

Annex C

Judicial review

Judicial Review is a mechanism by which an affected party can ask the High Court to rule on the legality of the actions of public bodies when exercising public law functions. This remedy assists in ensuring that the actions of public authorities have a proper legal basis. Persons adversely affected by the action of a public body may apply to the court for an appropriate remedy.

A feature in the Constitution which contributes to judicial review is the existence of unenumerated rights arising under Article 40.3 which covers the concept of constitutional justice.

Ministers and their departments are subject to judicial review. Certain other bodies, both public and private, may also be subject to review. Private sector bodies may be reviewed when they exercise a public function arising from a statutory power, but review may also arise in other situations. Certain functions of government departments and public bodies may appear to have a private law aspect and therefore should theoretically not be amenable to judicial review. This occurs, for example, in relation to contracts and other functions arising because of the corporate nature of the body when it is not exercising a specific public administrative function. It may be difficult to draw these distinctions in practice.

Basic principles

All decisions amenable to judicial review are subject to the necessity for conformity with European Community law and the Constitution. In addition to this basic requirement, the broad grounds on which a decision may be challenged can be summarised as follows:

- Legality and jurisdiction. Is the decision within legal powers and if so is it used for a proper purpose?
- Procedural fairness.
- The reasonableness of a decision.
- Compatibility with Human Rights law.
- Proportionality.
- Legitimate expectations.
- The obligation to give reasons.

Legality

The first issue to consider in making a decision is whether the relevant power exists. The source of the power may derive from: (a) primary legislation, (b) subordinate legislation, (c) common law, (d) a European Community instrument, (e) the inherent executive power of the State.

All the powers exercised must, however, fall within the limits that apply under European law and under the Constitution. Otherwise the instrument itself may be unconstitutional or in conflict with Community law. Primary legislation passed since the 1937 Constitution is presumed to be constitutional but it is still subject to review by the courts in particular circumstances. If any doubts arise, legal advice should be sought.

If the decision-making power exists, the next issue to determine is whether the exercise of that power is within or outside permitted limits. A Minister, as a corporate entity under the Ministers and Secretaries Act, has a variety of powers but may not be able to use these outside the scope of the functions specifically granted by statute.

If a particular statute gives a power, but does not set out the principles and policies which must inform that decision-making power, a problem arises and it may not be possible to use that power in a lawful manner. Even where the principles and policies are set out, if a Minister purports to use that power beyond the scope of those policies and principles, such exercise will also be *ultra vires* and illegal. The power must be exercised within the scope laid down in the relevant statute.

A decision-maker should ensure that in exercising discretion irrelevant factors have not been taken into account and that the issues to be considered have been given proper weight. The statutory power may indicate what matters must be taken into account or these may be implicit. If it appears to a court that an irrelevant matter was taken into account in the decision-making process, this may invalidate the decision. If it appears that relevant matters were excluded this will also be a potentially fatal flaw.

If a particular power is exercised by someone who does not meet the qualifications laid down in the instrument which granted that power, the action may be illegal. Certain important decisions may not be delegated where it is clear that the decision-maker specified in the statute must exercise the discretion personally. If a statute gives a specific power to a Minister to delegate to a body or person, that requirement must be met and the matter cannot be delegated to parties not specified.

On occasions the legislation makes specific requirements directing the decision-maker in the exercise of the power. In some circumstances this may require the giving of a decision within a reasonable time or within a specific time limit. Any delay or failure to meet the time limit may be judicially reviewable and the decision-maker could be compelled by the court to give an answer. Lengthy delays, where there is a clear obligation to give a decision, will be reviewed by the courts especially where the rights of individuals have been adversely affected.

Certain basic principles would also be implied even though not specifically stated in the power. So, for example, it is not possible for the power to be used retrospectively unless expressly stated in statute. There is also a presumption that a power will not restrict a person's access to the courts.

Procedural fairness

Procedural fairness when taking a decision is central to ensuring that a decision is not susceptible to judicial review. The concept is often referred to as “natural justice” or “constitutional justice”. The European Convention of Human Rights (ECHR) also deals with procedural fairness, particularly Article 6. Legislation itself may contain requirements such as the duty to consult or to hold an inquiry. Failure to abide by these requirements will render a decision susceptible to judicial review. The procedural requirements may be mandatory or directory in nature and it is only the mandatory requirements that will affect the validity of the decision. Determining whether a requirement is mandatory or directory is difficult and will depend on interpretation. In each case the intention of the legislator is important in determining whether the effect of non-compliance will impact on the validity of the decision.

Factors to be taken into account include the following:

- The importance of the relevant procedural requirement.
- The relation of that requirement to the general objects set out in the legislation.
- The relevant circumstances of the case.

Fair procedure consists of two elements:

- Eliminating bias and ensuring impartiality and independence.
- Ensuring the right to a fair hearing.

The first principle of fair procedure has traditionally been summed up as ensuring that no person should be a judge in his/her own cause. It is important to demonstrate that justice is not only done but is seen to be done. Any suggestion of bias can have serious consequences. Article 6 ECHR also requires that a tribunal, or decision-making body, which is determining civil rights or obligations, must be impartial and independent. There must be no suggestion of pressure or influence on the tribunal. The question is whether there is the appearance of a real danger of bias. If the decision-maker involved could have a conflict of interest, this raises the question of unfairness. A close connection between the decision-maker and one of the parties appearing before him/her can also result in the suggestion of bias and in those circumstances it would be safer to disqualify oneself from the decision-making process. Parties may waive any objection to the decision-maker if the connection or interest is clear but it is important in those circumstances that no pressure has been exerted. It is preferable to avoid situations where such risks arise and to maintain a situation where the decision-maker remains beyond reproach on these grounds.

The second principle of fair procedure arises from the right to represent one's own interests. For example, in cases of dismissal there must be adequacy of notice to the individual concerned, who should be told of the reasons for the dismissal and given sufficient time and opportunity to make representations. The same considerations apply where a licence may be revoked. An affected party must have notice of the matter and of the issues arising as well as an opportunity to respond.

In terms of a formal hearing, a party must be accorded sufficient opportunity to make his/her case. The following are some matters the courts have considered to be required for this purpose:

- A copy of the evidence.
- The right to cross-examine accusers.
- The right to refute any accusations by giving evidence.
- The right to address the tribunal in one's own defence.

The reasonableness of a decision

The issue of reasonableness is central to a discussion of judicial review. When considering an application for judicial review a court should not substitute its own decision for that of the decision-maker. The judicial review process is not an appeal involving a rehearing. Instead a court is reviewing the legality of the decision. A decision will generally be overturned if it is unreasonable in the sense that no reasonable person considering the question could have arrived at the decision made. The level of evidence required to justify a decision may vary according to the context however.

However, the principle remains that the court will not substitute its own decision for that of the decision-maker and the sanction is limited to quashing the decision itself. A court will often focus on the decision-making process, rather than on the final decision, to see if it was flawed. If a body takes an irrelevant consideration into account this will make the decision vulnerable on the grounds of unreasonableness as it offends the essential procedural process.

The court will be concerned with whether the decision-making body has addressed itself to all the relevant factors. A mere mistake will not necessarily be a ground for quashing a decision. It is the overall effect of any oversight or irregularity that is crucial.

In Ireland, in judicial review proceedings, in order to assess whether a decision is legally correct, the courts have regard to the provisions of the Constitution and human rights law.

Human rights law

The European Convention on Human Rights Act 2003 gave further effect to the ECHR in Irish law. The Act requires that any power should be exercised by a decision-maker or tribunal in a manner that meets the requirements of the Convention. ECHR principles will feature in judicial review applications. It will also be possible for affected persons to seek a separate declaration from the High Court that a statutory provision or rule of law is contrary to the Convention where no other legal remedy is adequate and available.

Proportionality

The concept of proportionality is well established in European law. It requires that a particular measure or penalty should be proportionate to the object or offence against which it is directed. Mandatory penalties could breach constitutional property rights and the right to earn a living if not properly framed and if not subject to proper controls.

The principle of proportionality in Irish law is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to be reasonable. In applying the principle of proportionality, the court may have regard to the degree of discretion conferred on the decision-maker. A margin of appreciation should be allowed to the

decision-maker in choosing an effective means of fulfilling any legitimate policy objectives.

Legitimate expectation

Legitimate expectation is another concept found in European and Irish law. For example, there are circumstances in which it would be unfair to permit an administrator to decide in a manner contrary to an earlier promise or representation, provided that promise is compatible with any relevant statutory provision. In relation to legitimate expectation, it is important to remember that discretion cannot be fettered and that a public authority must have the scope to act in the public interest.

A promise or expectation can be subject to review but such review may require allowing the affected party to make representations and have his/her views taken into account before a final decision is made. There may be an express or implied promise to a person or class of persons and this must be taken into account. This may be distinguished from situation where an error has been made. Provided that error is corrected promptly and the person to whom it is addressed has not acted to his/her detriment, the mistake may be rectified.

The obligation to give reasons

Under section 18 of the Freedom of Information Act 1997 a number of public bodies are obliged to provide reasons for decisions that affect a person. In some instances, unless reasons for a decision are given, it may not be possible, in defending judicial review proceedings, to establish if natural justice and fairness have been provided. If the reasons for a decision are not clear it may be difficult to establish whether a party has received a fair hearing. The body exercising a quasi-judicial function may be obliged to provide reasons in order to demonstrate that it is properly administering its functions.

Where an individual's civil rights or general interests are affected there may be a requirement to provide a reasoned decision. Failure to do so may also be contrary to the ECHR. If there are statutory provisions requiring the giving of reasons these must be adhered to. In other cases careful consideration should be given to whether it is advisable to provide an explanation. A record of the decision and the basis for it may be a protection. It will demonstrate that due process was accorded to the individual, that a decision was not irrational and that relevant matters had been taken into account.



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