

How to protect your organisation from judicial review

Association of Chief Executives seminar

2 July 2018



The potential threat of judicial review (JR) hangs over many organisations as they make potentially life-changing decisions for citizens across the country. The option of judicially reviewing a public body in order to challenge the decisions they make is an important part of our legal framework. However, their impact can be broad, not only in the resources required to manage them, but also the potential for changes to policy and working practices. So, the Association of Chief Executives was pleased to host Ofqual's Legal Director, Natalie Prosser, and Dame Glenys Stacey, HM Chief Inspector of Probation and previous Chief Executive at Ofqual, to examine the strategic risks of public law litigation, the action public bodies can take to mitigate the risks, and how best to manage a JR.

Natalie opened the session by explaining that there are two types of JR: those for transactional organisations, with individuals who may be affected in a significant way by a decision; and those that go to the integrity and purpose of why an organisation exists and go to the core of its practice. The latter of these are more dangerous and so organisations should be particularly mindful of them.

JRs are part of public law, which exercises government power. They are a procedure through which government is challenged and are an investigative process. A court has a lot of discretion to make enquiries and judges are entitled to ask a lot of questions. They tend to focus on how an organisation has done something, as opposed to what it has done, though this is not always the case. Courts have a lot of discretion and can quash a decision, make orders and can clarify what the law means. Damages are rarely awarded, although this is becoming more frequent. They are used to challenge decisions made by public bodies, and the court has the power to review a decision to check that the public body has acted lawfully.

and fairly. The focus of the JR will generally be on the process followed by a public body in reaching a decision rather than the substance of the decision (but not always). Natalie went on to describe the four main grounds for judicial review.

The first is illegality. This happens when the decision maker gets the law wrong; uses a power in the wrong way; or acts without the relevant power. This is most likely to arise when powers, duties and functions are misunderstood by those using them.

The second described is irrationality. These are usually manifestly unreasonable or illogical decisions that are difficult to explain - explaining a decision from the outset can often prevent a JR. A decision may be challenged as irrational if it defies common sense; the decision-maker took into account irrelevant matters or failed to consider relevant matter; or the decision lacks logic, based on the evidence of the facts.

Third is procedural unfairness. This is the most common ground for a JR and is based on someone having done something the wrong way, because a person has either not properly followed relevant procedures, (such as a failure to consult or to give reasons), or the principles of "natural justice" in the decision-making process (for example, if the decision-maker has shown bias, has failed to hear an affected party).

The fourth ground is legitimate expectation. This arises when a public body has made a statement that it will do something; or has acted in a certain way in the past (through custom and practice), therefore creating a legitimate expectation that it will do what it has said or behave as it has done previously, but then fails to act in this way.

There are other grounds under the public sector equality duty and the Human Rights Act 2000. The duty to act fairly is inherent in all of the grounds for a judicial review.

There is a common law duty to act fairly in the exercise of its functions. What is fair depends on the circumstances of the case - who is affected and how big is the impact. If one can't say it is completely fair there is a good chance it will be challengeable. Functions must be performed fairly, unless there is an express requirement to the contrary. The duty is strongest where a decision adversely affects a person's (this includes a company's) rights or interests. What fairness requires will be different in different circumstances, so one should treat like cases alike and different cases differently. A core part of fairness is that a person should be able to understand the reasons for a decision that affects them and that they should have the chance to make representations.

Natalie went on to say that there are areas where organisations are at high risk of JR:

- Failing to consult or consult properly: if public bodies can show a sensible approach to consultation and its rationale, this can be protective.
- Failing to give reasons: if reasons are given, whilst the other party may not like them, they are more likely to accept it if they are rational. If there is then a JR, the public body can show the reasons and 'get over the fairness hurdle'. Providing rationale is good practice because it forces one to test the decision.
- Fettering discretion: when an organisation can fetter its discretion it can be problematic, especially when there is a high churn of decisions. Many public bodies have a number of people making decisions and ideally, the decisions should be consistent and coherent. However, applying an over-rigid rule and not considering the specific facts or promises to use discretions in a particular way can be problematic.

Natalie then moved on to consider some case studies of JRs that have driven change. She noted that a high profile situation can trigger a JR, although it may have been that similar

decisions may have been made many times but not challenged. It may be necessary to defend such cases because losing it could open the flood gates to many more. The challenges can also lead to significant impact and wide-reaching reforms and demonstrate the importance of regularly testing decisions to ensure one is working within the statutory scheme.

Natalie then provide her own personal 'tick list' on how to avoid credible JR threats in the first place:

- Do the right thing in the right way - can you put your hand on your heart and say you've done the right thing – a good motto to live by!
- Do the job that you are set up to do – understand your remit and its boundaries, do you know your statutory scheme?
- Maintain an open mind – encourage a culture of constructive challenge and avoid groupthink and ask questions.
- Don't be complacent.
- Design good processes and operations that are sufficiently flexible but support consistent judgements and then follow them! It is very helpful to have to write things down, which is often not done.
- Embed sensible and proportionate governance around decision making.
- Be transparent – communicate early, engage, listen and respond.
- Keep good records - keep the right thing and keep it safe.
- Have good complaints and internal review processes and use them sensibly.
- If something goes wrong, put it right quickly. Give yourself a chance to make amends before it gets to court. Sometimes it is good to say sorry, accepting and admitting it carries a lot of weight.
- Be confident– you have an important job to do and sometimes that will be challenged no matter what. You may make decisions that are unpopular but you have to stand your ground – use the test, is it right and is it fair?

Natalie also advised the importance of good governance around decision making. Papers and minutes will often be the primary evidence that shows how decisions have been made, recording what is considered and how the relevant factors are balanced is important. Further, papers should be drafted so as to provide information and analysis to allow the decision makers to exercise judgement and balance relevant factors appropriately. This should include setting out, where relevant:

- Different stakeholders' perspectives – the people who will be impacted.
- Financial and operational impacts.
- Equality implications.

Natalie went on to refer to environmental factors that can increase the risk of public law challenge:

- Money: competitive markets and if the cost of litigation is less than the actual or potential losses of not challenging.
- Risk of damage to reputation
- Philosophy or ideological differences of view – ethical drivers

- Heightened political tensions
- Public/media campaigns
- Availability of crowdfunding
- Personality clashes, including miscommunications and bad relationships.

Natalie recognised that credible legal threats can have a big impact on an organisation, as they use up resources – human and financial; damage reputations; cause delay to work programmes; damage staff morale, who can be subject to personal abuse and attacks, which are incredibly stressful; undermine confidence internally and with external stakeholders; increase stress; cause fatigue; and leads to an increased risk of further challenges.

Going on to advise what organisations and its staff can expect when a major JR challenge hits:

- A full spectrum social media firestorm
- Vitriolic personal attacks on the Chief Executive
- Protesters picketing the office
- Broadcast vans outside and calls from Newsnight to the press office
- Hourly (or more frequent) calls from the partner department
- Cartoons in the national press
- Repeated calls for a public inquiry
- A barrage of FOIA requests
- Online petitions
- Called to appear before the Select Committee
- Conspiracy theories abound
- Blogger overload
- Liberal use across all media of the terms “fiasco”, “controversy”, “debacle” and “scandal”
- The letters before action arrive
- And vending machines may run out of food!

In such an event Natalie and Glenys provided sage advice, based on their experience from Ofqual.

- Don't panic!
- It can be useful to get a crisis communications specialist on hand and hire them if needed. They can be invaluable in ensuring the right messages are put out.
- Tracking social media will give a great deal of insight into what people are thinking and may determine your response.
- Engage actively with critics, particularly the most influential - don't be a faceless bureaucrat. They may not understand the organisation's perspective or misrepresent facts.
- Build a crisis team of the best staff who can make decisions, often on an hour by hour basis. Make sure people have specific roles and responsibilities and meet with them regularly so they know what they are doing and why

- Engage your board and secure their support so they are well briefed and have confidence.
- Communicate swiftly with staff, hold regular briefings face-to-face.
- Manage information correctly – be mindful of the need to be careful with documents.
- Publish as much information as possible.
- If you are investigating, be clear what you can assert legal privilege over.
- Keep your partner department informed. Organisations may need to remind departments that all communications will be disclosable under JR! Secretaries of State may have a lot to lose, so having them and the board's chair onside makes a big difference.
- CEOs need to work as hard as the staff so be right beside them. But also consider one's own resilience - give oneself space from the situation and do the best job one can.
- Be aware that some things may fall by the wayside, so it is good to keep an awareness of what is not being done.
- And keep things in perspective “don't lose your head even if all around you are losing theirs”.

The session was then open to the floor for a Q and A session, and the following points were made.

At times it can be difficult to explain the work of the public body so it can be useful to test one's argument to make it logical, as QCs and judges can find it hard to understand what the organisation does. If the organisation can draw 'a golden thread' from the statutory scheme to the action, the court will like this.

Embedding a culture of the importance of Freedom of Information is essential throughout an organisation as decisions may be made by junior staff who are not familiar with JRs. Training may include defensible decision making. Scenario case studies can be useful at getting people to examine whether their judgement would withstand scrutiny. Encouraging staff to be curious and share learning can also be helpful. Internal review processes can ensure decisions made are appropriate. Where particularly high profile/high risk decisions are being made the level of review should have parity with them.

Even if the organisation changes its mind, there can be good reason to defend a decision for reputational reasons because one may need to defend the right to make the decision.

There is potential for a public body to be JR'd by its partner department. Whilst this can undermine the organisation, it is possible.

JRs are very costly and therefore it is worth checking governance arrangements with the partner department to see what indemnity arrangements are in place to ensure there are the necessary funds. There may be a specific budget for litigation or business contingency.