



# Taxing Matters

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**Alice** Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).

Today we're talking about judicial review, what it is and how to use it to best effect, to talk us through this minefield is Robert Waterson.

Robert is a partner in RPC's tax disputes team where he assists on civil and criminal tax disputes for small and medium enterprises and individuals taking part in group litigation all the way through to FTSE 100 companies and high net worth individuals. Robert is described in glowing terms by all of the law directories, they toss around terms like 'very clever' 'incisive intellect' and 'dynamic' all of which are important but miss a crucial aspect, Robert is also the driving force behind RPC Harmony, RPC's choir. Which once recorded a Christmas song with a West End star to raise funds to support a homeless charity. Robert, welcome to Taxing Matters.

**Robert** Hi Alice, good to be with you today.

**Alice** **So, judicial review as a concept has been mentioned a number of times on Taxing Matters. What is a judicial review, what are we talking about here?**

**Robert** So, judicial review is an often-ignored part of the taxpayer's armoury when it comes to disputes with HMRC. Often ignored because generally speaking people tend to approach tax disputes as technical disputes concerning issues of black letter law. And quite often they are. But there are plenty of circumstances where there can be additional points which may be amenable to challenge via a different route and in particular judicial review.

So, what are we talking about when we are talking about judicial review? In broad terms it is a collection of actions which all revolve around, in one way or another, fairness. So, the notion that a treatment which has been meted out to a particular individual, and this isn't just in a tax context, is "unfair". In the legal sense of the word. And so, there are circumstances where in tax disputes you could have issues of fairness and there may be a mechanism to challenge by way of judicial review.

**Alice** **You mentioned there the legal concept of unfairness, what might a difference be between the legal concept of unfairness and what general people might think of as being unfair.**

**Robert** Sure. Well, a common theme when people come to me with tax disputes is the notion that what they are facing in one way or another is unfair. And when they talk about it, usually what they are referring to is the sort of generic sense that the treatment that they are receiving is unfair.

Now, if that unfairness comes from a situation say in statute where they are required to pay tax and they don't think they ought to, then really there isn't really a great deal you can do about that "unfairness" by way of challenge. You could have a go at whether or not the Revenue's application of that rule is correct and that would be a traditional challenge through the Tax Tribunals.

But there are circumstances where unfairness is such that it might meet the relevant legal threshold for a judicial review challenge.

So, what are we talking about? We might have a situation for instance where a body has acted illegally. So, in other words it's acted in a way which is outside of its powers. It might be that the body has acted in a way which is unreasonable, or that there has been some kind of impropriety or procedural impropriety in the manner in which a particular decision has been reached.

And in addition to that, any ground really that involves a challenge of the Human Rights Act is also usually pursued by way of judicial review.

**Alice** **So, what kinds of bodies might be the ones making these decisions which might be subject to judicial review?**

**Robert** So, judicial review only really applies in relation to decisions which are made by emanations of the state. So, there are lots of bodies which fall into that category, the obvious ones would of course be things like HMRC, the Police, a health service and so on.

And there is plenty of case law around quasi-public bodies, organisations which exist because of, or have a special status if you like, in the running of the country. And that they may be indirectly public bodies,

But when it comes to tax disputes, in my experience you don't usually get into a question as to whether or not judicial review can be brought against HMRC as a public body because obviously it clearly is one. And it exercises powers of tax management which are obviously public powers which it has to exercise in a fair way.

**Alice** **So, assume the company has a decision that they are looking at and saying this is unfair, what would they do next? What is the process?**

**Robert** I think this analysis has to be done right at the beginning of the process: it's the only sensible time that it can take place.

So when a new matter comes to me, for instance, the initial query which you are confronted with once you've got the outline of the relevant facts and you've had an opportunity to have a look at the relevant law, is, is there a ground to challenge whatever behaviour the Revenue has; whatever conduct the Revenue has decided to pursue.

Usually there'll be a decision, and by a decision, in the tax context that's almost always an assessment to tax, but it could also be a decision in relation to say, the exercise of a discretion. So, extra-statutory concessions are an obvious one, and circumstances where the Revenue may, effectively grant a taxpayer a particular treatment, or refuse to grant a particular treatment.

And so you look at it through the prism of the relevant legislation in order to determine if you have a technical challenge against the treatment which it is being pursued, and that would normally be a challenge which would go to the Tax Tribunal, under normal circumstances: you appeal your assessment, you go to the Tribunal, you have an argument about the facts in law.

But, separately and usually underneath the front part of the dispute if you like is a background of conduct or correspondence or interaction which colours the way in which this dispute has arisen.

So, I know on a previous podcast Harry Smith has talked on the subject of legitimate expectations, but one of the most common areas in which (and this is one of the most common areas in which judicial review challenges can arise) so you're thinking there about circumstances where HMRC have in some way indicated to the taxpayer that they ought to receive a certain treatment and then later on they've gone back on that. And in those circumstances that kind of "unfairness" is something which can't normally be pursued before the Tax Tribunal. It's something which under normal circumstances you could only pursue by way of a judicial review action.

Now that's a critical strategic decision-making point from a taxpayer's perspective. Because if the decision isn't taken at that stage to pursue a claim for judicial review (in some cases as well as a claim or an appeal in the Tax Tribunal) then quite often the opportunity to do so is then lost. And I can go into a bit more detail on that if you like.

So, when a decision is made the taxpayer then has a period in which it can appeal the decision to the Tax Tribunal. I'm sure others have gone through that process in other podcasts: there's a statutory window, usually 30 days, in which an appeal has to be either lodged with the tribunal or an appeal has to be made to HMRC.

That "decision" may also attach to rights in relation to judicial review, and in those circumstances a taxpayer has to decide if they want to issue judicial review; promptly or in any case within three months of the relevant decision.

There are circumstances in which that period can be extended, but they're quite unusual.

**Alice** **So, we've talked a bit here about what decisions you can judicial review. Are there any categories of decisions that you can't judicially review?**

**Robert** The analysis right at the beginning is whether or not you've got something which is amenable to judicial review, I suppose. I've talked about the distinctions between what you might consider to be a judicially reviewable "unfairness", if you like, and one which is just in the round "unfair".

Generally speaking, it is not possible to judicially review changes in legislation for instance. So the high court works on the basis, or the law works on the basis, that there's supremacy of parliament; so, the idea that parliament enacted legislation, which might well change the position as it appeared to be in the past, and it might even change the position retrospectively. And in those circumstances, it can be extremely difficult if not impossible to get the courts to find that, to uphold a judicial review challenge in those circumstances obviously because parliament has mandated that the law must change. And it must have considered those points when it enacted the relevant legislation.

There're arguments in relation to certain types of legislation so secondary legislation for instance may be challengeable by way of judicial review. And that is something which may be interesting of course in particular in relation to the fall out of Brexit where it is expected there will be an awful lot of secondary legislation.

But such challenges aren't easy.

And another point I would make about judicial review, is that they're not easy cases to win. There is a presumption, I think it is fair to say, on the part of the courts that decision made by public bodies are generally made for the right reasons and in roughly the right way.

Judicial review isn't a way of trying to get the court to remake a decision that you don't like. That's not really what the court's function is to do. And it might even be that the judge in the relevant case might have come to a different decision had he or she been the person making the decision at the relevant public body, but, again, that isn't the test. The test is really to look at the processes and the circumstances around the decision-making process in order to determine: Whether the relevant decision maker had the power to do what they did? Did they do it in all the circumstances in a way which is reasonable? Was there any impropriety in that process? And if all of those boxes are ticked, then it is very difficult to be successful.

That said, some of the most successful judicial review cases I've had have been ones that have either never got to court or have in fact, in some cases, pretty spectacularly come to an end during the hearing them self.

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**Alice** **So, just following on from that what are the tactical or practical matter that you might want to keep in mind in deciding whether or not to judicially review a decision and if so, how?**

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**Robert** Going back to the example that I gave earlier. So, you've got a case involving a particular tax treatment. The Revenue in the past, in this hypothetical case, has written to you and has indicated that the particular tax treatment you received will be X. You proceed on that basis, file all the relevant returns etc. so you've relied on that decision and that indication from HMRC, and years later they form the view that actually that wasn't right and they look at the relevant legislation again and say "actually we think it means Y not X".

In those circumstances, as I previously described, you've got two routes. You can say "well actually your analysis of the law is wrong, and the outcome ought to be what you said it was previously." And that's really a matter for the Tax Tribunal, that's really analysis of the black letter position as applied to the relevant facts.

But also, there's this letter that you received years ago, a letter which has indicated to you quite clearly what the relevant treatment should be. Now, the Tax Tribunal itself doesn't have the power to adjudicate on whether or not you have a legitimate expectation arising from that letter; the Tax Tribunal is a statutory body and it's limited in the scope of its powers by statute.

However, unlike that the High Court has inherent jurisdiction in relation to the remedies which you can obtain by judicial review. And can find that the taxpayer in that case, notwithstanding what the law might be, has been put in a position where it can rely on the relevant expectation that they have received having received that letter earlier.

Now, practically what do you do with that?

It's pretty unattractive for an adviser to have to go to the client in this way, but the only sensible approach in those circumstances is to issue an appeal in the Tax Tribunal and also issue a claim in the High Court at the same time.

Now, that's unattractive to clients, because obviously it means that the costs in relation the process are increased. But it is the only way that you can really protect your position and in the right case, and with the right analysis, I have on many occasions pushed for a client to take that approach. And the reason for that is because strategically it places the Revenue on the back foot.

So, what will actually happen, in most cases, is you will issue your claim to the High Court and your appeal to the Tribunal and one of those two proceedings will be stayed, because there's no point in them proceeding at the same time.

In most cases it will be a judicial review that's stayed and there are a couple of reasons for that. The first reason is that if the First Tier Tribunal proceedings are successful, so in other words, if you find that the law means what you thought it meant, and what they thought it meant originally, then the judicial review falls

away. It is no longer relevant because you haven't suffered any detriment in relation to the relevant tax treatment because it turns out you're right.

Judicial review is the option of last resort if you like, so the High Court generally takes the view that you need to exhaust all of the remedies before you then go to the Administrative Division and they hear your judicial review point.

In addition, unlike the Tax Tribunal, it is far more unusual for issues of evidence and findings of facts, if you like, to be determined by the High Court in judicial review proceedings. It is very unusual for instance that you would have witness evidence given during judicial review proceedings. It does happen, but it's very rare. Unlike that, the Tax Tribunal is set up really to hear evidence and to make findings of fact on that evidence.

So, a second reason, if you like, why the High Court proceedings would be stayed, is because by the time you've finished with the First Tier Tribunal proceedings, and assuming the taxpayer's lost - so it turns out the Revenue was right about how the law should have been interpreted - at that stage the High Court then benefits from having all the relevant findings of fact, having already been made by the Tax Tribunal. If there are additional points it needs to find, it will do that, but most of the leg work has already been done. So, that's why it tends to be divided up in that way.

So, then you say "okay well why would you bother issuing your proceedings at the beginning? Why would you go to that expense?" And the reasons for that are because of time limits. I have seen many cases reported where the taxpayer has thought "I will wait and see what happens in the First Tier Tribunal", or they have tried to plead grounds for judicial review in the context of the Tribunal, and they've found later that they've lost, the Tribunal's indicated that they don't have the jurisdiction to hear those points and, of course, by then it's far too late for them to commence proceedings in the High Court because of the time limits I've described before.

The other point is that it very much takes the fight to the Revenue in a different way to the way in which appeals in relation to the Tax Tribunal are dealt with.

Fundamentally you're dealing with, as I said right at the beginning, you're dealing with issues of fairness and psychologically that's a very different thing for the Revenue to have to tackle.

It's not a question of the administration of the law, it's a question of the fair administration of the law and whether or not this particular taxpayer's found themselves in a position where they've been treated in a way which, to the relevant legal standard, is unfair.

It's therefore very unattractive for the Revenue in those types of cases, for there to be a finding in the High Court, which is bound to be very critical in a case where the taxpayer wins, and indicates that they have received treatment which is unlawful, in the sense that it is unfair to an unlawful extent.

The presentation of that is very difficult for the Revenue to deal with, which is why I said earlier, lots of my most successful judicial review cases haven't actually got to the court, because the other side has given up before we've got to that stage; either because the risk was too great or because they spotted the particular issue.

Whereas by contrast the proceedings in the Tax Tribunal can be comparatively anodyne. It can almost become a discrete intellectual exercise; you take all of the burning injustice out of the process by looking at what does this statute mean, and should tax be paid in these circumstances etc. etc? Whereas really with judicial review you're dealing with the last resort, which is what it is, for the taxpayer and for anybody who brings judicial review proceedings; it is the last outpost that the citizen has against the excesses of the powers of state.

My view, taking it on a slightly different level, is that judicial review is a critical part of the democratic process because it is the last bastion, really, the last outpost, I suppose, on the citizens' interaction with the state before they don't have anywhere else to turn. So, it fulfils a very important democratic and constitutional role, much and unfairly maligned in the press and by politicians etc, but it is a key function.

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**Alice**

**And what can the court actually do if you are successful in a judicial review?**

**Robert**

So, the natures of the orders which can be made by the court, and I would emphasise at this stage that judicial review only happens by the permission of the court. It's not something that somebody has as of right. You go to the court and you ask permission firstly to move for judicial review, and then the orders that the court may make are at its discretion. And you can get mandatory orders, which are orders which compel the public body to carry out a particular duty or to behave in a certain way; prohibitory orders, which prevent them from doing something; quashing orders, which take an existing decision and quash it; declaration in relation to a particularly event or a particular occasion; and injunctive relief so that would be to prevent the tax authority doing something and that can be something which is quite important in the meantime if you like. You can seek interim injunctive relief by way of judicial review which would prevent the Revenue taking a

certain step until the matter is resolved, and obviously, you can have a final injunctive order which prevents them from doing do permanently. And obviously damages and restitution in the relevant cases.

So, the court has a very wide ambit of powers that it can exercise in these circumstances in order or bring relief to deal pretty much with whatever circumstance it is presented with where it finds that the judicial review is well founded.

It is a very powerful weapon for the taxpayer in the right case and obviously the court has extremely wide powers at its disposal.

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**Alice**

**And what about in the wrong case? What if it goes wrong? What are you looking at there?**

**Robert**

Well, the danger with judicial review, and it is a path which one doesn't embark upon lightly, the danger is that you lose of course, and usually the consequence of , is costs.

So, unlike the position in relation to most proceedings in the Tax Tribunal, you're into a normal cost regime. So, in those circumstances there would be costs - not only your own costs to pay but also the costs of the other side.

There are steps which can be taken in order to try and protect that position. You can seek orders where the court would limit your exposure costs. But those types of decisions have to be taken, or applications I should say, have to be broached right at the beginning of the process. After you've lost its probably too late.

So, that's the main downside, is the fact that you would have wasted your time and costs along the way. And yes so I think this idea that judicial review is something that you ought really to... the analysis needs to be done right at the beginning and you need to be reasonably sure that you are embarking upon something which is worthwhile for the client.

Another point which, and this is sometimes a strategic point, but sometimes you find yourself in a position where the judicial review has uncertainties around it because you don't really have access to all the relevant information. This is pretty common in public law matters, because the individual doesn't really have at their disposal all the information that the relevant public body has: so, they've made the decision, they've got access to all the files, all the information, they've got information about the decision that they made and why they made it. And quite often you'll end up with a client who's got a pretty strong inkling as to what's happened, but they don't really have an awful lot of information in order to back it up. So in circumstances where it's not clear exactly what the underlying factual position is because your client doesn't hold that information. Judicial review in particular comes into its own in relation to the way in which the disclosure obligation works.

So, in judicial review cases there's something called the duty of candour. And the reason this exists is the idea that when proceedings are issued the court has to be placed in a position where it understands all of the relevant facts. The idea that the litigation is pursued on the basis that all cards are put down face up. It's a duty which applies both to the Claimant and to the Defendant. But more often it's felt more by the defendant, because they have the greater obligations. There have been many cases in which failure to comply with the duty of candour by the defendant has been fatal to their case and they've seen criticism as a result of it.

As a solicitor, it's a very serious part of your work, the disclosure obligation in general. But in particular in cases involving public law, it's very important that the relevant lawyers take this duty very seriously and consider it properly because they will be called into question if they've not.

And that can give you access to information which normally you wouldn't receive.

So, in the past the public body would even disclose information which was subject to privilege in order to satisfy the conditions of the duty of candour. Now, it would be fair to say that in recent years, they've probably taken a more restrictive view of their obligations in that regard, and the jury's still out really on whether or not that's appropriate. But that's just meant there have been more cases, not specifically in relation to privilege but generally there have been more cases where there have been pretty swinging criticism from the courts in relation to public bodies that haven't taken this seriously and dealt with it properly.

Now, obviously from a strategic point of view that means you get access to information which can be very useful. It also means that if that information has to be disclosed, that it is more likely that HMRC, in this case, would think very carefully about whether this is case that they want to pursue: "Is this the case that we want this particular issue decided? Do we want these documents to go before the court in order for them to look at them and adjudicate on whether what we did was fair?" You're talking about internal email discussions, you could be talking about confidential policy papers, those sorts of things. And, you know, when looked at in the cold light of day in the Admin Division, "does our policy in this respect as HMRC make sense? Is it fair? Was it fair to this taxpayer?" And there have been as I said before cases where at that point, shortly after disclosure, the Revenue's position has changed, and the matter has been resolved.



**Alice** **So, this seems like quite a powerful weapon. If a company is contemplating using this what sort of information would they need to start looking to gather before they get far down the track, before they come for advice?**

**Robert** The analysis really, I think on the question of whether judicial review can be pursued, is analysis by the lawyer at the time shortly after the initial consultation. Certain questions will be asked, the relevant documents will be obtained - if there's a document in which you receive a particularly strong opinion from HMRC, which is relevant, then it is probably best to take that to the lawyer so they can consider it straight away. But that kind of careful analysis of working out how the facts fit around any potential claim is something which has to be done by the lawyer, as I mentioned earlier, pretty early in the day and so the claim has to be deployed promptly or in any case within three months.

So, if you're going to your adviser and you want them to consider this point then the sort of things which would be potentially relevant are obviously all of the correspondence you've had with HMRC.

Sometimes you could be looking at issues like guidance, so guidance can be put out specifically to an individual or company. It can be put out in a more general way so to a particular industry, so say pensions for instance or to people who operate as landlords or whatever it is, a certain "class" of taxpayer, or it can be advice and guidance which is put out to the world in relation to general points.

Now, guidance changes over time and if it's the case that you are looking at a situation where say "we receive this guidance information five years ago or whatever it is and we saw that, we read it, we relied on it, and then the position has changed", it's obviously important to preserve that as it was.

It probably won't come as a surprise to many people that guidance, as it is published almost always nowadays on the internet, changes and can change very regularly. And it can be quite tricky to obtain old copies of guidance. So, I mean it really is just a part of good administration, I think, if you receive something from HMRC generally and you did something which is important, contains information on what particular course you should take, the first question one should ask oneself, and I'm not just talking about during reviews, I'm talking about the process of actually running companies or being a responsible taxpayer, is "is this guidance really directed at me? Does it apply to my circumstances? Is it something where it would be worth getting some further clarification, should we write to them and ask them to say well we've got your guidance, it says this, these are our circumstances, can you confirm the same treatment?". And for goodness sake, preserve whatever it is you get back because those can be very powerful documents. You cannot assume that HMRC will retain them for any length of time or will even be able to find them after a certain amount of time. But retaining those types of proper records can be very important in really nailing these points and establishing grounds for judicial review.

**Alice** **So, in your experience, looking at all of these matters in the round, what kind of things work, what kind of things don't work?**

**Robert** Well, I've talked a little bit there in general terms about guidance. And I've already mentioned that judicial review claims are hard from the Claimant's side.

There's a big difference between, and there have been cases on really all of these points, there's a big difference between a piece of guidance or a long standing practice, which applies to you specifically, and something buried in sort of general part of the Revenue's internal manual, which says something kind of helpful to your argument, but you're not even sure if you read it at the relevant time.

So this is really looking for instance at legitimate expectation and if you've got, the more specific the particular piece of guidance you've received is, or the more peculiar to your circumstances the situation is, in terms of general fairness or something which maybe contains some illegality, the stronger your case will be. And these cases, they do turn on their facts and curiously for a court that doesn't normally find facts, you're looking at situations where you've got peculiar circumstances which apply to peculiar situations.

So, if you take something like, to move away from legitimate expectation, if you look at something like the application of an extra statutory concession.

That's the situation where the Revenue has a discretion to apply a particular treatment; that's what Parliament has given it, the power to make a choice. And in those circumstances, they're usually not appealable so you can't get a decision in relation to the discretion or arising from a discretion which you can then appeal to the tax tribunal. That might seem harsh but I mean, if you think about it, it's quite sensible because the sorts of things that you're considering when you are considering whether discretion has been fairly exercised are these issues of fairness. The Tribunal is not really set up for that.

I had a case, a number of years ago, where the issue turned on the way in which an exemption worked in relation to a particular medical issue, so that the tax treatment in particular, in relation to the number of days a

taxpayer could be in the UK, would be, under normal circumstances, one thing. But if this particular medical exemption was met, the Revenue had the discretion to excuse a longer period of time without it altering the relevant taxpayer's tax position. So, in broad terms, you know, if you get sick and there's nothing you can do about it, then we're not going to try and flip your position in relation to tax because you have happened to overstay your welcome. Now, in the particular case that I had, the way that they had applied this was really narrow, and discretions tend to be applied in quite a narrow way in my experience, but they had applied it in a way which I could see meant that because of the nature of the illness that my client suffered, the tax treatment was different, and that couldn't possibly have been right.

So, for instance because of the particular ailment the client had to stay for a lengthy period of time. And their view was well the illness itself wasn't expected, but the way in which the treatment progressed was really his choice, and so in those circumstances, they said, you don't get in to exercise of the discretion for this exemption because he made a decision to get treated and that treatment itself lasted a very long period of time and took him over the relevant number of days.

And I said it, "well it can't possibly be right that", well, firstly, he acted on the basis of medical advice, so query whether it's right for the Revenue to really gainsay that medical advice, which is basically what they were doing. And secondly, it can't be right that the relevant concession applies differently to different types of illness, you know, that can't have been the policy behind it; it's irrational, for you to consider it in that way.

And I got the case quite late in the day, in the sense that there had been a number of years of correspondence between the accountant advisors and HMRC, which had really come to nothing because the Revenue had dug in. But when I got it, and I commenced the judicial review process, they had to look at it through a different lens, and quite rapidly, they realised that, actually, when you looked at it from a public law point of view they couldn't really maintain the position that they had adopted, and the whole thing was resolved inside a month.

So, a good result for the client, but it demonstrates how these things can be very powerful.

One of the things I haven't mentioned about the judicial review process, and it really ties into a comment I often make to clients, which is, litigation isn't a binary process, you don't decide on one day that you press the button and then, you know, a year or two years later, you find yourself in a court room. There are lots of steps along the way which can be taken which can, and decision points, in relation to how the matter progresses, or if it progresses at all.

So, one of the really powerful ways in which the judicial review is supposed to operate, is that before you even issue your proceedings you've got to issue what is called a pre-action protocol letter. It's a detailed letter, a technical letter, which sets out the relevant facts and also the legal basis of the claim. And it goes before litigation is commenced.

The policy behind this particular protocol, is that it will hopefully avoid matters having to go to court.

And it can work very well, because it does focus the mind of the recipient on the way in which this matter is progressing and the idea that they've got to look at it as a public law point. I've seen people in the past consider it to be a bit of a, you know, a hurdle, that you've just got to get over.

But it's a powerful tool in the process. And it can mean that the matter is resolved effectively on judicial review grounds without you having to even issue a claim form. Timing is important, the pre-action protocol procedure doesn't in any way change the time limits I described earlier so issue your claim promptly in any case within three months.

But if you have the time to do it and you're able to do it, you do it early, you give the other side enough time to think and then hopefully you get the matter resolved really quickly for your client.

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**Alice**

**Are there any reputational consequences to your claim which you need to bear in mind in deciding whether or not you want to start this process?**

**Robert**

Well proceedings in the High Court are public, so, in the sense that, you know, people can turn up and they can watch proceedings take place.

There are circumstances where appearance can take place in private, but they are used in very, very few circumstances and the courts are pretty loathe to anonymise proceedings in that way.

So, you've got to, as with frankly almost all court processes, you've got to be prepared for the idea that there may be some public attention given to it. I have yet to come across a judicial review case, myself, where the client has decided that they didn't want to pursue judicial review in particular, because of the reputational risk. I have certainly encountered cases where the client has been keen not to progress any litigation because they are concerned of the reputational risks. But fortunately I think, I feel like that was more of an issue a few years ago and I think that the world has turned a few times since then. There are certain types of cases where people would rather it didn't get potentially into the public eye; certainly, there are categories of client where that is an important point; a point that I don't think that the public authority is always above exploiting, frankly.

But in recent years, people have generally been less concerned about that. And, you know, in tax cases the issues can be pretty anodyne, unless you are dealing with something that is quite egregious, in which case the reputational risk is something that the Revenue needs to be more concerned with.

So, I've mentioned a couple of times now some of the best outcomes have been cases that don't even get to the court. Part of the reason for that is because the Revenue doesn't want the decision; they don't pursue every single case. I mean if nothing else they've got their PR and statistics to maintain so, you know, they are very keen on indicating that they win an awful lot of Tribunal cases. That doesn't mean that they don't give up on the ones that don't make it all the way to a hearing, because the advisors involved in the matter have managed to get them to change their view.

And as I said when it comes to judicial review you're dealing with issues of fairness, so again, there's a different type of pressure which it brings to bear on HMRC and they, they have to take it seriously before they decide that this is a matter that they want to progress.

I mean another point, which I have seen used before is that if you get into the judicial review proceedings, the process of withdrawing, from the point of view of the Defendant, is not straightforward, it's not like say commercial litigation where you can just give up; there are circumstances where the Defendant has to ask for leave of the court in order to discontinue its position.

And there are good reasons for that. So, you know, you can envisage a situation where the High Court says "well actually, the situation here is so egregious that it is important as a matter of public policy that I, you know, the judge sitting in the court, deliver a judgment in relation to this matter." And so permission in those circumstances for the Defendant public body to withdraw, would be refused. Doesn't happen very often. It certainly tends to scare the horses when it does happen; and I've seen it happen in one case in particular where the judge was very adamant that he intended to reach a judgment if certain conditions weren't met.

And so, you know, it's as I said a few times, it's a very powerful weapon if deployed properly and in the right case.

I think most of the reputational risk is really on their side rather than yours.



I mean another point which I have seen used before is that if you get into the judicial review proceedings the process of withdrawing is not, from the point of view of the Defendant, is not straightforward, it's not like say commercial litigation where you can just give up. There are circumstances where the Defendant has to ask for leave of the court in order to discontinue its position and there are good reasons for that. So, you know, you can envisage a situation where the high court says well actually the situation here is so egregious that it is important as a matter of public policy that I, you know, the judge sitting in the court, deliver a judgment in relation to this matter. And so permission in those circumstances for the Defendant public body to withdraw would be refused. Doesn't happen very often, it certainly tends to scare the horses when it does happen and I've seen it happen in one case in particular where the judge was very adamant that he intended to reach a judgment if certain conditions weren't met.

And so, you know, it's as I said a few times, it's a very powerful weapon if deployed properly and in the right case. I think most of the reputational risk is really on their side rather than yours.

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**Alice** **Any final pieces of advice for anyone who is contemplating going down this path?**

**Robert** Yeah, I think with judicial review it is imperative that consideration is given early in the process and that consideration is careful. There are many, many instances where people have tried to use different routes in order to secure the kind of relief they would get or may get in judicial review cases and they found that the tribunal in particular doesn't have the jurisdiction to decide them. And by that stage it's too late. It's something that advisors have to think about really early on and it's something that clients have to think about really early on. Everybody comes, or most people come certainly in my experience, to cases with a view that what is happening to them is unfair. Now that's a very common theme amongst clients is the idea that a lot is unfair but it's important that consideration is given right at the beginning as to what is the nature of that unfairness and is that something that we need to pursue, or at least just protect the position early on so that it can be returned to later if possible.

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**Alice** Robert, thank you very much for taking us through judicial review. And thank you to all of our listeners for joining us. As ever a full transcript of this episode, together with our references, can be found on our website [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).

If you do have any questions for me or for Robert, or any topics you would like us to cover in a future episode, please do email us on [taxingmatters@rpc.co.uk](mailto:taxingmatters@rpc.co.uk), we would love to hear from you.

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Thank you all for listening and talk to you again in two weeks

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