

# Planning Democracy

## A short guide to judicial reviews in planning cases in Scotland

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### About this briefing

This is a briefing on going to court to challenge a planning decision in Scotland, using the process called 'judicial review'.

### What is Judicial Review?

Judicial Review allows you to ask a judge to review the legality of what a public body has or has not done. It is a legal procedure for challenging the legality of decisions.

Judicial review has several important features:

- It can only be used where you believe that the public body has acted unlawfully.
- It is not concerned with the merits of a decision (i.e. with whether or not there was a bad planning decision), unless the decision is fundamentally irrational.
- In most judicial review proceedings, the court will focus on the lawfulness of the process of decision taking (i.e. how the decision was made) rather than the actual decision (i.e. what was decided). There are some exceptions to this, however.
- It is a last resort to be used only when all else has failed (when there is no other right of appeal).
- It involves significant financial risks - seek expert legal advice before you start.

### Grounds for Judicial Review

Public authorities must act in accordance with the law. When they act and make decisions, public authorities are either (a) carrying out a legal duty (something that they *must* do in certain circumstances); or (b) exercising a power (something that they *may* do in certain circumstances).

If a public authority has a duty to do something then it must act consistently with that duty. If it does not, its failure to act will be unlawful.

If a public authority has a power to do something, then it has a choice whether or not to do it. However, there are likely to be legal constraints on how that power can be exercised.

For example, a public authority will usually be required to take account of all relevant matters, disregard irrelevant ones and act fairly (especially towards anyone who will be affected by their decision). In addition, the authority must follow a lawful procedure in deciding whether and how to exercise its power – such procedures are commonly set out in legislation or policy documents. Failure to do any of these things could give rise to a judicial review claim.

The arguments put forward by someone raising a judicial review are referred to as the 'grounds' for the judicial review.

Some of the most common grounds for judicial review in planning cases are set out below. There is often overlap between them, depending on the factual context and the decision being challenged.

### **Misunderstanding the law**

A public authority must act according to the law. Sometimes they misunderstand what the law requires of them.

### **Acting beyond their powers**

Public authorities are only able to act within the limit of their powers. Those powers are often set down in legislation.

### **Limiting their discretion**

Where a public authority is given a general discretion on how to act in certain circumstances, it must not limit that discretion by, for example, 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 given for 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 any other purpose.

### **Taking the wrong factors into account**

Public authorities often have to make complicated decisions balancing 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 decision-maker to exercise its judgement as to what is relevant.

### **Acting contrary to a European Law requirement**

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. The UK is now set to leave the European Union in March 2019 but, until then, EU law will remain part of UK law and acting contrary to an EU law requirement will remain as a ground for judicial review. It may also be relevant to some extent during any transitional arrangements.

### **Acting contrary to a Human Rights Act requirement**

It is unlawful for any public authority to act in a way that is in breach of a person's human rights as set out in the Human Rights Act 1998. This is one of the very few areas where a Court can consider the legality of an Act of Parliament itself. Normally it is limited to reviewing secondary legislation and/or the decisions taken in accordance with legislation.

### **Irrationality**

Although judicial review is not about the 'merits' of a decision, the courts may reach a view that a decision is so unreasonable or irrational that no reasonable authority could have reached that decision, having regard to all the facts. In that case the Court can declare the decision unlawful. It is very difficult to succeed on this ground – the threshold is high.

### **Fairness**

Public authorities must act 'fairly' in accordance with 'natural justice'. For example a decision must not be affected by actual or apparent 'bias', and people who will be affected by a decision must be given a 'fair hearing'. Importantly, that does not necessarily mean that they have the right to speak in person to the decision-maker (for example at a public hearing). It may be sufficient that they were given the opportunity to put in a written statement about the decision.

### **Inadequate consultation**

In many cases public 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. Consultees must be given sufficient information to allow them to respond meaningfully to the proposals and public bodies must ensure that all consultation responses are considered properly.

### **Who can you challenge?**

Judicial review proceedings can only be used to challenge public authorities. In planning matters in Scotland, these include:

- Government ministers;
- Local authorities (councils);
- The Scottish Environmental Protection Agency;
- Other regulators;

### **What can you challenge?**

Judicial Reviews can be used to challenge unlawful decisions, acts and failures to act by a public authority. Sometimes these will be easily identifiable, for example a grant of planning permission or a waste management permit. In other cases the decision may 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 in a particular way.

It is not possible to challenge the bringing into force of an Act of Parliament itself (unless it infringes the Human Rights Act), because that would infringe the constitutional principle that a democratically elected Parliament is supreme, but you can challenge secondary legislation (so called statutory instruments).

### **Who can bring the challenge?**

The Court will only allow a 'person' who has 'standing' to bring proceedings.

A 'person' can include a natural person, a group or a company or other organisation. Whether they have 'standing' is decided on the basis of whether that person or organisation has a 'sufficient interest' in the matter. Normally, in environmental cases, that is not a problem. However, a solicitor can advise you on whether or not you are likely to have standing and, if not, will try to help you to find someone who does.

### **Time Limits**

Act promptly! The limit for starting proceedings (i.e. lodging your detailed papers with the Court) is three months from the date of the relevant decision.

You should always act very promptly. That is particularly the case in relation to planning decisions where a developer may start spending money on a development as soon as it gets planning 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. Often you will have advance notice that a decision is going to be made. In those circumstances it is a very good idea to speak to a lawyer before the decision is actually taken.

### **Strengths of Judicial Review**

Judicial review is the only way of forcing a public authority to recognise it has acted unlawfully and to act lawfully. Done properly it provides a very powerful mechanism to force a 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 too.

### **Weaknesses of Judicial Review**

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 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 take a long time, the environmental harm that you are trying to prevent 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. It is not designed to make it easy for a non-lawyer to act on their own. If you lose, you will have to pay the legal costs of the other parties. Your first step should normally be to contact a lawyer and take legal advice (see list of contacts below).

### **What happens and when?**

#### **You contact a solicitor**

You get in touch with a solicitor to discuss your case.

#### **Inform the public authority about your complaint**

Your solicitor can help you to set out your complaint in writing to the public authority concerned.

### **Your solicitor hires an advocate for your case**

Your solicitor will 'instruct' an advocate to act on your behalf in relation to the judicial review. An advocate is required to present your judicial review case in court.

### **Your advocate lodges a petition for judicial review**

Your advocate will then lodge your 'petition' for judicial review. This is your written application to the court which explains why the court should consider your case.

### **Permission stage**

Before the full hearing for your case, you have to ask the Court for 'permission' to bring your judicial review action.

To be granted permission, you have to be able to show that you have 'sufficient interest' in the subject matter and that your case has a real prospect of success. This is not usually a high bar and your solicitor can advise you about this.

If you are refused permission, you can appeal the refusal. If you are granted permission, your case will then proceed to the hearing stage.

### **Hearing stage**

The hearing is where your advocate presents your case in court. The other side's advocate will also have an opportunity to respond to your advocate's arguments and will present the other side's case. The hearing will take place in the Court of Session in Edinburgh.

### **The judgement**

After the hearing (often several months afterwards), the court will issue a written judgement. The written judgement will explain the judge's decision on your case.

### **Appeal**

You may appeal, or the other side may appeal the judgement. Your solicitor will be able to advise you on whether this would be worthwhile.

### **What happens if you win?**

It is a matter for the judge's discretion whether or not to order the public authority to do anything differently. This will depend on many factors.

Sometimes you might 'win' your case but be told by the judge that they are not going to order the public authority to do anything different. In other cases the judge might order the public authority to do something (e.g. to go away and re-take the decision) or not to do something. 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 go away and take a decision again following the correct process. In such cases the authority may do that, but reach exactly the same outcome as the one that you objected to originally.

## What happens if you lose?

The most important feature of losing is the “loser pays” principle, which means you must pay the costs of the other side.

However, protective limits on your liability to the other side if you lost can now be put in place for environmental judicial reviews in Scotland. This is called a ‘protective expenses order’.

You have to apply to the court at the start of your case for a protective expenses order. Take legal advice on whether your case would be eligible for a protective expenses order.

Initially the following default costs caps apply to paying the Defendant’s costs if you lose:

- A cap on your liability - you could be liable to contribute to the other side’s costs up to a maximum limit of £5,000;
- A ‘cross-cap’ on your opponent’s liability to you – this limits the other side’s liability to pay your costs (if you win) to a maximum of £30,000.

These limits can be increased or decreased when you apply for a PEO. They do not change if your opponent appeals the first judgement, which means that even though your legal expenses increase on appeal – you can still only recover up to £30,000 from the other side if you are successful (or any other level of cap which has been set by the court).

Your solicitor should advise you about all of these costs issues when you first talk to them.

Remember, if you lose you can still appeal (with permission). However, there is likely to be a further financial risk involved in embarking on another round of litigation.

## Contacts

- Highland environmental law - <http://www.highlaw.co.uk/> - 01463-831344  
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- Living law - <https://www.livinglaw.co.uk/> - 07929 996105 - [contact@livinglaw.co.uk](mailto:contact@livinglaw.co.uk)
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