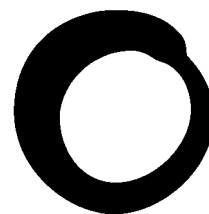


May 2008



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the Earth**

Judicial Review: an overview

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“The purpose of judicial review is to ensure that government is conducted within the law.”

Sedley J, R v. Secretary of State for Transport ex p. LB Richmond (No.3), 1985

What is Judicial Review?

Judicial Review is a form of Court proceeding that allows you to ask a judge to review the legality of a public body's actions. It can only be used in situations where there is no other right of appeal and where you believe that the authority has acted unlawfully.

Judicial review is only concerned with whether the decision has been made in accordance with the law and whether the decision made is itself lawful. Importantly, judicial review is **not** concerned with the *merits* of a decision i.e. with whether or not it is a good or bad environmental decision. The court will not substitute its own decision for the decision of the authority.

In other words it is not about whether their decision was right or wrong. Decision makers are allowed to get things 'wrong' i.e. to decide differently to the way that you, the Court or another decision maker would have decided. The question is whether they acted lawfully in how they got there.

The courts are usually less concerned with the decision than the manner of reaching it i.e. about lawfulness of process.

Judicial review should be seen as a last resort to be used only when all else has failed.

Grounds for Judicial Review

There are many different grounds for judicial review and often they overlap with one another. In essence, public authorities must act according to law. They are not above the law.

Normally speaking they are either carrying out a legal **duty** (i.e. something that they **must** do in certain circumstances) or they are exercising a **power** (i.e. a power that they **may** do certain things in some circumstances). If a public authority has a **duty** to do something, but does not do it, then it will be acting unlawfully. If a public authority has a **power** to do something, then it has a choice whether or not to do it. However, in deciding whether and how to exercise that power, it must still act lawfully, including taking into account relevant matters, disregarding irrelevant ones and acting fairly. In addition the authority must follow all necessary procedures in deciding whether and how to exercise that power. Failure to do any of these things may amount to grounds for judicial review.

Some of the most common grounds for judicial review are set out below.

Acting beyond their powers (Ultra Vires)

Public authorities are only able to act within the powers that they have been given by law. Those powers are often set down in legislation. A public authority is not allowed to act beyond those powers or to do things that it is not authorised to do.

Fettering their discretion

Where a public authority is given a general discretion on how to act in certain circumstances, it must not fetter that discretion by, for example, adopting an overly rigid policy or set of guidance or by agreeing to act in accordance with the decision of another public authority.

Exercising a power for the wrong purpose

Where an authority is given a particular power it will usually be in the context of a particular purpose. Sometimes that purpose is explicit and sometimes it is implicit. In either case the authority is not allowed to exercise a power for some other purpose.

Taking the correct factors into account

Public authorities often have to make complicated decisions balancing up a number of competing factors. When they do so they must take into account all of the factors that are legally relevant to the decision and must not take into account any other factors (i.e. legally irrelevant factors). Sometimes the legislation will explicitly say which factors are relevant or not. In other cases it will be a matter for the Court to decide.

Acting contrary to a European Law requirement (eg a Directive)

It is unlawful for any public authority to act in a way that is contrary to a European Law requirement. Environmental law in this country is largely driven by European law and there will often be a European law angle to an environmental case.

Acting contrary to a Human Rights Act requirement

It is unlawful for any public authority to act in a way that is a breach of a person's human rights and contrary to the Human Rights Act 1998.

Irrationality

Although judicial review is not about the 'merits' of a decision, the courts may reach a view that a decision is so unreasonable that no reasonable authority could have reached that decision, having regard to the facts. In that case the Court can declare the decision unlawful. This is a difficult ground of challenge.

Fairness

Public authorities must act 'fairly' in accordance with 'natural justice'. For example a decision must not be made on the basis of 'bias', and people who are to be affected by a decision in certain ways must be given a 'fair hearing'. Importantly, that does not mean that they need to be given an 'oral hearing'.

Inadequate consultation

In some cases consultation is required. Even if not required by law, where a consultation is carried out it must be carried out fairly. That means that it must be carried out at a stage where the results may make a difference to the outcome. It also means that consultation responses must be considered properly). Consultees must be given sufficient information to allow them to respond properly.

Who can you challenge?

Judicial review proceedings can only be used to challenge a public authority. These include:

- Government ministers (or Secretaries of State);
- Local authorities;
- Environment Agency;
- Other regulators;
- The Planning Inspectorate;

- Many other public authorities;
And, in some contexts, privatised utilities.

What can you challenge?

Judicial Reviews can be used to challenge unlawful acts and decisions of a public authority. Sometimes those acts will be easily identifiable (for example a grant of planning permission or a waste management licence), in other cases they will be less easy to identify, for example the existence of a policy or a decision in a letter to you stating that the authority will or will not do something.

Importantly, you can challenge both what the authority has done and how they have done it i.e. the process by which they reached a decision or acted.

Who can bring the challenge?

The Court will only allow a 'person' (including a group or company) to bring proceedings if they have 'standing'. That is decided on the basis of whether that person has a 'sufficient interest' in the matter. Normally, in environmental cases, that is not a problem. However, your solicitor will advise you on whether or not you are likely to have standing and, if not, will help you to find someone who does.

Sometimes a challenge will be brought by an individual and sometimes by a community group or by a national organisation. In some cases it can be useful for a community group to find someone who is eligible for legal aid and who has 'standing'.

Time Limits

The Courts will only allow you to bring judicial review proceedings if you have acted very promptly. The limit for starting proceedings (i.e. actually filing detailed papers with the Court) is three months from the date of the relevant decision. However, in many cases the Court will insist that proceedings are brought more quickly than that. That is particularly the case in relation to planning decisions where a developer may start spending money on a development as soon as they are granted permission.

As soon as you are aware of a decision or act that may be subject to judicial review challenge, you should take urgent legal advice (see contacts at the end of this note). Often you will have advance notice that a decision is going to be made. In that case you should speak to a lawyer in advance of the decision.

The Judicial Review Process – what happens, and when?

The first step in a judicial review process is to let the public authority know formally that you think they have acted, or are about to act, unlawfully and give them a chance to remedy the situation. This is done formally in a **Letter Before Claim** which should normally be written by your solicitor. Sometimes a solicitor will want to involve a Barrister at this stage.

Once you receive the authority's response to your Letter Before Claim, then you can decide whether or not to proceed with a judicial review. If you decide to do so, then your lawyers (your solicitor and barrister jointly) will prepare your **Claim Form** and any necessary evidence. The evidence will normally be in the form of a witness statement, together with a bundle of documents. Getting the documents ready involves a lot of work for your lawyers and for you. It is the time when you can often be particularly helpful by providing all of the

documents that are relevant and helping to explain matters. Even though your lawyers are the legal experts, you will be much more of a local expert.

The Claim Form will then be filed with the High Court. From then on you are the **Claimant** and the Public Authority is the **Defendant**. There may also be an **Interested Party** such as a developer in a planning case.

The first formal Court stage is a **Permission** decision by a judge. You are only allowed to bring judicial review proceedings if a judge gives you permission. He or she will only give you permission if you have an arguable case, if you have acted promptly and if you have 'standing' (see above). A permission decision will normally be made on paper and sent to your lawyers. A permission decision will normally be made within about 6-8 weeks of filing your papers with the Court.

If you are not given permission, then you can ask for an **oral hearing** to reconsider whether to give you permission. If you are still not given permission, then you can appeal.

If you are given permission, then your case (or the bits of it that have been given permission) will proceed to a full hearing. That hearing might be several months (or more) after permission has been granted.

The hearing itself will usually be in the High Court in London or Cardiff. Unlike a normal civil case, the hearing consists almost entirely of legal argument (submissions) between your barrister and the Defendant (and Interested Party's) barrister. It is very unusual for there to be any 'oral' evidence from witnesses or any form of cross examination. Most environmental judicial reviews will take one or two days.

Sometimes **judgment** will be given immediately at the end of the hearing. More often though the judge will 'reserve judgment'. This means that he will go away and think about it and write his judgment and will then notify the parties one or two days before he 'hands down' his judgment in Court.

After judgment any of the parties may ask for permission to **appeal**.

What happens if I win?

That depends. It is entirely a matter of the judge's discretion whether or not to grant any 'relief'. Whether or not he or she grants any relief will depend on many factors including whether the Claimant acted promptly and the 'requirements of good administration' and whether the decision would be any different if the authority was asked to take it again in a lawful manner.

Sometimes you might 'win' the argument but be told by the judge that he or she is not going to order the public authority to do anything. In other cases the judge might order the public authority to do something (for instance to go away and take the decision again) or not to do something (for instance not to grant a licence). Sometimes the judge will make a formal 'declaration' as to what the law means.

Because judicial review is often concerned with process rather than substance, there is a risk that a public authority will be told to go away and take a decision again in accordance with the correct process. In such cases the authority may do that, but may again reach exactly the same decision as the one that you objected to in the first place.

What happens if I lose?

The most important feature of losing is that you will normally be liable to pay the legal costs of the Defendant, and very occasionally the legal costs of an Interested Party. Those costs can be very high, £20,000 is not unusual (and it may be higher). However, there are ways to avoid this problem. These include: (1) bringing the case in the name of a person who is eligible for, and gets, legal aid; (2) in a 'public interest' case applying to the Court at the start of proceedings (when you file your claim form) for an order that you do not have to pay the other side's legal costs if you lose; and (3) reaching an agreement in advance with the public authority as to the apportionment of costs. Your solicitor should advise you about all of these when you first talk to him.

Remember, if you lose you can still appeal (with permission!). Many important environmental cases are lost first time around and then won on appeal.

Strengths and Weaknesses of Judicial Review

Strengths – Judicial review is really the only way of compelling a public authority to recognise its unlawful behaviour and to act lawfully. Done properly it provides a very powerful mechanism to force a recalcitrant public authority to act within the law. If you 'win' a judicial review, then it will often force a public authority to act lawfully in the future and may clarify a point of law for other public authorities. Public authorities do not like being judicially reviewed.

Weaknesses – Judicial review is only concerned with the question of whether a public authority has acted lawfully and not with the question of whether they have made a good decision. It is perfectly possible for a public authority to lawfully make a very bad (in environmental terms) decision. One of the particular problems with judicial review is the potential costs exposure (if you lose). Another problem is that because judicial review can be a long procedure, the environmental harm that you are trying to protect might have already occurred by the time that you get a judgment in your favour.

Warning

Judicial review is a complex and highly specialised legal process. Unfortunately, it is not designed to make it easy for a non-lawyer to act on their own. In addition, as with many other court proceedings, there is a real risk that if you lose you will have to pay the legal costs of the other parties. For those reasons, your first step should normally be to contact a lawyer and take legal advice (see contacts at the end of this briefing).

Contacts (for environmental law matters)

The Rights & Justice Centre provides legal advice and representation to people who want to use the law to protect their communities and the environment. We take on environmental "public interest" cases on behalf of these groups. We try in particular to work with disproportionately affected community groups who suffer the worst brunt of bad environmental decisions and who cannot otherwise get legal advice. We also try to take 'test cases' that will help other communities in the future.

Examples of cases on which we've recently acted include successfully challenging plans for a new incinerator in Hull and a proposed development of a severely contaminated site in Derbyshire without ensuring that it met environmental conditions.

If you hear of an individual or community group (it doesn't have to be a FoE group) who needs legal advice, you can either put them in touch with the legal team at legal@foe.co.uk or ask them to call our advice line on **Freephone 0808 801 0405** between **6:30 til 8:30 on Wednesday evenings** and **11:00 til 2:00 Thursday lunchtimes**.

Alternatively they can get in touch via the Friends of the Earth [Contact Form](#), remembering to select "Legal and planning rights" from the drop-down list of subject lines

The [Environmental Law Foundation](#) (www.elflaw.org) provides a very good referral service for community groups and members of the public to put them in touch with specialist environmental lawyers around the country who will provide you with some initial free advice and may then be able to act for you. You can contact ELF by telephone on 020 7404 1030 or by email at info@elflaw.org

Further information and guidance:

Friends of the Earth – Tel: 020 7490 1555
Website: www.foe.co.uk

Planning

Email: planning@foe.co.uk
Website: www.YourPlanningRights.co.uk

Right to Know

Email: RightToKnow@foe.co.uk
Website: www.RightToKnowOnline.org

Rights and Justice Centre

Email: legal@foe.co.uk

Useful web sites

Government

Communities and Local Government
<http://www.communities.gov.uk/>

The Planning Inspectorate
<http://www.planning-inspectorate.gov.uk/>

Environment Agency
www.environment-agency.gov.uk/

Information Commissioners Office
www.ico.gov.uk

Planning Portal
www.planningportal.gov.uk

Non Governmental Organisations (NGO)

Campaign to Protect Rural England planning site
www.planninghelp.org.uk

Environmental Law Foundation

www.elflaw.org/

Liberty

www.liberty-human-rights.org.uk/

Neighbourhood Initiatives Foundation

www.nif.co.uk/

Planning Aid

www.planningaid.rtpi.org.uk

Wildlife and Countryside Link.

www.wcl.org.uk

Specific reading

Community Rights Resource Pack:

<http://www.foe.co.uk/resource/local/planning/resource/index.html>