



How to bring a judicial review: Challenging cuts to LGBT services

Alice Cullingworth, 29 June 2017

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2. When should you contact a solicitor?
3. What do judicial review proceedings involve?
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How do you spot a potential
legal challenge?

Spotting a potential legal challenge

We are focussing today on trans rights cases, but a legal challenge can be made against many types of decisions by public bodies.

Judicial review is the legal process by which individuals or organisations can challenge a decision by a public body.

Judicial review is therefore a powerful tool by which individuals can hold the state to account.

It is a constitutional principle that the judiciary can scrutinise the lawfulness of decisions by the executive.

Spotting a potential legal challenge

Examples of decisions which can be challenged by trans people:

- Decision by a local authority or a NHS body to cut a service supporting trans people
- Decision by a NHS body to refuse access to medical treatment
- Decision to implement a new policy that will detrimentally affect trans people
- Decision to change criteria for trans people to access services
- Failure or inadequate consultation with the trans community

Spotting a potential legal challenge

The first step is to identify the decision, i.e:

- What the decision is, who made the decision (the cabinet, the full council, a panel, a Secretary of State), and when?

This is sometimes not clear. For example, a report might be provided by a committee setting out what decision should be taken, but it is not until the proposals are approved by the cabinet that the decision has been taken. Some decisions are more easily identified, e.g. a letter by a GP refusing access to hormone therapy.

Spotting a potential legal challenge

Any decision that is being proposed, or has been taken, which causes concern in the trans community is potentially open to legal challenge, however big or small.

If you are hearing from trans people about an issue then always consider – is this potentially open to legal challenge? Conduct the sniff test – does it feel unfair? Then it may be unlawful!

Also have in mind the next big question – which is who could act as a claimant? We will need a service user / patient who is directly and negatively affected by the decision as soon as possible.

When should you contact a solicitor?

When to contact a solicitor

The short answer is = IMMEDIATELY!

There is a good reason for this, which is that the limitation date for judicial review is 3 months, and without delay even within that time. And before issuing court proceedings, you have to follow the pre action protocol and prepare your evidence, which takes time.

It is right to campaign, petition, hold meetings with the community, lobby decision makers, etc – but if you do this first before approaching a solicitor, you could lose the opportunity to challenge the decision in court.

When to contact a solicitor

This might mean you approach a solicitor before a consultation has been published, before the consultation has closed, or before a decision has been taken.

As soon as you hear about a possible decision that causes you concern – that is the time to speak to a solicitor.

It may be too early for the solicitor to take action, but we can then advise you about how to key up a case.

When to contact a solicitor

Sometimes it would be more appropriate to make a formal complaint, and even escalate that formal complaint to an ombudsman, before instructing a solicitor. Sometimes, this action can be taken in tandem with legal action.

Judicial review is the 'remedy of last resort', so other options should be considered first. BUT if it is urgent then you can issue proceedings without making a formal complaint.

If you approach us early, we can advise you on the best course of action.

What do judicial review proceedings involve?

What judicial review involves

Stages in a judicial review claim:

- Investigations
- Advice on the merits of entering into pre action correspondence
- Letter before claim by the Claimant
- Formal response by the Defendant
- Advice on the merits of issuing proceedings
- Issuing application for judicial review in the High Court
- Possibly – application for expedition or interim relief on the papers or at an oral hearing
- Summary grounds in defence by the Defendant

What judicial review involves

- Possibly – note in reply by the Claimant
- Permission decision on the papers by the judge
- Possibly – oral renewal of permission decision
- Detailed grounds in defence by the Defendant
- Witness evidence by the Defendant
- Evidence in reply by the Claimant
- Substantive hearing
- Handing down of oral judgment by the judge
- Possibly – appeal to the Court of Appeal
- Costs negotiations

What judicial review involves

What grounds are available to challenge a decision depend on all the circumstances of the case.

Possible legal grounds include:

- Failure to conduct a lawful consultation (procedural)
- Breach of the public sector equality duty under the Equality Act 2010
- Breach of another “due regard” duty under an Act
- Irrationality
- Other illegality (e.g. breach of Regulations, failure to take into account a relevant consideration, irrationality, etc)

What judicial review involves

How long the process takes depends on:

- The urgency of the case
- The availability of the court
- The behaviour of the Defendant
- Without prejudice settlement negotiations could result in a settlement by consent at any time
- How many interim applications are made
- Whether either party appeals

How is judicial review funded?

Funding for judicial review

Legal aid is available for public law and community care law.

A client has to satisfy 2 means tests to qualify for legal aid:

- 1) The income test
- 2) The capital test

Funding for judicial review

The income test:

- A person receiving a “passported benefit” (Income Support, Income Related Employment and Support Allowance, Income Based Jobseeker's Allowance, Guarantee Credit, Pension Credit, Universal Credit) automatically passes the income test
- A person whose income (combined with their partner's income) is over £2,657 gross per month, is ineligible for legal aid

Funding for judicial review

- A person whose disposable income is over £733 monthly is ineligible
- A person whose disposable income is over £315 monthly will have to make a contribution
- Some deductions are allowed, and others are not
- The legal aid world is not reality...

Funding for judicial review

The capital test:

- A person's capital includes their home, minus the mortgage up to £100k. The first £100k of equity is disregarded
- Note - pensioner's disregard
- A person left with more than £8k in capital does not qualify
- A person left with £3-8k will have to make a contribution.
- A person left with less than £3k qualifies

Different rules for Legal Help, and for children vs adults

Funding for judicial review

The case must also pass the “merits test” to qualify for legal aid. This means the solicitor running the case must believe the case has reasonable prospects of success.

If a client qualifies for legal aid:

- The client will have their costs paid by the LAA and will benefit from costs protection; and
- The solicitor has an ongoing duty to the client and the LAA

Funding for judicial review

Legal aid is not the only option for funding. Consider:

- Crowd funding
- Pooling private funds
- PPOs / CCOs can assist

Sadly:

- BTE insurance policies normally exclude judicial review
- ATE insurance policies are normally very costly
- CFAs are rarely an option

What can be achieved by judicial review?

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Legal action can produce positive results at many stages:

- A letter before a letter before action can resolve the dispute
- A letter before claim can resolve the dispute
- The Defendant might agree to ADR to resolve the dispute out of court
- The Defendant may offer to settle immediately after the claim is issued
- Following permission being granted, the Defendant may offer to settle
- Other cases are fought to a final hearing

What can be achieved by judicial review?

- Victory at court will lead to the decision being “quashed” and/or a declaration is made by the court
- Overturning the decision may still mean that if the public body takes the decision again, it reaches the same conclusion that is objected to in the first place – but this may not be politically viable

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