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Commercial Disputes: How potent are judicial review remedies in commercial disputes with the Government? What counts, and what will sway a court?

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Nusrat Zar, Partner, +44 20 7466 2465 Nusrat.Zar@hsf.com

Agenda

Amenability to judicial review

Public law decisions

Procedural hurdles in judicial review

Grounds of judicial review

Which bodies are amenable to judicial review?

- The Courts focus on the nature of the act or decision being challenged and the source of the power under which it was made, rather than on the identity of the body in question:
 - Whether the power being exercised is founded in statute
 - Whether the decision has a “sufficient public element, flavour or character”

Court's view on amenability

- *R (Liberal Democrat Party) v ITV Broadcasting Ltd; R (on the application of Scottish National Party) v ITV Broadcasting Ltd [2019] EWHC 3282 (Admin)*
- *R (Holmcroft Properties Limited) v KPMG LLP [2018] EWCA Civ 2093*

Public law decisions

- Where a commercial or contractual decision engages a statutory duty or power or public policy: *R (Shoemith) v Ofsted and others* [2011] EWCA Civ 642
- Private law rights:
 - *R (Dean) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1998
 - *Data Broadcasting International Limited v Ofcom* [2010] EWHC 1243 (Admin)

Public law decisions cont...

- [Breach of public procurement obligations](#): *R (The Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC)
- [Fraud, corruption or bad faith](#): *R (SDC LLP) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin)

Procedural hurdles in judicial review

- Time limits for commencing a claim for judicial review are very short:
 - CPR rule 54.5(3): a claimant must file a claim form at Court “promptly and in any event not later than three months after the grounds to make the claim first arose”
 - Planning decisions: no later than 6 weeks after the grounds for the application arose
 - Procurement decisions: 30 days
- A remedy of last resort – claimants need to have exhausted alternative remedies first: *R (Good Law Project and Runnymede Trust) v Prime Minister and Secretary of State for Health & Social Care [2022] EWHC 298 (Admin)*

Illegality / unlawfulness

- A public body's actions will be unlawful if they are ultra vires i.e. beyond the scope of the body's powers
- Failure to comply with statutory duties, under EU or domestic law:
 - *R (SSE Generation Ltd) v Competition and Markets Authority* [2022] EWHC 865 (Admin)
- Breach of ECHR rights incorporated by Human Rights Act 1998

Irrationality / unreasonableness

- *R (The Electronic Collar Manufacturers Association and Petsafe Ltd) v Defra [2021] EWCA Civ 666*

Procedural impropriety / unfairness

- Unfair consultation which amounts to a mistake of fact:
 - *R (British Gas Trading Ltd) v Gas & Electricity Markets Authority and others [2019] EWHC 3048 (Admin)*

Procedural impropriety / unfairness

- Issue: Even if the Court finds that there is procedural impropriety, it might still not award a remedy:
 - S. 31(2A) of the Senior Courts Act 1981
The High Court—
 - (a) must refuse to grant relief on an application for judicial review, and
 - (b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
 - *R (The Good Law Project) v Secretary of State for Health and Social Care [2022] EWHC 46 (TCC)*

Remedies in judicial review

- All relief in judicial review proceedings is discretionary
- Three distinct categories of final remedies:
 - Declaratory remedies
 - Coercive remedies
 - Compensatory remedies
- Judicial Review and Courts Act 2022:
 - Introduces two new types of quashing order: a suspended quashing order and a prospective quashing order

Remedies in judicial review cont...

- Quashing orders: sets aside a decision as invalid from the time it was made:
 - Leaves the decision-maker free to "remake" the decision based on the evidence available to him at the time of the fresh decision
 - Risk that the decision maker might well arrive at the same outcome

| Questions?

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