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"Techniques for the protection of private subjects in contrast with public authorities: actions and remedies – liability and compliance"

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Answers to questionnaire: United Kingdom

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"TECHNIQUES FOR THE PROTECTION OF PRIVATE SUBJECTS IN CONTRAST WITH PUBLIC AUTHORITIES: ACTIONS AND REMEDIES - LIABILITY AND COMPLIANCE"

Response on behalf of the Supreme Court of the United Kingdom

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SESSION 1: LEGAL PROCEEDINGS THAT CAN BE BROUGHT BEFORE THE ADMINISTRATIVE COURT

1. **In your legal system, which judges are competent to pronounce on disputes in which one of the parties is the public administration?**
   - **An ordinary judge**
   - **An administrative judge**
   - **A judge who deals with special areas**
   - **Others**

In England and Wales, most claims for judicial review are determined by the Administrative Court, which is part of the Queen's Bench Division of the High Court of Justice. The judges in the High Court are ordinary judges, but those sitting in the Administrative Court are appointed on the basis that they have a degree of specialist knowledge about claims under public law as part of their general expertise (only part of their time is spent sitting in the Administrative Court; the rest of their time is spent dealing with other types of case). Depending on the jurisdiction in which a claim is brought, appeals in judicial review cases go to the Court of Appeal (in England and Wales), the Northern Ireland Court of Appeal (in Northern Ireland) and the Inner House of the Court of Session (in Scotland). The judges in these courts are generalists dealing with all kinds of case (but some of them have a degree of specialised knowledge of particular areas of law, including public law). Appeals then go to the Supreme Court of the United Kingdom, which again is staffed by generalists who have to deal with all kinds of case (some of whom have a degree of specialised knowledge of public law).

Some claims for judicial review, particularly in the immigration context, are determined instead by the Upper Tribunal, which is a specialised tribunal (under sections 15-21 of the Tribunals, Courts and Enforcement Act 2007). Appeals from the Upper Tribunal lie to the Court of Appeal and the Supreme Court.

Private law claims against public authorities, such as for breach of contract or for tort (eg negligence), are brought in the same manner as private law claims against private persons. Such claims are heard in the County Court or the High Court, depending on their value and complexity. The judges who hear these cases are generalists. Appeals lie to the Court of Appeal and the Supreme Court.

2. **Which actions can be brought before the administrative court in view of the exercise of administrative powers?**
   - **Annulment of administrative acts**
   - **action of condemnation**
   - **Other actions**

On a claim for judicial review, the High Court may grant:

- A **mandatory order**, requiring the administrative decision-maker to take some action;
- A **prohibiting order**, restraining or preventing the administrative decision-maker from doing something;
- A **quashing order**, recognising that the administrative decision or measure under challenge is unlawful and setting it aside; and/or
- A **declaration**, providing a statement as to how the law applies in a particular case or class of case.

3. **From which sources can actions be brought before the administrative court?**
   - **Law**
   - **Public authority regulations**
   - **Guidelines**
   - **Supreme Court rulings**
   - **Other**

An administrative decision can be challenged on the ground that it contravenes primary legislation enacted by Parliament, secondary legislation adopted by Ministers, and/or common law principles developed by the courts. Although an administrative policy is not itself law, an administrative decision can be challenged on the ground that the decision-maker failed to have regard to its policy, misdirected itself as to the meaning of its policy, or departed from its policy without good reason (see *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7 at para 124).

4. **Which administrative decisions can be challenged?**
   - **Administrative acts which have a specific recipient**
   - **General acts and regulations**
   - **Acts inherent to the procedure**
   - **Political acts**

A claim for judicial review can be brought in respect of all forms of administrative decisions and measures. There is a wide concept of locus standi. Judicial review is available in respect of an administrative decision which is directed to a specific person, or in respect of a measure of general application, such as secondary legislation or an administrative policy, provided the person bringing the claim has a "sufficient interest" in the matter to which it relates (as required by section 31(3) of the Senior Courts Act 1981).

The fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, does not provide reason for the courts to refuse to consider it (see *R*

(Miller) v Prime Minister [2019] UKSC 41 at para 31). Where, however, the decision under challenge is largely a matter of political judgment, the courts will tend to afford the decision-maker a wide margin of discretion (*R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at paras 52-53).

Procedural decisions can also be challenged, although relief might be refused if the claim is brought before a final decision has been taken, such that the claim is considered premature (see *R v Secretary of State for the Home Department, ex parte Hickey* [1995] 1 WLR 734 at 757-758).

5. **On the grounds of which defects can the annulment of an administrative act be requested?**
   - **Breaches of the law**
   - **Breaches of competence**
   - **Technicalities and procedural defects**
   - **Breaches of general principles**
   - **Other**

The available grounds of review are not codified in our system, but are generally developed by the courts over time. They include that:

- The decision was afflicted by **illegality**, for example because the decision-maker misinterpreted his or her statutory powers (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410) or exercised those powers otherwise than for the purpose intended by Parliament (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997);
- The decision was **procedurally unfair**, for example because the claimant was not given a proper opportunity to be heard (see *R (Osborn) v Parole Board* [2013] UKSC 61), or because the decision-maker was or appeared to be biased (see *Porter v Magill* [2001] UKHL 67);
- The decision was **irrational**, ie one that was so unreasonable that no reasonable decision-maker could have reached it (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223); and
- The decision-maker acted in a way which was incompatible with a right guaranteed by the **European Convention on Human Rights** (contrary to section 6 of the Human Rights Act 1998) or with provisions of EU law which continue to have effect in the UK as Retained EU law (under the EU (Withdrawal) Act 2018).

6. **Can the judge partially annul the challenged administrative act?**

Yes. Where only part of a decision is invalid and that part can be separated out from the valid part, the court may grant a quashing order to quash the invalid part only (see *DPP v Hutchinson* [1990] 2 AC 783).

7. Can the judge substitute the Administration by modifying the content of the administrative act?

It is a general principle of English administrative law that, on a claim for judicial review, the court will not substitute its decision for that of the original decision-maker. This is subject to specific and limited exceptions. First, when a claim for judicial review is brought in the context of criminal proceedings, section 43(1) of the Senior Courts Act 1981 gives the High Court power to vary a sentence imposed by the criminal court, if the High Court decides that the criminal court had no power to pass the sentence previously imposed. Secondly, section 31(5)(b) and (5A) of the Senior Courts Act 1981 gives the High Court power to substitute a decision of a court or tribunal, if the decision was quashed on the ground that there had been an error of law, and if, without that error, there would have been only one decision which the court or tribunal could have reached. Similarly, where a judicial review claim is brought against a Minister or other administrative decision-maker, if the court is satisfied that there was only one possible decision which they could have made then, under section 31(5)(a) of the Senior Courts Act 1980, the court may quash the decision and remit the matter to the original decision-maker "with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court"; alternatively the court may make a binding declaration to that effect or, if necessary, it may make a mandatory order to give effect to the court's ruling.

8. When the judge annuls the challenged act, can he dictate provisions which the Public Administration must abide by in the review proceedings of the subject-matter of the litigation?

Yes, subject to important limits. See answer 7 above.

9. When do the effects of the jurisdictional annulment of an administrative act become applicable?

In our system, it is generally understood that an unlawful administrative act is null and void. This means that the effect of granting a quashing order is to recognise that the unlawful administrative act has never had legal effect.

10. Can the judge modulate the effects over time of the ruling of annulment of an administrative act?

In our system, it is generally understood that an unlawful administrative act is null and void, and that the courts cannot alter this position by suspending the effect of a quashing order (see *HM Treasury v Ahmed* [2010] UKSC 5). The courts do, however, have discretion to decline to grant relief, for example if it would be disproportionate or would otherwise create administrative chaos (see *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills* [2012] EWHC 201 (Admin) at para 99).

The Judicial Review and Courts Bill, which is currently being considered by the UK Parliament, would, amongst other things, give the courts power to make quashing orders which would "not take effect until a date specified in the order" or which would "remov[e] or limi[t]

any retrospective effect of the quashing". When deciding whether to exercise this power, the courts would be required to consider various matters, including "any detriment to good administration that would result from exercising or failing to exercise the power" and "action taken or proposed to be taken… by a person with responsibility in connection with the impugned act".

11. Can the act of ordering payments for damages be proposed autonomously or must it always be proposed together with other kinds of actions?

No. In judicial review proceedings, a claimant cannot seek damages alone (see rule 54.3(2) of the Civil Procedure Rules). Generally, damages are not available in relation to an administrative act or measure which is found to be invalid for reasons of public law. To justify a claim for damages, the public authority must have committed a tort according to ordinary law (eg negligence or false imprisonment) or have violated a right set out in the Human Rights Act 1998 or which has continued effect in UK law as a matter of Retained EU law.

12. In the light of what kind of behaviour is the compensatory action for damages feasible when dealing with a Public Administration?

- **Implementation of an illegal and detrimental administrative act**
- **Non-observance of the deadline of the procedure**
- **Lesion of good faith and trust**
- **Resultant behaviour of the public administration**
- **Other**

In our system, there is not a general right to claim damages for losses caused by unlawful administrative acts (see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 at para 96).

A private law claim for damages in tort might lie, however. Examples would be (1) if the public authority has breached a statutory duty, and the claimant can show, as a matter of statutory construction, that that duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action (see *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 at 731); (2) if the public authority has breached a duty of care owed at common law, such as to give rise to liability in negligence (see *Poole BC v GN* [2019] UKSC 25); (3) if the public authority has detained someone (e.g. an immigrant) without proper lawful authority or for an excessive period; or (4) if the public authority has deliberately and dishonestly abused its powers, such as to constitute misfeasance in public office (*Three Rivers DC v Governors of the Bank of England* [2003] 2 AC 1).

In addition, section 8 of the Human Rights Act 1998 provides that a court may make an award of damages against a public authority where it is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. Also, although there is no longer any right in UK law to damages in accordance with the rule in *Francovich* (by virtue of paragraph 4 of Schedule 1 to the EU (Withdrawal) Act 2018), Retained EU law in the UK may include other rights to claim damages in respect of administrative action'.

13. Which are the different kinds of reimbursable damages?

- **Material damage**
- **Non-material damage**
- **Loss of opportunity**

Generally speaking, in tort damages are recoverable for material damage (injury to the person or to property) (and in certain cases this may include material damage in the form of pecuniary or economic loss, including in relation to loss of an opportunity which can be given a monetary value) and for non-material or non-pecuniary loss (such as pain and suffering).

When deciding whether to award damages under the Human Rights Act 1998, the court must take into account the principles applied by the European Court of Human Rights under article 41 of the European Convention on Human Rights. Damages are, in general, available for pecuniary and non-pecuniary loss, but not for loss of opportunity (see *R (Sturnham) v Parole Board* [2013] UKSC 23 at paras 33, 34 and 82).

14. Does the omission of lodging an action of annulment result in elision or reduction of the compensatory damages?

Potentially it may do, in limited cases. The courts might consider it to be an abuse of process for a person to bring a private law claim for damages when he could have brought a claim for judicial review but has not (see *Cocks v Thanet DC* [1983] 2 AC 286).

15. In order to award compensatory damages, is proof of the responsibility of the public administration required? If your reply is affirmative, which party is obliged to provide said proof?

Yes. The claimant bears the burden of establishing that a relevant wrong has been committed in respect of which damages are recoverable and of establishing on the balance of probabilities that he has suffered loss (see *R (Sturnham) v Parole Board* [2013] UKSC 23 at para 82).

16. Can the judge convert ex officio one action into another?

No. A judge could give directions for a claim to proceed (if at all) as an ordinary claim in tort for damages or as a claim for judicial review, but would only do so after hearing argument by the parties and usually only on the application of a party.

17. Is there a time-limit for the proposition of the compensatory action?

A claim in tort must be brought within six years of the date on which the cause of action accrued (in accordance with section 2 of the Limitation Act 1980). A claim under the Human Rights Act 1998 must be brought within one year, or such longer period as the court considers equitable having regard to all the circumstances (in accordance with section 7(5) of that Act). Under Retained EU law which remains applicable in the UK, the principles of equivalence and effectiveness continue to apply.

18. Can the judge rule that the Administration implement an administrative act? If your reply is affirmative, what are the prerequisites for implementation?

Yes. On a claim for judicial review, the court can grant a mandatory order to compel the performance of a public duty. See answer 7 above.

SESSION II – SPECIAL PROCEDURES

1. **Does your administration have provisions for special procedures?**

Yes. In England and Wales, the procedural rules which apply in judicial review proceedings are set out in Part 54 of the Civil Procedure Rules and Practice Directions 54A-54D. (Special procedures apply in Northern Ireland and Scotland with some modifications).

2. **What do the specialities consist of?**

There are a number of special features of judicial review proceedings, including:

- **Permission**: A claimant may not pursue a claim for judicial review to a full hearing without first obtaining the permission of the court (in accordance with section 31(3) of the Senior Courts Act 1981 and rule 54.4 of the Civil Procedure Rules). Applications for permission are usually dealt with by a judge "on the papers" (that is, without an oral hearing). The judge will refuse permission if the claim does not raise an arguable ground of challenge (see *Simone v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin) at para 112), if the claimant does not have a "sufficient interest" in the matter to be able to bring the claim (in accordance with section 31(3) of the Senior Courts Act 1981), or if it appears to be highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred (in accordance with section 31(3C)-(3D) of the Senior Courts Act 1981).
- **Time limit**: Permission must be sought promptly, and in any event within three months from when the grounds to make the claim first arose (in accordance with rule 54.5(1) of the Civil Procedure Rules). There is scope to extend this time limit when it is just to do so.
- **Evidence**: In general, judicial review claims are decided on the basis of written evidence. It is very rare for oral evidence to be given and tested at a hearing (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2115 (Admin)).
- **Disclosure**: The procedural rules relating to the disclosure of documents which apply in other civil proceedings do not apply to claims for judicial review (see paragraph 10.2 of Practice Direction 54A). The administrative body, however, has a "duty of candour", which means that they must ensure that all information relevant to the issues in the claim is drawn to the court's attention, whether it supports or undermines their case (see *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941). Exceptionally, where the court considers that the case is likely to turn on some unresolved factual question, the court may make an order for specific disclosure of documents (see *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53).

3. **The special rights are established:**
   - **According to subject (for example, tenders, procedures of expropriation, independent administration authorities)**

- **According to actions**
- **Both of the above**

Both. The abovementioned special procedural rules apply, generally, to claims for judicial review. Some distinctions are drawn, however, between claims according to their subject matter. For example, in the planning context, the time limit for bringing a claim is six weeks rather than three months (in accordance with rule 54.5(5) of the Civil Procedure Rules). The time limit for bringing a claim for judicial review in respect of a procurement decision is 30 days (in accordance with rule 54.5(6) of the Civil Procedure Rules).

4. **Does your system provide for appeals against the silence of the Administration at the request for an administrative provision presented by a private individual?**

Yes. If a public authority's failure to act is unlawful (for example, because statute requires a decision to be taken or notice to be given), that failure can be challenged on a claim for judicial review. On such a claim, the court may grant a mandatory order, requiring the public authority to act.

5. **Do the Administrations comply spontaneously with the decisions of the administrative courts?**

Yes.

6. **In your legal system, is there a special procedure for ensuring the integral execution of the sentence?**

Yes. A failure to comply with a mandatory order may be punishable as contempt of court (see *M v Home Office* [1994] 1 AC 377). Contempt proceedings can result in the imposition of a fine or a period of up to two years' imprisonment (in accordance with section 14 of the Contempt of Court Act 1981).

A declaration does not, however, have any coercive effect, and so non-compliance with such an order will not amount to a contempt of court (see paragraph 12.5.2 of the Administrative Court Judicial Review Guide 2021). If a public body fails to comply with the law as set out in a declaration, another claim for judicial review could be brought. However, administrative bodies invariably do comply with legal declarations issued by the courts.

7. **Are the judge's decisions which are not of the last resort immediately enforceable?**

Yes. The judge's order will take effect on the date(s) specified in the order. A Minister or an administrative body is bound to comply with the order of the court even if they consider it may be wrong and wish to challenge it on an appeal: see *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46. It is possible to ask the first instance court or an appeal court for the order to be suspended until an appeal can be heard.

8. **Following the annulment of a decision characterized by discretionary power, the interested party is forced to challenge each of the ulterior negative decisions which have been deemed illegitimate by dint of defects which are different to those identified by the judge or, in alternative, are there certain mechanisms of "reduction" of the aforesaid discretionary power which ensure the definition of the litigation once and for all?**

In our system, it is generally understood that an unlawful administrative decision is null and void. This means that the effect of granting a quashing order is to recognise that the unlawful administrative decision has never had any legal effect (see *HM Treasury v Ahmed* [2010] UKSC 5). It is not necessary to issue separate challenges in relation to successive decisions which have resulted in a final administrative decision or measure; if unlawfulness in relation to the prior decisions affects the final decision or measure, it is sufficient to challenge that final decision or measure. In its judgment, the court will identify precisely what legal errors occurred and at what stage of the decision-making process. Therefore, the outcome of the proceedings will resolve the litigation once and for all.

SESSION III – PRECAUTIONARY MEASURES

1. **Does the proposition of an appeal automatically suspend the effectiveness of the administrative act?**

No. Issuing a claim for judicial review does not automatically suspend the effect of the administrative decision being challenged. Equally, filing an appeal does not automatically suspend the effect of the order or decision of the lower court (unless, under rule 52.16 of the Civil Procedure Rules, the appeal is from the Immigration and Asylum Chamber of the Upper Tribunal). However, in both cases a party may apply to a court for an order to suspend the effect of the administrative decision or of the order of the lower court.

2. **In your legal system, are precautionary measures provided for?**

Yes. Interim injunctions and orders to stay (ie suspend) administrative decisions are available in judicial review proceedings.

3. **What kinds of decisions can the judge apply as a precautionary measure?**

The court can grant a mandatory injunction (requiring the public authority to do something) or a prohibiting injunction (requiring that the public authority not do something) or a stay (to suspend the effect of an administrative decision).

4. **What are the conditions for the acceptance of a precautionary request?**

The claimant must establish, first, that there is a real prospect that they will succeed at the final hearing of their claim and, secondly, that the balance of convenience favours the grant of interim relief (see *R (Detention Action) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin) at para 17).

5. **Can the judge force the petitioner to pay bail?**

If an interim injunction is granted, the claimant will usually be required to give a cross-undertaking in damages (see *R v Secretary of State for the Environment, ex parte RSPB* [1997] Env L.R. 431). This means that, if it is subsequently determined that the claimant was not entitled to the injunction, the claimant must compensate the defendant for any loss caused as a result.

6. **Are precautionary measures generic?**

Yes. Interim injunctions are available in both public law and private law proceedings and are governed, in general terms, by the same principles (as set out in *American Cyanamid Co v*

Ethicon Ltd [1975] AC 396). Suspension of court orders is available in public law and private law proceedings.

Those principles are subject to some modification in the public law context, however. In private law proceedings, the question of whether the balance of convenience favours the grant of an interim injunction will involve assessing whether the claimant could be adequately compensated by damages if his application for an injunction were refused, or whether the defendant could be adequately compensated in damages if the claimant's application for an injunction were granted. By contrast, in judicial review proceedings, the adequacy of damages as a remedy will rarely be determinative: in our system, damages are not usually payable for losses arising from an unlawful administrative act, and a public authority will not normally suffer financial loss if it is prevented from implementing a lawful decision. Accordingly, when considering whether to grant an interim injunction in judicial review proceedings, the courts will normally need to consider the wider balance of convenience, and in so doing, must take the wider public interest into account (see *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) at para 12).

7. Can a precautionary request be introduced autonomously before the presentation of the main trial proceedings (*ante causam*)?

Yes. In exceptional circumstances, an application for interim relief may be made before judicial review proceedings have been issued. Such an order will only be granted if the matter is urgent or if it is otherwise necessary to do so in the interests of justice (see paragraphs 16.1.3 and 16.2 of the Administrative Court Judicial Review Guide 2021).

8. In the event of cautionary request *ante causam*, does the precautionary decision of the judge lose effectiveness?

When granting an interim injunction, the court will decide how long the injunction should remain in force. This will usually be until the final determination of the claim.

9. When dealing with the precautionary request, does your legal system provide for specific procedure?

An application for an interim injunction is usually made when the claim is filed. The application will usually be considered by a judge "on the papers" (that is, without an oral hearing), typically at the same time as the claimant's application for permission to bring their claim for judicial review. The other parties to the case will usually be given opportunity to respond to the application. In an urgent case, the time allowed for response may be short (see paragraphs 16.3 and 16.5 of the Administrative Court Judicial Review Guide 2021). If time allows and the parties wish it or the court considers it is in the interests of justice, the court may direct that an oral hearing take place.

10. Is the precautionary decision taken unilaterally or collegiately?

Unilaterally. In judicial review proceedings, an application for an interim injunction will usually be determined by one High Court judge.

11. During the discussion of the precautionary request, can the judge directly define the judgement on the merit?

Interim injunctions are not meant to determine finally the issues in the proceedings. If the interim relief sought would, in practical terms, finally determine the claim, a particularly strong case must be shown to justify the grant of relief at the interim (but in reality, final) stage (see *R (Detention Action) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin) at para 17).

12. Can precautionary measures be challenged before the Supreme Court /Council of State?

Yes, but there can only be a challenge in the Supreme Court if there has first been an appeal to the Court of Appeal and if the test for the grant of permission to appeal to the Supreme Court is satisfied (namely, that the case "raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time"). Procedural or interim relief decisions are unlikely to give rise to issues which satisfy this test. Where the High Court or Upper Tribunal grants interim relief in the form of a precautionary measure, an appeal is available to the Court of Appeal provided that it is reasonably arguable that the court or the tribunal erred in law. The UK does not have a legal system which incorporates a Council of State.

13. Can the Supreme Administrative Court / Council of State, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level?

Yes, although it will do so only in "wholly exceptional circumstances". An appellant who wishes to postpone compliance with the order under appeal must first seek a stay from the first instance court or, as necessary, from the appeal court (in accordance with rule 37 of the Supreme Court Rules).

14. On average, how many precautionary decisions are taken every year by the Supreme Court/Council of State in comparison to the overall number of decisions taken?

So far in 2021, the Supreme Court of the United Kingdom has stayed the execution of the order under appeal in three cases. In 2020, it did so in one case. The Court determines, on average, around 50 cases per year. By comparison, 5,368 judicial review claims were issued in 2020 and 2,177 judicial review claims were issued in the first half of 2021. These figures do not include other forms of litigation to challenge the administration.