

2022 **NGO**

ENGAGEMENT GUIDE SERIES

Guide to the Judicial
Review Procedure in
Northern Ireland





This project is a cross-border collaborative effort between law firms and NGO partners to develop guidelines on recourses to action for the NGO community in the areas of UN and EU mechanisms, judicial review and the appointment of an *amicus curiae*.

The pathways to justice described in these guides are all too often overlooked or misunderstood due to the overwhelming amount of complex or academic information on these mechanisms. These guidelines steer our NGO partners through easily accessible resources on the different avenues to accessing justice.

The Free Legal Advice Centre (FLAC), The Public Interest Law Alliance (PILA), a project of FLAC based in Dublin, and The Public Interest Litigation Support (PILS) Project in Belfast identified a need in the NGO community for better information and resources on legal recourses to action in the following areas:

1. Individual non-court mechanisms at European level
2. Engagement with UN Special Procedures mandate holders
3. Taking individual complaints to UN treaty bodies
4. *Amicus curiae* procedure
5. Judicial Review

To address this need, PILA, The PILS Project and Arthur Cox offices in Belfast and Dublin collaborated to develop and finalise guideline documents in each of the target areas. The guides were written or revised by the Arthur Cox offices on a *pro bono* basis and were peer reviewed by colleagues from the legal sector in the North and South.

The aim of this project is to provide NGOs with the information they need to understand the available recourses to action and to determine which (if any) to pursue. Should an NGO decide to explore a recourse to action further, the NGO may contact PILA or The PILS Project for assistance through the respective *pro bono* referral schemes.

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Information sources and useful websites are hyperlinked throughout this guide. Updated links to the NGO Engagement Guides are available on the Public Interest Law Alliance website (www.pila.ie) and the PILS Project (www.pilsni.org) website.

What is Judicial Review?

Judicial Review is a legal process where decisions of public bodies (or bodies exercising public functions) may be challenged by individuals, groups and organisations. It provides the means by which judicial control of public administrative action is exercised.

The substantive grounds upon which public authority decision-making can be reviewed are generally derived from common law (Common law refers to court decisions, as opposed to legislation).

In Northern Ireland specifically, the power of the High Court to judicially review actions and decisions can be found in [Order 53](#) of the Rules of the Court of Judicature (NI) 1980. The procedure for [Judicial Review](#) and the standard documents used in such actions can be found in the Judicial Review Practice Direction 3/2018 (which is also referred to as the Pre-Action Protocol for Judicial Review).



Who can be judicially reviewed in Northern Ireland?

There are three tests that are applied to determine whether a body or party can be subject to Judicial Review. If any of them are satisfied, the decision-maker may be susceptible to Judicial Review.

The first test is referred to as the **source of power test**. This means that if the body derives its power from statute, its decisions are within the scope for Judicial Review.

The second test is known as the **public interest test** which is where an issue is one of public law and has an impact on the public generally. This test specifically excludes where a decision affects an individual alone or simply generates public interest.

The third and final test is the widest of the three. It applies where the decision-maker may not be a public authority (in that it is funded by the public or governed by statute) but it carries out a public function. The **public function test** is the most subjective of the three and will be applied on a case-by-case basis.



Barriers to Judicial Review

It is important to note that Judicial Review is discretionary and even if an applicant satisfies one of the above tests for Judicial Review, the High Court has no statutory obligation that compels it to hear the dispute.

There are a number of factors that the High Court will take into account in deciding whether or not to exercise its discretion which should be kept in mind by those considering to take a Judicial Review action. Seven broad but common barriers to Judicial Review are discussed in turn below.

1. Public or private

The distinction between a decision being a public or private issue can be challenging to identify in an age of frequent privatisation of functions or sectors that have been historically public. Therefore, a prospective applicant should take advice on whether the type of decision they are seeking to challenge is even capable of Judicial Review. As noted above in *Who can be judicially reviewed?* the “public function test” is highly subjective and is considered a barrier to Judicial Review.

2. Standing

Standing is a further barrier to Judicial Review that should not be underestimated. Standing refers to the capacity of an individual or organisation to take an action in court. The High Court have been known to take a strict view upon an applicant’s standing because of the importance of ensuring that the proper person is challenging the decision. The test applied to an applicant’s standing depends on the type of challenge being brought. If the challenge is domestic (in that it challenges a body subject to Northern Ireland or United Kingdom legislation, or concerns a body established in Northern Ireland or the United Kingdom for example) the test is whether the applicant has sufficient interest in the decision they are challenging. In practical terms, this test is potentially broad enough to allow the court to hear challenges brought by interest groups.



3. Alternative remedies

The availability of alternative remedies may also act as a bar for potential applicants to Judicial Review. This rule has evolved through common law which means that judges have attached much weight to this factor when deciding whether to exercise their discretion. The Judicial Review Court is one of last resort which means applicants must have exhausted all available avenues of remedy before taking an action for Judicial Review. However, applicants should be mindful of that fact that this is a discretionary matter for the judge and the court can hear actions where all alternative remedies have not been exhausted.

4. Delay

Delay in bringing a Judicial Review action can bar an applicant. The High Court can refuse cases that are not brought within three months from the date of the impugned decision. For the avoidance of doubt, this time limit means three months from the date of the decision to the day the action is brought. Where the decision is continuing in nature, the three-month time limit may not apply. The rationale behind enforcing this barrier relates to the public interest in not having a public authority hindered from making further decisions while under indefinite threat of Judicial Review. Despite this, the High Court still has discretion to extend this three-month deadline in limited circumstances.

5. Application is made prematurely

The High Court can refuse a Judicial Review action where the application is made prematurely. This includes where no decision has been made yet, the decision is conditional and may not be made, or a preliminary decision has been given but no final conclusive decision has been made. The rationale behind this barrier is the public interest in saving costs and court time because there is no logic in the High Court hearing a case about an issue that may not come to pass.

6. Satellite litigation

If the case being brought constitutes “satellite litigation”, the High Court are unlikely to hear it. This refers to one of more cases being brought to court that relate to a case being heard in another court. This barrier is connected to alternative remedies and prematurity because the High Court will consider a further action in another court as inefficient and likely advise the applicant to exhaust the challenges being brought elsewhere. That being said, the High Court has the discretion to hear what might be deemed satellite litigation in exceptional circumstances.

7. Duty of candour

Finally, where an applicant has not complied with the High Court duty of candour, the case may not be heard. This barrier stems from long standing laws of equity to come to court with ‘clean hands’ and in good faith. As such, non-compliance with this duty will result in an inability to bring an application for Judicial Review. To ensure that this duty is adhered to, applicants must put before the judge all relevant papers for consideration and interact with the decision-maker with honesty and integrity.

While costs to the parties are not necessarily a barrier or a factor that a judge will consider in deciding whether or not to allow a Judicial Review application, applicants should be cautious about bringing same.

Judicial Review cases are expensive to bring and, as will be detailed further in the “Remedies” section of this guide, they may not result in a change in the decision and therefore, can result in no net benefit for the applicant.

Grounds for Judicial Review

Broadly speaking, there are four main grounds for Judicial Review which will be explored in detail below.

The grounds have not been set out in statute but developed by case law which means that they could widen, narrow and otherwise evolve in years to come.

- 1. Illegality:** Illegality is objectively the clearest ground to identify and stems from the statutory duties of public bodies to comply with the law and act within its powers. Where there is no statutory basis for a decision or where a statutory duty or obligation has not been complied with, there may be a ground for Judicial Review.
- 2. Procedural Unfairness:** Procedural unfairness is considered to be one of the widest grounds for bringing a Judicial Review action in Northern Ireland. It stems from the principle that a decision-maker must comply with general principles of fairness. As one of the wider grounds, procedural unfairness also encompasses a number of sub-grounds such as where there has been bias, a failure to consult, give reasons, hold an oral hearing, or to make sufficient inquiry or the decision goes against a legitimate expectation of the person affected by the decision.
- 3. Irrationality/Unreasonableness:** Irrationality is a further ground for Judicial Review and is a more difficult ground to satisfy than procedural unfairness. The threshold for irrationality (also referred to as “Wednesbury Unreasonableness”) is that the decision made is so unreasonable that no reasonable authority could have ever arrived at the same decision.
- 4. Proportionality:** The fourth ground for bringing a Judicial Review action is proportionality. However, this ground will only arise where the action has a human rights element. If a decision maker has not given enough weight to the effect on human rights when making a particular decision, the decision may be susceptible to review.

Procedure for Judicial Review in Northern Ireland

1. Time Limits

The [Judicial Review Practice Direction 3/2018](#), Part A, Appendix 1 (the “Pre-Action Protocol”) must be followed when bringing an action for Judicial Review in Northern Ireland. A prospective applicant should bear in mind that, notwithstanding the time limits within the Pre-Action Protocol, time will continue to run for bringing an action. In other words, time for bringing an action does not stop to facilitate compliance with the Pre-Action Protocol.

2. Letter and Response

The Pre-Action Protocol requires the applicant to write a letter to the proposed respondent setting out the issue and seeking resolution before bringing court proceedings. This letter must be sent within seven weeks of the decision being made and the respondent must reply within three weeks.

In order to ensure that an action can still be brought within the three-month time limit, prospective applicants should serve this letter as soon as possible after the decision to avoid being barred from Judicial Review for delay. The Pre-Action Protocol contains a template letter for prospective applicants to follow which directs users as to what detail the letter should include.

3. Apply for leave

Actions for Judicial Review cannot be brought without seeking the leave of the High Court. This means that applicants must obtain the Court’s permission to bring an action before they can move forward. Applicants usually engage solicitors and barristers (often referred to as counsel) to assist in drafting the application which will consist of:

- a. an *ex parte* docket which recites the application to be moved;
- b. an Order 53 statement which sets out the background to the case;
- c. the relief sought and the grounds for review;¹ and
- d. grounding affidavits and exhibits.²

¹ A draft Order 53 statement can be found in Part B.2 of the Pre-Action Protocol.

² Procedural requirements for affidavits and exhibits can be found in Part B.14-16 of the Pre-Action Protocol.

For the avoidance of doubt, skeleton arguments are not required at the application for leave stage unless directed to do so by the High Court. Skeleton arguments are summarised arguments intended to be raised by counsel during the hearing.

4. Leave Hearing

The leave hearing may be conducted on the papers, at an *inter partes* hearing or *ex parte*. *Inter partes* refers to a hearing where all parties are present and *ex parte* refers to a hearing where the applicant is present and the other party is not present or given notice of the application. The burden will be on the applicant to argue that they have a case with a reasonable prospect of success.

In Northern Ireland, most leave hearings are carried out on the papers alone.

At the end of the leave hearing, the judge may refuse leave or grant leave on all grounds, limited grounds or amended grounds.

If leave is granted, directions will be given and dates for further hearings will be set. The High Court also has the power to hear the leave application and the substantive issues of a full hearing at once where urgent circumstances require. This is often referred to as a "rolled up" hearing.

5. Preparation of the Notice of Motion

In the time between leave being granted and the full hearing, any directions given during case management hearings should be followed, funding for a full hearing should be secured and a Notice of Motion should be prepared.

The Notice of Motion gives notice to the Respondent that a full hearing is being moved and should specify the relief sought and grounds on which leave was granted. Within six weeks of receiving the Notice of Motion, the Respondent will lodge their replying affidavit and exhibits. An affidavit is a sworn, written, statement of fact which allows evidence to be presented in court. Exhibits refers to any document or item which is referred to in the affidavit. The applicant can respond to the replying affidavit within three weeks responding directly to same with what is known as a rejoinder affidavit.

If further issues arise during this process which require fresh evidence to be produced before the court, leave can be sought to file further affidavits.

6. Interlocutory Applications (if required)

Interlocutory applications can also be made between the leave hearing and the full hearing. These often concern discovery, requests to amend an Order 53 statement, or interim relief. At this interlocutory stage, notices may need to be issued to parties not part of the proceedings but involved in some other way. Once interlocutory applications have concluded, the case can be listed for hearing and the parties must lodge a trial bundle, skeleton arguments and an authorities bundle.

7. The Full Judicial Review Hearing

At the full hearing, the burden is on the applicant to prove their ground of challenge. The hearing will proceed largely on the basis of affidavit evidence and will be conducted by barristers.

The judgment is usually reserved which means it is not normally given on the day of the hearing. The final decision may grant some or all of the relief sought or refuse the relief altogether.

8. Costs

Costs are dealt with once the judgment is handed down and it should be noted that costs are always discretionary and not guaranteed. In Judicial Review actions, costs generally 'follow the event' meaning that the losing party pays the winning party's legal costs of bringing the action. However, if there is a settlement prior to the full hearing, costs should be agreed at that stage. If the applicant is legally aided and does not get costs from the respondent, it is necessary to obtain an order for legal aid taxation at the final hearing.

Appeals

If an applicant is refused leave to bring a Judicial Review action, the decision can be appealed to the Court of Appeal. As outlined in [Order 53](#), Rule 10, leave to apply to the Court of Appeal is not required when challenging the decision of the High Court to refuse leave to apply for Judicial Review.

If an applicant is granted leave, the case proceeds to full hearing and judgment is handed down. There is also a right of appeal to the Court of Appeal. The time limit for appeal is six weeks from the date on which the judgment or order of the High Court was given. During the time limit for appeal, the appellant must serve a Notice of Appeal on all parties to the proceedings in the court below. The Notice of Appeal must identify the conclusions of the first instance judge which are being challenged and the reasons why.

The next step in bringing an appeal is setting the appeal down which allows the matter to be listed for hearing. To set the appeal down, the appellant must, within seven days after service of the Notice of Appeal, enter the appeal for hearing by lodging three copies of the Notice of Appeal and a copy of the judgment with the Judicial Review office in the High Court.

After the appeal is set down, the appellant must lodge: the Respondent's notice, the pleadings, the transcript (if available), and affidavits and exhibits were in evidence in the High Court to the extent that they are relevant to the appeal in question. No fresh evidence can be produced on appeal unless it is evidence of a matter which occurred after the Judicial Review hearing or there are exceptional grounds.

Finally, it should be noted that the Court of Appeal is generally reluctant to interfere with the decision of the judge in the High Court unless it can be proven that they erred in law or principle in a manner that could be seen as unreasonable. Therefore, bringing an appeal may not result in a change in decision and will result in further costs.

Remedies in Judicial Review actions

An understanding of the remedies available is essential before considering Judicial Review as a course of action. As Section 18(1) of the Judicature Act explains, there are six key remedies available through an application for Judicial Review:

- i. An order of *mandamus*;
- ii. An order of *certiorari*;
- iii. An order of prohibition;
- iv. A declaration;
- v. An injunction; and
- vi. Damages.

In addition to appreciating the remedies available, prospective applicants should be made aware that the grant of any remedy is discretionary and not automatically available even if you win your case. However, judicial discretion can also be beneficial to applicants in the context of remedies because it allows a judge to grant remedies irrespective of whether they are the same as those remedies initially requested by the applicant.

1. **Order of mandamus** requires a public authority to perform a certain action or comply with a statutory duty. This remedy is usually sought where the applicant wants to force a body to do something it is under an implied or statutory obligation to do. Judges are generally reluctant to grant such an order due to their draconian nature and are more likely to grant one of the other above remedies.
2. **Certiorari** is the most frequently claimed remedies in Judicial Review and is colloquially referred to as a "quashing order," because it sets aside a decision made by a public authority. When a quashing order is granted, the judge will often order the public authority to take the decision again and follow the correct procedure. Therefore, the outcome of the decision may be the same and applicants should be mindful of this possibility.
3. **Order of prohibition** may be made in instances where the public authority has clearly acted beyond its powers and the applicant has succeeded in proving the ground of illegality. The order will restrain a public authority from doing

something unlawful or outside its jurisdiction. However, as with mandamus above, the threshold for this remedy is high and a judge may take the view that a declaration would suffice.

4. **Declarations** are binding statements made by the court to reflect the correct legal position on a matter or outline the rights of the parties. A declaration will be made where the court wishes to make its view clear but avoid taking more prescriptive action. Declarations are also useful in cases where the main issue is a common one and public authorities would benefit from guidance as to how to act or make decisions in the future.
5. **Injunctions** are quite flexible and can take different forms. For example, a judge could grant an injunction that stops a party from taking an action or an injunction that requires a party to take a certain action. Unlike the above remedies, injunctions can be put in place at an interim stage where the judge considers that not granting one would prejudice the proceedings and it would be just and convenient to do so.
6. **Damages** can also be claimed in Judicial Review actions. Damages will be available if the applicant can establish a private law claim in tort or contract, a right to recover a debt from a public body, or that the public body breached their rights under the European Convention on Human Rights and that damages are the most appropriate remedy.





Case Study: PILS and IEF – Integrated Education

An Application by Drumragh Integrated College for Judicial Review and in The Matter of a Decision of The Department of Education [2014] NIOB 69

Integrated education brings children and staff from Catholic and Protestant traditions in Northern Ireland, as well as those of other communities, together in one school. In 2012, Drumragh Integrated College was the only integrated Catholic/Protestant post-primary school in the district of Omagh, Co. Tyrone. Due to demand from local families, Drumragh submitted a development proposal to the Department of Education to increase their pupil numbers. It was denied.

Drumragh and the Integrated Education Fund (IEF), an independent NGO that supports integrated education in Northern Ireland, wanted to challenge the Department of Education's decision, and the way it was made, but unfortunately had no budget for legal casework. As an NGO member of The PILS Project, IEF approached the PILS team for help.

The PILS Project's solicitor and a pro bono barrister (volunteering their services for free through the PILS Pro Bono Register service) discussed legal strategy and provided representation, and the PILS Litigation Fund provided financial support to get the Judicial Review underway.



This was the first direct challenge to the Department of Education's statutory duty (under Article 64 of the Education Reform (NI) Order 1989) to encourage and facilitate integrated education.

On 15 May 2014, Mr Justice Treacy handed down the decision of the Belfast High Court, in favour of Drumragh. The judge noted that the planning processes had not been suitable, saying that the creation of an additional difficulty is the opposite of 'encouraging and facilitating'.

IEF's CEO Tina Merron has since commented on the ongoing impact that this Judicial Review continues to have, years after the judgment was published: *"The use of strategic litigation to strengthen the statutory duty for integrated education has had a profound impact on the development of a number of integrated schools in recent years. It has enabled it to become the fastest growing form of education in Northern Ireland."*



Case Study: Take Back the City – JR 204 – Housing

7,545. That is the number of households that are currently homeless in Belfast.

Supported by NI human rights NGO Participation and Practice of Rights (PPR), Take Back the City campaigners produced an interactive map of Belfast in 2021. Instead of plotting tourist attractions, this map is made up of layers of inequality data, highlighting areas of major housing need and chunks of unused public land. One area in West Belfast really stands out. The plot, known locally as Mackie’s after the former munitions factory based at the site, is made up of 25 acres of land owned by the Department for Communities, and a further 30 acres owned by Invest NI and a private developer.

And it was this very piece of land that was the subject of Judicial Review in 2022. When Belfast City Council announced that the site was going to be rezoned for non-housing use and instead converted into a - very wide – cycle path, a family in housing need applied for leave to judicially review the decision. Their legal action argued that the plan breached the Council’s own planning policy and gained widespread media attention.

In March 2022, leave was granted for JR 204 in Belfast’s High Court. The campaigners did not know whether the case would be given leave by the Court and were delighted when it was, saying it felt like families’ concerns were vindicated.

In May 2022, Belfast City Council applied for a voluntary quashing of their original decision. In June 2022, Belfast City Council brought the plans back unchanged and the same scheme was voted through by Councillors. During that planning meeting, Councillors were warned by the Council’s agent that funding for the green-way as a whole was “time-bound” and that any “slippage” would result in lost money.



The action created a highly visible campaign around which homeless families and housing campaigners could rally to lend their support. It raised awareness of the failure of multiple public authorities to work together to prioritise the human rights of thousands of families. The issue was covered extensively in local and [national media](#).

While Take Back the City was highly disappointed in both the process and the outcome for the ultimate decision on the Greenway, its campaigners plan to keep working to secure homes on the Mackie's site. In summer 2022, the coalition launched an international [urban design competition](#) to bring the vision of homeless families for the site to life.



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