Judicial review is the means by which the courts control administrative action by public bodies (including inferior courts and tribunals). It is a supervisory jurisdiction which reviews administrative action rather than being an appellate jurisdiction.

The principal rules of the court governing claims for judicial review are in CPR, Part 54, supplemented by PD 54A. CPR, r. 54.1(2)(a), defines a claim for judicial review as:

a claim to review the lawfulness of—

(i) an enactment; or

(ii) a decision, action or failure to act in relation to the exercise of a public function.

Although other remedies may be asked for, the characteristic remedies in judicial review claims are the prerogative mandatory, prohibiting and quashing orders (see 74.53 to 74.60), which county courts do not have power to grant (County Courts Act 1984, s. 38(3)(a)). Judicial review claims are assigned to the Queen’s Bench Division in the High Court by the Senior Courts Act 1981, sch, 1, para. 2(b), and are dealt with in the Administrative Court.

APPLICATIONS FOR JUDICIAL REVIEW

Most judicial review claims are brought in the Administrative Court and are governed by Pt 54 of the Civil Procedure Rules and its four accompanying practice directions. However, under the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal now has jurisdiction to deal with certain judicial review claims: Tribunals, Courts and Enforcement Act 2007 ss.15, 18. These are, broadly speaking, claims relating to decisions of the First-tier Tribunal in certain Criminal Injuries Compensation Scheme appeals and claims relating to certain decisions of the First-tier Tribunal where there is no right of appeal to the Upper Tribunal (see further below). This section deals first with traditional judicial review claims in the Administrative Court and then with judicial review claims in the Upper Tribunal.

BODIES OPEN TO JUDICIAL REVIEW
There are to conditions necessary to determine whether a decision by a body is judicially reviewable:

(a) the decision or action must be made by a public body; and

(b) the public body must make a public law decision or take a public law action.

Any body performing public law duties or powers is susceptible to judicial review. Historically, the most important factor considered by the courts in identifying activities subject to judicial review was the source of the power being exercised by the decision-maker whose decision was sought to be challenged. However, the courts have recognised that such an approach is too restrictive and they are now influenced by the type of function performed by the decision-maker (R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815).

The essential elements which comprise a public law body are (1) a ‘public element’ (which can take many different forms); and (2) the exclusion of bodies whose sole source of power is consensual submission to their jurisdiction (per Sir John Donaldson MR in R v Panel on Take-overs and Mergers, ex parte Datafin plc). Thus, the test of is a public body is not solely an examination of the source of the regulator’s power but also a consideration of the regulator’s functions.

Central government and statutory bodies

Central government and bodies which derive authority from statute are susceptible to judicial review. Central government’s bodies which have been held to be reviewable also includes inferior courts, local authorities, tribunals and inquiries and regulators with a statutory basis. Ministers acting on behalf of the Crown are also subject to judicial review (Re M [1994] 1 AC 377). The Parliamentary Commissioner for Standards has been held not to be reviewable because he or she is one of the means by which the Select Committee on Standards and Privileges carries out its functions, and those functions form part of the proceedings of Parliament (R v Parliamentary Commissioner for Standards, ex parte Al Fayed [1998] 1 WLR 669) and the courts will not intervene in the affairs of Parliament.

Other courts and tribunals susceptible to judicial review include magistrates’ courts, coroners’ courts, local election courts (R v Cripps, ex parte Muldoon [1984] QB 68 (DC); [1984] QB 686 (CA)), patents appeal tribunals (Baldwin and Francis Ltd v Patents Appeal Tribunal [1959] AC 663), county courts (save where they perform the functions of a superior court) and statutory tribunals in certain
circumstances (where a High Court judge does not sit, and dependent upon their powers and relationship with the High Court according to its enabling statute) (see *R v Cripps, ex parte Muldoon* [1984] QB 686). Judicial review does not lie against the High Court or the Court of Appeal, but only against the decisions of inferior courts.

Following the creation of a single tribunal structure by the Tribunals, Courts and Enforcement Act 2007, it has been held by the Supreme Court that a decision of the Upper Tribunal is subject to judicial review only if there is an important point of practice or principle or some other compelling reason for the case to be reviewed (*R (Cart) v Upper Tribunal* [2011] UKSC 28, [2011] 3 WLR 107). Any historical exceptions relating to judicial review of immigration and asylum decisions identified in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1 WLR 475, cannot now apply to the centralised tribunal system (*R (Rana) v Upper Tribunal (Immigration and Asylum Chamber)* [2010] EWHC 3558 (Admin), LTL 20/1/2011).

The Senior Courts Act 1981, s. 29(3), enables the High Court to make prerogative orders against the Crown Court to the same extent as it may against an inferior court other than in relation to the Crown Court’s jurisdiction in trial on indictment matters. Trial on indictment includes decisions as to sentence, such as confiscation and compensation orders, as they are an integral part of the trial process and therefore outside the scope of judicial review (*R (Faithfull) v Crown Court at Ipswich* [2007] EWHC 2763 (Admin), [2008] 1 WLR 1636).

Nationalised industries are also subject to judicial review. For example, the British Coal Corporation has been held to be reviewable in respect of its decision to close coal pits (*R v British Coal Corporation, ex parte Vardy* [1993] ICR 720).

A person or body exercising prerogative powers (i.e. non-statutory acts of executive government) may be amenable to judicial review (*R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864). In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 the House of Lords held that prerogative powers were reviewable, but Lord Roskill listed six examples of prerogative powers which he thought would not be reviewable, i.e. treat making, defence of the realm, prerogative of mercy, grant of honours, dissolution of Parliament and the appointment of ministers. The prerogative of mercy has subsequently been held to be judicially reviewable (*R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349). The prerogative power of colonial
governance does not enjoy immunity from judicial review (R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61, [2009] 1 AC 453).

However, in R (Wheeler) v Office of the Prime Minister [2008] EWHC 1409 (Admin), [2008] ACD 70, the issue of political promises made in relation to the government entering into a treat was within the scope of judicial review, although it was found that in the specific circumstances there had been no breach of legitimate expectation by the government’s decision not to hold a referendum before entering into the Lisbon Treaty.

The High Court has reviewed the exercises of prerogative powers by the Crown in certain instances, including a decision of the Foreign Secretary to refuse to issue an application with a passport (R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett [1989] QB 811) and the residual power of the Home Secretary to depart from immigration rules (R v Secretary of State for the Home Department, ex parte Beedassee [1998] COD 525).

Non-statutory bodies

Non-statutory bodies which carry out public law functions will also be susceptible to judicial review. Bodies concerned with the regulation of commercial and professional activities to ensure compliance with proper standards, e.g. the Law Society and the Institute of Chartered Accountants, may be susceptible to judicial review whether or not their powers derive from statute or royal charter. Other self-regulating organisations and other private institutions may also perform some types of public function.

The Panel on Takeovers and Mergers was held in R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815 to be judicially reviewable despite the fact that it had no direct statutory authority. The Court of Appeal was influenced by the fact that the Panel ‘oversees and regulates a very important part of the United Kingdom financial market’ without any legal support. It considered that if the body in question exercised public law functions or the exercise of its functions had public law consequences, this would be sufficient to make it reviewable. The Panel clearly exercised public functions.

Following R v Panel on Take-overs and Mergers, ex parte Datafin plc the Advertising Standards Authority was found to be a public body upon the basis that, in the absence of a self-regulatory body
such as the Authority, its function would be exercised by the Director General of Fair Trading (R v Advertising Standards Authority, ex parte Insurance Service plc (1990) 2 Admin LR 77). Similarly, although financial services self-regulating organisation lack statutory underpinning (but were contemplated by the Financial Services Act 1986), they have been found to be reviewable (R v Life Assurance Unit Trust Regulatory Organisation Ltd, ex parte Ross [1993] QB 17), as has the London Metal Exchange, which is a recognised investment exchange (R v London Metal Exchange, ex parte Albatros Warehousing BV (2000) LTL 31/3/2000). However, the decisions of bodies set up by self-regulating organisation pursuant to regulatory powers are not also automatically reviewable. The Insurance Ombudsman Bureau (a body recognised by LAUTRO as performing a complaints investigation function for the purposes of the Financial Services Act 1986 and with voluntary membership) has been held to possess power over its members which was solely derived from contract and was not therefore regarded as a public body (R v Insurance Ombudsman Bureau, ex parte Aegon Life Assurance Ltd [1994] COD 426).

The Court of Appeal has held it arguable that the Press Complaints Commission is a body subject to judicial review (R v Press Complaints Commission, ex parte Stewart-Brady (1997) 9 Admin LR 274).

A housing association, as a registered provider of social housing, is amendable to judicial review in respect of its functions in managing and allocating its housing stock (R (Weaver) v London and Quadrant Housing Trust [2009] EWCA Civ 587, [2010] 1 WLR 363 at [83]).

However, R v Panel on Take-overs and Mergers, ex parte Datafin plc has been interrupted narrowly in some subsequent cases. In R v Chief Rabbi, ex parte Wachmann [1992] 1 WLR 1036, Simon Brown J stated that, ‘[t]o attract the court’s supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision making power in question’. Sports bodies not backed by statute are generally outside the scope of judicial review. In R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 WLR 909 the Court of Appeal also took a slightly different approach and required the existence of governmental and not simply ‘public’ functions and possibly actual (as opposed to potential) governmental intervention. Therefore the Jockey Club was held to fall outside the scope of the court’s supervisory jurisdiction because it did not form part of a system of governmental control. The court was also influenced by the fact that the Club’s source of power was contractual and that a private law remedy was available to the claimant (see also R (Mullins) v Appeal Board of the Jockey Club [2005] EWHC 2197 (Admin), [2006] ACD 2; and R v Football Association Ltd, ex parte Football League Ltd [1993] 2 All ER 833).
Decisions of leaders of particular faiths on disciplinary issues have consistently been held not to be judicially reviewable (R v Chief Rabbi, ex parte Wachmann; R Imam of Bury Park Jame Masjid Luton, ex parte Sulaiman Ali [1994] COD 142; R v London Beth Din, ex parte Bloom [1998] COD 131; R v Provincial Court of the Church in Wales, ex parte Williams [1999] COD 163). However, the consistory courts of the Church of England have been deemed to be within the jurisdiction of the High Court because of their regulation by measures which have the effect of Acts of Parliament and therefore form part of the fabric of the state (R v Chancellor of the Chichester Consistory Court, ex parte News Group Newspapers [1992] COD 48).

A defendant private limited company, set up by a local authority to manage local farmers’ markets, and having as directors stallholders of those markets, was a public body amenable to judicial review. The defendant owed its existence to the authority which had set it up using its statutory powers, the defendant had effectively stepped into the authority’s shoes and the authority had assisted the defendant in many respects (R (Beer) v Hampshire Farmers Market Ltd [2003] EWCA Civ 1056, [2004] 1 WLR 233).

A private company limited by guarantee, operating on a mutual basis, whose members were healthcare professionals who were afforded the right to request certain discretionary benefits, such as professional indemnity or insurance cover, in exchange for an annual fee, was not amenable to judicial review. Its relevant functions were not governmental, but rather those of an insurance company. The company was not woven into the fabric of public regulation just because it operated in the healthcare sphere or because there was a public interest in patients being indemnified against negligent treatment (R (Moreton) v Medical Defence Union Ltd [2006] EWHC 1948 (Admin), LTL 2/8/2006).

**DECISIONS OPEN TO JUDICIAL REVIEW**

Primary legislation may be reviewed to determine its compatibility with European Union (EU) law. Where national law conflicts with any directly effective provision of EU law, the rule of national law must be set aside and EU law applied (R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603). As to the reviewability of primary legislation for compatibility with the European Convention on Human Rights in the Human Rights Act 19998, sch. 1, see chapter 88.
Subordinate legislation which has been debated in and approved by affirmative resolution of both Houses of Parliament is susceptible to judicial review (*R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129).

However, even where there is a private law cause of action, judicial review may still be appropriate where there is a sufficiently public issue. For example, judicial review was appropriate where the question was whether the Secretary of State had exceeded his powers in granting consent to a market of authority to grant leases (*R (Corporation of London) v Secretary of State for Environment, Food and Rural Affairs* [2004] EWCA Civ 1765, *The Times*, 27 December 2004, reversed on another point [2006] UKHL 30, [2006] 1 WLR 1721). Similarly, even though declarations can be granted in private law proceedings on the construction of private law contracts without the affected party being a party to the proceedings, where the dispute concerned the construction of a planning agreement under the Town and Country Planning Act 199, s. 106, in reality the document was about the planning objectives of a planning authority, which were therefore public law matters which ought to be dealt with in judicial review proceedings with the local planning authority as a party (*Milebush Properties Ltd v Tameside Metropolitan Borough Council* [2011] EWCA Civ 270 [2011] PTSR 1654).

The existence of a contractual relationship or a decision based upon the consent of the parties will always make it difficult to establish that the decision is amendable to judicial review (*R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *R v National Joint Council for the Craft of Dental Technicians (Dispute Committee), ex parte Neate* [1953] 1 QB 704).

However, public law issues may arise where an employer exercises a power which is not wholly contract-based. A decision to suspend a claimant in breach of a code of discipline which had statutory force was reviewable (*R v Secretary of State for the Home Department, ex parte Attard* [1990] 2 Admin LR 641). The employment conditions of police constables are underpinned by statute and accordingly reviewable (*Chief Constable of North Wales Police v Evans* [1982] 1 WLR 115). A decision is reviewable if it involves a constitutional or public law principle such as the appointment of Crown prosecutors (*R v Crown Prosecution Service, ex parte Hogg* [1994] 6 Admin LR 778). Public law issues arise where the question is whether the public body had authority to enter into the contract, but not where the only issue is whether or not there is a breach by a public authority of its own internal procedures or standing orders (as was the case in *R v Lambeth London borough Council, ex parte Thompson* [1996] COD 217).
Although the courts will not strike out a private law claim simply on the grounds that it would have been more appropriate to use judicial review, they will do so if it amounts to an abuse of process. In deciding whether using a private law claim for a public law issue amounts to an abuse of process the court will consider whether the private law route has been used to take advantage of the longer limitation period, or whether other judicial review rules have been flouted (Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988). It has been held that where a litigant has a claim which could be brought either by judicial review or by an ordinary action the choice of either might amount to an abuse of process. The exercise of the jurisdiction to strike out the claim on this ground would depend on a consideration of all the relevant circumstances, including any matters occurring before the proceedings were instituted and which remedy would be more appropriate (Phonographic Performance Ltd v Department of Trade and Industry [2004] EWHC 1795 (Ch), [2004] 1 WLR 2893; see also Jones v Powys Local Health Board [2008] EWHC 2562 (Admin), LTL 21/11/2008). For example, proceedings commenced by a landowner seeking declarations in respect of a breach of condition notice in the planning context should have been brought by judicial review since service of a breach of condition notice was a purely public law act, and therefore could not be challenged by private law proceedings (Trim v North Dorset District Council [2010] EWCA Civ 1446, [2011] 1 WLR 1901).

GROUND OF JUDICIAL REVIEW

Judicial review is not an appeal mechanism, but a review of public law functions (R v Richmond upon Thames London Borough Council, ex parte JC (2000) The Times, 26 April 2000 (QBD); [2001] LGR 146 (CA)). There are a number of classifications on the grounds upon which a decision by a public authority may be found to be invalid. A commonly used classification is the tripartite distinction in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 between:

(a) illegality,

(b) irrationality, and

(c) procedural impropriety.

This classification is not set in stone. Within each of the three heads are a number of grounds which are capable of being characterised in more than one way. In addition, many factual situations can be analysed in more than one way. For example, where a statute lays down a procedure with which a
Illegality needs to comply, a failure to follow the wording of the statute could fall under both the illegality head and the procedural head.

**Illegality**

Illegality arises where a decision-maker who must understand correctly the law that regulates his or her decision-making power and must give effect to it fails to do so (Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). Illegality also includes *ultra vires* acts and errors of law. An error in relation to a precedent (jurisdictional) fact is also often placed under the illegality heading. An action or decision is said to be tainted by illegality if:

(a) it was purportedly taken under legislation which does not contain the requisite power; or

(b) it was purportedly taken under legislation which contains precise limits on the circumstances in which a power or duty can be used, and the action or decision in question either exceeds those limits or fails to perform the power or duty in a proper way.

‘Illegal’ could also be used to describe a statutory instrument which conflicts with primary legislation, or an Act of Parliament which is incompatible with European Union law. One particular aspect of illegality is an allegation of a breach of Convention rights under the Human rights act 1998 (see chapter 88).

**Jurisdiction and vires in general.** The courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. Such a body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction. The term ‘jurisdiction’ has been used by the courts in different senses. A body will lack jurisdiction in the narrow sense if it has no power to adjudicate upon the dispute, or to make the kind of decision or order, in question; it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a manner which is procedurally irregular, or in a *Wednesbury* sense, unreasonable, or commits any other error of law. In certain exceptional cases, the distinction between errors of law which go to jurisdiction in the narrow sense and other errors of law remains important.

A body which acts without jurisdiction in the narrow or wide sense may also be described as acting outside its powers or ultra vires. If a body arrives at a decision which is within its jurisdiction in the
narrow sense, and does not commit any of the errors which go to jurisdiction in the wide sense, the court will not quash its decision on an application for judicial review even if it considers the decision to be wrong.

There is a presumption that the acts of public bodies, such as orders, decisions and byelaws, are lawful and valid until declared otherwise by the court. Although some acts or measures may be described as being ‘void ab initio’ or as ‘nullities’, the modern view is that it is for the court to determine both whether an act is unlawful and what the consequences of that finding of unlawfulness should be.

**Manifest unreasonableness.** A decision of a tribunal or other body exercising a statutory discretion will be quashed for ‘irrationality’, or as is often said, for ‘**Wednesbury** unreasonableness’. As grounds of review, bad faith and improper purpose, consideration of irrelevant considerations and disregard for relevant considerations and manifest unreasonableness run into one another. However, it is well established as a distinct ground of review that a decision which is so perverse that no reasonable body, properly directing itself as to the law to be applied, could have reached a decision, will be quashed.

Ordinarily the circumstances in which the courts will intervene to quash decisions on this ground are very limited. The courts will not quash a decision merely because they disagree with it or consider that it was founded on a grave error of judgment, or because the material upon which the decision-maker could have formed the view he did was limited. However, the standard of reasonableness varies with the subject matter of an act or decision. The court will quash an act or decision which interferes with fundamental human rights for unreasonableness if there is no substantial objective justification for the interference. By contrast, the exercise of discretionary powers involving a large element of policy will generally only be quashed on the basis of manifest unreasonableness in exceptional cases.

In addition to administrative acts and decisions, byelaws may be held to be void for manifest unreasonableness.

Generally where a statute provides that one body or person may substitute its own determination for that of another body where that body is ‘proposing to act unreasonably’, such a provision will be construed as applying only where the latter body is proposing to act unreasonably in the **Wednesbury** sense.
Jurisdictional defects. An inferior court, administrative tribunal or other public decision-making body will also lack jurisdiction and act ultra vires in the narrow sense where it has no power to adjudicate upon the dispute or to make the kind of decision or order in question. A public body will lack jurisdiction or vires in this sense where it is improperly constituted, or the proceedings have been improperly constituted, or authority to decide has been delegated to it unlawfully. A public body purporting to exercise statutory powers will also act without such jurisdiction or vires where its act or decision lies outside the ambit of the enabling power by reason of the parties, the subject matter, or the geographical area in which the subject matter arose. Where the exercise of statutory powers is subject to the existence of a fact or fulfilment of a condition, the exercise of those powers in the absence of that fact or without fulfilment of that condition will be without jurisdiction and ultra vires. A body may be taking a valid decision exhaust its powers such that any further decision on the same matter will be made without jurisdiction or vires.

Save where Parliament has otherwise provided, a tribunal of limited statutory jurisdiction cannot acquire jurisdiction to determine a matter by consent of the parties. Nor can it decline to adjudicate in respect of a matter on which it is bound to adjudicate.

Ultra vires acts. Whether or not a decision is ultra vires depends upon the relevant primary or secondary legislation and its interpretation on the particular facts and circumstances of each case. Therefore few general rules can be laid down. Some examples include, however, a refusal to refer a complaint relating to a milk price-fixing to a committee of investigation contrary to the policy and objects of the relevant statute (Padfield v Minister of Agriculture, fisheries and Food [1968] AC 997); the destruction of food which was ‘unlikely to become’ unfit for human consumption (R v Thames Magistrates’ Court, ex parte Clapton Cash and Carry [1989] COD 5218); the removal of school governors because of their failure to support the ILEA’s educational policy (Brunyate v Inner London Education Authority [1989] 1 WLR 542).

Errors of law. An alternative way of analysing illegality is an error of law. This is where a public body makes a decision based upon an incorrect interpretation of the law. For example, the House of Lords has held that the defendant borough council misinterpreted s. 4(2)(b) of the Housing (Homeless Persons) Act 1977 in holding that the immigrant claimant became ‘intentionally homeless’ by bringing his homeless family to the United Kingdom to live with him (Re Islam (Tafazzul) [1983] 1 AC 688).
Precedent (jurisdictional) fact/error of fact. Although error of fact has not historically been regarded as a ground for judicial review (R v Hillingdon London Borough Council, ex parte Puhlhofer [1986] AC 484), the courts will review instances where the public body has failed to establish a vital fact which triggers its power and makes the exercise of its powers lawful, e.g. the requirement to establish that a person is an ‘illegal entrant’ before the power of deportation can lawfully arise under the Immigration Act 1971 (Khera v Secretary of State for the Home Department [1984] AC 74). Factual aspects of a decision may be reviewed in some limited circumstances (see per Lords Slynn of Hadley, Nolan and Clyde in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 AC 295).

For there to be a sufficient mistake of fact giving rise to unfairness the following criteria need to be fulfilled:

(a) there must be a mistake as to an existing fact, including mistake as to the availability of evidence;

(b) the fact or evidence must now be uncontentious and objectively verifiable;

(c) the claimant or his advisers must not have been responsible for the mistake of fact; and

(d) the mistake must have played a material (but not necessarily decisive) part in the Tribunal’s reasoning (E v Secretary of State for the Home Department [2004] EWCA Civ 49, [2004] QB 1044). (See also R (Ross) v West Sussex Primary Care Trust [2008] EWHC 2252 (Admin), LTL 29/9/2008; Connolly v Secretary of State for Communities and Local Government [2009] EWCA Civ 1059, [2009] NPC 114; and R (March) v Secretary of State for Health [2010] EWHC 765 (Admin); [2010] Med LR 271.)

There is a distinction to be made between cases where an appeal court is satisfied, on new evidence, that a minister or inferior body or tribunal took a decision on the basis of a belief as to the existence of a material fact that has now been demonstrated to be plainly wrong, and cases where it took its decision in the mistake belief that there was in fact no apparently cogent evidence to refute a material finding it had made (see Shabana Shaheen v Secretary of State for the Home Department [2005] EWCA Civ 1294, [2006] Imm AR 57, where on the facts, the Court of Appeal held that the Immigration Appeal Tribunal had not made an error of law).
In exercising their functions, public bodies evaluate evidence and reach conclusions of fact. The court will not ordinarily interfere with the valuation of evidence or conclusions of fact reached by a public body properly directing itself in law. The exercise of statutory powers on the basis of a mistaken view of the relevant facts will, however, be quashed where there was no evidence, or no sufficient evidence, available to the decision-maker on which, properly directing himself as to the law, he could reasonably have formed that view. The court may also intervene where a body has reached a decision which is based on a material mistake as to the established fact. Although the general rule is that a judicial review is determined on the basis of the material that was before the decision-maker, where it is alleged that there has been a mistake of fact fresh evidence may be admitted.

The court adopts a different approach where the existence of a state of affairs is a statutory precondition to the jurisdiction of a public body. Where the existence of such a state of affairs is put in issue, the decision-maker must determine that issue, but his determination is subject to review by the court. In each case, the extent to which the court will intervene depends on the proper construction of the governing statutory provision. In some cases the jurisdiction of the decision-maker has been held to depend on the existence, objectively determined, of a particular fact or facts. Such facts may be described as jurisdictional or precedent facts. The court will itself determine whether a jurisdictional fact exists and intervene if its conclusion differs from that of the decision-maker. In doing so, the court may admit evidence on the issue. In other cases the statute will provide that a body is to have power or jurisdiction where it ‘is satisfied’ of certain matters, or where certain facts ‘appear’ to that body. In that case the court will generally only intervene if the body’s finding that the necessary facts existed was not one which a reasonable person, properly directed as to the question to be determined, could have come to, or if the body is not in fact satisfied as to the relevant matters. Where the determination of the jurisdictional fact is not in terms expressed to be a question for the subjective consideration of the relevant body, the courts may still construe the statutory provision as requiring only that the body should be subjectively satisfied as to the existence of any jurisdictional fact.

Errors of law. There is a general presumption that a public-decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been on different had the error not been committed. Where a notice, order or other instrument made
by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed.

In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete.

A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law; frustrates the purpose of a statute or otherwise acts for an improper purpose; takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant considerations into account, or fails to take relevant considerations into account; admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence or on the basis of a material mistake of fact; misdirects itself as to the burden of proof; fails to follow the proper procedure required by law; fetters its discretion or improperly delegates the decision; fails to fulfil an express or implied duty to give reasons; acts arbitrarily or discriminately; or otherwise abuses its power.

The distinction between law and fact. The distinction between what will be treated as a question of law and what will be treated as a question of fact is one of importance. In general, where a body makes an error of law in reaching a decision, it will act without jurisdiction or power, and the court may quash that decision on an application for judicial review. By contrast the court will generally not intervene on the ground that a body has reached an erroneous finding of fact unless the finding is manifestly unreasonable or a mistake has been made as to an established and material fact that gives rise to unfairness or the finding of facts was otherwise reached through an error of law or is a precedent fact.

There is often difficulty in deciding whether a question should be classified as one of law or as one of fact (or fact and degree). Determination of the primary facts is not a matter of law, but to make a finding unsupported by any evidence is an error of law. Drawing inferences from the facts as found, and in particular determining whether the primary or secondary facts fall within the ambit of a statutory description, are potentially classifiable as questions of law, as questions of fact, or as questions of mixed law and fact. The method of classification may be important, for judicial review of findings of law may entail an independent determination of the matter already decided, whereas a
review of findings of fact is likely to be more limited. It has been said that if the question is one which only a trained lawyer can be expected to decide correctly, there is a presumption that it will be categorised as one of law. Otherwise the question is usually treated as one of mixed law and fact, so that the range of meanings that can reasonably be ascribed to a statutory expression is a question of law; but whether the facts as found fall within the ambit of that expression will be held to be a question of fact, on which the decision of the competent authority will not be disturbed unless it is perverse (or is such that no reasonable authority properly instructed in the law could have arrived at it), or is erroneous because a wrong legal approach has been adopted.

A court will generally be reluctant to disturb the findings of a tribunal with specialised knowledge of technical subject matters, irrespective of whether these findings be classified as law or fact.

Irrationality

A decision may be tainted by irrationality where the decision-making body allegedly:

(a) acted for an improper purpose;

(b) acted with bad faith;

(c) fettered its discretion;

(d) improperly delegated its functions;

(e) reached a conclusion that no body properly directing itself on the relevant law and acting reasonably could have reached;

(f) failed to take into account relevant matters or took into count irrelevant matters’

(g) abused its powers or infringed a legitimate expectation; or, possibly,

(h) acted in a disproportionate manner; or

(i) did not act consistently.
The Human Rights Act 1998 may also provide a backdrop to claims based upon the ground of irrationality. When scrutinising an executive decision which interferes with human rights, the court will ask, applying an objective test, whether the decision-maker could reasonably have concluded that the inference was necessary to achieve one or more of the legitimate aims recognised by the Convention (R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840). The proportionality of any inference will now be an issue in any review by the courts of the decision of a public authority R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 in a case raising the Human Rights Act 1998.

**Improper purpose.** In cases where a power granted to a public body for one purpose is exercised by it for a different purpose, that power is deemed not to have been validly exercised, e.g. where a local authority decided to avoid the products of a company in order to put pressure upon its parent companies to withdraw their interests from South Africa (R v Lewisham London Borough Council, ex parte Shell UK Ltd [1988] 1 All ER 938); where a transaction by a local council was for the improper purpose of circumventing its restrictions on borrowing and spending (Crédit Suisse v Allerdale Borough Council [1997] QB 306).

Generally the interpretation by the courts of the purpose of a statutory provision involves search for the ‘natural and ordinary meaning’ of the word or term. Although reference may be made to Parliamentary records to aid the construction of legislation which is ambiguous or obscure (Pepper v Hart [1993] AC 593) this principle is not applicable in relation to the determination of the general purpose of a statutory scheme, but only to resolve ambiguity in a statutory provision.

The exercise of a discretionary power for a purpose alien to that for which it was granted is unlawful, regardless of whether or not that alien purpose is in the public interest. If the purposes for which the power can legitimately be exercised are specified by statute and those purposes are construed as being exhaustive, an exercise of that power in order to achieve a different and collateral object will be pronounced invalid. The fact that the relationship between the subject matter of the power and the prescribed purposes for which it may lawfully be exercised is expressed to be ascertained to the satisfaction of the competent authority does not necessarily preclude the court from deciding independently whether those purposes have indeed been pursued. If the permitted purposes are left unspecified, or are not exhaustively specified, by statute, it lies with the court to determine what, if any, are the implied restrictions on the purposes for which the power is exercisable; statutory powers are not to be employed so as to defeat the spirit of the Act conferring them. An exercise of a statutory
power which would undermine the operation of provisions in the statute for consultation or appeal will conflict with the objects of the Act. The use of statutory powers to impose penalties in respect of conduct of which the decision-maker does not approve will be quashed where that is not a legitimate purpose, as will the improper use of a power to obtain financial benefits, or the use of a power for illegitimate political purposes. In some contexts the motives or purposes animating those performing an act or making a decision may be immaterial, provided that the object for which the power was conferred has been substantially fulfilled and that the repository of the power was acting in good faith.

Where a power is exercised for purposes partly authorised and partly unauthorised by law, the court generally adopts one of two approaches. It may ascertain the dominant or true purpose for which a power is exercised, and if that purpose is permitted, the exercise will be lawful even though some secondary or incidental advantage may be gained for a purpose which is outside the authority’s powers. Alternatively, it will ascertain whether the decision to exercise the power was significantly influenced by the existence of the unauthorised purpose, and if it was, quash the exercise of the power on the ground that it was exercised having regard to an irrelevant consideration.

Where a prima facie case of misuse of power has been made out, it is open to a court to draw the inference that unauthorised purposes have been pursued if the competent authority fails to adduce any grounds supporting the validity of its conduct.

**Bad faith.** A decision is made in bad faith if it has been affected by motives such as fraud, malice, or personal self-interest. A power is deemed to have been exercised fraudulently where the decision-maker had an intention to achieve an object other than that which is claimed to be seeking, e.g. he promotion of another public or private interest. A power is regarded as exercised maliciously if an action or decision is motivated by a personal animosity towards those who are directly affected by its exercise, e.g. the decision by a county council to cease advertising in journals controlled by Times Newspapers (which had an article criticising a councillor) was explicitly held to be motivated by bad faith and declared invalid (*R v Derbyshire County Council, ex parte The Times Supplements Ltd* (1991) 3 Admin LR 241).

The exercise of a discretion by a public body in bad faith is unlawful and will be quashed by the court. A decision is taken in bad faith if it is taken dishonestly or maliciously although the courts have also equated bad faith with any deliberate improper purpose. A decision or order, though itself taken or made in good faith, will be quashed by the court if procured by fraud. In very exceptional
circumstances a narrow definition of the statutory grounds for challenging an administrative act may be effective to exclude fraud or bad faith as a ground of challenge; but it is well established that in general legislative formulae purporting to exclude judicial review of a tribunal’s proceedings altogether do not operate to exclude challenges founded on fraud. Fraud or bad faith must be expressly pleaded by the party alleging it.

There are situations where tortious liability may be incurred in respect of acts done in bad faith although no liability would arise were the same acts to be done in good faith.

**Fettering of discretion.** Where a public body maintains a rigid policy with no exceptions it thereby fetters its discretion. Although a public authority can have a policy, it must consider particular cases rather than fetters its discretion by always following its stated policy blindly.

The courts may be prepared to scrutinise closely the conduct of a decision-maker in assessing whether or not he or she has unlawfully fettered his or her discretion, e.g. a course of conduct involving the consistent rejection of applications belonging to a particular class may justify an inference that the public body has adapted a policy to refuse them all. However, it is unlikely that the courts will deem a decision-maker to have fettered his or her discretion in circumstances where he or she afforded those individuals affected the ability to make representations, e.g. decisions of local authorities in relation to the disposition of planning appeals or proposals for the compulsory acquisition of land have been upheld in circumstances where the decision was made after a public inquiry (*Franklin v Minister of Town and Country Planning* [1948] AC 87; *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281).

Where a public body has discretion in exercising its public functions, it must not fetter that discretion by adopting an over-rigid policy. There is a balance to be struck between certainty, rigidity and individual consideration. It is generally lawful, and can be desirable, for a public body to have a policy which allows for exceptions, so long as there is genuine flexibility.

**Improper delegation.** In general a public law function must be exercised only by the body to whom it has been given. When a power is provided to a person in circumstances indicating that trust is being placed in his or her individual judgment and discretion, that person must exercise that power personally unless he or she has been expressly empowered to delegate it to another. Public bodies which exercise functions analogous to the judiciary are precluded from delegating their powers of
decision unless there is express authority to that effect (General Council of Medical Education and Registration of the United Kingdom v Dental Board of the United Kingdom [1936] Ch 41).

Where an authority vested with discretionary powers affecting private rights then empowers one of its committees, members or officers to exercise those powers independently without any supervisory control, the exercise of those powers is likely to be held invalid. Thus, for example, a delegation by the Director of Public Prosecutions to non-qualified lawyers of the power to review prosecutions in order to decide whether there was sufficient evidence to proceed was held to be unlawful because the statute giving the power to the Director clearly contemplated that it would only be delegated to a member of the Crown Prosecution Service who was a lawyer (R v Director of Public Prosecutions, ex parte Association of First Division Civil Servants (1988) The Times, 24 May 1988).

**Wednesbury** unreasonableness. Lord Green MR stated in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223:

> it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

In order to prove **‘Wednesbury unreasonableness’** something overwhelming must be proved but this test has been fulfilled in a number of cases, e.g. a local authority resolution to ban a rugby club from its property for not putting pressure upon three of its players not to participate in a tour of South Africa (Wheeler v Leicester City Council [1985] AC 1054); a justice’s clerk’s refusal to supply duplicate legal aid orders (R v Liverpool Justices, ex parte R. M. Broudie and Co. (1994) 7 Admin LR 242); and the Lottery Commission’s refusal to allow a bidder one month to allay its concerns about the bid (R v National Lotter Commission, ex parte Camelot Group plc [2001] EMLR 3).

Failure to take account of relevant considerations. A further limb of the ground of irrationality comprises failure to take account of relevant considerations or the taking into account of an irrelevant consideration. For example, the court held that a borough council took into account irrelevant (philanthropic) considerations in deciding to overpay its staff, and also failed to take into account relevant considerations of comparable wages and the costs of living (Roberts v Hopwood [1925] AC 578).
A statute may expressly or impliedly make clear considerations to which regard must or must not be had. There may also be considerations to which the decision-maker may have regard in the exercise of his discretion subject to normal public law principles (see CREEDNZ Inc v Governor-General [1981] 1 NZLR 172).

A failure to assess the evidence properly, resulting in a decision which appears to be unsupported by the evidence, can also be characterised as a failure to take account of relevant considerations. This may arise where the court is unable to identify the evidence to support a decision, in which event the decision will be flawed in law (AJ (Liberia) v Secretary of State for the Home Department [2006] EWCA Civ 1736, LTL 15/12/2006).

It is not necessary to prove that the influence of irrelevant factors was the chief or main influence upon the decision made or action taken. As a general rule it is enough to prove that the influence was material or substantial (R v Inner London Education Authority, ex parte Westminster City Council [1986] 1 WLR 28). Where a decision-maker leaves out of account some relevant matter, the legal test is whether that factor might realistically have caused the decision-maker to reach a different conclusion (W v Special Educational Needs Tribunal (2000) The Times, 12 December 2000).

If the challenge is based upon a claim that relevant considerations were not taken into account, the courts will normally try to assess the actual or potential importance of the factor that was overlooked, even though this may involve a degree of speculation. Examples of decisions challenged under this ground include the unlawful expenditure of public funds by a board of guardians in cancelling a series of loans to miners without taking into account the ability of the debtors to repay their loans (Attorney-General v Tynemouth Poor Law Union Guardians [1930] 1 Ch 616) and the decision of a university to refuse to permit a controversial meeting on its premises which had been influenced by an irrelevant consideration, namely, the likelihood of violence outside the premises (R v University of Liverpool, ex parte Caesar-Gordeon [1991] 1 QB 124).

**Abuse of power/substantive legitimate expectation.** There is authority that an undertaking or promise by a public authority may lead to a legitimate expectation which must not be thwarted (R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association [1972] 2 QB 299) the fulfilment of substantive expectations has been upheld, e.g. an expectation contained in the terms of a Home Office circular setting out the conditions for the adoption of children from abroad (R v Secretary of State for the Home Department, ex parte Asif Mohammed Khan [1984] 1 WLR 1337) and an expectation that
foreign doctors given particular immigration status would be able to seek and obtain employment in the UK in their field (which subsequent guidance then sought to restrict) (R (Bapio Action Ltd) v Secretary of State for the Home Department [2008] UKHL 27, [2008] 1 AC 1003). A suggestion that the concept of substantive legitimate expectation is nothing more than a challenged based upon Wednesbury unreasonableness grounds (R v Secretary of State for the Home Department, ex parte Hargreaves [1997] 1 WLR 906) was effectively circumvented in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213.

**Proportionality.** Proportionality is a concept central both to EU law and to the European Convention on Human Rights and means that remedies or measures should be proportionate to the legitimate aim that is sought to be achieved or the state of affairs they are intended to redress, and thus the administrative process should be in proportion to the outcome of the process. The conventional view is that proportionality is simply a facet of irrationality/Wednesbury unreasonableness and there is no separate ground of proportionality within the domestic context (R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696). However, it is clear that the tests of proportionality and Wednesbury unreasonableness do not always yield the same results but are moving closer together (R (Association of British Civilian internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473, [2003] QB 1397). Although there is an overlap between the traditional grounds of judicial review and the approach of proportionality, the intensity of review is greater under the proportionality approach (R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532). Proportionality has been raised in the context of personal liberty (R v Secretary of State for the Home Department, ex parte Pegg [1995] COD 84) and has also been applied where a sentencing decision is susceptible to judicial review (R v Highbury Corner Justices, ex parte Uchendu (1994) 158 JP 409).

The principle of proportionality requires that there be a reasonable relationship between the objective which is sought to be achieved and the means used to achieve that end. The principle of proportionality will be applied by the court when reviewing action or legislation for compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms or European Union law. The courts will also quash punishments imposed by administrative bodies or inferior courts which are wholly out of proportion to the relevant misconduct. It remains an open question whether proportionality is a free-standing ground of review in domestic law. However, the courts will often consider a lack of proportionality an indication or aspect of Wednesbury unreasonableness. Although normally in judicial review proceedings the court will not substitute its own view for that of the
where the proportionality principle applies, the court will assess for itself whether the right balance has been struck.

**The intensity of review.** Where a body is endowed by statute with a discretionary power, the court will not quash any exercise of that power which is lawful and reasonable simply because the court disagrees with the decision taken. The court will review the exercise of a discretionary power to ensure that it was lawful and reasonable, according the principles set out above. The intensity of scrutiny will vary according to the subject matter and statutory context.

Where the exercise of a discretionary power is liable to interfere with fundamental human rights, the courts will examine the decision-maker’s actions more rigorously than where such interests are not directly affected by the action taken. The court will decide for itself whether, as a matter of law, a fundamental human right has been breached. Scrutiny of administrative action may be less intense where the exercise of a discretion involves considerations of policy or allocation of resources, national security, where statutory powers are required to be exercised in emergencies, or where they are subject to political controls.

**Administrative consistency.** There is a general principle, as one aspect of irrationality as a ground for review, that like cases should be treated alike (but clearly where cases are not alike this may justify differential treatment).

Where the Agricultural Wages Board established a new category of worker whose minimum wage was lower than that of a standard worker, but excluded mushroom harvesters from those who could be paid this rate, this exclusion was found to infringe the principle of public administration that all persons in a similar situation should be treated similarly (*R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin), *The Times*, 15 July 2004).

**Procedural impropriety**

Procedural impropriety is concerned with the procedure by which a decision is reached, not the ultimate outcome. In order to prove procedural impropriety the claimant must show that the decision was reached in an unfair manner. If there is no statutory framework which expressly stipulates the relevant procedural requirements, there are two applicable common law rules under this head, namely:
(a) the rule against bias, which requires the public body to be impartial and to be seen to be so; and

(b) the right to a fair hearing whereby those affected by a decision of a public body are entitled to know what the case is against them and to have a proper opportunity to put their case forward.

Infringement of express procedural rules

A decision made or action taken by a public body should not infringe express procedural rules outlined in primary or secondary legislation, e.g. a notice of school closure was quashed where there was a failure to consult under s. 184 of the Education Act 1993 and a government circular (R v Lambeth London Borough Council, ex parte N [1996] ELR 299); procedural codes are laid out in the town and country planning legislation which set out the procedure for an appeal or a full structured inquiry. Courts may be called upon to adjudicate upon the extent to which the statutory procedure if fulfilled. There have also been cases where the courts have supplemented a statutory scheme over and above that which is expressly specified (e.g. Fairmount Investments Ltd v Secretary of State for the Environment [1976] 1 WLR 1255). However, it is generally recognised that such supplementation should be exercised only in extreme circumstances where considered necessary to promote the purpose of the legislation (Wiseman v Borneman [1971] AC 297).

Implied procedural rules

The requirement to comply with express procedural rules is supported by the common law obligation to provide a fair hearing. The rules of natural justice embody a duty to act fairly. Whenever a public function is performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly. This is more compelling in the case of any decision which may adversely affect a person’s rights or interests (e.g. R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association [1972] 2 QB 299) but will not apply to situations which are too remote to qualify for a fair hearing.

Bias
In some cases where the decision-maker has a direct personal or proprietary interest in the outcome of a matter, he or she should always be disqualified from adjudicating upon the issue. However, when the interest is indirect, the courts generally apply the following test. First, the court should ascertain all the circumstances which have a bearing on the suggestion that the tribunal is biased. Secondly, it should ask whether those circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility that the tribunal is biased (Porte v Magill [2001] UKHL 67, [2002] 2 AC 357. See also Bolkiah v Brunei Darussalam [2007] UKPC 62. LTL 9/11/2007.

The House of Lords has held a judge in the House of Lords involved with Amnesty International to be automatically disqualified because his participation in a case where Amnesty was an intervener offended the fundamental principle that man may not be a judge in his own cause. Although this principle normally applies only in cases where the judge has a pecuniary interest, the court confirmed that it could and did extend to cases where the judge has a non-pecuniary interest (sufficient to amount to an interest in the outcome of the proceedings) in one of the parties thereto (R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119, subsequently applied in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451).

In considering the questions of apparent bias it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there is a real possibility that the decision-maker is biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant issues (Georgiou v Enfield London Borough Council [2004] EWHC 779 (Admin), [2004] LGR 497).

The question of independence should be tested by reference to the fair-minded and informed observer’s knowledge of all the information which could have been ascertained by fair-minded outside observer (Re P (A Barrister) [2005] 1 WLR 3019). The fair-minded observer would not reach a conclusion without seeking to obtain the full facts (Virdi v Law Society [2010] EWCA Civ 100, [2010] 1 WLR 2840). However, the information to be attributed to the fair-minded and informed observer includes that which would be apparent to the court upon investigation and is not restricted to that available to a hypothetical observer at an original hearing (National Assembly for Wales v Condon [2006] EWCA Civ 1573, [2006] NPC 127). The attributes of the fair-minded and informed observer include reserving judgment until she has seen and fully understood both sides of an argument, taking the trouble to inform herself on all relevant matters, taking a balanced approach to any information she is given, being able to put material into social, political or geographical context, knowing that
judges like anyone else have their weaknesses but knowing that fairness requires judges to be, and be seen to be, unbiased (Hellow v Secretary of State for the Home Department [2008] UKHL 62, [2008] 1 WLR 2416, subsequently applied in Competition Commission v BAA Ltd [2010] EWCA Civ 1097, [2011] UKCLR 1).

A public body should not allow decisions to be made by people who have a financial interest in the decision or a family/business connection with any party. However, it has been held that no bias arose in the case of a grant of planning permission to develop a rugby club’s land where it was subsequently discovered that the club had an interest in acquiring land belonging to the chairman of the planning authority (R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd [1996] 3 All ER 304), nor where a planning officer had to consider various development proposals, including one put forward by her husband’s company, since her decision was actually adverse to that company (R (Persimmon Homes Ltd) v Vale of Glamorgan Council [2010] EWHC 535 (Admin), LTL 22/3/2010). Bias may also arise because of a personal business relationship between the adjudicator and one of the parties, or because of partisanship by the adjudicator in relation to the issues to be resolved. Where a decision-maker takes part in the determination of an appeal against one of his or her own decisions (unless he or she is expressly authorised to do so by statute) it will be tainted by apparent bias, e.g. a clerk to a statutory tribunal could not act as clerk to the appeal tribunal hearing the appeal against that decision (R v Salford Assessment Committee, ex parte Ogden [1937] 2 KB 1). See also R (Al-Hasan) v Secretary of State for the Home Department [2005] UKHL 13, [2005] 1 WLR 688.

Right to a fair hearing

The right to a fair hearing embodies the idea of even-handedness between the parties in relation to obtaining information which is made available, and the provision of an opportunity to make representations. The concept of a fair hearing varies from case to case. For example, there may be an entitlement to an oral hearing in cases where the livelihood or liberty of the claimant is at stake, whereas such an entitlement will not be deemed necessary in relation to more minor matters with less potentially adverse consequences. The two main elements of procedural fairness are:

(a) the right to know the opposing case; and

(b) a fair opportunity to answer that case.
Reasons

There is no general duty under English law upon a decision-maker to give reasons for his or her decisions although statute does provide for such a duty in certain instances (e.g. Housing act 1985, s. 64). However, in *R v Civil Service Appeal Board, ex parte Cunningham* [1992] ICR 816 Lord Donaldson MR stated that:

> I do not accept that, just because Parliament has ruled that some tribunals should be required to give reasons for their decisions, it follows that the common law is unable to impose a similar requirement upon other tribunals, if justice so requires.

In *R v Ministry of Defence, ex parte Murray* [1998] COD 134, the Divisional Court confirmed that although the law did not at present recognise a general duty to give reasons, there was a perceptible trend towards an insistence on greater transparency in decision-making. Where a statute conferred a power to make decisions affecting individuals, the court would readily apply necessary additional procedural safeguards so as to ensure the attainment of fairness. The Court of Appeal has acknowledged that it might be the trend for requirements to give reasons to become the norm rather than the exception, but despite this there remains no general duty at common law to give reasons for an administrative decision. Indeed the Court of Appeal considered that the Freedom of Information Act 2000 was Parliament’s considered statutory framework for the disclosure of information held by public authorities and its enactment therefore militated against the incremental imposition by the judiciary of a common law general duty to give reasons (*R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312, LTL 25/11/2008).

Reasons should therefore be given where either:

(a) a decision without reasons was insufficient to achieve justice; or

(b) the decision appeared aberrant.

Cases suggest that a duty to give reasons arises in cases where the body departs from its usual policy or practice (*R v Islington London Borough Council, ex parte Rixon* [1997] ELR 66), and where a failure to give reasons or the giving of inadequate reasons would lead to the quashing of the decision in question (*R v Westminster City Council, ex parte Ermakov* [1006] 2 All ER 302).
Procedural legitimate expectation

A procedural legitimate expectation arises in circumstances where a decision deprived the claimant of:

some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374).

The concept of procedural legitimate expectation has been applied to ensure that no adverse decision will be taken without first giving the affected party an opportunity of making representations.

Examples of legitimate expectations are that taxi drivers had a legitimate expectation of consultation prior to the issue of licences in circumstances where such consultation had been expressly promised (R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association [1972] 2 QB 299); civil servants had a legitimate expectation of consultation prior to the removal of trade union right, subject to considerations of national security (Council of Civil Unions v Minister for the Civil Service [1985] AC 374); coal miners’ unions had a legitimate expectation of consultation on pit closures (R v British Coal Corporation, ex parte Vardy [1993] ICR 720); illegal immigrants had a legitimate expectation of an opportunity to state their case prior to deportation (R v Attorney-General of Hong Kong, ex parte Ng Yuen Shiu [1983] 2 AC 629); residents had a legitimate expectation of being consulted about all the options in respect of a traffic order (R (Montpeliers and Trevors Association) v City of Westminster [2005] EWHC 16 (Admin), [2006] LGR 304).

Consultation

In many areas consultation is playing an increasingly important role. For example, in the context of environmental decisions, consultation is particularly significant given the Government’s obligations under the Convention on Access to Information, Public Participation in Decision-Making and Access to
Justice in Environmental Matters 1998 (the Aarhus Convention). There are four basic requirements of an adequate consultation:

(a) It must be at a time when proposals are still at a formative stage.

(b) The proposer must give sufficient reasons for any proposal to allow intelligent consideration and response.

(c) Adequate time must be given for consideration and response.

(d) The product of consultation must be conscientiously taken into account in finalising any proposals.


ALTERNATIVE REMEDIES TO JUDICIAL REVIEW

Generally, any alternative remedies should be exhausted before resorting to judicial review in cases where the alternative remedy is adequate to resolve the complaint (R v Sandwell Metropolitan Borough Council, ex parte Wilkinson (1998) 31 HLR 22). Although the jurisdiction of the court to grant relief by way of judicial review is not ousted by the existence of an alternative remedy, it may exercise its discretion to refuse relief, refuse to grant permission or adjourn the case until after the alternative remedy has been used.

Where there is an alternative remedy available that is more suitable, a judicial review will not be permitted to continue in the Administrative Court. For example, where a matter concerning the lawfulness of the arrest and detention of various individuals could have instead been brought in private law as false imprisonment, and where there were complex factual issues and disputes of fact involved which were wholly inappropriate for judicial review proceedings, the matter should have been addressed in an ordinary Queen’s Bench claim (Sher v Chief Constable of Manchester [2010] EWHC 1859 (Admin), [2011] 2 All ER 364).
A number of cases have indicated that judicial review is to be regarded as a remedy of last resort. For example, permission to apply for judicial review of a decision of the Law Society was set aside because of the existence of an alternative remedy in the form of an appeal to the Master of the Rolls (R v Law Society, ex parte Kingsley [1996] COD 59); permission to apply for judicial review was set aside where a claimant had a statutory right of appeal to the Secretary of State under the Town and Country Planning Act 1990, s. 78, against a grant of planning permission subject to conditions (R v Secretary of State for the Home Department, ex parte Watts [1997] COD 152); judicial review of a decision of the Customs and Excise Commissioners was refused because the claimant should have invoked a statutory right of recourse to a value added tax and duties tribunal (R v Commissioners of Customs and Excise, ex parte Bosworth Beverages Ltd (2000) The Times, 24 April 2000); judicial review of a decision of the Secretary of State for the Home Department to issue a notice of liability to a civil penalty under the Immigration and Asylum Act 1999, s. 35, was refused on the basis that the claimant’s remedy was to defend civil proceedings brought by the Home Secretary after the expiry of the time prescribed for payment of the penalty (R (Balbo B & C Auto Transporti Internazionali) v Secretary of State for the Home Department [2001] EWHC 195 (Admin), [2001] 1 WLR 1556); a challenge to the service of prohibition notices by the FSA should have been by way of appeal to the Financial Services and Markets Tribunal rather than by way of judicial review (R (Davies) v Financial Services Authority [2003] EWCA Civ 1128, [2004] 1 WLR 185).

**JUDICIAL REVIEW CLAIMS IN THE ADMINISTRATIVE COURT**

A claim for judicial review is a two-stage process. The claimant must first seek permission to apply for judicial review. This application for permission will generally be dealt with first on the papers by a judge of the Queen’s Bench Division (Administrative Court), after the defendant has had an opportunity to serve its Acknowledgement of Service and Summary Grounds for Contesting the Claim. If permission on the papers is refused, the claimant may then renew his application at an oral hearing. If permission is granted as such a hearing, the matter then proceeds to a substantive hearing, following service of further evidence by the parties and Detailed Grounds for Contesting the Claim.


When to use Part 54. A claimant must use Pt 54 if he is seeking a mandatory order, a prohibiting order or a quashing order, or an injunction under the Senior Courts Act 1981 s.30 to restrain a person from
acting in any office in which he is not entitled to act: Senior Courts Act 1981 ss.30, 31(1), Pt 54.2. This is so whether or not the claimant is seeking any additional other remedy: Pt 54.3(1). Mandatory, prohibitory and quashing orders are the new names for orders of mandamus, prohibition and *certiorari*.

A claimant may use Pt 54 where he is seeking an injunction or a declaration and must do so if he is also seeking a mandatory, prohibiting or quashing order: Pt 54.3(1). The court may rant a declaration or an injunction in a claim for judicial review if, having regard to the nature of the matters in respect of which relief may be granted by mandatory, prohibitory and quashing orders and the nature of the persons and bodies against whom relief may be granted by such orders and all the circumstances of the case it would be just and convenient for the declaration to be made or the injunction granted: Senior Courts Act 1981 s.31(2). A claimant may also use Pt 54 if he is seeking damages, restitution or the recovery of a sum due, but only if he is in addition seeking one or more of the other remedies mentioned above: Pt 54.3(2).

Part 54.1(2)(a) defines a claim for judicial review as a claim to review the lawfulness of an enactment or of a decision, action or failure to act in relation to the exercise of a public function. If a claim contains some elements which fall within the definition of judicial review and some elements which fall outside it, the court will often leave it to the claimant the choice of whether to use Pt 54; *O’Reilly v Mackman* [1983] 2 A.C. 237; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624; *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 [HL]; *Clark v University of Lincolnshire* [2000] 3 All E.R. 752, CA. However, it is important to bear in mind that the time limits for making an application for judicial review are short and that the procedure contains other important safeguards for defendants, such as the requirement for permission (see below). Although the court now has power to transfer proceedings into and out of Pt 54 (Pt 54.20), a claimant who issues Pt 7 or Pt 8 proceedings in an attempt to get round the Pt 54 time limits or other safeguards is liable to have his claim struck out for abuse of the process of the court; see *Clark v University of Lincolnshire* (referred to above); *Jones v Powys Local Health Board* (2009) 12 C.C.L. Rep. 68; cf. *R v Chief Constable of the British Transport Police Ex p. Farmer* [1998] C.O.D. 484.

**Time limits.** An application for judicial review must be made promptly and in any event not later than three months after the grounds to make the claim first arose: Pt 54.5(1). The time limit cannot be extended by agreement between the parties: Pt 54.5(2). Moreover, this is subject to any enactment which provides a shorter time limit for specific types of claim: Pt 54.5(3). When the claim seeks to
quash a judgment, order or conviction, the date when the grounds to make the claim first arose is the
date of the judgment, order or conviction: Practice Direction 54A para. 4.

If a claim is not made within time, the claimant can ask the court to extend time. The onus is on the
claimant to show good cause for the delay. It is not on the defendant to show the delay has caused
does not bring the proceedings promptly and in any event not later than three months after the
grounds to make the claim first arose but permission to proceed with the judicial review is granted,
the defendant can at the substantive hearing contend that relief should be refused on the ground that
its grant would be likely to cause substantial hardship to, or substantially prejudice the rights of, any
person or would be detrimental to good administration: Senior Courts ct 1981 s.31(6); *R v Criminal
Injuries Compensation Board Ex p. A* [1999] 2 A.C. 330. It is important for the purposes of time limits
to identify the correct decision being challenged; see *R. (Burkett) v Hammersmith and Fulham LBC*
[2002] 1 W.L.R. 1593. This decision also left open the question whether provision in Pt 54.4(1) that
the claim form must be filed “promptly” is sufficiently certain to comply with the right of a fair hearing
within a reasonable time in art. 6(1) of the European Convention on Human Rights. However, the
Court of Appeal has since confirmed that the requirement for promptness is compatible with the
requirements of art. 6(1): see *Hardy v Pembrokeshire CC* [2006] Env. L.R. 28; *Finn-Kelcey v Milton

**Pre-Action Protocol.** This protocol, which can be found on the website of the Ministry of Justice (as
[www.justice.gov.uk](http://www.justice.gov.uk)), sets out a code of good practice and contains the steps which parties should
generally follow before making a claim for judicial review. All claimants will need to satisfy themselves
whether they should follow the protocol, depending upon the circumstances of their case. The
protocol will not be applicable in urgent cases nor where the defendant has no legal power to change
the decision under challenge. Where the use of the protocol is appropriate, the court will normally
expect all parties to have complied with it and will take into account compliance or non-compliance
when giving directions for case management of proceedings or when making orders for costs.
However, even in emergency cases, it is good practice to fax to the defendant the draft Claim Form
which the claimant intends to issue. A claimant is also normally required to notify a defendant when
an interim mandatory order is being sought.

The protocol does not affect the time limit specified by Pt 54.5(1), and compliance with the protocol
alone is unlikely of itself to be sufficient to persuade a court to allow a late claim, although it should
be a factor taken into account.
The protocol states that before making a claim, the claimant should send a letter to the defendant. The purpose of this letter is to identify the issues in dispute and establish whether litigation can be avoided. Claimants should normally use the suggested standard format for the letter outlined at Annex A of the protocol. The letter should contain the date and details of the decision, act or omission being challenged and a clear summary of the facts on which the claim is based. It should also contain the details of any relevant information that the claimant is seeking and an explanation of why this is considered relevant. The letter should normally contain details of any interested parties (as defined in Pt 54.1(2)) known to the claimant. They should be sent a copy of the letter before claim for information.

Defendants should normally respond within 14 days using the standard format at Annex B of the protocol. Failure to do so will be taken into account by the court and sanctions may be imposed unless there are good reasons. Where it is not possible to reply within the proposed time limit the defendant should send an interim reply and propose a reasonable extension. Where an extension is sought, reasons should be given and, where required, additional information requested. If the claim is being conceded in part or not being conceded at all, the reply should say so in clear and unambiguous terms, and:

(a) where appropriate, contain a new decision, clearly identifying which aspects of the claim are being conceded and which are not, or, give a clear timescale within which the new decision will be issued;

(b) provide a fuller explanation for the decision, if considered appropriate to do so;

(c) address any points of dispute, or explain why they cannot be addressed;

(d) enclose any relevant documentation requested by the claimant, or explain why the documents are not being enclosed; and

(e) where appropriate, confirm whether or not the defendant will oppose any application for an interim remedy.

The response should be sent to all interested parties identified by the claimant and contain details of any other parties whom the defendant considers also have an interest.
Avoiding proceedings. The pre-action protocol states that the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation. Both claimant and defendant may be required by the court to provide evidence that alternative means of resolving the dispute were considered and the courts will have regard to this as well as the other parts of the protocol when determining costs. As well as following the pre-action protocol, parties should bear in mind the guidance of the Court of Appeal in R. (Cowl) v Plymouth City Council - Practice Note [2002] 1 W.L.R. 803, which emphasise the need in a public law context to consider alternative ways to resolve the dispute before resorting to litigation. This guidance was recently endorsed and reiterated by the Court of Appeal in R. (on the application of C) v Nottingham City Council [2011] 1 F.C.R. 127.

Standing and the “victim” test. A court may not grant permission to apply for judicial review unless the claimant has sufficient interest in the matter to which the claim relates: Senior Courts Act 1981 s.31(3). Whether a party has a sufficient interest is a mixed question of fact and law: see R v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd [1982] A.C. 617, in which the House of Lords also found that it was generally undesirable for the courts to consider standing as a preliminary issue. If permission is granted, standing can be considered again at the substantive stage.

When the application for judicial review includes a claim that a public authority has acted or proposes to act in a way which is made unlawful under s.6 of the Human Rights Act 1998, the claimant must also establish that he is a “victim” of the unlawful act for the purposes of art. 34 of the European Convention on Human Rights: see ss.7(1), (7) of the Human Rights Act 1998.

Permission. A claimant needs the court’s permission to proceed with a judicial review. Permission is needed even if the proceedings are commenced as a private law claim and subsequently transferred to the Administrative Court: Senior Courts Act 1981 s.31(3), Pt 54.4. The question of permission will generally be considered without a hearing in the first instance: Practice Direction 54A, para. 8.4. The court will serve its decision on the parties: Pt 54.11.

An applicant requires permission to proceed with a judicial review application in the Upper Tribunal: Tribunals, Courts and Enforcement Act 2007 s.16(2). The application for permission is usually considered on the papers first, and the Upper Tribunal is required to send to the applicant, each respondent and any other person who provided an acknowledgement of service (and may send to any other person who provided an acknowledgement of service) (and may send to any other person who may have an interest in the proceedings) written notice of its decision and the reasons for any refusal, or any limitations or conditions on the grant of permission: Upper Tribunal Rules r.30(1).
If permission on the papers is refused, or granted on limited grounds or subject to conditions, the applicant may apply for the decision to be reconsidered at a hearing. Such an application must be made in writing and must be received by the Upper Tribunal within 14 days after the date on which the Upper Tribunal sent written notice of its permission decision to the applicant: Upper Tribunal Rules r.30(4), (5). The parties entitled to attend the permission hearing must be given at least two working days’ notice of the hearing: Upper Tribunal Rules r.36(2)(a).

If permission is refused, or is granted subject to conditions, the claimant may request that the decision be reconsidered at a hearing: Pt 54.12. Such a request must be filed within seven days after service of the court’s reasoned decision refusing to give (unconditional) permission: Pt 54.12(4). A defendant or interested party who has not acknowledged service of the claim form in accordance with Pt 54.8 will not be allowed to take part in the permission hearing unless the court allows him to do so: Pt 54.9(1)(a).

If permission is refused at the oral hearing, the claimant may apply to the Court of Appeal for permission to appeal: Pt 52.15(1). The claimant must use the appellant’s notice N161: Pt 52 Practice Direction para. 5.1. The application must be made within seven days of the Administrative Court decision: Pt 52.15(2). On the application, the Court of appeal may, instead of giving permission to appeal, give permission to apply for judicial review: Pt 52.15(3). Where the Court of Appeal gives permission to apply for judicial review, the substantive hearing will be in the Administrative Court unless the Court of Appeal orders otherwise: Pt 52.15(4). If the Court of Appeal refuses permission to appeal, there is no further appeal to the Supreme Court: Access to Justice Act 1999 s.54(4), Pt 52 Practice Direction para. 4.8.

Where the court grants permission to apply for judicial review, it may also give directions: Pt 54.10. The court will serve the order granting permission, and any directions, on the claimant, the defendant and on any other person who filed an acknowledgement of service: Pt 54.11.

Neither the defendant nor any interested party may apply to set aside the grant of permission: Pt 54.13.

Permission to proceed with a claim for judicial review must be obtained from a High Court judge (usually one of the Queen’s Bench Division who has been assigned to hear matters listed in the Administrative Court Office List) (CPR, r. 54.4; Senior Courts Act 1981, s. 31(3)). To grant permission the court has to be satisfied that:

(a) there is an arguable case for review;
Traditionally the test for the grant of permission has been that a claimant must demonstrate to the court upon ‘a quick perusal of the papers’ that there is an arguable case for granting relief (R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617).

Permission should be granted if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the claimant. The Court of Appeal has held that the test to be applied in deciding whether to grant permission is whether the judge is satisfied that there is a case fit for further investigation at a full with-notice hearing of a substantive claim for judicial review (R v Secretary of State for the Home Department, ex parte Begum [1990] COD 107). However some judges seem to apply more stringent criteria and require a claimant to demonstrate something approaching a reasonable prospect of success or a strong prima facie case.

Permission will be refused where an application is frivolous, vexatious or hopeless; or a claim is made by ‘busybodies with misguided or trivial complaints of administrative error’ (R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617); or a claim is misconceived, unarguable or groundless.

Response. The defendant and any other person served with the claim form who wishes to contest the claim or to support it on additional grounds must serve detailed grounds and any written evidence within 35 days after service of the order giving permission: Pt 54.14. There is no prescribed form for the detailed grounds. Where the party filing detailed grounds intends to rely on documents not already filed, he must file a paginated bundle of those documents when he files the detailed grounds: Practice Direction 54A para. 10.1.

Disclosure. Disclosure is not required unless the court orders otherwise: Practice Direction 54A para. 12. Disclosure will be ordered to the extent that the justice of the case requires it: O’Reilly v Mackman [1983] 2 A.C. 237.

Relief. Where the court makes a quashing order, it may remit the matter to the decision maker and direct it to reconsider the matter and reach a decision in accordance with the judgment of the court.
or, insofar as any enactment permits, substitute its own decision for the decision to which the claim relates: Pt 54.19(2), Senior Courts Act 1981 s.31.

Judicial review claims in the Upper Tribunal

The Upper Tribunal (Administrative Appeals Chamber) has jurisdiction to deal with classes of claim specified by direction where certain other conditions are met: Tribunals, Courts and Enforcement Act 2007 ss.14, 18. Such a direction was issued by the Lord Chief Justice with effect from November 4, 2008, specifying two classes of judicial review claim to be dealt with in the Upper Tribunal, namely applications relating to decisions of the First-tier Tribunal in certain Criminal injuries Compensation Scheme appeals: and applications relating to certain decisions of the First-tier Tribunal where there is no right of appeal to the Upper Tribunal (unless, in either type of case, the application seeks a declaration of incompatibility under s.4 of the Human Rights Act 1998): see Lord Chief Justice’s Direction Classes of Cases Specified under s.18(6) of the Tribunals, Courts and Enforcement Act 2007.

Applications for judicial review or for permission to apply for judicial review specified under s.18(6) brought in the High Court which satisfy other specified conditions must be transferred to the Upper Tribunal and certain other such applications may be so transferred if it appears to the High Court just and convenient to do so: Senior Courts Act 1981 s.31A.

Judicial review claims in the Upper Tribunal follow a broadly equivalent procedure to those brought in the High Court, and are governed by The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (“the Upper Tribunal Rules”). The person bringing the claim is referred to as the applicant: Upper Tribunal Rules, r.2. There is a two stage process, in which the applicant must first seek permission to apply for judicial review. The respondent has the opportunity to respond by serving an Acknowledgment of Service and summary of grounds for opposing the application. Permission is usually considered by a judge of the Upper Tribunal on the papers first, and if permission is refused the applicant may renew his application at an oral hearing. If permission is granted, the matter proceeds to a substantive hearing, following the service of any further evidence by the parties and detailed grounds for contesting the claim.

Time limits. The principal time limit for judicial review claims in the Upper Tribunal is equivalent to that in the High Court, that is to say applications must be made promptly and (unless a shorter time limit is specified on any other enactment) must be received by the Tribunal no later than three months after the date of the decision, action or omission to which the application relates: Upper Tribunal Rules, r.28(2). However, an application for permission to bring judicial review proceedings challenging a decision of the First-tier Tribunal may be made later than that tie if it is made within one month after
the date on which the First-tier Tribunal sent written reasons for the decision or notification that an application for the decision to be set aside (itself made in time) has been unsuccessful: Upper Tribunal Rules, r.28(3). The Upper Tribunal may extend time for bringing a judicial review claim: Upper Tribunal Rules r.5(3)(a). There is an equivalent provision to s.31(6) of the Senior Courts Act 1981 giving the Upper Tribunal power to refuse permission or to refuse any relief where it considers that there has been undue delay and that granting the relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration: Tribunals, Courts and Enforcement Act 2007 s.16(4), (5). See further above in relation to High Court judicial review claims.

Standing. As with the High Court, the Upper Tribunal may not grant permission to apply for judicial review unless the applicant has sufficient interest in the matter to which the application relates: Tribunals, Courts and Enforcement Act 2007 s.16(3). See further above in relation to High Court judicial review claims.

Relief. The Upper Tribunal has power when determining judicial review cases to grant mandatory, prohibiting and quashing orders, declarations and injunctions. Where it grants such relief, this has the same effect as, and is enforceable as if it were, the corresponding relief granted by the High Court on an application for judicial review: Tribunals, Courts and Enforcement Act 2007 s.15(1), (3). In deciding whether to make such orders, the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant such relief in a judicial review application: Tribunals, Courts and Enforcement Act 2007 s.15(4), (5).

The Upper Tribunal may also make an award of damages, restitution or the recovery of a sum due if the application includes such a claim and the Tribunal is satisfied that the High Court would have made such an award if the claim had been made in a High Court action: Tribunals, Courts and Enforcement Act 2007 s.16(6).

Where the upper Tribunal makes a quashing order, it may remit the matter back to decision maker with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal, or, in the case of the decision of a court or tribunal quashed on the ground that there has been an error of law, it may substitute its own decision where, without the error, there would have been only one decision that the court or tribunal could have reached: Tribunals, Courts and Enforcement Act 2007 s.175. A decision substituted by the Upper Tribunal has effect as if it were a decision of the relevant court or tribunal.

Requirement for prompt commencement
In a claim for judicial review the claim form must be filed promptly, and in any event not later than three months after the grounds to make the claim first arose (CPR, r. 54.5(1)). This time limit may not be extended by agreement between the parties (r. 54.5(2)). Where the High Court considers that there has been undue delay in making a claim for judicial review, the court may refuse to grant permission or any relief sought in the claim if it considers that the grant of the relief sought would be ‘likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration’ (Senior Courts Act 1981, s. 31(6)).

PROCEDURE ONCE PERMISSION HAS BEEN GRANTED

Defendant’s evidence and evidence in reply

If permission is given to proceed with a claim for judicial review, the order granting permission will be served on the defendant and any other person who filed an acknowledgement of service (CPR, r. 54.11). Any of those persons who wish to contest the claim, or to support it on additional grounds, must, within 35 days after service of the permission order, file and serve the detailed grounds for contesting or supporting and their written evidence (r. 54.14(1)). If it is intended to rely on documents not already filed, a paginated bundle of the new documents must be filed with the detailed grounds (PD 54A, para. 10.1). In judicial review proceedings, CPR, r. 54.14(1), applies instead of r. 8.5(3) to (6) (r. 54.14(2)). The 35-day time limit can be extended or shortened on application to a master of the Administrative Court Office or a High Court judge (r. 3.1(2)(a)). The 35-day time limit applies both to written evidence and to detailed grounds for contesting the claim or supporting it on additional grounds (R (J) v Newham London Borough Council [2001] EWHC 992 (Admin), The Independent, 10 December 2001). Failure to serve within the time limit may be dealt with by the general discretion of the court to extend time, subject to the overriding objective. Any evidence in reply should include details of facts which the defendant intends to rely upon, its answers to issues raised by the claimant, a response to the claimant’s evidence, and should exhibit all documents relevant to the decision challenged which have not been exhibited with the claimant’s evidence and which the defendant wishes to rely upon at the substantive hearing. The written evidence should also make clear if there is any factual conflict between the claimant and the defendant. The written evidence should be filed in the Administrative Court Office.
Permission to proceed with a judicial review claim is permission to proceed on specified grounds only. The claimant will not be able to rely on other grounds without further permission from the court (r. 54.15). Notice of intention to rely on additional grounds must be given to the court, and to any other person served with the claim form, no later than seven clear days before the hearing (or the warned date if one has been given) (PD 54A, para. 11.1). Where there is good reason to allow argument on an additional ground, permission should be granted. Each case should be considered on its facts. In exercising discretion, a judge should bear in mind that if permission to rely on a ground is refused, the Court of Appeal on an appeal from the hearing at first instance would not be able to consider it (R (Smith) v Parole Board [2003] EWCA Civ 1014, [2003] 1 WLR 234).

Interim remedies

Although most forms of interim remedies are available in judicial review proceedings, obtaining interim remedies is more restricted than in private law actions. Generally the most appropriate time to apply for interim remedies is at the stage of applying for permission but a court may grant interim remedies to any of the parties during the course of judicial review proceedings. (If interim remedies are sought after the substantive application has been dismissed, pending appeal, it will be necessary to show that the appeal has a good prospect of success).

Injunctions are the main type of interim relief ordered in judicial review proceedings. To obtain an interim injunction in a civil case, it must be established that the claimant has a serious issue to be tied on the merits and that the ‘balance of convenience’ favours the making of an interim order (American Cyanamid Co. v Ethicon Ltd [1975] AC 396; see chapter 37). The balance of convenience test involves the court considering whether there is an adequate alternative remedy in damages, the interests of the general public to whom the duties are owed, the importance of upholding the law of the land, and the duty upon certain authorities to enforce the law in the public interest. There is a presumption in favour of a cross-undertaking in damages (PD 25A, para. 5.1(1)). The approach to applications for interim injunctions in judicial review proceedings is similar to that adopted in applications for interim injunctions in private law claims (R v Kensington and Chelsea Royal London Borough Council, ex parte Hamell [1989] QB 518). However, where public bodies are concerned the balance of convenience may be more difficult to make out – i.e. ordinary financial considerations may be qualified by recognition of the interests of the general public (Smith v Inner London Education Authority [1978] 1 All ER 411). Usually an application is for a prohibitory injunction to prevent a public body from doing something.
Where a mandatory injunction is sought, the order will not be granted unless the court has a high degree of assurance of the merits of the case.

**SUBSTANTIVE HEARING**

**Listing the hearing**

If the parties agree about the final order to be made in a claim for judicial review, the claimant must file at the court two copies of a document signed by all the parties setting out the terms of the proposed agreed order, together with a short statement of the matters relied upon as justifying the proposal and copies of any authorities or statutory provisions relied on (PD 54A, para.17.1. The court will consider the documents and will make the order if satisfied that the order should be made (para. 17.2). If the court is not satisfied that the order should be made, a hearing date will be set (para. 17.3). Where the agreement relates to an order for costs only, the parties need only file a document signed by all the parties setting out the terms of the proposed order (para. 17.4).

**Oral evidence**

In judicial review proceedings the Administrative Court may, either under CPR, r. 32.1, or its inherent jurisdiction, hear oral evidence and order the cross-examination of witnesses *(R (G) v Ealing London Borough Council [2002] EWHC 250 (Admin), [2002] ACD 48)*. In practice, the courts very rarely allow cross-examination in judicial review cases on the basis that it is not usually required in the interests of justice *(Khera v Secretary of State for the Home Department [1984] AC 74; George v Secretary of State for the Environment (1979) 77 LGR 689)*. Generally, the applications to cross-examine will be successful only where they are necessary in relation to disputes over the factual circumstances, in particular, applications based upon procedural impropriety where there is a material conflict of evidence about the procedure followed by the defendant, or where bad faith and/or bias is alleged against the defendant. In the absence of cross-examination the defendant’s evidence of the facts must be assumed to be correct, unless there are documents which show that this evidence cannot be correct. Therefore, the proper course of action for a claimant who wishes to challenge the defendant’s evidence is to apply for cross-examination of the relevant witness, despite the general practice of not permitting cross-examination *(R (McVey) v Secretary of State for Health [2010] EWHC 1225 (Admin), [2010] ACD 95)*.
The general approach to evidence in judicial review proceedings is that fresh evidence can only be adduced in very limited circumstances (R v Secretary of State for the Environment, ex parte Powis [1981] 1 WLR 584). However, in some cases fairness may require that new expert evidence is used, although such cases will be very rare. Expert evidence will be allowed only to explain technical processes, and not to give an opinion on the reasonableness of the expert tribunal’s decision, which would amount to an attempt to challenge the technical judgment of the tribunal on the merits of the case (R (Lynch) v General Dental council [2003] EWHC 2987 (Admin), [2004] 1 All ER 1159).

Substantive judicial review applications in civil matters are therefore generally heard by a single judge sitting in open court. There may be cases involving regulatory issues in which a private hearing may be ordered in the light of CPR, r. 39.2(3)(a) or (c), in circumstances involving confidential information or significance or where there is a special reason to fear that reporting of the case may be unbalanced (R (Amvac Chemical UK Ltd v Secretary of State for the Environment Food and Rural Affairs [2001] EWHC 1011 (Admin), [2002] ACD 219). A substantive application in a civil case is heard by the Divisional Court only in exceptional circumstances such as where the application raises questions of difficulty, complexity or importance. Occasionally, the hearing may be before a judge in chambers. In exceptional cases the Court of appeal may, where it deal with an appeal against refusal to give permission to proceed with a claim for judicial review, hear the substantive application (e.g. as in British Airways Board v Laker Airways Ltd [1984] QB 142). However, usually the substantive hearing is heard by a different judge or court from that which granted permission.

All the remedies available in judicial review proceedings are subject to the discretion of the court, so that even if a case is proved the court may refuse any or all of the remedies sought by the claimant. The High Court may exercise its discretion under the Senior Courts Act 1981, s. 31, to make the prerogative mandatory, prohibiting and quashing orders and provide the private law remedies of injunction, declaration, damages, restitution or the recovery of any sum due. The Administrative Court may make a declaration of incompatibility under the Human Rights Act 1998, s. 4. These remedies may be sought individually (except that a judicial review claim may not seek a money remedy alone: CPR, r. 54.3(2)), alternatively or in combination. Declaratory and injunctive relief are obtainable
in proceedings for judicial review even when one of the prerogative orders is capable of being granted (R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1).

The discretionary nature of remedies

All public law remedies are discretionary, i.e. even though the claimant has standing to commence judicial review proceedings, the decision or action in question is reviewable, and the grounds for review are proved, the court may yet decide not to award the claimant all or part of the remedies requested. The court has withheld remedies on a number of grounds.

A court may refuse relief because of the claimant’s conduct or motives, for example, where the claimant suppressed or misrepresented material facts in presenting the claim (R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac [1917] 1 KB 487), or delayed in commencing proceedings. The time limits set out in CPR, r. 54.5(1) and the Senior Courts Act 1981, s. 31, must be adhered to strictly and therefore undue delay may result in the refusal of any relief. The court may also refuse to grant relief if it believes the likely effect of a remedy will serve no practical purpose, e.g. in cases where the public body has already remedied its position to meet the claimant’s demands (R v Gloucestershire County Council, ex parte P [1994] ELR 334) or where a public body shows that it is doing all it can to comply with its statutory duty. The quashing of a challenged planning permission may be withheld where it is impossible to sever the part to which the claimant’s challenge relates from the rest of the planning permission, which was lawfully granted. In those circumstances relief would simply take the form of a declaration that the local authority had failed to consult properly before granting planning permission (R (Guiney) v Greenwich London Borough Council [2008] EWHC 2012 (Admin), LTL 15/8/2008). Breach of a statutory provision may have such an insignificant effect that the court may refuse relief (as in R v Dairy Produce Quota Tribunal, ex parte Davies [1987] 2 CMLR 399). In exercising its discretion, the court will take into account whether others will be directly or indirectly affected by its decision – e.g. a decision which has the potential to affect a large number of individuals such as an inquiry into a new motorway. Therefore reliance upon a decision by third parties may also induce the court not to grant the remedy claimed.

Quashing order

A quashing order deprives the decision which is being reviewed of all legal effect and the decision challenged is therefore effectively set aside. Until a decision is quashed, it is deemed to possess a
‘presumption of validity’ and is disobeyed at the claimant’s risk pending the substantive judicial review hearing (F. Hoffmann-La Roche & Co. AG v Secretary of State for Trade and Industry [1975] AC 295).

A quashing order is available to quash the decisions of inferior courts or tribunals and any other public body ‘having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially’ (per Lord Atkin in R v Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd [1924] 1 KB 171). The courts have subsequently accepted that a quashing order is not confined to the review of decisions of a judicial nature (R v Hillingdon London Borough Council, ex parte Royco Homes Ltd [1974] QB 720). The court will consider the nature of the power exercised in order to determine whether this test has been satisfied. A quashing order may be claimed against a broad range of administrative decision-makers, e.g. local authorities, legal committees and ministers of the Crown and may relate to administrative decisions and delegated legislation.

When a quashing order is sought and the court is satisfied that there are grounds for quashing the decision it may in addition remit the matter to the decision-maker and ‘direct it to reconsider the matter and reach a decision in accordance with the judgment of the court’ (CPR, r. 54.19(2)(a)). This power may be used to ensure that a decision is reconsidered and a new decision made. However, there is no guarantee that a different result will be reached: the decision-maker is justified in reaching the same result again provided that the matter is reconsidered in accordance with the law. Where the court considers that there is no purpose to be served in remitting the matter to the decision-maker, it may, subject to any statutory provision, take the decision itself (r. 54.19(2)(b)). (However, where a power is given by statute to a tribunal, person or other body, it may be the case that the court cannot take the decision itself).

Prohibiting order

A prohibiting order presents the decision-maker from acting or continuing to act in excess of jurisdiction. Therefore, if a public body threatens to make an unlawful decision which could be quashed had it been made, the court may make a prohibiting order to prevent the decision being made. For example, a local council was prohibited from increasing the number of taxi licences in breach of an undertaking to consult the local professional association (R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association [1972] 2 QB 299).

Mandatory order
A mandatory order requires an inferior court or tribunal or a person or body of persons charged with a public duty to carry out its judicial or other public duty. A mandatory order may compel a court or tribunal to state its case (\textit{R v Watson, ex parte Bretherton} [1945] KB 96) and to give reasons for its decision where it was required to do so by statute (\textit{Brayhead (Ascot) Ltd v Berkshire County council} [1964] 2 QB 303). This includes the provision of adequately intelligible reasons (\textit{Earl Iveagh v Minister of Housing and Local Government} [1964] 1 QB 395). A mandatory order can compel a public body to exercise its discretion in accordance with the law, though the court is reluctant to use the remedy in this way (e.g. \textit{R v Barnett London Borough Council, ex parte Nilish Shah} [1983] 2 AC 309).

\textbf{Injunctions}

Under the Senior Courts Act 1981, s. 31(2), in judicial review proceedings the court may make a declaration or grant an injunction if it considers that it would be just and convenient having regard to:

(a) the nature of the matters in respect of which a remedy may be granted by way of a mandatory, prohibiting or quashing order;

(b) the nature of the persons and bodies against whom a remedy may be granted by way of such an order; and

(c) all the circumstances of the case.

\textbf{Declarations}

A declaration may be granted in judicial review proceedings in the circumstances set out in the Senior Courts Act 1981, s. 31(2).

Declaratory relief and any other private law remedy may be granted by a court even if none of the prerogative remedies is available, provided the case is within the realm of public law.

The court has a broad discretion to grant declaratory relief (\textit{Barnard v National Dock Labour Board} [1953] 2 QB 18). Declarations may be sought in order to challenge the legality of decisions taken or polices adopted by a public body, to challenge delegated legislation, to determine the ambit of public
law obligations, to pronounce upon questions of law and the compatibility of primary legislation with EU law (*R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1).

**Damages**

Damages arising from any matter to which a judicial review claim relates may be awarded if the court is satisfied that they would have been awarded in an ordinary claim started at the same time as the judicial review claim (Senior Courts Act 1981, s. 31(4)).

**APPEALS**

An appeal against the decision of the High Court is a substantive hearing or a judicial review claim lies to the Court of Appeal and therefore to the Supreme Court in the normal way.