Guide to judicial review in the incinerator context,
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This guide is intended as an outline and should not be relied upon as legal advice in any particular case. If you think there may be a case for judicial review then we recommend that you seek legal advice from a firm of solicitors who specialise in this area of the law.

April 2017 note from UKWIN: This guide was last amended in 2013 and so some elements are out of date. For example, **the Aarhus caps regime was changed to make pursuing claims more risky but that is not reflected in this guide**. See https://ukhumanrightsblog.com/2017/03/17/access-to-environmental-justice/ for relevant discussion.

Introduction

A judicial review involves a judge "reviewing" whether a public body's decision is lawful. It is essentially a challenge to the *way* a decision has been made, not an appeal to assess whether the decision was right or wrong. The usual outcome of a successful judicial review is that the public body is ordered to *reconsider* their decision. So the judge could set aside a planning decision permitting an incinerator to be built, and make a declaration that the planning authority's decision was unlawful, with guidance about factors to be taken into account if/when a new decision was taken. The judge would not normally forbid an incinerator to be built, or order the authority not to grant planning permission. So, judicial review is a court process to ensure that decision-makers follow a proper procedure which is fair and rational.

Understanding these limits, judicial review can be a powerful tool for challenging incinerator developments, generating publicity and providing a focus to build a campaign. A decision ordering the council to reconsider may force them to re-think, or give campaigners time to collect vital evidence to influence the second decision. Since there is no third party right of appeal by the public of a decision to grant planning permission, judicial review may also be the only legal option.

Contents

The aim of this guide is to help campaigners work out when judicial review is an option in incinerator cases, what the risks are, and how to build a case.

This guide will cover:

1. Judicial review checklist

To work out whether to bring a judicial review, consider each of these points:

a) Is there an alternative to judicial review?
b) Is the decision one which can be judicially reviewed?
c) Is there an individual or organization with a "sufficient interest" to bring the claim?
d) Is the decision unlawful?
e) Is the challenge within the time limits?

a.) Is there an alternative to judicial review?

An application for judicial review may be refused if there is an adequate alternative legal solution, such as an appeal, which can provide a similar outcome. For example, the Secretary of State's decision to grant or refuse planning permission to an incinerator development decision has its own statutory review procedure, known as "a Section 288 Challenge" (not covered here).

b.) Is the decision one which can be judicially reviewed?

Who can be judicially reviewed?

It is only possible to apply for judicial review of decisions made by a public body, such as local or central government, (or by a private body which is exercising public functions). In the incinerator context, a judicial review can normally only be brought of decisions by the local planning authority or of the Secretary of State for Communities and Local Government/planning inspector. It is not usually possible to apply for judicial review of any decision made by an incinerator development company. An example of when a private organisation has been judicially reviewed is a privatised water company exercising statutory powers[1]

[1] R. v Northumbrian Water Ltd Ex p. Newcastle and North Tyneside HA [1999] Env. L.R. 715

Which aspects of incinerator decisions can be judicially reviewed?

The most obvious and most common incinerator judicial review challenge will be the decision to grant planning permission by the planning authority. Other potentially challengeable decisions include:

- A local authority's decision to adopt new local planning documents.[2]
- A local authority's choice of company from which to procure waste services.
- The Environment Agency's decision to grant an environmental permit to the developer.

c.) Is there an individual or organization with a "sufficient interest" to bring the claim?

The person or organization who makes an application for a judicial review claim is known as the "Claimant". They must have a "sufficient interest" in the development. The Claimant could be a local resident who will be personally affected by the noise, pollution etc., or a campaigning group with relevant knowledge. For example in a recent incinerator case the Claimant lived in a village near to the proposed site and was a member of a local activist group.[3] There have also been examples when the Claimant could not prove an active interest in any campaign but just lived in the area and would have been affected by the decision.[4] A national environmental organization whose work relates to the issue generally would normally be allowed to apply for judicial review. A grey area might be a local incinerator campaign from another part of the UK.

One option may be for a local resident to bring the claim, and a local or national environmental group to "intervene" in the case as an interested party, which can give expert evidence.

d.) Is the decision unlawful?

For a judicial review to be successful the Claimant must show that the decision is:

- Illegal and/or;
- Irrational and/or;
- Unfair.

Illegal

Decision makers must understand the laws that regulate their decisions and apply them properly. This means that if a public authority exceeds the powers it has been

[2] There are a number of documents that are used to set out a local authority's strategy for development and to guide their decisions on planning applications. These documents are now known collectively known as the Local Plan.

[3] R. (on the application of De Whalley) v Norfolk CC [2011] EWHC 3739 (Admin)

[4] R. (on the application of Edwards) v Environment Agency (No.2) [2008] UKHL 22

given or does not comply with a legal duty it will be acting unlawfully. Examples are:

- The decision maker has misunderstood the law and either refused to act or acted incorrectly.
- They have applied an internal policy inflexibly without considering the individual circumstances of the case or have blindly followed a recommendation of a third party without considering all the relevant factors themselves. This is known as a "fettering of discretion".
- They have taken irrelevant factors into account as major factors guiding the decision or ignored other key factors.
- They have not taken into account the European Convention of Human Rights (ECHR) when making the decision.

Illegality in the incinerator context

Example 1 – relevant considerations

The key bit of legislation that governs what are irrelevant and relevant factors in a planning decision is the Town and Country Planning Act 1990. That Act says that when making planning decisions the waste planning authority must look firstly at the development plan of the waste planning authority and then at any other "material considerations".[5] That means that as a starting point they must consider all the relevant factors identified in the local development plan. The development plan may be made up of more than one document. Often local authorities will have adopted a specific waste plan document that will be the most relevant document for an incinerator development. If they have not considered any relevant parts of these documents then the decision could be unlawful.

What is a material consideration will depend on the circumstances. Certain matters should always be taken into account, such as national planning policy documents[6], the result of consultations and responses from objectors. But anything that is a legitimate planning concern relevant to the specific proposal should also be taken into account. The UKWIN Guide to Site-Specific non-waste planning arguments covers likely material considerations in incinerator challenges.[7]

In terms of checking up on the waste planning authority, they are obliged to give their reasons for deciding to grant the planning application. These reasons should be checked carefully to make sure all of the above has been covered. For example in 2009 Tesco successfully judicially reviewed a decision to grant planning permission to Sainsbury's in Teignbridge because the District Council had not taken into account key parts of the local development plan when giving their reasons for granting permission.[8]

[5] Section 70 Town and Country Planning Act 1990
[6] This now consists of the National Planning Policy Framework which largely replaced the old policy statements. However waste policy has been left out of the framework and is covered by Planning Policy Statement 10- Planning for Sustainable Waste Management.
[7] http://ukwin.org.uk/files/pdf/UKWIN-Guide-to-site-specific-non-waste-planning-arguments.pdf
[8] R (Tesco stores limited) v Teignbridge District Council [2009] EWHC 3685 (Admin)

In some cases new material considerations arise after the planning committee has resolved to grant permission but before a decision notice is issued. In such circumstances the planning authority may be obliged to refer the application back to the planning committee for review so that it can be ensured that the committee would reach the same decision on a reconsideration of the application. Failure to properly handle a significant new factor could result in a decision being unlawful as material considerations would not have been considered.[9]

Example 2 – Human rights

It may be possible to argue that a decision to allow an incinerator to be built in a particular location will result in a breach of the right to respect for private life under Article 8 of the European Convention of Human Rights (ECHR). The ECHR is part of UK law under the Human Rights Act and so the local authority, planning inspector and courts must all take it into account when making decisions.

López Ostra v Spain[10] was the first major decision of the European Court of Human Rights on the relationship between the right to a healthy environment and the Article 8 right to respect for private life, home and family life. Mrs. López Ostra and her family were so badly affected by the pollution from a tannery waste treatment plant that they had to move out of the area. The Court found that this was a violation of Article 8: "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".

There is a significant obstacle in using human rights arguments, which is that there is a defence to Article 8 where it can be shown that the violation is "necessary" or "proportionate". The greater the level of noise, nuisance, pollution etc., the more difficult it will be to show that the interference with Article 8 is proportionate. The court has to balance individual needs against the needs of the state/society.

Another potential ECHR argument relates to property rights so could be used either by the developers or by local residents. In the case of local residents, they could argue be that the incinerator decision will result in disproportionate interference with their right to peaceful enjoyment of possessions (i.e. their home, business, farm etc.) under Article 1 of Protocol No. 1.

Example 3- European environmental law

The main areas of EU law likely to arise in incinerator decisions-making are the Habitats Directive[11] and the Environmental Impact Assessment (EIA) Directive.[12]

[9] Kides, R (on the application of) v South Cambridgeshire District Council & Ors [2002] EWCA Civ 1370
[10] App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) (1994)
[11] Directive 92/43/EEC
[12] Directive 2011/92/EU

An environmental impact assessment (EIA) is aimed at providing decision makers with environmental information to take into account in decision-making. An EIA is required legally when the proposal is likely to have a "significant effect" on the environment. They will usually be required in incinerator cases. If the waste planning authority fails to follow the relevant procedure then it may be possible to argue that the decision is unlawful. Friends of the Earth has produced a useful guide which provides the basic structure of the EIA system.[13]

Similarly, a decision may be unlawful if the Habitats Directive has not been complied with. The authority should consider if the proposed incinerator development is near to a "protected site" or might affect a "protected species". See further UKWIN Guide to Site-Specific non-waste planning arguments, pp 9-10.[14]

Irrational

Public bodies must not act perversely or irrationally. This is a very high threshold to win in court. The starting point is the "Wednesbury" case in which the judge said that for a decision to be irrational it must be "…so unreasonable that no reasonable authority could ever have come to it…".

Unfair

Public authorities must act fairly. This means that they must not be biased when making decisions, that they must give those affected by a decision a fair hearing and they must follow the correct procedures.

Bias can either be direct and obvious, such as financial interest in the decision, or it can be an apparent bias. For apparent bias the courts have adopted a test of whether there is a "real possibility" of bias. In other words, "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision] was biased".[15]

Planning decisions are governed by local and national procedures which usually include notice and consultation requirements. If those procedures are not complied with, this may be an argument in support of judicial review.

Whilst a local authority may, in advance of the planning committee's decision, make public statements about how approving a planning application is in the best interest of the council, e.g. due to the alleged financial implications of refusal, this would not normally be sufficient, on its own, to constitute bias.

Example 1 – bias in planning committees

It may sometimes appear like a planning committee has already made their mind up

[13] http://www.foe.co.uk/resource/guides/environmental_impact_asses1.pdf
[14] http://ukwin.org.uk/files/pdf/UKWIN-Guide-to-site-specific-non-waste-planning-arguments.pdf
[15] *Magill -v- Porter* [2001] UKHL 67

about a proposed development, especially if members of the committee are known to hold certain views. But an apparent predisposition is not enough. There must be an apparent predetermination or closing of their mind.

In one example of a case where bias was established, the chairman of a planning committee had been in close contact with the developer and had spoken with them about promoting their proposal. He had also threatened to compulsory purchase the land of an objector to the development!

In this case these actions were enough to show he could not make an impartial decision.[16] Since a planning committee is a collective decision process, it is the effect of the bias on the final decision which is relevant. In this case it was a close vote for the planning committee so the chairman's vote was crucial and the bias of the decision was established.

Example 2 – an expectation of consultation

The Government had published a White Paper that said it was not minded to support nuclear new build and that it would not change its mind without the fullest public consultation. It then announced a review of this policy and issued a consultation. However the consultation was presented as an 'issues' paper that was asking for views about what issues should be considered when making the final decision about whether to support nuclear. The government then published a position paper saying that it now supported nuclear new build.

The consultation was not required by statute but it was found that through making the unequivocal statement about the fullest public consultation the government had created a "legitimate expectation" of a full consultation. The consultation which it carried out was found: to be misleading, to not contain enough information about the proposals, and to be too short. As a result, the Government decision to support the new nuclear build was found to be unlawful.

e.) Time limits

The rule is that a judicial review in general is that the challenge must be made promptly and in any event ***not later than three months*** after the decision.[17] For planning decision cases (and procurement challenges) the rule is now that the challenge must be made promptly and ***within six weeks of the decision***.[18] The court may reject a claim even if it is brought within the above time limits if there has been delay.[19] The developer may argue that they have incurred/are incurring costs as a result of any delay. Because the time limit is now so tight for planning challenges it is

[16] *R (Ghadami) -v- Harlow District Council* [2004] EWHC 1883 (Admin)
[17] The government is currently proposing to reduce the three-month period for judicial reviews of planning decisions to six weeks.
[18] This rule came into force on the 1 July 2013 and applies to decisions made after this date.
[19] This rule does not apply in cases that have a European Community law element. In these cases the rule is simply that the claim must be brought within three months.

recommended that you start planning and contacting lawyers before the final decision is made.

It is crucial to work out which decision is the relevant decision to challenge in an incinerator judicial review, and to ensure that the application is not made too early, or too late. In the context of a planning judicial review of a planning decision, the time limit begins to run from the date of formal grant of planning permission (i.e. the date the decision letter is issued) and not from the date of the resolution to grant permission.

2. An outline of the judicial review procedure and possible outcomes

This is a very brief outline of the judicial review procedure. The process can be divided into three main stages: pre-action stage, permission, and the final hearing.

Pre-action stage

Before applying to court, the Claimant should follow the "pre-action protocol". This involves sending a "pre-action protocol" letter to the opponent, threatening judicial review. The letter should also name any "interested party" who might wish to be involved in the claim, e.g. the developer, or a national environmental organisation which has opposed the development. The letter should be sent to them so they can indicate if they wish to be involved in the judicial review. The letter has a series of standard headings and should explain the factual background to the case and why the decision is unlawful, request relevant information and give the opponent 14 days to respond, before court action starts. In very urgent cases, e.g. if the three month time limit is due to expire, it may be necessary to give a shorter deadline. If the protocol is not followed, the court may take it into consideration when it is considering whether to award costs to either party.

Application for Permission stage

A judicial review application is made by completing form N461 and paying a fee, currently £60. A Claimant on a low income can apply for an exemption.[20] The Administrative Court has its main office in London, but also has regional courts in other cities such as Birmingham, Manchester and Cardiff.

Urgent orders

If the opponent (or an interested party such as the developer) will not agree to delay action pending the court case, it may be necessary to ask the court for an urgent order or injunction. An application can be made on form N463 at the start of the case for an "expedited" or fast track timetable. Alternatively an application can be made (or as an application at a later stage of the case) asking the court to order the opponent or a third party either to not do something or to take a particular action, e.g. not to construct the incinerator because it would prejudice the case. This is

[20] See the Administrative Court Website for more details http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court

often crucial in environmental cases because otherwise the potentially irreversible damage to the environment may already have taken place before the hearing.

When deciding whether to make the urgent order, the court should consider the public interest and the effect of the proposed order on the parties involved. Traditionally, the court would expect the Claimant to promise to cover the financial costs flowing from the injunction if they lose. This sometimes means that an injunction is not a viable option for an environmental campaign group, even though the lack of an injunction/ability to delay incinerator works may seriously prejudice the case.

The defence/acknowledgement of service

After an application is made to court for judicial review, it will be sent to the opponent (and any interested party). The standard timetable allows the opponent 21 days from receiving the claim to file their acknowledgement of service which confirms they wish to participate in the case and a defence. In urgent cases, the court may order a quicker timetable.

The papers will be passed to a judge to consider whether or not to grant permission for the case to go ahead. The case will only be allowed to proceed to a full hearing if the judge decides it is an "arguable" case (i.e. it has a reasonable prospect of success). If the judge decides to refuse permission then the Claimant can re-apply for permission to be considered at a hearing in court, which is known as a "renewal" of permission. If permission is granted, a fee currently set at £215 must be paid. The court will set directions- a timetable with deadlines for disclosing evidence, preparing a trial bundle, exchanging skeleton arguments etc.

Final hearing

In London, the time from starting a claim to a final hearing may be as long as a year unless an "expedited" timetable has been ordered. The regional courts have shorter backlogs so usually offer a speedier service. At the hearing, the focus is on the legal argument, and there is not normally any chance to give oral evidence.

Outcome

The most likely remedies in an incinerator judicial review are:

- A quashing order, e.g. setting aside the decision to grant planning permission
- A declaration, e.g. stating that a certain policy is unlawful

Compensation is rare in judicial review, and not likely to apply in an environmental claim. Also if a personal benefit is applied for, it could be a barrier to obtaining a protective costs order (see below).

All remedies in judicial review are discretionary. This means that the judge could state in its judgement that a council's decision was unlawful, but decide not to

intervene, for example because significant costs had been incurred in the development. Also a remedy may be refused if the court considers that a Claimant's conduct has been unreasonable or the effect of the remedy would be against the public interest.

3. Funding and costs

As well as the costs of bringing the case, the potential Claimant (or interested party) needs to consider protection against the risk of an order for costs if the case fails.

Legal Aid

One option may be for an interested local resident to apply to the Legal Services Commission (LSC) for public funding under the legal aid scheme. The value of being funded by the legal aid scheme is that in addition to having your own costs covered you will receive a certain level of costs protection from your opponent's costs.

To get legal aid, the applicant must a) qualify financially and b) show the case has a reasonable chance of success. The level of potential benefit to the wider public may also be taken into account.

The financial eligibility test means that legal aid is only available for people on low incomes. An applicant on means-tested benefits such as Employment Support Allowance, Income Support, Job Seekers Allowance or Guaranteed Pension Credits should be automatically eligible. Otherwise the applicant should be on a low income with limited savings. They may need to pay a monthly contribution. The Government's legal aid calculator is available from: http://legalaidcalculator.justice.gov.uk/calculators/eligiCalc?execution=e2s1 If you need help in working out eligibility, ask a solicitor with an LSC contract in public law.

The LSC are also likely to consider whether there are other people or groups with an interest and who could pay for the case, or at least contribute to it. An incinerator decision may have an impact on a large catchment area; the LSC will sometimes refuse legal aid on this basis or ask for contributions from local groups or individuals.

Conditional Fee Agreement and After the Event Insurance

These agreements have provided access to justice in a number of areas of law since their introduction. They are commonly known as "no win, no fee". The way it works is that you sign a conditional fee agreement (CFA) with your own lawyer that states that you only pay their legal fees if you win. If you win then most of your lawyer's costs will be covered by the opponent through the loser pays principle. These agreements are often accompanied by taking out After the Event (ATE) insurance. This insurance provides protection to you if you lose from paying the other side's costs. The insurance premiums used to be payable by the other side if you won but this is no longer the case. This means that in practice it is now quite difficult to use this form of insurance as the premiums themselves can be very expensive.

Unfortunately, although some judicial reviews will be run on a CFA it is not as readily available as in other areas of law such as personal injury. The reason for this is that it is very difficult to predict with certainty the outcome of a judicial review so lawyers and insurance companies are less likely to make these agreements because the risks of losing money are too high. However it is still worth discussing this option with any lawyer you are considering to instruct.

The Costs Protection Regime in environmental cases (formerly known as Protective Costs Orders)

There has been a significant change to the law recently which means that environmental law judicial reviews now have a different system of costs from other types of judicial reviews. If the claimant loses then there will be a limit to the amount of costs that they can be ordered to pay to the other side. For individuals the limit is £5,000 and for anyone else, including local campaign groups and NGOs, the limit is £10,000. There is also an automatic reciprocal limit of £35,000 on how much the defendant can be ordered to the claimant in the event the claimant is successful. The system is designed to be simple and work automatically if you tick a box on the claim form. If you do not want the new system to apply then you can opt out at this stage. There is no scope at present for challenging the levels of the costs caps in these types of cases so you need to factor in these amounts from the beginning.

This new regime should apply in all incinerator judicial reviews as it is difficult to imagine an incinerator case without a significant environmental element. The system replaces what are known as “protective costs orders” which will still apply to all other judicial review claims.

4. Five take-away points

1. Act promptly! Time starts to run for from the date of the relevant decision and the maximum time limit in planning cases is six weeks (and three months for other judicial reviews). Even this may be too long if the Claimant has sat on his/her hands, while the developer has been investing.

2. Keep records and try to be consistent! Watch the public body carefully from the beginning and try to get as much evidence as possible about the decision-making process. Also try to communicate with all parties from the beginning and keep records. Try to decide on carefully formulated and consistent demands and then stick to them if possible. If you think the public body are making a mistake then draw their attention to it at the time. The Administrative Court will likely want to see evidence that such efforts have been made at the time.

3. The key to a successful judicial review is to monitor and scrutinize the decision-making process. A judicial review is a challenge to the *way* in which a decision was taken. It is not an appeal against the decision.

4. The best outcome of the judicial review process is only that the authority will be ordered to reconsider. Use the judicial review as the focus for a broader strategy: getting publicity; lobbying; changing local opinion; gathering hard evidence about the impact of the incinerator.

5. The Claimant in a judicial review must show a "sufficient interest" in the case. Local residents and campaign groups are good candidates in incinerator cases.