

1. INTRODUCTION: WHAT IS JUDICIAL REVIEW?

Judicial review is the review by a judge of the High Court of a –

- decision;
- proposed decision;
- refusal to exercise a power of decision.

To determine whether that decision or action is unauthorised or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

The courts have historically had jurisdiction to review the decisions of public bodies under an ancient form of common law remedy known as the “prerogative writs”. Over time the procedural rules that applied became very complex. In 1972 Parliament enacted what was intended to be a simplified procedure for reviewing the exercise of powers derived from statute (the Judicature Amendment Act 1972). That Act provides a valuable framework for judicial review in this country, and it is attached as Appendix D. The exercise of non-statutory public powers remains reviewable at common law.¹ The practical position is that any exercises of power are reviewable by the courts that:

... in substance have important public consequences however their origins and the persons or bodies exercising them might be characterised ...²

Many types of decisions or actions are capable of being reviewed by the courts. At its most basic level, judicial review is available when an Act of Parliament creates a discretionary power for public officials to exercise – be they Ministers, Chief Executives of Government Ministries, or Ministry employees – and somebody adversely affected by the exercise of that power challenges the decision on the basis that the person exercising it has not acted consistently with the power given by the Act, for example, by misinterpreting the provision giving it. Seen in this way, judicial review essentially involves the courts ensuring that the law is being followed when power is exercised in a manner that affects people. There are many types of decision that can be challenged by way of judicial review, and various bodies exercising “public” powers or functions that can have their decisions reviewed by the court, but focusing on this core aspect of judicial review provides the clearest insight into the essence of it.

The purpose of judicial review is two-fold:

- (i) the definition of principles to govern public administration by the Executive; and
- (ii) the safeguarding of individual interests against illegal or unreasonable administrative action, or from administrative action taken without following proper procedures.

The **Laws of New Zealand** defines judicial review in the following way:

3. What is judicial review? Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made

¹ See *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385, at 388 (PC).

² *Royal Australasian College of Surgeons v Phipps* [1999] 2 NZLR 1 11 (CA). The correctness of this approach was not challenged in the Privy Council [2000] 2 NZLR 513.

according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfil their function of administering justice according to law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law. The Court of Appeal has observed that New Zealand administrative law is ‘significantly indigenous’, and that judicial review powers here have a broader scope than those under English law.³

Judicial review is not the same as an appeal. An appeal exists when a statute provides that a decision can be appealed to a court. In an appeal a judge will more clearly review the merits of the earlier decision. There is usually no “deference” accorded to the decision being appealed from.⁴ Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. However, there are examples where the distinctions between a review of the decision-making process and an examination of the merits of the decision itself (as in an appeal) can sometimes be difficult to make. The applicant’s focus of concern will almost always be on the decision itself. Indeed some of the powers of appeal – for example appeals on errors of law – are very similar to judicial review.

In recent years there has perhaps been a greater willingness to look at the weight that a decision-maker has given to particular factors. This is particularly so when individual rights are affected by a decision, especially those protected by The New Zealand Bill of Rights Act 1990 and Human Rights Act 1993. Recently the courts have referred to there being different intensities of review that depend on the subject matter.

A judge has a wide range of discretionary powers when dealing with applications for judicial review of decisions or actions. The Judicature Amendment Act sets out some of those powers (s 4). At an early stage, the judge may also be asked to make an interim order preserving the status quo until the review is complete. Again the Judicature Amendment Act makes specific provision for interim relief (s 8).

In judicial review proceedings the documents are critical. The court decides the matter by examining all the paper generated within the relevant organisation and put in evidence by the parties, which may include:

- decision papers
- memoranda between officials and Ministers/advisers and decision-makers;
- Cabinet papers/minutes;
- Board/Council meeting papers/minutes;

³ “Administrative Law”, Philip Joseph and Jason McHerron.

⁴ *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC)

- diary notes;
- file notes;
- correspondence;

And by evaluating the sworn affidavit evidence of the decision-maker and those involved in the process.

At the conclusion of the case, a judge may –

- make declarations about the way a decision was made or action taken (eg declare that certain things that ought to have been done were not done, or that some matter taken into account by the decision-maker was not relevant);
- set aside the decision as unlawful (and thus restoring the position prior to the decision having been made);
- direct the person who made the decision or took the action to reconsider and re-determine the matter, and may give directions as to how this should be done (eg taking into account certain relevant matters).

Relief, or the remedy, is entirely discretionary. An applicant may make out his or her case but not persuade the court to take any steps as a consequence. The most common form of remedy is an order setting aside a decision, coupled with an order requiring reconsideration by the decision maker, or resulting in that anyway. This can lead to the same ultimate outcome when a decision maker reconsiders the matter lawfully. Thus in some cases a successful claimant in judicial review can win the battle, but lose the war.

We are seeing more claims for “substantive” forms of relief, with a degree of success; for example compensation for breach of a fundamental right (including the right to natural justice)⁵ and restitution where charges have been unlawfully levied.⁶

⁵ *Upton v. Green* (No.2) (1996) HRNZ 179 (HC); *Binstead v. Northern Region Domestic Violence Approval Panel* [2002] NZAR 865 (HC)

⁶ *Waikato Regional Airport Ltd & Ors v. Attorney General* [2004] 3 NZLR 1 (PC)