Friends of the Earth

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Judicial Review:

An Introduction

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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 this all about?

This briefing tells you about the advantages and pitfalls of taking your campaign into the courtroom.

What is Judicial Review?

Judicial Review is a legal procedure for challenging the legality of decisions: it allows you to ask a judge to review the legality of what a public body has or has not done (acts and failures to act).

The following points are important to keep in mind:

- Judicial review can only be used where you believe that the public body has **acted unlawfully**.

- It is **not concerned with the merits of a decision** (eg with whether or not it is a good or bad decision, or whether it is morally right or wrong), unless the decision is fundamentally irrational.

- In most judicial review proceedings, the court will focus on the lawfulness of the **process of decision taking** (eg how it was made) **rather than the actual decision** (eg what was decided). There are some exceptions to this, however.

- Judicial review should be seen as a **last resort** to be used only when all else has failed (when there is no other right of appeal).[1] Bringing a judicial review involves considerable costs risks, so it is very important to seek expert legal advice before starting a claim.

Grounds for Judicial Review

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

- If a public authority has a **duty** to do something, then it must act accordingly. 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.

[1] See the other briefings in our Community Rights Resource Pack for information on other legal tools for campaigning: http://www.foe.co.uk/campaigns/fair_future/resource/rights_resource_pack.html

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 its decision). In addition, the authority must follow a **lawful procedure in deciding whether and how to exercise its power**. This is most commonly set out either in legislation or in relevant policy documents. Failure to do any of these things could give rise to a judicial review claim in the High Court.

Lawyers call the arguments put forward by the claimant in a judicial review claim the "grounds" for the judicial review. Some of the most common grounds for judicial review are set out below. There can be considerable 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.

Case examples

The Critical Mass Cycle Rides have taken place every month in London since 1994. At a Critical Mass ride in 2006, the Metropolitan Police handed out leaflets, which stated "*These cycle protests are not lawful because no organiser has provided police with the necessary notification. Your participation in this event could render you liable to prosecution.*" The Metropolitan Police tried to require cyclists to give advance notice for the rides under the Public Order Act 1986, on the basis that the rides were 'not commonly or customarily held', as they took a different route each month. This would have changed the very nature of the rides which have never had a formal route or organiser. Friends of the Earth took the case to court on behalf of one of the cyclists, opposing this attempt to restrict the Critical Mass rides. The House of Lords disagreed with the Metropolitan Police and said that the term 'commonly or customarily held' covered events even if they took different routes. This was a case of the public authority simply misunderstanding the law[2].

In June 2018, the Secretary of State for Transport (then Chris Grayling) adopted the Airport National Policy Statement (ANPS) which gave a green light to Heathrow expansion. However, the government did not consider the Paris Agreement when making the decision, because it thought this was not required under the Planning Act 2008, and that it should restrict itself to domestic carbon reduction targets only. Friends of the Earth challenged the decision on the basis of the sustainable development duty in section 10 of the Planning Act, and Plan B Earth brought a challenge in relation to section 5(8) of the Planning Act. Both climate claimants argued that the government should have taken the Paris Agreement into account,

[2] Kay v Commissioner of Police of the Metropolis [2008] UKHL 69

and won in the Court of Appeal in a ground-breaking victory for climate justice.[3] They were the only claimants to succeed, in proceedings which involved many other parties, including local authorities and NGOs, whose challenges were based on non-climate factors.

- **Acting beyond their powers[4]**

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

Case example
In 2011 the government proposed to vary the feed-in tariff scheme providing incentives for the installation and use of small-scale solar power to generate electricity. This would have reduced the rate of payment with retrospective effect, affecting certain installations that had already been implemented at an earlier higher tariff in circumstances where the installer counted on the scheme for continuing commercial certainty. Friends of the Earth challenged the decision and the judges in the High Court and Court of Appeal agreed with us: the relevant legislation did not give the Secretary of State the power to reduce the feed-in tariff for installations that were already eligible for a higher tariff at the point the proposed reduction was due to come into effect. The effect of the Secretary of State's proposals would have been to take away an existing entitlement without proper statutory authority. There was a presumption against retrospective operation in the construction of statutes[5].

- **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, adopting an overly rigid policy 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 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.

[3] *R (oao Friends of the Earth Ltd) v Secretary of State for Transport* [2020] EWCA Civ 214

[4] Lawyers often use the Latin phrase "ultra vires" to refer to a public body acting "beyond its powers". Officially the use of Latin phrases in court was phased out by major rule changes made in 1999 but old habits die hard!
[5] R. (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change [2012] EWCA Civ 28

- **Taking the wrong 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 decision-maker to exercise its judgment as to what is relevant.

Case example

Many of the planning cases that Friends of the Earth's lawyers bring are based on this ground. In planning cases the local authority must have regard to all considerations that are material, and no others. Our claims will often question whether the authorities have considered all material factors. For example, we may challenge a failure to consider or apply correctly an important aspect of government planning policy or the relevant policies in the local plan. In a recent case, Friends of the Earth argued (unsuccessfully) that North Yorkshire County Council had failed to take into account the climate change impacts of a fracking planning application in Ryedale[6].

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

It is currently 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.

On 31 January 2020, the UK left the European Union, and the UK is now in a transition period until 31 December 2020. Until then, most EU law will remain part of UK law and acting contrary to an EU law requirement will remain as a ground for judicial review.

Case examples

In 2008 the Environment Agency failed to consider climate change impacts when it issued an incinerator permit, because it believed that European Law prevented it from doing so. Friends of the Earth brought a judicial review claim on behalf of an anti-incinerator campaign group (Hull and Holderness Opposing the Incinerator). In response to the claim, the Environment Agency conceded that it had misunderstood the European Directive and revoked the permit.

In the Heathrow challenge referred to above, Friends of the Earth also argued successfully that the Secretary of State had breached EU law, by failing to undertake a lawful environmental assessment.

[6] R. (on the application of Friends of the Earth Ltd) v North Yorkshire CC [2016] EWHC 3303 (Admin)

- **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. **Warning** – it is **very** difficult to succeed on this ground – the threshold is high. Friends of the Earth England, Wales and Northern Ireland, Friends of the Earth Scotland, RSPB and the law firm Leigh Day have brought a complaint to the UN that the UK is breaching international law (the Aarhus Convention, which guarantees access to justice in environmental matters) by the way it is applying the irrationality test. We are awaiting the UN's decision on this.

- **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.

Case example
This was one of Friends of the Earth's grounds for judicial review in the feed-in tariff case mentioned above. The Government sought to give effect to its decision to vary the scheme before the end of the consultation on the proposed changes. This would have made it impossible for the Secretary of State to consider the responses to the consultation as required by law.

Who can you challenge?

Judicial review proceedings can only be used to challenge **public authorities**. These include:

- Government ministers (or Secretaries of State)
- Local authorities
- The Environment Agency
- Other regulators
- The Planning Inspectorate
- And in some contexts, privatised utilities or other private entities where they exercise public functions.

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 it has done it** e.g. 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 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, your solicitor will 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.

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' to bring the challenge.

Time limits

In two words: **act promptly!** The limit for starting proceedings (eg actually filing detailed papers with the Court) is generally **3 months** from the date of the relevant decision.

But if you are challenging a planning decision, the time limit for starting proceedings is reduced to **6 weeks** from the date of the decision.

The Court may insist that proceedings are brought more quickly than those limits, and will always require you to 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. The duty to act promptly will also be relevant whenever the decision you seek to challenge does not involve EU law.

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 it is a very good idea to speak to a lawyer before the decision is actually taken.

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 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 – Judicial review is only really 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 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. 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 list of contacts below).

For more information on the process of bringing a judicial review challenge, have a look at our briefing "Judicial Review (part 2) – the Judicial Review Process".

Contacts (for environmental law matters)

The Friends of the Earth Rights and Justice Centre provides this and other legal and planning briefings in order to help people who want to use the law to protect their communities and the

environment. Friends of the Earth also seeks to take "test cases" that will help communities in the future. For example, we challenged Heathrow expansion on climate change and sustainable development grounds in support of our West London local group network and to protect our shared environment.

If you hear of an individual or community group that needs legal advice, you can try calling the Environmental Law Foundation advice and referral service ("ELF"). ELF (www.elflaw.org) provides a very good referral service for community groups and members of the public, to put you 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 0330 123 0169, by email at info17@elflaw.org or through the online enquiries form on its website (see below).

Further information and guidance

Friends of the Earth	Tel: 020 7490 1555 Website: www.foe.co.uk
Planning	Email: planning@foe.co.uk

Useful websites

Government

- The Ministry of Housing, Communities and Local Government https://www.gov.uk/government/organisations/department-for-communities-and-local-government
- The Planning Inspectorate https://www.gov.uk/government/organisations/planning-inspectorate
- Environment Agency https://www.gov.uk/government/organisations/environment-agency
- Information Commissioner's Office www.ico.org.uk
- Planning Portal www.planningportal.gov.uk

Non-governmental organisations (NGOs)

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

- Environmental Law Foundation
  www.elflaw.org

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

- Planning Aid
  http://www.rtpi.org.uk/planning-aid/

- Wildlife and Countryside Link
  www.wcl.org.uk

Specific reading

For more information on your environmental rights, have a look at other briefings in our Community Rights Resource Pack: https://friendsoftheearth.uk/legal-and-planning/guide-community-rights-environment-and-planning-law