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# CHAPTER 27 — JUDICIAL REVIEW
# SECTION 1 — BEFORE & AFTER BOWMAN

## 1. BACKGROUND

### 1.1. The Purpose of Judicial Review

While the Immigration and Asylum Act 1999 provides for appeals against most decisions in immigration cases, the exercise of their powers by public authorities, which includes a Minister, an official or the appellate authorities, is always open to challenge in the Courts by way of judicial review. The Courts will not assess the merits of the decision but rule upon its lawfulness. The Court cannot replace an unlawful decision with a lawful one. There are limits on the authority of the Court. Lord Diplock (in the GCHQ case) restricted the Court's involvement in judicial review to the consideration of decisions which were illegal, irrational or subject to procedural impropriety. However, this traditional view has become blurred as administrative law has developed

### 1.2. Illegal Acts or the Ultra Vires rule

All public bodies and officials must act within the law: Ministers exercise their powers as a consequence of Statute and the common law and cannot act beyond those powers as that would be illegal or ultra vires. When considering whether a body has been acting ultra vires the Court will look at the relevant statutory provisions and the purpose of the statute: illegality is often a matter of statutory interpretation.

### 1.3. Irrationality, Unreasonableness or the Wednesbury Principle

Public Authorities must act with reason. The court has defined unreasonableness as, "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt." Irrationality was also described by the Court as "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

### 1.4. Procedural Impropriety or Natural Justice

Natural justice demands that the person who makes the decision is impartial, has no interest in the outcome of the case and that a person who is affected by the case has an opportunity to state his case. However, this rule goes further than fairness. Where a body has in the past come to a decision it must be consistent in the future in the

decision-making process. This has been described as legitimate expectation but is more commonly understood as consistency. Legitimate expectations can arise from past conduct. Previous decisions do not necessarily bind an authority and a change in circumstances or giving fair notice of a change in policy can allow a public body to distinguish its current policy and decision-making from the past.

### 1.5. Stage at which the Court may hear a case

Normally the court will not hear a case unless satisfied that all statutory remedies open to the applicant have first been exhausted. Immigration cases should not therefore reach the stage of judicial review until they have been through the entire appeals system. However, the courts have shown that they are prepared to hear direct challenges to executive decisions in illegal entry cases, where the applicant is in the UK and the right of appeal cannot be exercised until after removal. In port refusal cases the court will entertain such applications where exceptional circumstances exist.

### 1.6. The Treasury Solicitor

Whenever a Home Office decision is challenged, or when the Home Office itself wishes to challenge a decision of the Immigration Appellate Authority in the High Court, the Home Office legal representative is provided by the Treasury Solicitors Department. His representative will regard as his client the administrative directorate responsible for the decision under review and will prepare the case for the court hearing. The Directorate concerned and Legal Adviser's Branch (LAB) will be consulted as necessary, and Counsel will be briefed. It is important to bear in mind the distinction between the respective roles of the Treasury Solicitor's Department, LAB and the caseworking Directorate. **The function of the Treasury Solicitor is to conduct the litigation, together with Treasury Counsel, in accordance with Home Office instructions.**

### 1.7. Legal Adviser's Branch

The function of LAB is to give general advice, e.g. in relation to the interpretation of legislation and general questions of law, and where appropriate, i.e. in particularly sensitive cases, LAB's advice should be sought before instructing Treasury Solicitors. **It should be noted that Treasury Solicitors should not be approached for legal advice.**

### 1.8. Judicial Review Monitoring Unit

The JRMU will co-ordinate the progress of JR cases (both pre- and post-2nd October 2000) ensuring that Bowman recommendations and deadlines are adhered to; in consultation with the caseworker, determine strategy for cases, advising and calling upon expert resources; maintain a database of JR activity, collecting, analysing and reporting management information on individual cases and overall trends; identify

and highlight key issues/policy difficulties; and manage the interface with Treasury Solicitors (including the management of the Service Level Agreement).

1.9. **The Appeals and Judicial Review Unit**

The Appeals and Judicial Review Unit (AJRU) is part of the Asylum and Appeals Policy Directorate and has the responsibility for considering the implications of significant Court judgements on Home Office policy in its entirety. All cases, the outcome of which may affect how particular cases or how policy might be conducted in the future, should be brought to the attention of AJRU.

## 2. THE BOWMAN REPORT

2.1. Sir Jeffrey Bowman became Chairman of a Review of the Crown Office in March 1999 and the Review Team reported in March 2000. *The Bowman Report* looked at the difficulties which the courts experience in dealing with the large caseload of judicial review applications and considered what measures could be taken to enable the courts to manage more effectively. *Bowman* noted that immigration cases are the single greatest source of applications for permission to seek judicial review. This leads to delays in reaching permission decisions and hearings; and that delay itself increases the likelihood of unmeritorious judicial review proceedings as a way of delaying removal.

2.2. *Bowman* proposed procedural and structural reforms designed to deal more editiously with all JR cases, but with particular benefits in immigration cases. *Bowman* recommended that claimants should be required to state their case fully at the outset and that defendants should consider, before the permission stage, the strength of their case and their grounds for defending it.

2.3. Many of the *Bowman* recommendations have been implemented by incorporation into the Civil Procedure Rules via The Civil Procedure (Amendment No 4) Rules 2000 effective on 2nd October 2000(Rule 54) and will have significant implications for handling judicial review applications.

## 3. JUDICIAL REVIEW BEFORE BOWMAN

3.1. There are still likely to be some JR cases which began before 2nd October 2000. In these cases the application for leave to move was ex parte – that is by one party alone – and there was no requirement for formal notice to be given by the applicant to the other party.

3.2. To obtain leave to move (and thus a full hearing of the case) an applicant must demonstrate to a judge that he has an arguable case. Applicants could apply for a table application, which is dealt with on the basis of the documentary evidence by a judge sitting in private; an oral hearing from the outset or, if the table application is not granted, to renew his application by requesting within 10 days a hearing in open

court. If the application is once again refused, an application for a similar purpose may be made to the Court of Appeal (ex parte) within 7 days from the date of refusal.

3.3. Intervention is possible at the ex parte stage and there are considerable benefits from doing so in the right cases. This would usually take the form of an "assertive letter" but care must be taken to ensure accuracy. The letter should contain: the basic history of the case; the reasons (and facts) which caused the Secretary of State to make the decision; any compassionate or compelling circumstances that were taken into account; that regard has been had to published policy; and a request that the letter is put before the court when the application is made. This request enables the Directorate to present its side of the case to the judge at the ex parte stage without being formally represented.

3.4. If an application for leave to move is not granted, action may be resumed but caseworkers should keep in mind that there is more than one avenue available for an ex parte application; the first refusal of leave may not therefore conclude the matter. If leave to move is granted, as a general rule, removal will be deferred until the result of the judicial review is known.

## 4. JUDICIAL REVIEW AFTER BOWMAN

4.1. Bowman took the view that, if the defendant were involved in the permission stage, his participation would enable the court to give fuller consideration to the merits and may encourage earlier settlement. Requiring the defendant to outline his defence and address his mind to the issues would assist the judge in deciding whether or not permission should be granted.

4.2. Therefore under the new Civil Procedure Rules the claimant must notify the defendant (usually the Secretary of State) that an application for judicial review has been lodged (no longer ex parte) and serve a copy of his claim form with accompanying documentation (formerly there was no obligation to provide a copy of the grounds for relief).

4.3. Briefly, if the defendant decides to oppose the application, he must submit his defence within 21 days. The application for permission is then considered on the papers by a single judge, or at an oral hearing at the **discretion** of the judge. The claimant cannot require an oral hearing at the initial stage. If permission is granted the defendant will get a further 35 days to lodge a detailed defence. If permission is refused, the claimant can renew at an oral hearing.