



# Challenging Authority - Judicial Review in the railway industry

## The powers that be

The railway industry is highly regulated with direct involvement of government bodies at a number of levels. As a result railway companies are frequently subject to the decisions of public bodies with authority over how they operate.

The exercise of such governmental, statutory and regulatory powers can have substantial direct and indirect effects upon a company's costs, access rights and opportunities.

When the decisions are inappropriate or unfair, Judicial Review proceedings are often the remedy available to the industry to defend its interests and expectations.

Judicial Review is a narrow and limited right intended to protect private citizens and companies from the inappropriate exercise of the power granted to public bodies. To make the most of Judicial Review, an understanding of its limits and uses is important. Some of those uses and some of the pitfalls are set out below.

## When can the incorrect use of public authority be stopped?

The exercise of public power is intended to give effect to laws enacted by parliament and to government policy. It is delegated to organisations appointed to discharge a public role for the benefit of society as a whole.

Consequently, a private individual or company cannot object to the results of the legitimate exercise of the decision maker's discretion. It is not enough to say that a decision is inconvenient or would have been better if made differently. Instead the decision must be shown to be so bad that it is irrational, improper or that a competent decision maker plainly could not have reached it. The test for a successful Judicial Review challenge is therefore high and success is more likely in challenges to the process of decision making than to the substantive fairness of the decision itself.

Nonetheless, challengeable decisions are made. Some examples of when successful challenges might be mounted are in the following box:

### Possible grounds for challenge

- The decision making process was inadequate or all relevant matters (including submissions from an affected party) were not considered;
- A public body ignores guidance it has issued on how it will take decisions;
- A decision is made for an irrelevant reason, such as to punish a party for previous unconnected actions or to exert pressure to increase payments or change different services;
- The decision is incompatible with a party's legitimate expectations about running their business;
- The decision is contrary to another law or exceeds the decision maker's power;
- A decision is made which is a breach of a party's human rights or is contrary to European laws.

## Pitfalls and idiosyncrasies in Judicial Review proceedings

The following points should be considered when commencing proceedings:

- **Time Limits** - Judicial Review should be brought as soon as possible, and in any event within 3 months of the relevant decision. During this period a substantial pre-action protocol should also be completed.
- **Permission** – Proceedings may only be brought with the court's permission.
- **Limitations** – the court may express strong views and overturn decisions, but does not have executive power so cannot substitute its own decision.
- Proceedings (even if fast tracked) are likely to take upwards of 6 months.

## What do I get if I win?

The most effective result of a successful Judicial Review is an order to overturn (cancel) the flawed decision.

Although courts cannot generally substitute their own decisions the public authority itself will usually substitute a

decision in line with the court's finding, following a successful Judicial Review.

Financial compensation for the impact of a flawed decision is not usually available.

## So, how do I use Judicial Review proceedings to the best advantage?

Public authorities wish to avoid Judicial Review of their decisions as it suggests that their exercise of public power has been poor, it involves them in substantial and potentially costly litigation and there is a prospect of public judicial censure.

It is therefore in all parties' interests that the decision maker is fully aware of all relevant matters and evidence (as well as your views and intentions concerning Judicial Review) before the decision is taken and that engagement about the correct decision continues throughout the process including after the decision has been made (but before an application for Judicial Review has been made).

Parties facing the prospect of an adverse decision from a public authority may wish to consider the steps set out opposite.

- Ensure your point of view and reasons are explained in full (in writing) to the authority before the decision is made;
- Identify and raise all relevant evidence and highlight all guidance and policy which may be relevant;
- Explain the possibility of Judicial Review and give the authority the chance to amend its decision;
- Clearly identify the decision you are challenging and be sure that that decision is flawed (rather than the result of the decision is simply unhelpful);
- If proceedings must be issued to protect your rights, do not delay.

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