **alone** or **alongside** other orders.

Injunction: Orders a party to **perform, or refrain from performing**, a specific act.

Relatively **rare**.

Sometimes granted at the **permission stage** as a form of **interim relief** - either before or after permission is granted.

Damages: May be awarded but only if either

- (i) the court is satisfied that **damages could have been awarded in a private law action**; or
- (ii) the public body has **breached its duties** under HRA 1998.

Prerogative orders: These are **quashing, prohibitory and mandatory** orders.

They are **not** given as of right.

These are **specific** to JR.

Remedies are **discretionary** and should only act as a **necessary counterbalance**.

They should be applied in a **proportionate** way to **balance** the degree of individual interest in the matter against the wider public interest.



Grounds for JR: Proportionality?

When **human rights protected by the ECHR** are engaged, the relevant test to be applied by the courts is that of **proportionality**, rather than Wednesbury unreasonableness test.

Proportionality requires that the **means employed** by a decision-maker to achieve a legitimate aim must be **no more than is necessary** to achieve that aim.

Unless and until Parliament incorporates the ECHR into domestic law, there may currently be **no basis** upon which proportionality as applied by the European Court can be followed by UK courts.

Arguably, the **intensity of review** is somewhat **greater** under the proportionality approach.

It is argued that proportionality should be recognised as an **established principle** of administrative law, not just limited to the ECHR and EU law.

It is **not for the court** to perform** Wednesbury unreasonableness' burial rites.

Proportionality is often viewed as a **more forensic and precise legal test** than Wednesbury.

Wednesbury's replacement by proportionality should only be sanctioned by a **full panel of UKSC**.

There is likely a need for **authoritative review** in this area.

HRA, ECHR & ECtHR

.....Introduction.....

HRA: Human Rights Act

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

HRA incorporated most of ECHR into UK domestic law.

Before the HRA, people wishing to enforce their rights under the ECHR against the UK had to take their case to ECtHR.

.....Categories of Protected Rights.....

Absolute rights: Rights that **cannot be legitimately interfered with** by the state.

E.g. Articles 3, 4 & 7.

Limited rights: Rights which **can**, in certain prescribed circumstances contained within the articles themselves, **be legitimately interfered with** by the state.

E.g. Articles 2, 5 & 6.

Qualified rights: Rights where the **1st paragraph** of the article sets out the **substantive right(s)** and the **2nd paragraph** lists the **circumstances and methodology** by which the rights may be **lawfully interfered with** by the state.

E.g. Articles 8, 9, 10 & 11.

To interfere with a qualified right, the **PBL, legitimate aim and proportionality** requires must be met.

.....Judicial Principals & Techniques.....

1. Positive obligation: Under this principle the state can in certain circumstances be under a **duty to prevent the violation of human rights** being carried out by non-state actors.

The ECHR obligation requires the state to **abstain from interfering with a human right**.



HRA, ECHR & ECtHR (cont)

Contracting states must enact laws in their domestic legal systems that **prohibit, deter, and punish individuals** who commit Convention violations.

There is an **obligation on authorities** to take **preventative measures** where they **know or ought to know** that there is a **real and immediate risk** to the life of a person from third party acts.

If the authorities **fail to take measures within the scope of their powers** which judged reasonably might have been **expected** to avoid that risk, there is likely a breach, especially if the authority had **assumed responsibility and control** over the person.

2. Margin of appreciation:

Contracting states are allowed a **certain measure of discretion** when taking measures that restrict ECHR rights.

State discretion is **not unlimited**.

The ECtHR affords the state a **broader discretion** in decisions concerning:

- morality & religion
- public emergency
- national security
- social, economic & environmental policies.

The ECtHR affords **less discretion** in decisions concerning **individual rights**:

- a person's existence or identity
- a person's liberty
- legal rights

The margins of appreciation here **only** apply to ECtHR cases**.

3. Principle of proportionality:

There is a search for a **fair balance** between the demands of the **general interest of the community** and the requirements of the **protection of the individual's fundamental rights**.

Different variations of the proportionality test are employed for different articles.

Section 2 HRA: ECHR Decisions

Mirror principle: The domestic courts should **follow any clear and consistent** ECtHR jurisprudence unless there are special circumstances or the ECtHR decision is fundamentally at odds with the UK constitution.

Mirror to dialogue: The relationship between the UK courts and the ECtHR has increasingly been described as one involving dialogue.

It is argued that legal reasoning on ECHR issues in UK courts should have an influence over ECtHR, and **not in one direction**..



Section 2 HRA: ECHR Decisions (cont)

There are rare occasions where ECtHR decisions may not **sufficiently appreciate or accommodate** aspects of a state's **domestic process**.

Section 6(1) HRA: Public Authorities

There are **legal duties** imposed on **public authorities**.

Parliament in its **legislative roles** and any person exercising functions **in connection with Parliament proceedings** are **excluded** from being public authorities.

Core public authorities: Those that are **clearly and inherently** public.

Likely subject to legal duties in respect of **all their actions**.

A bod whose nature is **governmental** in a broad sense.

E.g. central government, local government, the police, immigration officers, prisons, courts and tribunals.

Indicators of core public authorities:

- possession of **special powers**
- democratic **accountability**
- **public funding** in whole or in part
- obligations to act **only in the public interest**
- a **statutory constitution**

Functional/hybrid public authorities: Any person whose functions are of a **public nature**.

Likely subject to legal duties in respect of their **public functions** but **not** private functions.

Indicators of functional/hybrid authorities:

- the extent to which the body is **publicly funded** for the relevant function
- exercising **statutory power**
- taking the place of **central government** or **local authorities**
- providing a **public service**

A **close relationship** between the private body and delegating authority suggests a **functional/hybrid** nature.

Private bodies: Bodies with **no public functions**

No liability falls on private bodies.

Their conduct may however be **regulated in a Convention compatible way** under the indirect horizontal effect of the HRA.

