

Challenges to university decisions: key issues in judicial review

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What is Judicial Review?

It is the way in which the Courts oversee bodies exercising a public function and ensure that those bodies act lawfully and fairly.

A claim in judicial review may only be advanced on the following grounds:

- Illegality – where a body has exercised a power it has wrongly, or sought to exercise a power that it does not have
- Irrationality – the test being that the decision is so unreasonable that no other body acting reasonably could have come to it
- Procedural impropriety – such as a lack of fairness in the decision-making process, bias or impartiality, or a failure to give reasons for a decision

An individual has three months from the date of a decision to bring a claim in judicial review.

Judicial review is not to enable the Court to retake a decision or to consider the merits of a decision, but to conduct a review of the process of the decision and to determine whether any part of it was unlawful.

Top Tips

The following top tips should be considered in taking any decision:

- Provide for a process which is fair, allowing the individual to make informed representations, and eliminating any appearance of bias
- Ensure that the relevant decision-making body takes the decision, and in accordance with internal rules and procedures
- Ensure that all material considerations are taken into account when the decision is taken, and that irrelevant considerations are disregarded
- Make a clear record of the decision evidencing the considerations of the University
- Communicate the decision and reasons for it to the individual concerned

Key Issues for Universities

Case law has identified some key issues for universities to consider if a claim is made.

Exercise of academic judgment

The Courts recognise a boundary between the role of the Court in determining lawfulness and the role of the body concerned in exercising its expert judgment. In the case of *R (on the application of Kwao) v University of Keele* [2013] EWHC 56 (Admin), for example, the Court held that a challenge against a decision to award a lower level masters instead of a doctorate required the Court to undertake an academic exercise for which it was not equipped.

This is not however an issue that is always entirely clear cut and in the case of R (on the application of Mustafa) v Office for the Independent Adjudicator for Higher Education [2013] EWHC 1379 (Admin) the Court considered the issue of plagiarism and determined that this did not always require the exercise of academic judgment.

Whilst in the vast majority of cases the Court will not interfere with such matters, careful consideration should always be given to the nature of the decision and what is in fact involved on the part of the decision maker.

Alternative Remedy

Judicial review is a remedy of last resort. Where an alternative remedy is available then that must be exhausted before a claim may be made in judicial review. The recent case of St George's, University of London v Rafique-Aldawery; University of Leicester v Sivasubramaniyam [2018] EWCA Civ 2520 provides helpful guidance. In this case the Court of Appeal recognised that the Office for the Independent Adjudicator for Higher Education ("the OIA") provided a suitable and cost-effective alternative to a judicial review claim. Whilst the OIA cannot rule on legal rights, it does scrutinise the behaviour of Universities to a standard which would reflect that in judicial review and the OIA could provide more flexible remedies than the Courts.

The Court gave guidance to students that they should first establish whether their complaint falls within the jurisdiction of the OIA. Where this was unclear then the student should issue a claim in judicial review at the same time as making a complaint to the OIA in order to protect their position (due to the strict time limit referred to above). In such circumstances if the OIA is able to determine the complaint then it can do so, which provides a more cost-effective means of redress for both parties. If the OIA is unable to determine the matter then the student will have protected their position and may pursue their claim in judicial review should they so wish.

Where does this leave Universities?

Universities should follow the top tips listed above to avoid successful challenge. If a challenge is advanced then consider the extent to which it could be said to require the exercise of academic judgment, and whether the OIA would offer a suitable means of redress to avoid the potential expense of judicial review litigation.

Potential Changes to Judicial Review

The Independent Review for Administrative Law has recently issued a call for evidence, particularly relating to observed trends in judicial review, how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving issues raised in judicial review. The closing date for responses was the 19 October 2020. Browne Jacobson LLP has provided its observations in response to the call for evidence in light of our experience in this area of law and will keep our clients updated as to any changes in this area.

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