

# JUDICIAL REVIEW

This is a process available through the courts by which public authorities can be challenged in relation to decisions which are unlawful or wholly irrational.

In the education context it may be used for challenging:

- Failure to provide support specified in Part 3 of a Statement of SEN;
- Failure to meet time limits during the statementing process;
- Failure to carry out annual reviews when due, or to complete the annual review process within a reasonable period;
- Refusal by a maintained school to admit a child when the school is named in a Statement;
- Failure to provide full time education;
- Failure to implement a SENDIST decision or obey a SENDIST order (unless SENDIST itself provides a remedy);
- Failure to issue change of phase Statements by 15<sup>th</sup> February in the relevant year;
- Decisions of independent appeal panels in relation to school admission and exclusions;
- Refusal of schools to readmit after exclusions are overturned;
- Unlawful exclusions;
- Failure to provide school transport, or the decisions of independent panels considering school transport issues;
- (Possibly) attempts by local authorities to change Statements, particularly with regard to school placements, too soon after previous appeals;
- Unlawful school placement policies by local authorities;
- Unlawful school closure or reorganisation arrangements.

This is not an exhaustive list.

It must however always be borne in mind that the courts require that judicial review (JR) should only be used as a last resort, after all other efforts to resolve the issue have failed. This means that, for example, local authority complaints procedures and the local government ombudsman should be used where they are available and where they can provide a realistic remedy - it would be accepted that they cannot provide an adequate remedy where the issue is urgent. It also means that the opponent should have been given an opportunity to remedy matters by means of a pre-action letter set out in accordance with a protocol prescribed in the Court Procedure rules. Solicitors dealing with JR will always have to be cautious about it, and if the opponent is offering anything approaching a reasonable compromise, for example a meeting to discuss resolving the issue, JR would not be appropriate.

The court's jurisdiction is limited to considering the decision being challenged. Judges have a wide discretion as to a remedy, but will not get into areas of expertise, particularly with regard to provision for SEN. Therefore if, for instance, the issue relates to education of a child out of school and there is a dispute as to the ability of the school proposed to meet the child's SEN, the courts will not adjudicate on that because it is beyond their expertise and is the province of SENDIST; they would simply order some sort of interim provision and possibly make orders to expedite a SENDIST hearing if

appropriate. Where they decide that the decision of an independent panel was unlawful they will not substitute their own decisions; they will order the issue to be reconsidered, usually by an independently constituted panel, although they may give some guidance as to the approach the new panel should take. However, in some areas the decision they take may well resolve the issue, e.g. by ordering a school to admit a child or by ordering full time education.

Most of these challenges relate to the rights of the child, and therefore can be brought in the child's name. The exception is challenges to decisions on school admissions, and the possible challenge of early attempts to amend statements in defiance of SENDIST decisions which would relate to parental rights. The advantage of the challenge being in the name of a child is that this means that the child may be eligible for Legal Aid - and also means that local authorities, etc., faced with a pre-action letter know that there is no cost barrier to bringing a challenge, which may well persuade them to be more sensible.

Where a JR is appropriate the procedure normally followed is:

1. Prepare a draft statement, usually in the name of the parent, setting out the background facts.
2. Instruct counsel who will normally draft the relevant grounds, which summarise the facts and relevant law and set out what remedy the claimant is asking for.
3. Complete various forms and a court bundle which includes the grounds prepared by counsel, the finalised signed statement, all relevant documents including the pre-action letter and any response, and copies of relevant statutory material and Code of Practice guidance. Copies of these are then lodged with the court and stamped. If necessary, the claimant can ask for the case to be considered urgently, specifying a time limit for the purpose, but the claimant needs to be reasonable about this - it will only annoy a judge if a case which has been specified as urgent clearly isn't, especially if he has had to go through a large volume of papers in a short space of time. If expedition is requested a copy of the claim form and grounds must be faxed to the other side before the claim is issued to give them a chance to send any observations to the court.
4. Serve the JR bundle on the other side.
5. The opponents should enter an Acknowledgement of Service stating whether they resist and if so why.
6. The papers go before a judge who considers firstly whether any urgent interim remedy is appropriate. In that event he will normally order an expedited interim hearing and make other orders relevant to this, for instance imposing an early time limit for the Acknowledgement of Service. Otherwise the judge will consider whether to give permission for the application to proceed. In that event he will again impose a timetable for the remainder of the case, including a hearing date which, in an urgent case, can be quite early. If he refuses permission, it is possible to renew the application which will then be dealt with as a hearing in court with the other side permitted to make representations in opposition. The hearing will virtually always be based solely on legal arguments, with no witnesses being called.

7. If permission is granted, the judge may make further orders about deadlines for filing further evidence or submissions.
8. There will then be a hearing which again is almost always based on the papers and legal argument alone, without witnesses being called. If the claim succeeds, the solicitor may have to take action to enforce the order made by the court.
9. In some cases the court will operate a “rolled up” permission and final hearing, particularly where the issue is urgent.

Note that it is now possible for judicial review cases to be heard in the upper tier of SENDIST and that cases with an SEN element may well be transferred for this purpose.

The procedure is, in court terms, reasonably prompt - a full case may be resolved within about 3 months, and interim relief can be applied for very much more quickly in urgent cases. However in many respects the advantage lies in the threat of JR: local authorities and schools may well be persuaded to take parents more seriously if they realise that the parent knows that this is an available remedy. It also lies in the fact that LAs are forced to account for themselves when they are trying to be evasive, and also in forcing them to think about negotiating and complying with their legal duties.