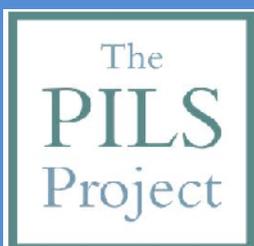




# Judicial Review in Northern Ireland:

A guide for non governmental  
organisations

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*Advancing human rights and equality through  
public interest litigation*

# Judicial Review Guide for NGOs in Northern Ireland

## **PREFACE**

The PILS Project seeks to advance human rights and equality in Northern Ireland through the use of and support for public interest litigation. Public interest litigation is defined as the use of litigation or action which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raises issues of broad public concern. One of its objectives is to raise awareness of and tackle barriers to public interest litigation and promote access to justice for those most in need.

We would like to acknowledge and thank a working group of practitioners and volunteers who assisted in the production of this handbook; Evelyn Doherty; Fiona Doherty; Paul Mageean; Marieanne McKeown, Louise Arthurs and David Scoffield BL.

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# Judicial Review Guide for NGOs in Northern Ireland

<b>Index</b>	<b>Page</b>
1 What is Judicial Review?	3
2 Who can be judicially reviewed?	4
3 What can be judicially reviewed?	7
4 Who can take a judicial review?	16
5 Roles for NGOs in judicial review	19
6 Remedies	22
7 Steps to be taken before initiating a judicial review action	23
8 Steps involved in the judicial review process	25
9 Time limits	31
10 Covering the costs of judicial review	33
11 Judicial Review checklist	36

## **Disclaimer**

Whilst every effort has been made to ensure that the information in this handbook is accurate, Public Interest Litigation Support Ltd, does not accept any legal responsibilities for any errors, howsoever caused. This handbook is for guidance and information purpose only. It is not a definitive or exhaustive statement of the law and also should not be construed as legal advice.

## 1 What is judicial review?

Judicial review is the name of a **particular type of court action** where an individual **challenges the decisions or actions of a body performing a public function**.

In a judicial review, the High Court examines whether the body acted lawfully in arriving at its decision. Usually, the Court examines whether the body:

- a) observed all relevant legal rules, standards and requirements; and
- b) acted within the limits of its powers.

**Judicial review is not an appeal.** The Court generally examines how the body arrived at its decision rather than the merits of the actual decision itself.

**Judicial review is a remedy of last resort.** This means that it is usually only appropriate to take a judicial review action when there is no adequate alternative way to resolve the issue, such as an appeal.

## 2 Whose decisions can be judicially reviewed?

The decisions of **bodies performing a public function** may be judicially reviewed. This includes the decisions of:

- public bodies performing public functions; and
- private bodies performing public functions (although this is much more rare).

**The crucial question to ask is** – ‘what function was being performed by the body when it made its decision?’ If it was a public function, the decision is likely to be able to be judicially reviewed.

### **What is a public function?**

A body is performing a public function when it makes a decision or takes action which is public in nature, usually as a result of exercising some statutory power. Often this will have implications for the public generally and not just an individual or a group, although decisions relating directly to an individual (for example, decisions about benefits entitlement) can also be taken in the course of a public function.

### **Public bodies performing public functions**

A list of public bodies in Northern Ireland (although not necessarily exhaustive) can be found at

<http://www.infolaw.co.uk/lawfinder/results.asp?lwftp=The+Directory&lwfct=Public+Bodies%3A+Northern+Ireland&lwfsc=ifllwbrws>

Examples include:

- Government Ministers and departments;
- Secretaries of State;

- the Police service (PSNI);
- the National Health Service (NHS); and
- the Parades Commission.

**Remember:** Not every decision of a public body can be judicially reviewed since public bodies can also do things which may be private functions, much like any individual or corporation (for instance, employing people or purchasing goods), rather than public functions.

### **Private bodies performing public functions**

Private bodies may also exercise public as well as private functions. For example, privately owned utility providers.

**Remember:** It is the nature of the function performed by the body when making a particular decision which is relevant. Below are some examples which illustrate this point well.

#### Case study – *Re Wadsworth's Application*<sup>i</sup>

The Court held that the decision of Northern Ireland Railways Company Ltd (a private company) to exclude a taxi driver from a designated rank at Belfast Central Station was subject to judicial review.

This was because the Court found that the provision of taxi services at Central Station affects the public generally.

Case study: *Re Kirkpatrick's Application*<sup>ii</sup>

The Court found that a decision of Lough Neagh Fishermen's Co-operative Society (a private company) with regard to licensing was subject to judicial review. This was because the Court found that the regulation of fishing activities affects the public generally.

### 3 What can be judicially reviewed?

Judicial review is most commonly used to challenge the decisions of a body performing public functions (hereafter referred to as a 'body') but it can also be used to challenge the following:

- A formal written policy of a body.
- An informal unwritten policy of a body.
- An act or omission of a body.
- A letter from a body stating that it will or will not do something.
- Regulations.
- Acts of the Northern Ireland Assembly and other legislation (Acts of the UK Parliament can be challenged on human rights and European law grounds only).

This guide will refer to decisions only but keep in mind that this includes all of the above.

#### **Grounds for judicial review**

A decision may be challenged if, in arriving at the decision, the body:

1. acted illegally;
2. acted in a procedurally unfair manner;
3. acted irrationally; or
4. acted contrary to an individual's legitimate expectation as protected by law.

This is a summary of the available grounds and there are several sub-categories within each. Judicial review actions can be taken on more than one ground. Often, the grounds for judicial review overlap.

This is the area where specialist legal advice is most likely needed to help identify when a judicial review action may be possible.

### 1. Illegality

A body must not act illegally i.e. it must correctly understand and apply the law that regulates its conduct.

When considering whether a decision can be challenged on this ground, the starting point is to look at the statute which regulates the conduct of the particular body (hereafter referred to as ‘the governing statute’). The governing statute will usually contain relevant information concerning:

- the scope of the body’s powers; and
- the procedural requirements that the body must comply with.

There are a number of ways in which a body may act illegally, including the following:

- by making a mistake in applying the law;
- by doing something prohibited by law;
- by not doing something required by law;
- by acting in a way that breaches an individual’s human rights, contrary to the Human Rights Act 1998 (HRA);
- by using its powers for a purpose which is not permitted;
- by fettering its general discretion on how to act by adopting an overly rigid policy or set of guidelines; and
- by delegating a function it is not permitted to delegate.

Case study – *Colaiste Feirste v Department of Education*<sup>iii</sup>

Colaiste Feirste, Northern Ireland's only Irish language secondary school, took a judicial review action against the Department of Education's decision not to provide transport to some pupils who wished to attend the school.

The school argued against the decision on a number of grounds. One of the grounds was that, in making the decision, the Department of Education had made a mistake in law by failing to give proper weight and consideration to its statutory obligation to encourage and facilitate the development of Irish-medium education.

The Department of Education argued that this statutory duty is aspirational and, as such, is not a real legal obligation.

**Held:** The judge agreed with the school. The judge ruled that the Department's statutory obligation to encourage and facilitate the development of Irish-medium education is not aspirational, it is intended to have practical consequences and legislative significance. The judge found that the Department had, therefore, made a mistake in law by failing to give proper weight and consideration to its statutory obligation. The judge ordered the Department to reconsider the matter, this time in accordance with its statutory obligation.

## 2. Procedural Unfairness

A body must adopt fair procedures in arriving at its decisions which affect the rights or interests of individuals. What is 'fair' will vary from case to case. It will depend on a number of different factors, including the following:

- the interests of the particular individual affected by the decision;
- the statutory duties of the particular body (these will be set out in the governing statute); and
- any other considerations which the governing statute allows to be taken into account.

There are a number of ways in which a body may act in a procedurally unfair manner, including the following:

- by failing to comply with established or agreed procedures;
- by failing to ensure an individual affected by a decision has been provided with sufficient and relevant information;
- by failing to ensure an individual affected by a decision has been given the opportunity to present their side of the story;
- by failing to provide an individual with adequate reasons for a decision where there is a duty on the body to do so; and
- where the body is not independent and impartial or does not appear to be so.

Case study – *Royal Brompton & Harefield NHS Foundation Trust* case<sup>iv</sup>

The Royal Brompton & Harefield NHS Foundation Trust (RBH) is a specialist heart and lung centre at Royal Brompton Hospital.

RBH took a judicial review action against the Joint Committee of Primary Care Trusts (JCPC). RBH's challenge concerned JCPC's decision regarding which hospitals would provide children's heart surgery. In particular, RBH argued that JCPC had not properly complied with its statutory duty to consult RBH prior to making its decision.

RBH made a number of arguments against the consultation process carried out by JCPC, including the following:

- It was argued that the decision was biased because JCPC simply rubber stamped the steering group's recommendation and two members of the steering group were consultants working at the two hospitals ultimately chosen to provide the services.
- It was also argued that, before embarking on the consultation process JCPC had already decided that it would not choose RBH to provide the services. As such, it was contended that the consultation process was a sham.

**Held:** RBH lost the case on both of the above arguments.

With regard to the bias argument, the judge found that it did not matter that the two consultants were members of the steering group because JCPC did not simply rubber stamp the steering group's recommendation. The judge ruled that JCPC only arrived at its decision after a full and proper consideration of all the material before it.

With regard to the second argument, the judge examined the consultation document, witness statements and other documentary evidence. The judge accepted that, before embarking on the consultation process, JCPC had a preference regarding which hospitals would be chosen. However, it was clear from the consultation document that this preference could be challenged. Therefore, the judge found that JCPC had not made its final decision before embarking on the consultation process.

The following two grounds are exceptions to the general rule that judicial review does not examine the actual merits of decisions.

### 3. Irrationality

A decision may be challenged under the ground of irrationality where:

- the decision is so illogical that no reasonable person could have arrived at such a decision (very few judicial review actions succeed on this ground);
- the decision can be shown to have failed to take into account legally relevant considerations; or
- the decision can be shown to have taken legally irrelevant considerations into account.

Again, the starting point is to look at the governing statute for the particular body. It may deem certain considerations:

- Relevant: i.e. the body must take them into account;
- Irrelevant: i.e. the body must not take them into account; or
- Discretionary: i.e. the body may decide whether or not they should be taken into account but must act reasonably in making any such decisions.

Case study - *In Re JRI's Application*

The applicant was an eight year old girl who challenged the Chief Constable's decision to introduce, on a pilot basis, tasers for use by the PSNI.

The applicant argued that the Chief Constable's decision to introduce tasers was irrational because an Equality Impact Assessment (EQIA) on its likely impact had not been completed. Furthermore, the Equality Commission had advised that the Chief Constable should await the EQIA before introducing tasers.

**Held:** While the Court stated a reasonable decision-maker may have made a different decision, it found that the decision to introduce tasers on a pilot basis was well within the range of rational decisions available to the Chief Constable. Therefore, it held that the Chief Constable's decision was lawful.

4. Legitimate expectation

If a body has promised an individual a particular benefit or that it will act in a certain way, that individual is said to have a legitimate expectation that the body will keep its promise and act accordingly.

A body cannot, without sufficient justification, go back on or act contrary to an individual's legitimate expectation, to which the body itself has given rise. Public bodies are, of course, allowed to change their minds sometimes. Therefore, the question for the Court will be

whether the change of approach requires the individual to be given additional safeguards or is so unfair as to be an abuse of power.

An individual's legitimate expectation can be established from:

- specific representations made by the body to the individual that it would act in a certain way (the strongest form of expectation);
- the past practice of the body; or
- (much less frequently) the circumstances of the case.

Case study – *Loreto Grammar School cases*<sup>v</sup>

Loreto Grammar school took a judicial review action against the Minister for Education. The school challenged the Minister's decision to refuse funding for the construction of a new school on the site of the existing school. The school argued that a previous Minister had promised to provide the funding to the school and, as such, the school had a legitimate expectation that the funding be provided and the new school built.

When the case was first heard, the Court agreed with the school that it had a legitimate expectation that a new school, financed by public funding, would be built on the existing site by a certain date. The Court, therefore, held that the Minister's decision was unlawful.

The Department of Education then appealed the Court's decision, arguing that the previous Minister's promise was conditional. It stated that the previous Minister's promise was dependent on the availability of funds and on the policy decisions of the present Government and could not, therefore, give rise to a legitimate expectation.

**Held:** The Court of Appeal agreed with the Department of Education. It held that, with a project of this scale, duration and ambition, details of the project would develop and change over time. As such, assessment of the project was ongoing and would require detailed approval. The Court held that the school had no legitimate expectation since no legitimate expectation could arise until final approval for funding was given.

## 4 Who can take a judicial review?

The Court will only allow an individual (including a group or company) to take a judicial review action if they have 'standing'. This means that:

- for decisions challenged on human rights grounds the individual must be a 'victim' of the disputed decision; and
- for all other challenges, the individual challenging the decision must have 'sufficient interest' in the matter.

### What does 'sufficient interest' mean?

Individual: must generally be affected by the disputed decision

Special interest group/NGO: each case will vary but the Court normally adopts a generous approach when deciding whether a particular special interest group/NGO has 'sufficient interest' in the matter. The Court will look at the matter as a whole, including the following issues:

- the role of the interest group/NGO;
- the merits of the challenge;
- the importance of the matter involved; and
- the likelihood of any other responsible group making a challenge.

### What does 'victim' mean?

This is a stricter test than the 'sufficient interest' test.

Individual: to be a 'victim', must have personally had his/her Convention rights violated.

However, there may also be circumstances where an individual is a victim on the basis that his/her Convention rights are potentially violated.

Also, where an individual is a close relative (e.g. spouse or parent) of someone whose Convention rights have been violated, that individual may claim to be an indirect victim.

Special interest group/NGO: Because Convention rights belong to individuals only, a special interest group or NGO cannot be a 'victim' and cannot, therefore, make a challenge in their own name on human rights grounds.

Case study - *Family Planning Association of Northern Ireland's Application v Minister for Health, Social Services and Public Safety*<sup>vi</sup>

The Family Planning Association (FPA) took a judicial review action against the Minister for Health, Social Services and Public Safety. FPA argued that the Minister had failed to issue advice or guidance to women and clinicians on the availability of abortions in Northern Ireland. FPA asserted that this failure was in breach of the Minister's statutory duty to ensure the provision of health and social services.

**Held:** The Court found that FPA had 'sufficient interest' and stated that, where the applicant was a person or group seeking to challenge the validity of ministerial action on reasonable grounds, applications for judicial review should not be refused on the ground of lack of standing.

## 5 Roles for Special interest groups/NGOs in judicial review

Special interest groups/NGOs can play a direct or indirect role in judicial review actions

### Direct role

Where they have 'sufficient interest' in the matter (this has already been discussed under section 4 above), special interest groups/NGOs can challenge decisions of bodies by taking a judicial review action in their own name. Where this is not possible, or for some reason the group/NGO does not wish to bring a judicial review itself, there are a number of indirect roles which such a group may play, as discussed below.

### Indirect roles

#### 1 Third party interventions

- A third party intervention basically means that the Court permits a special interest group/NGO to make a written submission, and sometimes also an oral submission, to the Court in judicial review actions between other parties. The submission should directly address the issues which the Court must decide and should generally add something which the existing parties to the case cannot provide.
- The practice of allowing a group/NGO to intervene is becoming more common.
- It is important for a group/NGO to be clear about why they wish to intervene in a judicial review action between other parties. A group/NGO may wish to intervene for a number of reasons. For example:
  - An intervention can give a different perspective to the issue being decided.
  - It can add credibility to a point being made by one of the parties.

- It can provide additional information on the implications the Court's decision might have.
- The Court will usually permit a third party intervention if:
  - the interest group has some expertise in the matter at hand;
  - the intervention will assist the Court in deciding the case; and
  - the benefits of allowing the intervention outweigh any inconvenience, delay or expense it may cause to the parties involved.
- Although not required, it can be useful to seek consent to intervene from the parties involved. Groups are advised to do this before approaching the Court.
- It is possible to make a joint intervention with another group.
- It is important to remember that third party interveners normally bear their own costs.

## 2 Assistance to parties in a judicial review action.

It is possible for special interest groups/NGOs to provide assistance to a party in a judicial review action without becoming formally involved in the case through a third party intervention. For example, groups/NGOs can assist a party by providing them with:

- their expertise and advice;
- reports and evidence; or
- funding.

Case study – *Re Peter Neill*<sup>vii</sup>

This judicial review action concerned a challenge to the introduction of Anti-Social Behaviour Order legislation in Northern Ireland. One of the grounds of challenge was based on the statutory equality duty in section 75 of the Northern Ireland Act 1998. This was to be the first time a Northern Ireland court would consider this particular duty.

The Committee on the Administration of Justice (CAJ) had been involved in lobbying and briefing around the enactment of section 75. It had also continued to monitor the operation of section 75 and had a dedicated equality officer to carry out this task. Due to its knowledge of the background to section 75 and the purpose for which it was enacted, CAJ was in a unique position and also had a clear interest in ensuring its effective implementation.

Due to its unique position, CAJ was granted leave to intervene. While the judicial review action was ultimately unsuccessful, CAJ's submissions on the correct interpretation and application of section 75 were specifically relied upon by the Court.

## 6 Remedies

If the Court finds that a body's decision or decision-making procedure was unlawful, it may make one of the following orders:

- Quashing order (also referred to as *certiorari*): This is the most commonly requested remedy. It strikes down the unlawful decision made by the body. The body must then re-take the decision, in a lawful manner this time.
- Prohibiting order: This prevents a body from taking an unlawful decision or action.
- Mandatory order (also referred to as *mandamus*): This order requires the body to carry out an action it has a duty to perform.
- Declaration: The Court may simply declare what the law is or declare the respective rights of the parties without making any further order.
- Injunctions: Like prohibiting and mandatory orders, injunctions either restrain a body from acting in a certain way or compel a body to act in a certain way.
- Damages: Damages are rarely awarded but may be awarded in judicial review actions in some circumstances, particularly those cases taken on human rights grounds.

**Remember:** It is important to know at the outset what remedy a particular individual is looking for. Unless he or she is seeking one of the above remedies, judicial review may not be the appropriate mode of redress for that person.

## 7 Steps to be taken before initiating a judicial review action

**(NB: At all times, keep in mind the time limits for judicial review applications!)**

1. Engage in correspondence with the body.
  - As a general rule, it is best to try to resolve the problem with an informal complaint first and then resort to other methods if that does not work.
2. Try all other available remedies:
  - Internal appeal or complaints procedures: For example, all public bodies have a mechanism for dealing with complaints, the details of which are usually on their websites.
  - Ombudsmen: For example, the Northern Ireland Ombudsman also deals with complaints of unfair treatment by the Government and public bodies.
  - A statutory right of appeal may exist.
3. Comply with the 'Pre action Protocol for Judicial review'.
  - Where an individual has been unable to resolve the problem informally and has tried all other appropriate remedies, they must, if there is time to do so, send a detailed letter to the body before taking any further action.
  - This letter (known as a 'letter before action') must be in the format set out in the 'Pre action Protocol for Judicial review'. The 'Pre-action Protocol' is available on the Court Service's website at: [http://www.courtsni.gov.uk/en-gb/judicial%20decisions/practice%20directions/documents/practice%20note%201\\_2008/j\\_j\\_pn%201-2008%20revised%20version.htm](http://www.courtsni.gov.uk/en-gb/judicial%20decisions/practice%20directions/documents/practice%20note%201_2008/j_j_pn%201-2008%20revised%20version.htm)
  - Ideally, the letter before action should be done by a lawyer specialising in judicial review and it should:
    - i. set out, in detail, where it is alleged the body has gone wrong;

- ii. ask the body to provide, within a specified timeframe, detailed reasons for its decision; and
  - iii. threaten judicial review action if the body does not provide the detailed reasons within the timeframe or does not provide satisfactory reasons.
- Often, letters before action encourage bodies to put matters right without the need for any further action. This saves time and money.
  - If a letter before action is not sent to the body, there is a risk that the Court will not make an order for the body, if it is the losing party to pay the costs of the winning party (see Section 10 below on Costs).

#### 4. Apply for legal aid

- In an appropriate case, it may be possible for an individual to apply for legal aid to meet the costs of his/her judicial review application.
- Applications for legal aid should be made to the Northern Ireland Legal Services Commission (LSC). LSC has certain criteria which must be met before it will grant legal aid, including the following:
  - the case must have a reasonable chance of succeeding (often LSC will require an opinion from Counsel regarding the case's prospects); and
  - the disposable income of the individual applying for legal aid must be below a certain level.
- LSC may grant a legal aid certificate which authorises the individual to progress his/her case to its final conclusion or it may be restricted in scope.
- Further information on legal aid applications can be found on the LSC's website at: <http://www.nilsc.org.uk>

## 8 Steps involved in the judicial review process

An application for judicial review has two fundamental stages:

1. Application for leave to apply for judicial review.

This is where an individual asks the Court for leave (i.e. permission) to have his/her case dealt with by the Court. The Court will either grant or refuse permission to proceed to the second stage. Cases are usually only refused leave if they are hopeless on their merits or if there is some fundamental problem with the application (such as a lack of standing or an unacceptable delay in bringing the case).

2. Substantive hearing of the case.

This is where the Court considers the case after all the relevant evidence has been provided and gives its judgment.

### **Application for leave to apply for judicial review**

There are three documents (these should be prepared and lodged by a lawyer specialising in judicial review cases) which must be lodged with the Court in order to initiate an application for leave:

1. Order 53 statement.
2. A supporting affidavit verifying the facts relied upon.
3. An *ex parte* docket.

In addition to the above documents, applications concerning immigration and asylum cases which challenge a person's removal from the country should include the following documents:

1. A copy of the removal directions and the decision to which the application relates.
2. Any other document the person was provided with when they were served with the removal directions.

Following the lodgement of these documents, the respondent (i.e. the body being challenged) is usually given an opportunity to comment on whether or not leave should be granted.

The judge may make a decision on the grant of leave 'on the papers'. This means that he or she will decide whether to grant or refuse leave after considering all of the documents that have been lodged with the Court. It is more common, however, for the judge to hold an oral hearing before making a decision as to whether leave should be granted.

### **Reasons why a judge may refuse to grant leave**

The most common reasons why a judge may refuse to grant leave are as follows:

- The application was not brought promptly or within the judicial review time limit;
- The applicant failed to disclose all relevant information to the Court;
- The other party was not performing a public function at the time it made the decision;
- The applicant did not have standing; or
- The applicant had an alternative remedy which he/she should have tried first.

If leave is refused, it may be possible to appeal the refusal. If leave is granted, the case may proceed to the second stage.

**Substantive hearing of the case:**Notice of Motion

Within 14 days of leave being granted, a document known as a 'Notice of Motion' must be lodged with the Court. Again, this document should be prepared and lodged by a lawyer specialising in judicial review cases.

This 'Notice of Motion' initiates the judicial review action. If it is not lodged within 14 days of leave being granted, the leave will lapse and it will be necessary to go back to Court to ask again for permission for the case to be heard by the Court.

Progress of the case

Once the 'Notice of Motion' has been lodged, there may be a number of matters to be dealt with before the judge will set a court date to hear the case. The most important of these is the filing of evidence. The respondent (the body being challenged) will generally file a sworn statement or statements (called 'affidavits') explaining its side of the story. The applicant, and any other parties, will have a chance to respond to this and there can be several rounds of written evidence before the case is ready for hearing. It is possible for a judge to hear evidence in Court from witnesses in a judicial review case but this is very rare; and most cases are dealt with by the evidence being provided in written form.

There may be other matters which are also dealt with before the case is ready for full hearing.

For example:

Discovery:                    This is where parties involved may apply for the other party to disclose documents relevant to the case.

Interrogatories: This is where parties may apply for the other party to provide written answers to questions, requesting specific information relevant to the case.

A judge will manage the progress of the case. He or she will set a timetable for the completion of all matters and will then fix a date for the hearing of the matter.

#### Settling a judicial review action

A judicial review action may be resolved before the hearing of the case. This may happen in circumstances where one of the parties concedes on the basis that the other party has a strong case.

A judicial review action may also be settled where, due to developments, both parties recognise that the action is no longer of practical relevance. If a case is not settled, the matter will proceed to the substantive hearing.

#### The substantive hearing

It is for the applicant to prove 'on the balance of probabilities' that the disputed decision was unlawful. This means that the applicant must prove that it is more probable than not that the decision was unlawful.

As noted above, evidence is normally by way of affidavit only. This means that the applicant and respondent do not give oral evidence. Instead, they lodge sworn statements containing their evidence with the Court.

On the day of the hearing, Counsel for both the applicant and respondent will put arguments to the judge as to why the case should either succeed or fail. Usually, the judge will give his or her decision in writing at a later date.

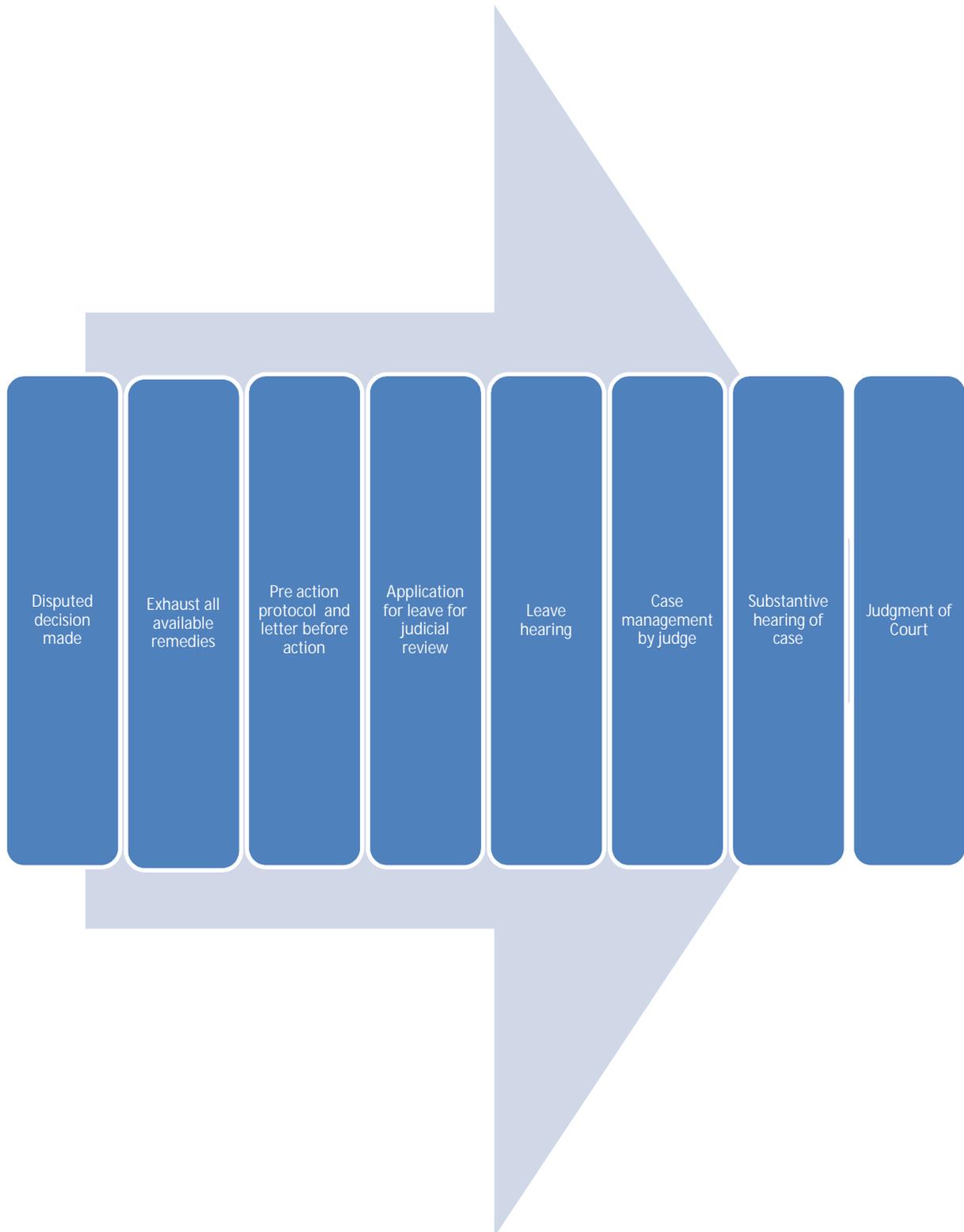
### Length of time a judicial review action takes

The length of judicial review actions varies from case to case.

In urgent cases, it is possible to speed up the process. For example, in circumstances where a prisoner is urgently seeking compassionate leave, a letter before action, application for leave and substantive hearing may be dealt with within a number of hours. There is no set procedure for dealing with urgent matters but, if a case is particularly urgent, the Judicial Review Office within the Courts Service should be informed as soon as possible.

On the other hand, other particularly complex cases may take up to two years before judgment is finally given. The important thing to remember is not to delay and to seek legal advice as soon as possible.

Process map of a judicial review action



## 9 Time limits

Under the High Court Rules, judicial review actions must be brought **promptly**. This is because judicial review actions have the potential to impact the interests of the public generally as well as the interests of the applicant.

The outer time limit by which applications must be initiated is **within three months of the date the disputed decision was made**. Although this time limit can be extended by the Court where there is good reason for the delay (see below), it is best not to be in the position of having to seek such an extension.

### What does 'promptly' mean?

There is no actual definition of what promptly means. It depends on the circumstances of each case but, as a general rule, it means:

Applications should be initiated (i.e. actually lodging the required documents with the Court requesting the Court for leave – see Section 8 above) **as soon as possible**:

- once it is clear that the case is suitable for judicial review; and
- the pre action protocol has been complied with (note: there may not be enough time to comply with the pre action protocol if the outer time limit of three months has almost expired).

**NB: Do not assume that seeking leave within 3 months is sufficiently prompt. It is possible to be refused leave even though it has been sought within 3 months of the disputed decision being made.**

### Delay

If there has been any delay in making an application for judicial review, this delay will need to be explained to the Court. The following are usually not accepted as valid excuses for late applications:

- ignorance of the law, even if you have been badly advised; or
- unjustified delay in seeking proper advice.

### Extension of time

Extension of time to initiate a judicial review action may be granted by the Court. Examples of reasons why the Court may grant an extension of time are as follows:

- The grave consequences for the applicant if time is not extended.
- The time taken to pursue an alternative remedy.
- The time spent seeking legal advice if the issue is particularly complex.
- The time spent seeking public funding for the applicant.

### Environmental matters

The time limit for initiating judicial review actions which involve relying on EU environmental law is generally three months (because EU law considers the notion of acting 'promptly' to be too imprecise). In certain such cases, therefore, there is no requirement for the applicant to act as quickly as possible (although this is still advisable).

For judicial review actions concerning domestic environmental law, the applicant must act as quickly as possible.

## 10 Covering the costs of judicial review

### Costs rules

The determination of who pays for the cost of a judicial review action is a matter for the judge to decide in the particular circumstances of the case. This can be a very important issue, however, since the costs of judicial review proceedings in the High Court can be very substantial indeed.

- Leave stage

If leave to apply for judicial review is refused, the unsuccessful applicant normally bears his or her costs only.

However, there may be exceptional circumstances where an unsuccessful applicant can be ordered to pay the other party's costs. For example, if the applicant failed to engage in any correspondence with the other party prior to making the application for leave.

If leave is granted, the issue of who pays the leave stage costs is normally left until the substantive hearing of the matter.

- Substantive hearing stage

The general rule is that the losing party will pay all or a proportion of the other party's costs as well as their own costs.

However, it must be remembered that the judge always has discretion to make any order that he or she sees fit.

## **Legal Aid**

In an appropriate case, it may be possible for an individual to apply for legal aid to meet the costs of his/her judicial review application (see Section 7 above). Where an individual is legally aided, the respondent, even if it is successful, usually does not recover costs.

## **Protective Costs Orders**

- It is possible to make an application for a protective costs order (PCO) in judicial review actions. A PCO is a costs order usually made at an early stage in the judicial review action. It states that, if the applicant is unsuccessful in their case, they will not have to pay the other party's costs or will only have to pay a certain amount.
- A PCO provides protection to an applicant who wishes to take a judicial review action but is worried about the risk of having to pay the other party's costs if they lose their case. However, the circumstances in which the Court will grant a PCO are quite limited.

## **Support from statutory bodies**

The following statutory bodies may also be able to provide assistance to individuals or groups wishing to take a judicial review action against a body:

- Northern Ireland Human Rights Commission;
- Equality Commission of Northern Ireland; and
- Northern Ireland Commissioner for Children and Young People.

## **Pro bono legal assistance**

The Northern Ireland Lawyers Pro Bono Unit, run jointly by the Bar Council and Law Society, offers free legal advice to and representation for individuals that cannot access legal aid on a range of issues.

In addition, the Law Centre (NI) has launched a Legal Support Project which provides a free representation unit that will concentrate on representation at social security appeals and industrial tribunals in particular.

### **Support from PILS Project**

Where other funding is not available, the PILS Project can provide financial assistance for strategically important public interest cases which involve human rights or equality issues.

## 11 Judicial review checklist

### **The following is a quick checklist of points to consider if thinking about a judicial review action:**

1. **PUBLIC FUNCTION:** Does the body's decision/action/omission/policy have sufficient public character to make it suitable for judicial review?
2. **GROUND:** Are there valid reasons for challenging the decision?
3. **STANDING:** Does the person/group making the challenge have sufficient interest or are they a victim?
4. **REMEDY OF LAST RESORT:** Have all other appropriate remedies been pursued? What do you want to achieve? Is judicial review the appropriate remedy?
5. **TIMING:** Has there been any delay in challenging the decision? Can the challenge be made within time?
6. **COSTS:** How can the judicial review action be funded?

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<sup>i</sup> [2004] NIQB 8.

<sup>ii</sup> [2004] NIQB 15.

<sup>iii</sup> [2011] NIQB 98.

<sup>iv</sup> [2011] EWHC 2986.

<sup>v</sup> In the Board of Governors of Loreto Grammar School's Application [2011] NOB 30; In Re Loreto Grammar School's Application [2012] NICA.

<sup>vi</sup> [2004] NICA 37.

<sup>vii</sup> [2005] NIQB 66; [2006] NICA 5; [2006] NI 278.

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