

FORMAL MEMORANDUM

JUDICIAL REVIEW: POLICY AND PROCEDURE

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Introduction

1. An applicant may commence proceedings in the Administrative Court for judicial review of an action or decision taken by the Commission in respect of his/her application.
2. Proceedings will be issued on the basis that the action or decision under challenge breached one or more of the public law principles of lawfulness, fairness and reasonableness.
3. An applicant has a period of three months from the date of the action or decision under challenge in which to apply to the Administrative Court for permission to proceed with an application for judicial review. Outside

this time limit, he/she must apply for leave to apply for permission out of time.

4. Proceedings may be issued

- (i) during the course of the review;
- (ii) after a final decision has been taken;
- (iii) on refusal to accept a re-application.

During the course of the review

5. Judicial review proceedings may be proposed or issued at any time during the course of a review. They may relate, for example, to delay in progressing a case; the question of interim disclosure; or a decision not to exercise a statutory power, pursue a particular investigative step or interview a witness.

After a final decision has been taken

6. Judicial review proceedings may be proposed or issued in relation to the Commission's decision not to refer. The grounds of review will vary significantly from case to case but may include, for example, a challenge to the Commission's interpretation of the law; the assessment of fresh evidence or the credibility of a witness; the test of "real possibility" set out in section 13 of the Criminal Appeal Act 1995; or the exercise of the discretion not to refer¹.

On refusal to accept a re-application

7. An application to the Commission which does not result in referral may become the subject of a re-application.² The decision not to conduct a further review may be subject to challenge by way of judicial review.

The pre-action protocol

8. The pre-action protocol was introduced in England and Wales in 2002 in order to reduce the increasing number of claims being issued in the Administrative Court. There is no equivalent procedure in Northern Ireland.
9. The applicant is required to write a letter before action to the Commission setting out, in general terms, the basis of the challenge.

¹ The Commission's policy on the exercise of the discretion not to refer is set out in [Discretion in referrals](#).

² The Commission's policy on re-applications is contained in [Stage 1 Decisions \(Including Re-Applications\)](#)

10. The Commission's response to any letter issued under the pre-action protocol for judicial review will be provided within **14 days** of receipt.
11. Any letter received at the Commission which indicates an intention to commence proceedings for judicial review will be passed immediately to the Legal Adviser.
12. The Legal Adviser will form a view as to whether the challenge should be conceded or contested. If a concession is proposed, the Legal Adviser will refer the matter to the Chair.

If proceedings are issued

13. The Commission will not accept service of proceedings unless they have been properly issued and sealed by the Administrative Court and a Court reference number has been allocated. When received at the Commission, all proceedings will be passed to the Legal Adviser, who will review the documentation relating to the action or decision under challenge and consult as necessary.
14. Unless the application is to be conceded, an Acknowledgement of Service must be filed at the Administrative Court within **21 days** of receipt. This is a formal document setting out the Commission's considered response to the applicant's challenge.
15. Ordinarily, the Acknowledgement of Service will be drafted by the Legal Adviser. In an appropriate case, it may be necessary to instruct counsel to advise on the issues raised in the claim, or to draft the Acknowledgement of Service.
16. After the Acknowledgment of Service has been filed, the papers relating to the application for permission will be considered by a single judge of the Administrative Court, who will issue a written decision as to whether to grant or refuse permission to proceed.
17. If permission is refused, the applicant may renew the application, at which point an oral permission hearing of 20-30 minutes will be scheduled by the Administrative Court.

If permission is granted

18. If permission is granted by the single judge, the Legal Adviser will consider whether the claim should be conceded or contested and make an appropriate recommendation to the Chair. The Chair will decide, after consulting as necessary, whether or not the claim should be conceded or contested.

If the challenge is conceded

Judicial Review by applicants.

This document will be reviewed and updated when necessary.

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19. In an appropriate case, the Chair may decide that the applicant's challenge should be conceded. This may occur as a result of correspondence exchanged through the pre-action protocol, after proceedings have been issued in the Administrative Court or after leave is granted by the single judge.
20. The Commission and the applicant may be able to reach agreement as to how the challenge can be resolved without recourse to litigation.
21. If a challenge is conceded, in whole or in part, the Chair will decide:
 - (i) whether any discrete piece of additional work is to be undertaken;
 - (ii) whether the case should be re-opened and a fresh review commenced;
 - (iii) whether the same Case Review Manager should be involved;
 - (iv) whether the same Commissioner(s) should be involved.
22. The Director of Casework and Casework Support Manager will be notified of the Chair's decision to re-open a case. As a general rule, any review work to be undertaken will commence immediately.

The overriding principle of fairness

23. The Commission recognises the need for fair and independent consideration of any judicial review challenge. As a general rule, the Commissioner (or committee of Commissioners) who took the decision under challenge will not be consulted during the judicial review process, nor will they express any view on the merits of the challenge to those who are considering the matter at the Commission.
24. The only exception to this general rule is when clarification of some factual matter is required. For example, if the caseworker involved in the case is on leave, or no longer employed by the Commission, and some factual matter within the investigative or decision-making processes is not clear from written records.

Time limits

25. The time limits referred to in this document relate to consecutive days, not working days. No additional time is afforded in lieu of weekends or Bank Holidays.
26. The 14-day time limit for responding to a letter issued under the pre-action protocol cannot be extended by consent of the parties.

27. The 21-day time limit for filing an Acknowledgement of Service cannot be varied by consent of the parties in accordance with Civil Procedure Rule 54.8 (3).
28. In order to ensure that the Commission complies with its obligations in relation to these time limits, any Commissioner, case reviewer or administrator who receives any item of correspondence relating to judicial review will pass the matter to the Legal Adviser immediately.

Delegation

29. The Chair may, in any individual case, decide to delegate all or part of his role in the judicial review process as outlined above.
30. In the Chair's absence (but only when necessary in order to meet a judicial review deadline) the decision as to whether a case is to be re-opened may be taken by the Deputy Chair or a senior member of staff.
31. In no circumstances will such delegation be to a Commissioner who made or took part in making the decision under challenge.