Judicial Review in Planning and Environmental Cases in Northern Ireland

- A Guide for Litigants in Person

Anurag Deb (KRW LAW LLP) | Richard Honey BL (Bar Library)

Conor Fegan (Barrister, Francis Taylor Building) | Monye Anyadike-Danes QC (Bar Library)

Friends of the Earth (Northern Ireland)

Foreword

The right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights. It is an overarching right, not qualified by whether or not a party is legally represented. There are two important strands to Article 6 rights in the context of those who are unrepresented; firstly, is the litigant in person able to participate effectively in the proceedings to a level where he or she is able to influence them so that the court can ensure procedural and substantive justice? Secondly is there a fair balance between the parties in the opportunities given to them to present their case in a manner which does not disadvantage them with respect to the other side? Effective participation and equality of arms are the bedrock of a personal litigant's right to a fair trial.

Judicial review can be loosely defined as the principal legal procedure by which public power is defined, invoked or restrained. Properly exercised, the jurisdiction is a very valuable protection for the citizen against the possibility that the Executive might overreach itself. Judicial reviews are increasingly complex and those engaged in them face considerable pressures.

This publication provides a detailed guide for personal litigants in judicial reviews involving planning and environmental protection issues. It provides a useful overview of procedures and sets them in context. It is written in accessible language and I am sure will be a valuable reference for those embarking upon such judicial reviews without the benefit of legal representation. It fills a void.

The Right Honourable Sir Declan Morgan
Lord Chief Justice of Northern Ireland

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INTRODUCTION

This guide is the product of a series of discussions with people who are passionate about environmental protection and sustainable development and are keen to use their rights under the law to see their environment appropriately cared for. One of the most powerful ways in which these rights can be vindicated and environmental protections enforced is through applications for judicial review at the High Court in Northern Ireland. The court reviews decisions against legal standards and looks at whether decisions by public bodies or officials were lawful. If unlawful, the court can quash decisions and even ask the decision-maker to remake the decision. As important as judicial review cases are, they are also highly technical and require specialist knowledge of practice, procedure and the law of judicial review. Though we who have practical experience will always advise individuals to seek legal advice, we recognise that sometimes this is not possible, and individuals are left being highly dependent on the limited resources of the court. This will often result in protracted delays and multiple hearings before a Judge to deal with mistakes and issues in the judicial review documents. We hope to address this problem in some meaningful way through this guide, and we hope to do so as accessibly as possible.

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A. What is judicial review?

(1) Introduction

Judicial review is nothing more or less than a review, by one or more Judges of the High Court, of the lawfulness of a decision made by a public body or public official. The High Court has the power (generally) to quash unlawful decisions, order that the unlawful decision be made again according to guidelines set out by the court, prohibit a public body or official from acting beyond their powers, grant an injunction against a public body or official, declare a decision to be unlawful and in some circumstances, even award damages for the effect of an unlawful decision on the person or group which sought the review of the decision (the available orders are discussed in greater detail in SECTION B). Judicial review is not the appeal of a decision, so the High Court will not substitute its own decision for the decision under review. It may, however, set out guidelines for a decision-maker to remake their decision if it is found to be unlawful. Thus, the High Court will not examine the merits of a decision – only whether the decision under challenge is within the range of lawful decisions which could have been made.

(2) Lawfulness

A decision is judged to be lawful or unlawful on the basis of certain legal principles. Very few decision-makers have an absolute discretion on the decisions which they make, and most decision-makers — including, for example, local councils, Northern Ireland Departments and Ministers, the Northern Ireland Environment Agency, and the Planning Appeals Commission — must make decisions in line with these legal principles. The most important principles, including relevant case-law are dealt with in greater detail in SECTION N, but are summarised here as follows:

1. Illegality
    a. A decision which is authorised or required by legislation (whether of the UK Parliament, the Northern Ireland Assembly or the EU) must not go beyond the ordinary meaning or purpose of that legislation (e.g. the Planning Act (Northern Ireland) 2011, the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017, etc.) (referred to as ***ultra vires***);
    b. Decision-makers must not make decisions which they are not authorised to make;

c. A decision-maker must not consider irrelevant matters when making a decision;
d. A decision-maker must consider all relevant matters when making a decision;
e. A decision-maker must not bind themselves into exercising a discretion in one particular way but must exercise that discretion according to the facts and circumstances of each case which requires such a discretion to be exercised (often referred to as a fetter on discretion).

Examples

A decision was taken by the Department for Infrastructure ("DFI") to grant planning permission to the Mallusk incinerator. There was no Minister heading up the DFI at the time the decision was made, despite there being a legal requirement for Northern Ireland Departments to be headed by Ministers at all times. The DFI decision was therefore made by civil servants in the **absence of the lawful decision maker (a Minister)**, thus making the decision unlawful – *Re Buick's application for judicial review* [2018] NIQB 43;

The Belfast City Council Planning Committee ("PC") granted planning permission for a major office development in an area which the Planning Appeals Commission ("PAC") had proposed to be designated for social housing. The PAC is the independent expert planning appeal body in Northern Ireland. In making its decision, the PC did not consider the PAC proposal, but if it had, the PC may have been compelled to reject the office development proposal because of the expert status of the PAC in Northern Ireland planning matters. Thus, the PC **failed to consider a relevant matter**, thus making its decision unlawful – *Re Conlon's application for judicial review* [2018] NIQB 49.

A planning application for a residential development was refused and the refusal appealed to the Secretary of State. The appeal was on the basis that the developer had been willing to accept a condition that site development would not occur until vehicular access between the site and a nearby highway was achieved (a ***Grampian condition***). The Secretary had issued a policy of not allowing Grampian conditions if these could not be fulfilled within the time-limit imposed by the planning permission and the developer's appeal was rejected on this ground. Such a rigid application of policy was held to have **bound the decision-maker's hands** and was thus unlawful – *Merritt v Secretary of State for the Environment, Transport and the Regions* [2000] 3 PLR 125.

2. Irrationality / Unreasonableness: defined as a decision where an error of reasoning "*robs the decision of logic*" (*R v Parliamentary Commissioner for Administration ex p Balchin* [1996] EWHC 152 (Admin), [1998] 1 PLR 1, at paragraph 27)

Example

Planning permission was granted by Camden Borough Council ("CBC") to change the use of a public house into a mixed retail and residential development. However, the conditions imposed on the development in order to mitigate the effects of noise and vibration were **irrational** because they could not achieve their objectives – *Obar Camden Ltd v London Borough of Camden* [2015] EWHC 2475 (Admin).

a. Legislation may demand that a certain decision may only made only after following a certain procedure such as holding a public inquiry, which must be followed;
b. A decision-maker may not make a decision in which s/he has a personal interest – there does not need to be actual bias, only a real possibility of bias (also known as apparent bias);
c. Anyone affected by a decision should ordinarily be given an opportunity to be heard and present their case to the decision-maker before the decision is made;
d. In some circumstances, decision-makers have a duty to give reasons for their decisions –failure to do so may be unlawful.

Examples

Lord Hoffmann voted with two other Law Lords to declare that Augusto Pinochet could be prosecuted for crimes such as genocide. Amnesty International ("AI") was given permission to intervene in Pinochet's case to argue that he should be allowed to be prosecuted. Lord Hoffmann was later discovered to be a director of a company related to AI, thus giving the **appearance that he was possibly biased** against Pinochet, so the original order allowing him to stand trial was set aside – *R v Bow Street Metropolitan Stipendiary Magistrates ex parte Pinochet Ugarte (No. 2)* [1999] UKHL 1.

A former chief constable was dismissed without being given an opportunity to present his case to the watch committee dismissing him – he was thus **prevented from being heard** in a decision which greatly impacted him, thus making the decision procedurally improper – *Ridge v Baldwin* [1964] AC 40.

South Cambridgeshire District Council ("SCDC") granted planning permission to a proposal by Cambridge City Football Club to build a football stadium on land which was part of the Green Belt. SCDC's reasons for its decision were unclear, particularly when building on the Green Belt required reasons to show that the benefits of the stadium very clearly outweighed preserving the Green Belt. SCDC was thus **required to give reasons**, and its failure to do so was procedurally improper – *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71.

4. Legitimate expectation: in some circumstances, a certain policy, promise or representation made by a public official or body may give rise to an expectation that the policy, promise or representation in question will be followed, unless there is an overriding public interest against following the relevant policy, promise or representation (see for example *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7). There are two types of legitimate expectation: the first, which is a promise of some substantive benefit to a person or limited class of persons (referred to as a

"substantive legitimate expectation") and the second, which is a promise that a certain procedure would be followed by the relevant public authority (referred to as a "procedural legitimate expectation"). It has long been thought that an applicant would need to demonstrate having suffered a detriment in reliance of a legitimate expectation in order to challenge a decision using such an expectation (see e.g. *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17 at para 121). The Supreme Court in *Finucane* clarified that procedural legitimate expectation does not require such detriment (leaving the question of whether substantive legitimate expectation requires such detriment, unanswered). The law in this field is not necessarily settled, and we would caution against couching policy as legitimate expectation.

A useful and important case in which the above principles were laid out in full was *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 in the speech of Lord Diplock in the House of Lords. This case is useful to read when considering the various reasons why a decision may be unlawful and remains one of the most important landmarks in the history of judicial review. It is important to remember, however, that the same principles are not uniformly applied to all judicial review cases. A useful distinction is between planning cases and those involving human rights. In the *Balchin* case above (a planning case), irrationality rests on an error of reasoning which renders a decision devoid of logic. However, in cases involving fundamental rights which are not protected by the Human Rights Act 1998, there is support for the view that a more demanding standard will be applied whether that be anxious scrutiny (*R v Ministry of Defence, ex parte Smith* [1996] QB 517) or proportionality (R *(Youssef) v Secretary of State Foreign and Commonwealth Affairs* [2016] UKSC 3). In this sense, a judgment in a human rights case may answer questions which are fundamentally different to those in planning cases and would thus be unsupportive of a planning challenge. It is also important to keep up-to-date with recent cases, as the principles of judicial review are judge-made and continuously evolve in judges' hands.

(3) A "public law" decision

Judicial review is only available for decisions which are, in legal terms, decisions in public law. This means that the decision must be one which is made in the public interest, and which affects the public at large, rather than one which affects only private interests, such as those of a company awarded a government contract (R *v Lord Chancellor ex parte Hibbit and Saunders* [1993] COD 326). In this context, a decision can refer to both an action and a failure to act. This distinction however can be difficult to apply in practice.

The key question the Court will ask when considering whether a decision can properly be challenged in judicial review is what the nature of the decision is (whether affecting the public interest or affecting private interests, see [*Hampshire County Council v Graham Beer* [2003] EWCA Civ 1056]) rather than the source of that decision (in other words whether the decision was made by a public body or a private body since not every decision made by a public body is a decision that is made in the public interest or affects the public at large).

For environment cases generally, the vast majority of decisions which are challenged in judicial review cases will have been made by local councils, Northern Ireland Departments or Northern Ireland Ministers, the Northern Ireland Environment Agency, and the Planning Appeals Commission, and will be public law decisions.

(4) Standing

'Standing' is a legal term referring to the ability of an individual or group to bring legal proceedings before a court. The rules around standing can be complex, and must be followed, otherwise the case can be dismissed for a simple but very important reason: if an individual or a group does not have the legal ability to bring a case to the attention of a court, the court does not have the legal capacity to hear the case; in these circumstances, the court has no choice but to dismiss the case. You should therefore always be aware of the rules of standing before bringing any case before the court.

In judicial review, an individual or group has standing only if they have "*sufficient interest in the matter to which the* [judicial review] *relates*" (section 18(4) of the Judicature Act (Northern Ireland) 1978). While "*sufficient interest*" is not exactly defined (with good reason, as an exact definition would keep the court from adopting a flexible approach according to any case before it), the Court of Appeal in *Re D's application* [2003] NICA 14 laid out four principles in order to clarify the meaning of sufficient interest (*D*, at para 15):

"*(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.*

(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.

(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

The above principles are the same for groups as they are for individuals, and groups are not necessarily disadvantaged from bringing judicial review cases over individuals (see for example *R v Commissioners of Inland Revenue, ex p National Federation of Self-Employed and Small Businesses Ltd* [1981] AC 617). However, it may be that an individual will have the better standing to bring the judicial review over a group. We illustrate this point with a simple example:

Ms A lives beside a Green Belt site where a proposed development has just been granted planning permission. Her interests were therefore engaged when the local authority considered the application. Ms A has been campaigning and lobbying for months against the grant of planning permission, together with several of her friends who do not live near the site at all. In order to challenge the grant of planning permission, Ms A decides to form a group with her friends in order to share the legal cost of the case. However, the group has weaker standing than Ms A, given that she lives next to the site, whereas the rest of the group members are not.

However, where the issue is a point of principle of general application, it may be that group and individual interests are legally indistinguishable. For example, an error of law or erroneous guidance which infects an array of environmental decision-makers and environmental decision making across Northern Ireland may well be taken by a group of individuals to illustrate the extent of the impact of the error.

You should thus carefully consider whether a judicial review should be brought by an individual or a group when it comes to standing. It may be that, in particular cases, standing would not matter as individuals and groups would have the same standing. In most cases however, it is usually fairly straightforward to distinguish between individual and group interests, and one will often be stronger than the other. A fairly clear example of lack of standing is where an individual brings a judicial review challenge concerning a project with which the individual has no connection, geographically or otherwise. Taking an interest in the environment is not necessarily the same as having an interest to protect. The key point here is that you must have skin in the game; otherwise, there is no game.

The extent to which groups are sometimes formed in order to share the costs of judicial review cases is discussed in SECTION I.3.

(5) Identifying the correct decision-maker

In environmental cases, particularly when challenging grants of planning permission, it is common to find that planning applications are considered by a number of statutory agencies which are themselves under the supervision of or attached to multiple Northern Ireland Departments. For example, an application to build a residential complex at the very edge of a protected area will very likely result in reports from the Natural Environment Division of the Northern Ireland Environment Agency and DfI Roads, each of which is an agency of a different Northern Ireland Department. While you may disagree with the content of these reports and may well hold the view that the relevant agency was wrong, these agencies are required to be consulted. Agency reports <u>inform</u> rather than <u>determine</u> the decision to grant or refuse a planning application, and the actual decision-maker will usually be the body which notifies the grant of permission. If, however, a decision-maker relies so heavily on a flawed report that the report can be said to have determined the decision, the relevant Agency may be added as a party in a judicial review. It is important to appreciate such nuances at this stage, and seek legal advice in case of uncertainty.

The reason why it is important to correctly identify the decision-maker is simple: having the decision-maker incorrectly named would mean that the Court could not hear the case, as no case would lie against the incorrect decision-maker.

(6) Inform yourself fully

Given the legal principles which the Court will look at (above), it is vital that, when considering whether to begin a judicial review, you have as much information as possible about how a decision was made in order to appreciate whether that decision can be challenged (and the likelihood of success).

Applications for planning permission are available for public viewing on the Planning Portal (http://epicpublic.planningni.gov.uk/publicaccess/) and will often contain most of the relevant and important reports, maps, drawings and other documents which a decision-maker will rely on to inform his or her decision. It is also important to read the relevant legislation, policy documents and statutory development plans which the decision-maker must consider when determining a planning application. Although this can involve reading hundreds, if not thousands, of pages,

relevant sections of the legislation and policy documents will often be highlighted or cited in the reports accompanying the planning application, and the ability to quickly cross-refer between different reports and policy documents is an invaluable research skill in judicial review. There is a comprehensive list of relevant legislation and policy documents contained in the APPENDIX.

Aside from what is available online, the Environment Information Regulations 2004 ("EIR") are an invaluable tool to inform yourself as to public decision-making. Under Part 2 of the EIR, requests for environmental information should ordinarily be supplied within 20 days of the relevant public authority receiving the request, unless one of the exemptions relating to the nature of the request (Regulation 12(4) EIR) or one of the exemptions relating to the impact of disclosure (Regulation 12(5) EIR) applies. There is a presumption in favour of disclosure, with the test for exempted information being whether maintaining the exemption outweighs the public interest in disclosing the information. The scope of the EIR is often broader and more generous than the Freedom of Information Act 2000, with fewer exemptions than the 2000 Act.

Information gathered using the EIR or elsewhere is essential in trying to determine important questions when considering whether to start a judicial review, for example:

(1) The information which the decision-maker considered when making a decision;
(2) The information which the decision-maker did not take into account when making a decision;
(3) Any policies which the decision-maker considered, and how these policies were interpreted; and
(4) The law which the decision-maker considered and whether this law was considered correctly, for which you may wish to conduct a search online of case-law (see the APPENDIX).

You should be aware however that, given the timescales involved in gathering information using the EIR, you may not be able to gather all the information necessary by the time a judicial review application has to be lodged (covered in greater detail in SECTION C.1). Nevertheless, an application made under the EIR before the start of a judicial review may yield useful, and indeed crucial, information by the time the judicial review is fully heard.

Once you have gathered as much information as possible relevant to a decision of a public authority, and feel that, based on your research the decision was illegal, irrational, procedurally improper or in violation of a legitimate expectation (or some/all of these), you must next follow the procedure to start a judicial review.

B. Remedies in a judicial review

(1) General principles for relief in judicial review

Judicial review is part of what is known as the 'supervisory jurisdiction' of the court, in other words, the capacity of the courts to examine the lawfulness of State action. As such, the court has an ultimate discretion when it comes to judicial review – even if any challenged decision is unlawful, the court may refuse to grant a remedy, on the basis that the challenged decision has become academic, that the remedy sought is too broad or not clear enough to be understood or enforced, or any other reason which seems fair to the court when exercising its discretion.

However, assuming that the court has found a challenged decision to be unlawful and is prepared to grant a remedy against the decision-maker, sections 18(1), 19 and 20 of the Judicature Act (Northern Ireland) 1978 (JANI) contain a list of remedies which the court may grant:

"*18 Application for judicial review.*

(1) Rules of court shall provide for a procedure, to be known as an application for judicial review, under which application may be made to the High Court for one or more of the following forms of relief, that is to say, relief by way of—

(a) an order of mandamus;

(b) an order of certiorari;

(c) an order of prohibition;

(d) a declaration;

(e) an injunction.

19 Stay and interim relief.

On an application for judicial review, the High Court may grant a stay of proceedings or of enforcement of an order or may grant such interim relief as it considers appropriate pending final determination of the application.

20 Damages.

In proceedings on an application for judicial review the High Court may, in lieu of or in addition to any other relief, award damages to an applicant, if—

(a) he has, in accordance with rules of court, joined with his application a claim for damages arising from any matter to which the application relates; and

(b) the court is satisfied that, if such claim had been made in a separate action begun by the applicant at the time of making his application, he would have been entitled to such damages."

We will examine each of the above remedies below.

(2) Final remedies: orders and damages

Section 18(1) of the JANI contains a list of orders (referred to in some judgments, particularly older judgments as 'prerogative orders') which the court may grant at the time of handing down the final judgment in a judicial review: mandamus, certiorari and prohibition. Mandamus (Latin: *we command*) is an order compelling a public authority to do something, certiorari (Latin: *(we wish) to be informed*) is an order quashing a public authority's decision, and prohibition is an order restraining a public authority from carrying out a particular act. A declaration is the court expressing itself as to the lawfulness of a decision. An injunction is an order <u>against an individual but not usually (in planning cases) a public authority</u> to compel that individual to do something or prohibit that individual from doing something.

The remedy (or remedies) which may be appropriate depend a great deal on the nature of the decision being challenged, whether the decision-maker has the ability to re-make the decision if it is quashed, and what is required of the court by fairness, in the circumstances of a case. For example, once a local council or Northern Ireland Department has granted planning permission (in other words, publicly notified the grant), it does not have the legal authority to re-determine the planning application if the planning permission should be quashed – so it cannot re-make the decision to grant planning permission (this inability is referred to in legal terminology as '*functus officio*'). There would thus be no point in asking for an order of mandamus requiring the decision-maker to re-take the decision to grant planning permission, and the appropriate remedy would be an order of certiorari, to quash the decision.

The court may be persuaded to grant a declaration in circumstances where granting a prerogative order may have economic or other consequences which the court would consider

disproportionately high. A declaration which is ignored by a public authority may well offend the court into making further orders and eventually holding that authority in contempt.

An injunction, if granted in planning and environmental judicial reviews, takes effect usually against a developer, and not against a public authority – generally because the developer has been acting in breach of certain laws. It is, however, by no means usual for courts to grant injunctions in planning cases, or judicial reviews generally, and the court will not grant an injunction where alternative remedies are available or it appears to the court that an injunction would be unfair, given the balance of interests between the parties in a case (see *R v MAAF ex p. Mosanto Plc. (No. 2)* [1999] QB 1161, Independent, October 7 1998).

In practice, it is common to ask for multiple remedies in the one judicial review case – if asking for an order of certiorari, you might also ask for a declaration that the decision under challenge was unlawful; you should also ask for your legal costs or costs protection and it is always good practice to include a 'catch-all' request for any orders or directions which the court considers necessary in the circumstances of a case. What this translates into in terms of actual drafting is explained in more detail in SECTION D.2.

It is possible to award damages in judicial review cases, as from section 20 of the JANI (as above), but this is subject to a strict test – only if you have a claim for damages which relates to any issues within the judicial review case and if the court is satisfied that, at the time of bringing the judicial review case, if you had made a separate claim for damages, you would have succeeded. In practice, this test is very difficult to satisfy for a simple reason: unless one or more issues central to the judicial review involved your quantifiable interests (in other words interests such as financial loss as a result of unemployment, injury or expenses caused as a result of the public authority's conduct), you would not have been entitled to damages, with or without the judicial review. Thus, while many lawyers will routinely ask for damages in judicial review cases as a way of covering all bases before the court, in practice damages in judicial review cases are very rarely awarded.

You should note that it is possible (if appropriate) for a judicial review to turn into a claim for damages. The opposite is not possible. However, the circumstances in which this is possible involve nuances and procedures better left out of this guide. If the court indicates that your case is better served as a claim for damages, please seek legal advice as soon as possible.

(3) Interim remedies

From section 19 of the JANI (as above), the court has broad powers to order any interim remedies (awarded while the judicial review is progressing through the court), if it considers such remedies appropriate. Typically, two such remedies are often asked for: discovery and an injunction. Before delving into these two remedies, it is important to note that both are rarely granted.

Discovery is a legal term in Northern Ireland which describes both the disclosure of documents (defined broadly as anything that gives information – *McCarthy v O'Flynn* [1979] IR 127) relevant to the issues in a case, as well as the procedure by which such documents are disclosed. In theory, it is possible to apply to the court for discovery of relevant documents before the judicial review is finally determined by the court. The application is described in more detail in SECTION F.2. However, while discovery is a routine matter in ordinary civil actions for damages, it is rare in judicial reviews for an important reason: public authorities have a duty of candour to disclose their reasons for coming to a decision (including documentary evidence which supports this reasoning) in judicial review cases (for a recent case which discusses this duty, see *R (Bancoult (No. 2)) v Foreign and Commonwealth Secretary* [2016] UKSC 35 at para 183 – 187). Breach of this duty could have a seriously adverse impact on the public authority's case before the court, and public authorities are thus routinely reminded by the court to comply with their duty of candour. This generally makes discovery somewhat superfluous. Additionally, the court in judicial reviews is not concerned with fact-finding exercises (as set out in SECTION A), and thus does not require extensive evidence (remember that it is the legal consequence of evidence which is the key question in judicial review). Nevertheless, it is possible for you to apply for discovery of documentation outside any evidence submitted by the public authority which suggests that the public authority's evidence is inaccurate, misleading or materially incomplete (see for example *R v Foreign Secretary ex parte The World Development Movement Ltd* [1995] 1 WLR 386). However, if applying for discovery, the court will not allow a fishing expedition, and any application needs to be tailored in terms of specific documents which are relevant to the issues in the case. You should also be aware that the court will not order discovery unless it is satisfied that discovery is necessary for a case to be determined fairly. In judicial review cases which do not engage the Human Rights Act 1998, discovery is not necessary if, on the public authority's evidence, there is no definitive material indicating improper decision-making (*Re McGuigan's application* [1994] NI 143).

An interim injunction may be considered necessary in planning cases, particularly as it is important to stop a development from taking place before settling the issue of whether the development was lawfully permitted. However, the grant of an interim injunction rests on certain tests which are entirely outside judicial review cases, and while it would be a distraction to delve too deeply into these tests, it is worthwhile to consider the main points of when a court may grant an injunction. The main case which is often cited when applying for an injunction is *American Cyanamid v Ethicon Ltd* [1975] AC 396 and the courts must consider four principles when determining whether or not to grant an interim injunction:

(1) The strength of your case;
(2) Whether damages would be an appropriate alternative to an injunction;
(3) Where the balance lies between the competing interests of the parties (referred to as the 'balance of convenience' principle); and
(4) The importance of maintaining the status quo between the parties while the case is progressing through the court.

If damages are deemed to be an appropriate alternative to an injunction, the court will normally refuse the grant of an injunction. For example, in *Coventry v Lawrence* [2014] UKSC 13, the existence of planning permission may be indicative of the public benefit associated with the activity for which permission was granted, as a result of which damages may be more appropriate than an injunction against the relevant activity (at para 125).

C. Beginning a judicial review

(1) The Pre-action stage

Once you have identified an action or omission which you wish to challenge, you have 3 months from the date of the decision in which to start the judicial review. This is a vital time-limit, which can be extended for good reasons, but is not normally. The reason why there is such a strict time-limit is because of the nature of judicial review: while a decision is under challenge in the courts, the decision is usually not implemented, and thus may have no effect. Any number of people, groups or entire communities could be dependent on the effects of a decision, and it would thus effectively freeze government work if government decisions could be challenged over a longer period of time.

However, before you formally begin the judicial review, you should notify the decision-maker that you are going to challenge their decision, and why you are challenging the decision. This is done for three important reasons:

(1) So that the decision-maker is not blindsided in court;
(2) So that the decision-maker has an opportunity to reconsider their decision; and
(3) So that the decision-maker has an opportunity to provide any additional reasoning or relevant documents which relate to the decision in question.

The notification is sent by way of a formal letter, known variously as a pre-action protocol letter, pre-action letter, letter before action or letter before application. It is vital that this step is followed before starting the judicial review, because the failure to comply with this step and appropriately notify the decision-maker may result in the judicial review being dismissed.

PD 3/18 sets out (Part A at [4]) a tentative timetable for sending the pre-action letter – normally within 7 weeks of the decision which you seek to challenge. This ensures that the public authority you will potentially challenge will have ample time in responding (and responding adequately) to your letter.

(2) The Pre-action Protocol

The senior courts in Northern Ireland (the High Court and Court of Appeal, officially known together as the "Court of Judicature in Northern Ireland") routinely issue guidance known as "practice directions" or "practice notes". Although these are not Rules of the Court, these are directions from the court, and should be followed. Failure to do so without good reason may result in cases being dismissed, possibly with the party which failed to comply with the directions being required to pay some costs. In judicial review applications, the most important practice note is the Judicial Review Practice Direction 3/2018 ("PD 3/18"), which came into force on 5 November 2018 and which this guide will deal with extensively. At this stage in a judicial review, it is important to read and understand Appendix I of the PD 3/18, which contains the Pre-Action Protocol which should be followed in the vast majority of judicial review cases, except those which are required to be determined urgently (such as judicial reviews of deportation decisions) or those where the decision-maker does not have the legal power to change their decision (such as decisions by the Asylum and Immigration Tribunal). The Protocol should be followed in planning and environmental judicial reviews.

The Protocol reflects the court's view that litigation, including judicial review, is a last resort and so parties should consider whether there are other avenues for resolving disputes (such as ombudsman schemes or mediation). While in some limited cases ombudsman schemes can be very useful and inexpensive (for example the Local Government and Social Care Ombudsman for England and the Northern Ireland Local Government Commissioner for Standards), judicial review is normally how planning and environmental disputes are resolved in Northern Ireland. This is not to suggest that you should not attempt to resolve your dispute through correspondence and negotiation (including mediation) before going into court.

(3) The Pre-action Protocol Letter

Annex A of PD 3/18 contains a very useful example of a pre-action protocol letter, which is the example most widely used in practice in Northern Ireland. We see no reason to deviate from the court's own example and reproduce it exactly below, with our commentary in red:

"*Letter before application*

Section 1 - Information required in a letter before application

Information required in a letter before application

1. Proposed claim for judicial review

To

(Insert the name and address of the proposed respondent - see details in section 2.)

2. The applicant

(Insert the title, first and last name and the address of the applicant.)

3. Reference details

(When dealing with large organisations it is important to understand that the information relating to any particular individual's previous dealings with it may not be immediately available. Therefore it is important to set out the relevant reference numbers for the matter in dispute and/or the identity of those within the public body who have been handling the particular matter in dispute - see details in section 3.)

4. The details of the matter being challenged

(Set out clearly the matter being challenged, particularly if there has been more than one decision.)

5. The issue

(Set out the date and details of the decision, or act or omission being challenged, a brief summary of the facts and why it is contended to be wrong including any breach of Human Rights relied on.)

The reference to 'Human Rights' is a reference to the Human Rights Act 1998 (HRA) which incorporates most of the European Convention on Human Rights (ECHR) into UK domestic law. It is neither explicitly a part of, nor should it be confused with, European Union law. While there are circumstances in which ECHR rights may be relevant for a planning or environmental judicial review for the most part, these are not relevant. We therefore do not examine the reference to 'Human Rights' in any detail in this guide.

6. The details of the action that the respondent is expected to take

(Set out the details of the remedy sought, including whether a review or any interim remedy is being requested.)

The reference to 'remedy' here does not mean the remedies detailed in Section B, as those are only available to the court – rather, you should set out here what you expect the decision-maker to do, within the range of possibilities that the decision-maker is by law authorised to do. For example, before the public notification of planning permission, you can ask that a local council reconsider their decision to authorise planning permission.

7. The details of the legal advisers, if any, dealing with this claim

(Set out the name, address and reference details of any legal advisers dealing with the application.)

8. The details of any interested parties

(Set out the details of any interested parties and confirm that they have been sent a copy of this letter.)

An 'interested party' (referred to as a 'proper person to be heard' in the Rules of the Court) is someone whose interests are directly affected, that is, without an intervening party – in planning cases, the developer's interests are almost always directly affected, as they will lose out if planning permission is quashed and so the developer (if known) should be named in this section.

9. The details of information sought

(Set out the details of any information that is sought. This may include a request for a fuller explanation of the reasons for the decision that is being challenged.)

10. The details of any documents that are considered relevant and necessary

(Set out the details of any documentation or policy in respect of which the disclosure is sought and explain why these are relevant. If you rely on a statutory duty to disclose, this should be specified.)

11. Costs

(If it is an Aarhus Convention case, state whether or not it is intended that the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (as amended, see SECTION I of this guide) should apply. If it is intended that the regulations should apply, set out the grounds on which they apply.)

12. The address for reply and service of court documents

(Insert the address for the reply.)

This is the address at which you want to receive papers.

13. Proposed reply date

(The precise time will depend upon the circumstances of the individual case. However, although a shorter or longer time may be appropriate in a particular case, 14 days is a reasonable time to allow in most circumstances.)

14 days is the standard timeframe during which replies are expected to pre-action protocol letters.

Section 2 - Address for sending the letter before application

Public bodies have requested that, for certain types of cases, in order to ensure a prompt response, letters before application should be sent to specific addresses.

• ***Where the application concerns a decision in an immigration, asylum or nationality case:***

Litigation Team

UK Visas and Immigration

Festival Court 1

200 Brand Street

Glasgow

G51 1DH

Email: SNIJRTeam@homeoffice.gsi.gov.uk

Fax: 03703369648

• ***Where the application concerns a decision by a local authority:***

The address on the decision letter/notification; and their legal department

Often, you will not know the address of the local authority legal department and in any event, the local authority may not have a specific legal department and may instead pay another authority's legal department for legal matters – do not worry. It is enough to send the letter to the address on the decision (e.g. planning permission notification) and it will be forwarded to the appropriate legal team.

• ***Where the application concerns a decision by a department or body for whom the Crown Solicitor acts and the Crown Solicitor has already been involved in the case the letter before application should be addressed to the person who sent the letter notifying the decision and a copy should also be sent, quoting the Crown Solicitor's reference, to:***

The Crown Solicitor's Office

Royal Courts of Justice

Chichester Street

Belfast BT1 3JY

• ***Where the application concerns a decision by a department or body for whom the Departmental Solicitor acts and Departmental Solicitor has already been involved in the case the letter before application should be addressed to the person who sent the letter***

notifying the decision and a copy should also be sent, quoting the Departmental Solicitor's reference, to:

The Solicitor

Department of Finance and Personnel

Departmental Solicitor's Office

Centre House

79 Chichester Street

Belfast

BT1 3JE

The Departmental Solicitor normally acts for all Northern Ireland Departments, for example the Department for Infrastructure.

In all other circumstances, the letter should be sent to the address on the letter notifying the decision.

Section 3 - Specific reference details required

Public bodies have requested that the following information should be provided in order to ensure prompt response.

• Where the claim concerns an immigration, asylum or nationality case, dependent upon the nature of the case:

• the Home Office reference number;

• the Port reference;

• the Asylum and Immigration Tribunal reference number;

• the National Asylum Support Service reference number; or if these are

unavailable;

• the full name, nationality and date of birth of the claimant.

• Where the claim concerns a decision by the Legal Services Commission (now known as the Legal Services Agency Northern Ireland):

• the certificate number."

All the sections contained in the court's example above may not be relevant to your case. A sample pre-action protocol letter from a personal litigant is provided below:

"*Dear Sir/Madam,*

Pre-action protocol letter for proposed judicial review

To: DE Council, [ADDRESS]

The applicant:

Ms A, of [ADDRESS]

Reference details:

Planning permission P/X/Y/Z granted on [DATE]

The details of the matter being challenged:

The decision of DE Council to grant planning permission on [DATE] to planning application P/X/Y/Z for the development of a multi-storey car park on the site of [ADDRESS].

The issue:

The decision of DE Council was in breach of section 45(1) of the Planning Act (Northern Ireland) 2011 in that the Council failed to have regard to the local development plan when considering the planning application.

The decision was also in breach of Regulation 24(1)(b) of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 in that the Council did not reach a reasoned conclusion on the significant effects of the proposed development, having completely omitted to address the serious risk to migratory bats from the alignment of the proposed multi-storey car park as identified by the Northern Ireland Environment Agency.

The decision was also in breach of the following policies:

1. *Planning Policy Statement (PPS) 3, in that there was no transport assessment done in relation to the planning application as required by Policy AMP 6;*
2. *Policy AMP 7 of PPS 3 in that the proposals would significantly inconvenience traffic flow along the dual carriageway as there is no proposed turning lane into the car park;*

…

Etc.

The details of the action that the respondent is expected to take

The Council is expected to revoke (if the grant is formally notified) the grant of planning permission / reconsider (if the grant is not yet formally notified) its decision to grant planning permission as above and having done so, refuse the application.

The details of the legal advisers, if any, dealing with this claim

The proposed applicant is unrepresented in this matter.

The details of any interested parties

John Doe & Co Ltd, of [ADDRESS], the planning applicants

The details of information sought

Full reasons for failure to address the concerns of the Northern Ireland Environment Agency in relation to the serious adverse impact on migratory bats as identified above.

The details of any documents that are considered relevant and necessary

Minutes of the meeting of [DATE] between the planning applicants and the members of the Council's Planning Committee as these are relevant to the issue of whether or not the Planning Committee appreciated that the proposed access into the proposed development was inappropriate and in breach of Policy AMP 6 of PPS 3.

Costs

This case involves Articles 6 and 9 of the Aarhus Convention 1998, thus falling within the remit of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (as amended) and the proposed applicant intends to rely on the same in the proposed judicial review proceedings.

The address for reply and service of court documents

The address for service is the same as that of the proposed applicant, as above.

Proposed reply date

The Council are requested to respond within 14 days of the date of this letter, failing which proceedings will be issued without further notice.

Yours faithfully,

Etc."

D. The application for leave

(1) The parts of the application

A judicial review case involves two stages: the leave stage and the substantive stage. 'Leave' is the term used to refer to the stage at which the court is requested to grant permission for a judicial review to go to a full or 'substantive' hearing. At the leave stage, the court is concerned with whether or not your case is arguable or worth further examination.

It is at this stage that the court dismisses those cases which are unarguable for various reasons: no identifiable decision (or lack of decision), the case being taken against the incorrect decision-maker, the case involving arguments which have no basis in law or the subject matter is not a public law matter and thus improper for judicial review. At this stage, if your case is dismissed, the general rule is that you will not have to pay the other side's legal costs. However, this general rule can be overridden and costs ordered against you if your case is considered to be, for example, an "*affront to the rule of law*" (see *Re Sherrie's application* [2018] NIQB 24 at para 7 – 8).

A vital rule to be aware of both before and during any case in the High Court, including judicial reviews, is the 'overriding objective' in Order 1 Rule 1A quoted in full below:

"*The overriding objective*

1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to -

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it -

(a) exercises any power given to it by the Rules; or

(b) interprets any rule.

(4) Paragraph (3) above shall apply subject to the provisions in Order 116A, rule 2(1), Order 116B, rule 2(1) and Order 116C, rule 2(1)."

The most important principle which comes out of the overriding objective is that the time, effort and money spent on dealing with a case, both by the parties to a case and by the court, must be proportionate to the case itself. In other words, a case with fewer issues to be determined will not require extensive evidence, including expert evidence, or much time allocated to hear the case, or indeed much time to deal with preparing the case for a full hearing. The court will always consider the overriding objective when dealing with a case, and it is vitally important that you are similarly aware of it. Ask yourself the following questions if unsure of whether you are complying with the objective: do I need (something) in order to have my case heard fairly? Is my application/request a reasonable one (in the context of the overall case) on which the court and the parties should spend time, resources and energy? Do not, however, be afraid to ask if you are unsure – the court always appreciates when the parties are engaging with the overriding objective, and a few questions to the Judge about whether a request is reasonable in the overall case may save valuable court time in the long run. As the saying goes: a stitch in time saves nine.

Assuming that your case is arguable, you will need three main documents in order to make your application for leave:

(1) A docket for *ex parte* application (referred to as an '*ex parte* docket');
(2) A statement of grounds (referred to as an 'Order 53 Statement'); and
(3) A grounding affidavit, with relevant materials exhibited to the affidavit.

An application for leave is determined *ex parte*, which simply means that the application is ordinarily determined by the court on the papers without the respondent having to make any oral argument in support of their positions. The *ex parte* docket simply certifies this fact. Having said that, some judicial review cases can involve oral argument at the leave stage, for example if the case is particularly complex, novel or the court has indicated that it is not minded to grant

leave and allow the case to proceed to a full hearing, but wants to allow the parties (and especially the applicant) the benefit of oral argument before doing so.

A statement of grounds, known as an Order 53 Statement (after Order 53 Rule 3(2)(a) of the Rules of the Court of Judicature (Northern Ireland) which requires this statement) is a statement in which the applicant (you) is named and described, along with the remedies which you seek and the reasons or grounds on which you seek those remedies.

A grounding affidavit is an affidavit (a sworn statement of facts) made by you, which details the facts on which you base or ground your application. An affidavit is not a skeleton argument, and the Rules of the Court expressly forbid any argument from being made in an affidavit. It is simply a statement of facts on which you rely in your application for leave. You will also need to exhibit relevant documentary evidence to this affidavit.

In legal terminology, you may hear the above three documents – the *ex parte* docket, the Order 53 Statement and the grounding affidavit together referred to as the 'pleadings' in a judicial review. A 'pleading' is a document which outlines the facts which the party making the pleading will seek to prove through the case (thus a document which 'pleads' a party's case). Technically, therefore, only the Order 53 Statement is a pleading in judicial review cases – an affidavit being a statement of facts. Nevertheless, the word 'pleading' is used as a convenient shorthand to refer to the three elements of an application for leave.

(2) The pleadings

PD 3/18 (at Appendix II) contains a 'model' Order 53 Statement for standard use in judicial review cases. We, therefore, set out the entire application for leave around this model, with our notes and commentary in red. PD 3/18 also requires (at Part B, paragraph 3) that every Order 53 Statement be 'completed in an electronic format' which we would suggest means in Microsoft Word or equivalent software, so that the electronic version can be transmitted by email to the court in urgent cases and so that amendments (if ordered by the court) can easily be made.

No 2019/…../01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

In the Matter of an Application by XY
For leave to apply for Judicial Review

____

DOCKET FOR *EX PARTE* APPLICATION

The Applicant to move on the day of 2019 or so soon as possible thereafter:

(a) **State in precise terms the Order applied for**:

a. An Order of *certiorari*;
b. An Order of *mandamus*;
c. Such further or other relief as this Honourable Court shall deem just and proper in the circumstances;
d. All necessary and consequential directions; and
e. Costs

(b) **State the documents relied upon with dates of filing of Affidavits**:

a. Statement filed pursuant to Order 53, rule 3(2)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 dated [DATE]; and
b. Affidavit of [APPLICANT] (with exhibits), filed on [DATE FILED WITH COURT]

Dated this day of

Signed: ______________________________
[NAME]

No 2019/…../01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For leave to apply for Judicial Review

ORDER 53 STATEMENT

[1] **The Applicant**

1.1 The Applicant is XY, who is …………………… (a brief description of who you are)

[2] **The Proposed Respondent**

2.1 The proposed Respondent is ………………….. (use the official name of the decision-maker i.e., if an individual, then his/her office; there is no need to describe the office)

[3] **The impugned decision/omission**

3.1 The Applicant is challenging the proposed Respondent's decision dated ………….. whereby it was determined that ………………….. **[OR] ……….** the proposed Respondent's failure to ………………… [within a reasonable time?] * this question would relate to a case where the key issue is that a public authority failed to carry out a duty within a reasonable time, and that this duty was subject to an unreasonable delay; it may be relevant to planning judicial review cases. What might be a 'reasonable' time will depend on the facts and circumstances of each case and is not set in stone. If the duty has not been carried out at all, then you could add after 'within a reasonable time', "or at all" …………………………...

[4] **The relief sought**

4.1 The Applicant seeks the following primary relief: (see SECTION B of this guide for remedies)

(i) ………………………..

(ii) ………………………..

(iii) Such further or other relief as this Honourable Court shall deem just and proper in the circumstances

(iv) All necessary and consequential directions

(v) Costs.

The additional relief as we have included are good practice in order not to leave out any relief which you may be granted by the court if your challenge is successful.

[5] **Grounds of Challenge**

The Applicant's grounds of challenge are:

(i) **Illegality.** The Applicant contends that the impugned (challenged) decision was unlawful in the following respects: (see SECTION A of this guide)

(a)

(b)

(c)

(ii) **Immaterial considerations.** The Applicant further contends that the impugned decision is vitiated (impaired) by the proposed Respondent having taken into account the following immaterial facts/considerations: (see SECTION A of this guide)

(a)

(b)

(c)

(iii) **Material considerations.** The Applicant further contends that the impugned decision is vitiated by the proposed Respondent having failed to take into account the following material facts/considerations: (see SECTION A of this guide)

(a)

(b)

(c)

(iv) **Procedural unfairness.** The Applicant contends that the impugned decision was procedurally unfair in the following respects: (see SECTION A of this guide)

(a)

(b)

(c)

(v) **Irrationality**. The Applicant contends that the impugned decision was irrational in the Wednesbury sense in the following respects: (see SECTION A of this guide)

(a)

(b)

(c)

(vi) **Improper motive/bad faith.** The Applicant contends that the impugned decision is vitiated by improper motive/bad faith in the following respects: (see SECTION A of this guide) NB: Any decision that is arguably wrong in law will not necessarily be influenced by bad faith or improper motive — bad faith or improper motive require strong evidence in order to be properly made part of a case; the court will not allow vague and unsubstantiated allegations of bad faith or improper motive to be raised if all that the public authority is alleged to have done was to have made a mistake as to its legal powers or duties or to have acted irrationally.

(a)

(b)

(c)

(vii) **Breach of statutory duty/requirement**. The Applicant contends that the impugned decision is vitiated by the proposed Respondent's failure to comply with the following statutory duty/requirements: (see SECTION A of this guide)

(a)

(b)

(c)

(viii) **Substantive legitimate expectation.** The Applicant contends that he had a substantive legitimate expectation that …………….. This expectation was engendered (created) by …facts which gave rise to this expectation…. This expectation was frustrated in the following respects: (see SECTION A of this guide)

(a)

(b)

(c)

(ix) **Breach of EU law.** The Applicant contends that pursuant to [MEASURE OF EU LAW] * Directives, Regulations and the EU treaties can all be laid out here, where relevant …………………. of …………………….. he had the following legal rights: (see SECTION A of this guide)

(a)

(b)

(c)

The Applicant further contends that his aforementioned right/s was/were breached in the following respects:

(d)

(e)

(f)

(x) **Breach of Prison Rules.** The Applicant contends that the impugned decision is unlawful as it infringed the following provision/s of the Prison Rules ………………………… (etc): (this will not apply in planning and environmental cases)

(a)

(b)

(c)

In the following specific respects:

(d)

(e)

(f)

(xi) **Breach of policy**. The Applicant contends that he is entitled to rely upon the proposed Respondent's policy …………………… [*description, date* ……. *particulars etc*] ………………….. The impugned decision is in breach of said policy in the following respects: (this could apply to planning and environmental cases where departmental policies which are not planning policies have influenced the decision being challenged)

(a)

(b)

(c)

(xii) **Planning policies**. The Applicant contends that he (/she) is entitled to rely upon the proposed Respondent's policy [*description of relevant policy: name/title, date, particulars* * for the meaning of 'particulars' see the Glossary at the end of this guide…… *etc*] The impugned decision is in breach of the said policy in the following respects: (see SECTION A of this guide)

(a)

(b)

(c)

[6] **Interim relief**

The Applicant seeks the following form/s of interim relief: (see SECTION B of this guide)

(a)

(b)

(c)

[7] The grounds upon which the Applicant seeks interim relief are:

You may find that activities for which planning permission was granted may be harming a protected area or adversely impacting a protected species – in these cases, you may wish to apply for an interim injunction to restrain the developer from continuing such activities while the lawfulness of the planning permission was being determined in court (but remember the factors which you will need to address in SECTION B.3 of this guide). Effectively, interim relief (except discovery, on which see SECTION B.3) is mainly granted where (1) the refusal to grant relief would result in substantial injustice to the party seeking the relief, (2) in circumstances where the injustice is not quantifiable and cannot in any event be remedied by compensation at the end of the case and (3) the grant of interim relief would preserve the *status quo* between the parties (see the discussion of the *American Cyanamid* principles in SECTION B.3 of this guide). These are some of the reasons why you might apply for interim relief.

(a)

(b)

(c)

[8] **Expedition**

The Applicant requests expedition on the following grounds:

Expedition in judicial reviews is granted, but in cases of great urgency such as in cases involving immigration and asylum matters (such as deportation and removal orders). Expeditious hearings are not ordinarily granted in planning and environmental cases.

(a)

(b)

(c)

[9] **Human rights: declaration of incompatibility**

9.1 It is hereby certified, with reference to Order 121(2) of the Rules of the Court of Judicature, that one of the issues raised in these proceedings is whether the Court should make a declaration that ………………… [*relevant provision/s of primary legislation*] is incompatible with ………….. [*relevant protected Convention right*]. (this is unlikely to apply in planning and environmental matters, but is essentially used where one of the central issues in a judicial review is that certain sections of Acts of Parliament or certain Orders in Council are incompatible with ECHR rights and thus must be declared to be incompatible under the Human Rights Act 1998)

[*Alternatively*]

9.2 It is hereby certified, with reference to Order 121(3A) of the Rules of the Court of Judicature, that one of the issues raised in these proceedings is whether the Court should find that ……………… [*relevant provision of subordinate legislation*] ………………… is incompatible with [……….. *relevant protected Convention right* ……..]. (the same as above, but with legislation lower than an Act of Parliament or certain Orders in Council, for example Acts of the Northern Ireland Assembly, rules, regulations, byelaws and so on)

[10] **Devolution issues**

10.1 It is hereby certified, with reference to Order 120, Rule 2 of the Rules of the Court of Judicature, that these proceedings give rise to a "**devolution issue**" within the meaning of Schedule 10 to the Northern Ireland Act 1998.

10.2 It is further certified that the Applicant has complied with Part D of the Judicial Review Practice Note 1/2008 by filing **the attached Notice** and serving same on all parties to these proceedings and, further, that the said Notice specifies the facts, circumstances and points of law said to give rise to a devolution issue in sufficient detail to enable the Court to determine whether this is so.

This section is unlikely to apply in most planning and environmental cases as it relates to cases where a central issue is for example, whether any Act of the Northern Ireland Assembly is outside the capacity of the Assembly, whether a Northern Ireland Minister or Department has acted in breach of ECHR rights or EU law or any question relating to subjects which are outside the capacity of devolved government in Northern Ireland. For this reason, we have not discussed this in any detail. We strongly recommend that if devolution issues arise in a judicial review, you obtain legal advice and representation.

[11] **Service**

11.1 It is hereby certified that this Statement and all accompanying documents were:

(a) Served on …………………… **[name]** ………………. by **[method]** ……………at **[address, to specify individual office where appropriate***]**……….. on [**date**]. This is the respondent or decision-maker you are challenging

(b) Served on …………………..*[Ditto.]* This is for any interested party

(c) Served on ………………….. *[Ditto]* This is for any interested party

11.2 If the matter is urgent, service by email must be preceded by a telephone call to check that the email will be received.

11.3 ***If service is by hand delivery at a multi occupancy/public building, leaving a document at the front reception desk does not put the solicitor on notice. Thus service has to be effected at/in the ***office*** of the solicitor.

[12] **Legal Aid**

The Applicant is/is not an assisted person.

[***If legally aided***] The certificate of legal aid is attached.

[13] **Protective Costs Order**

There is no application for such an order.

[*OR*]

The Applicant's application for a protective costs order, with accompanying draft order, is attached. This is dealt with in SECTION I

[14] **PAP REQUIREMENTS**

I/We certify that the PAP requirements of the JR Practice Note have/have not been fully observed 'PAP' is the Pre-action Protocol (see SECTION C and PD 3/18)

[IF 'have not', insert here relevant explanation, information etc]

[15] **JR PRACTICE Direction**

I/We hereby certify that there has been full compliance with the JR Practice Direction. This is PD 3/18 – see SECTION C.

[16] **PROPOSED LITIGATION TIMETABLE**

(It is good practice to suggest a reasonable timetable bearing in mind the time it may take the other side to respond to your application, the resources and time which the court can afford to give your case and the time which your case would realistically take in which to be properly heard by the court; an example based on the standard directions in Part E of PD 3/18 is included below. You should take into account the overriding objective when proposing a timetable.)

The Applicant's proposed litigation timetable is as follows:

(a) Any affidavit evidence from the proposed Respondent and disclosure (per their duty of candour to the Court) will be provided within 28 days of any grant of leave at latest.
(b) Any interested parties' affidavit evidence to be provided within 28 days of the grant of leave at latest.
(c) Any evidence from the Applicant in response to any evidence from the Respondent and/or interested party to be provided within 21 days of (a) and (b).
(d) The backstop date for any interlocutory application to the Court is within 14 days of any affidavit evidence and disclosure from the proposed Respondent or, if no affidavit evidence or disclosure is provided, within 14 days of any grant of leave.
(e) The Applicant's skeleton argument to be provided within 14 days of (c).
(f) The Respondent and/or interested party to provide their skeleton argument(s) within 14 days of (e).
(g) An agreed bundle of authorities to be provided within 7 days of (f).
(h) The substantive hearing will be conducted within 14 days of the backstop date set out in paragraph 2 above, time allocation half day.
(i) Except as stated above, the Judicial Review Practice Direction applies.

[17] **LEGAL REPRESENTATION**

Name of Applicant's solicitor:

[The individual responsible solicitor and firm]

Name of Applicant's counsel:

Name of legal representative/s of proposed Respondent/s:

SIGNATURE OF RESPONSIBLE SOLICITOR

Signed: ________________________________

[MUST BE THE SOLICITOR PERSONALLY RESPONSIBLE]

of ………………………………………………………… ….. [FIRM]

Solicitors for the Applicant

Solicitor's email address: ________________________________

Dated this …….. day of ……………………………………… [MONTH & YEAR]

It is unclear how this last section is to be completed by individuals who have no legal representation, but we would respectfully suggest that this section does not imply that you can only approach the court if you are legally represented.

Applicant: XY: 1st: [DATE WHEN SWORN]

This line above on the top right-hand corner is contained in Practice Direction 5/2005, attached as Appendix V to PD 3/18, and contains four key points: the party on whose behalf the affidavit is made, the initials and full surname of the person making the affidavit (known as the 'deponent'), the number of the affidavit in relation to the deponent (i.e. is it the deponent's first, second or third affidavit, and so on) and the date when the affidavit is sworn. The above line should be included in affidavits and exhibit certificates only, not on *ex parte* dockets or Order 53 Statements.

No 2019/ /01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For leave to apply for Judicial Review

AFFIDAVIT OF XY

I, XY, aged 18 and upwards, **MAKE OATH/SOLEMNLY AFFIRM (an oath is a religious declaration of truth and an affirmation is a non-religious declaration – both are equally valid and you should use whichever you are comfortable with)** and **SAY** as follows:

General rules for drafting affidavits:

(1) Number every paragraph consecutively;

(2) Describe yourself in the introductory paragraph – for example, where do you live and what is your interest in this case – why have you brought it before the court?

(3) Always refer to yourself in the first person and not "the Applicant", etc.

(4) Do not include any argument in the affidavit – for example, making submissions or declaring something to be wrong or incorrect (unless such an assertion is supported by evidence). Consider when drafting, whether you are using language designed to persuade the reader (for example "I submit that" or "I would contend that"): if you are, then it is likely to be sworn argument, and should be avoided;

(5) Include all relevant facts which you personally know or believe to be true, but do so in a coherent narrative; your affidavit should not jump from point to point or across events in time – you may, for example, wish to work chronologically from the beginning of a planning application through to the final grant of planning permission;

(6) Each paragraph in your affidavit should, as far as possible, be confined to one discrete point or fact;

(7) Numbers and dates should be expressed in figures and not in words;

(8) Each factual assertion in an affidavit should be backed up by documentary evidence which will have to be exhibited. This is sometimes done using various outdated phrases (for example "*I beg leave to refer to…*"). We recommend something like this: "*I now refer to* [DOCUMENT] *which is exhibited at* [EXHIBIT REFERENCE]";

(9) Exhibit references are generally in the format INITIAL/NUMBER. For a leave application in a planning or environmental matter, you will likely have a large number of exhibits. For convenience, we recommend that the exhibit reference be in the format INITIAL/TAB NUMBER so that it would read XY1 Tab 1 (2, 3, 4. …) thus requiring one exhibit certificate for all the exhibits instead of separate certificates for separate exhibits; if you need to file any additional affidavits, the exhibit reference would reflect the number of the affidavit, for example XY<u>2</u> Tab 1 (2, 3, 4…)

(10) You must exhibit documents to affidavits using an exhibit certificate (set out below) and not simply attach documents to the affidavit.

Save as otherwise appears, I depose to the foregoing from facts within my own knowledge, information and belief.

____

[DEPONENT]

Sworn/Affirmed on the day of
At [ADDRESS WHERE AFFIDAVIT SWORN]
Before a Solicitor/Commissioner for Oaths/Affirmations
Empowered to Administer Oaths/Affirmations
For the Court of Judicature in Northern Ireland

____

[SOLICITOR/COMMISSIONER FOR OATHS]

The above section is known as the 'jurat' and must not be separated from the main body of the affidavit. Please delete 'Solicitor/Commissioner for Oaths' as appropriate. If you discover a mistake in the affidavit after it is sworn and the jurat completed, you should rectify the mistake in a further affidavit. <u>If you change your affidavit after it is sworn, the court may not allow it to be used.</u>

This affidavit is filed by the Applicant in this case.

The above line is known as the 'filing clause' and is an important part of the affidavit.

Applicant: XY: 1st: [DATE WHEN SWORN]
No 2019/ /01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For leave to apply for Judicial Review

EXHIBIT CERTIFICATE XY1

These are the exhibits (Tabs 1 – ??) as referred to in the affidavit of XY and hereinafter indexed, sworn before me

This day of

……………………………………………………..
[SOLICITOR/OATHS COMMISSIONER]

INDEX

TAB	PAGE

This is an exhibit certificate and must be used in order to exhibit documents to an affidavit.

---

(3) Building the Book of Pleadings

All the documents mentioned in the previous section (the *ex parte* docket, Order 53 Statement, affidavit and exhibits) are to be included in one file, paginated continuously, with the pre-action correspondence (your letter and the response from the public authority) being the final elements in the bundle (Part B, paragraph 13). However, in planning and environmental matters, exhibits may run into hundreds of pages and it may not be practical to have both parts in one file. In this case, you should ensure that each file is appropriately indexed.

Finally, it is vital to ensure that the whole Book of Pleadings has an accurate index at the front. The index should be comprehensive and describe fully each element in the corresponding file. The court will read the papers you lodge and you want the papers to be as easy to read as possible.

(4) Lodging the application in court

Once you have completed your Book of Pleadings, you need to serve a copy of the Order 53 Statement on the decision-maker (the proposed respondent) and any interested parties you have identified. This service needs to be demonstrated on the Order 53 Statement (as above) before lodging with the court.

Next, you should bring a few copies of the Book of Pleadings (including the copy with the original sworn affidavit) to the court for issuing. This involves the High Court Fees Office at the front of the Royal Courts of Justice in Belfast stamping the Book of Pleadings (specifically the *ex parte* docket, Order 53 Statement and affidavit) upon payment of the court fee for the application – from October 2019, this fee is **£261.00** The precise number of copies you should bring are as follows: two for the court (including the copy with the original affidavit) and one each for the proposed respondent, all interested parties and you.

Finally, you should take the two stamped copies intended for the court to the Judicial Review Office on the second floor of the Royal Courts of Justice, where you can submit them (and your application) for the attention of the court.

E. The grant of leave

(1) Important matters pre-leave

Prior to the court making any determination as to the grant of leave in your application, you may receive court directions requiring you to undertake certain steps; for example, to appear before a Judge for a review of the case, to amend a part of your pleading, or to submit further evidence in support of your application. It is vitally important that you understand and follow all these directions, as failure to do so without good reason can adversely affect your case. If you have any queries or confusion about any directions, you should contact the Judicial Review Office immediately.

If you are directed to amend a pleading, you may be required to "further or better particularise" (set out in greater detail) one or more assertions contained in the pleading. It is important to know how such an amendment should be drafted for the court. Firstly, you have to clearly outline which parts of the amended pleading are original and which are amended. This is done by carrying out the amendments on a copy of the original pleading, showing any words or phrases struck through and any which are new. All amendments are underlined in colour, which follows a particular sequence: red for the first set of amendments, green for the second set of amendments, purple for the third set of amendments and **yellow for the fourth set of amendments**. We have not in our experience had to amend a pleading beyond a fourth time, so have not included any remaining colours. It is also good practice to provide a 'clean' copy of the amended pleading, with the any strikethroughs and colours removed, particularly if the amendments are extensive.

An example is set out below.

No 2019/…../01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For leave to apply for Judicial Review

AMENDED ORDER 53 STATEMENT
PURSUANT TO THE DIRECTIONS OF THE COURT DATED [DATE]

…

[2] **The Proposed Respondent**

2.1 The proposed Respondent is ~~the DE Council~~ the Department for Infrastructure

…

If you are directed to attend a review, it will be a short procedural hearing about the progress of the case and the respective positions of the parties. You are advised to prepare for the review, but not to prepare the substantive arguments for your case – simply be prepared to answer any questions the court may have on whether there are any outstanding matters (for example pre-action correspondence or responses to such correspondence and relevant dates) or matters of funding to be dealt with. You may wish to prepare a short document with all of the above issues in bullet-points for your convenience during the review. The court may also ask if the application for leave is opposed by the proposed respondent. Finally, you may wish to discuss with the other side(s), particularly their barrister(s), the issues which you wish to go through and perhaps get agreement on at least some of these issues (for example, resolution of any disputed dates or flagging up any procedural steps that have yet to be completed).

Depending on the view that the court takes of the initial application for leave, how ready it is for hearing and the position of the parties, the court may direct a leave hearing, which is a short (typically 30 minutes to an hour) hearing for the court to determine whether there is an arguable case on which to grant leave. The court may already have indicated whether it is provisionally prepared to grant or refuse leave, in which case the leave hearing is a final chance for you to persuade the court that you have an arguable case (if the court has indicated that it is not prepared to grant leave) or for the respondent to persuade the court not to grant leave (if the court has indicated that it is prepared to grant leave).

Conduct in court, the framing of legal arguments and the use of cases, statutes and other authorities are dealt with in detail in SECTIONS F and G of this guide.

(2) The Notice of Motion

If you are granted leave, you have 14 days from the grant of leave to lodge a document known as a 'notice of motion' to continue the judicial review to full hearing. If you do not lodge the notice of motion within this time, the grant of leave lapses, and you will have to seek the court's permission to continue your case. We strongly advise you to obtain legal representation at this stage as the next stage of judicial reviews can become highly technical, especially when the challenge is fully heard by the court. Aside from anything else, the threshold you have to satisfy in order to win your case is much higher than at the leave stage – the threshold being: are you able to persuade the court that your grounds of challenge are made out on the law and the facts

of your case? The answer to this question involves complicated reasoning as to how the legal principles can be applied to the facts of a case, whether such an application is persuasive, and whether, even if persuasive, the court can be persuaded to grant the remedies you seek.

Judicial reviews are made in the High Court by way of an oral application, known as a 'motion' and the notice of motion is a document notifying all parties who are affected by the judicial review of the fact that your motion will be heard on a particular date in court. The notice of motion needs to be addressed to the court and to all parties who are affected by the judicial review. In planning cases, this will typically mean the respondent and the developer(s). If a particular case 'cuts across' the functions of several different authorities, for example in *Re Buick* [2018] NICA 26, in which the planning application for an incinerator in the Mallusk area cut across the functions of the Department for Infrastructure and the Department of Agriculture, Environment and Rural Affairs, then the notice of motion also needs to be addressed to and served on these other authorities.

You should pay close attention to the court's directions on the grant of leave, as the court may grant leave on some, but not all, of the grounds in your Order 53 Statement. If this is the case, then you will need to amend the Order 53 (deleting the disallowed grounds and keeping only the permitted grounds), as set out in the previous subsection, and serve the amended Order 53 Statement with your notice of motion. The notice of motion must be stamped with the seal of the court, as with the pleadings in the application for leave (see SECTION D.4) and served on all parties named on the notice, as well as on the court. The fee for having the notice of motion stamped, from October 2019, is **£261.00**

An example of a notice of motion is set out below, with our commentary in red.

No 2019/…../01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For Judicial Review
Note that after the grant of leave, the title of the case changes from "For leave to apply for judicial review" to "For judicial review"

NOTICE OF MOTION

TAKE NOTICE that pursuant to the leave of the Honourable Mr/Ms/Mrs/Madam Justice [SURAME] given on [DATE], the Queen's Bench Division of the High Court of Justice in Northern Ireland will be moved, on the [DATE/S], by the Applicant for the following relief, namely:

(a) Orders, Declarations, etc. Set out in full the remedies from the Order 53 Statement

(c) Such further or other relief as this Honourable Court shall deem meet;

(d) All necessary and consequential directions; and

(e) Costs.

AND FURTHER TAKE NOTICE that the application will be grounded on the Applicant's (amended) statement filed pursuant to Order 53 Rule 3(2)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 on the [DATE OF FILING OF ORDER 53 STATEMENT], the affidavits which have been filed in the course of these proceedings and the reasons to be offered.

Dated [DATE OF FILING OF NOTICE OF MOTION].

Signed: ……………………………

The Applicant

[ADDRESS]

TO: [RESPONDENT]

TO: [INTERESTED PARTIES]

TO: Judicial Review Office, Royal Courts of Justice, Chichester Street Belfast BT1 3JY

F. After the grant of leave

(1) Procedural matters before the main hearing

Following the grant of leave, and in line with the duty of candour on the respondent (see SECTION B.3 above), the respondent may wish to submit evidence to defend its position and challenge your case. This evidence is presented by way of material exhibited to an affidavit and is typically referred to as a 'replying affidavit' as it replies to your challenge of the respondent's decision. You should carefully consider this evidence and whether or not you need to respond to this evidence yourself. It would not further your case, and may in fact harm it, if your response simply repeats points made in your earlier evidence. You may, however, wish to submit further evidence on a point which the respondent has raised and you have not had the opportunity to respond to so far, or you may wish to clarify a point where the respondent is disputing your version of events. The evidence which you, as the applicant, file in response to the respondent's evidence, must be by way of one or more further affidavits which are typically referred to as 'rejoinder affidavits'.

You may also be served with evidence from any interested parties (in planning cases, typically the developer/s) or interveners (individuals or groups which have successfully applied to the court to intervene in your case, such as NGOs which have an interest in environmental protection), on which you may wish to reply, but you should be careful not to repeat your initial evidence in reply to any interested party evidence. The court may also (though rarely) order evidence on an issue which becomes more important as the case progresses (see for example *Re Alexander's application* [2018] NIQB 55 at para 57).

(2) Interim applications

Exceptionally, you may wish to make applications to the court for further evidence or discovery (see SECTION B.3) where any of the other parties submit evidence which appears to be inaccurate, misleading or materially incomplete (here 'materially' refers to relevance to the case, so 'materially incomplete' simply means whether there is any real reason to suspect that there is a lack of relevant evidence from the party disclosing the evidence). Before making any formal application, the court will expect you to try and resolve the issue through correspondence with

the party with whom you have the issue/dispute. It is, therefore, important to remember the conditions which, if satisfied, the court may grant discovery: firstly, go over the evidence of the party from whom you are seeking discovery to make a note of what has been disclosed, and what remains to be disclosed (for example, if the party refers to or quotes from notes or minutes in their affidavit but has not disclosed these); secondly, consider whether any of these documents are relevant to any issues in the case (for example, disclosure of planning committee minutes may reveal exactly which factors the planning committee considered when making their decision); thirdly, consider whether you need these documents in order for your case to be fairly considered by the court (for example, a local authority may have disclosed its reasoning for granting planning permission on the permission notice itself, in which case, minutes may add nothing to your case).

Applications for interim or 'interlocutory' discovery are, under the Rules of Court (Order 53, Rule 8(1)) made to a "*judge in chambers*". What this means in terms of the format of the application, is that the application is made by way of a document known as a 'summons' and is supported by an affidavit with relevant materials exhibited to the affidavit. A summons is essentially a document sealed with the seal of the court, requiring all parties named in the summons to appear before the court to hear the application made by the party lodging the summons. The application fee for interim applications by summons to a Judge in chambers, from October 2019 is **£151.00**

An example of a summons for further and better discovery (if the initial affidavit evidence appears incomplete), with our commentary in red, is provided below:

No 2018/…../01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For Judicial Review

SUMMONS PURSUANT TO ORDER 24

LET ALL PARTIES CONCERNED ATTEND the Judge in Chambers at the Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on the day of 2018 at am/pm do not fill out the date or time – this is for the court staff to fill out specifying when the summons will be listed before the court, referred to as the 'return date' as that date is when the parties 'return' to court for the application to be considered upon the hearing of an application by the above-named Applicant for an Order granting further and better discovery to the Applicant, from the [PARTY FROM WHOM YOU ARE SEEKING DISCOVERY] within [DAYS] of the date of the said Order, and with the costs of this application granted to the Applicant.

Signed: ………………………………

Applicant

[ADDRESS]

To: Respondent/Interested Party [PARTY FROM WHOM YOU ARE SEEKING DISCOVERY]

[ADDRESS]

To: Judicial Review Office

Royal Courts of Justice

Chichester Street

Belfast BT1 3JF

A summons must be supported by an affidavit (general guidance for which is in SECTION D.2), setting out any relevant correspondence between you and the party from whom you are seeking further and better discovery, what discovery you are seeking (specify documents where possible), why you are seeking discovery (for example if the party's affidavit suggests that the evidence is

materially incomplete), how that discovery is relevant to your case and why ordering discovery is necessary for the case to be fairly dealt with. As before with affidavits, any material exhibited to an affidavit must be done by way of an exhibit certificate and not simply attached to an affidavit. You should always be aware that the court will not grant a sweeping application full of generalised and vague requests (for example "any and all reports/minutes/communication/notes concerning whether or not any Councillors on the planning committee have any business relationships with the planning applicant"), and the general rule is: the more tailored and specific the request is, the more likely it is that a court will be persuaded to grant it. Also remember the overriding objective (SECTION D.1) when considering whether to make an application for interlocutory discovery.

Although we have briefly talked about injunctions as an interim remedy (SECTION B.3), we do not set out an example of an application for an interim or interlocutory injunction here for a simple reason: the test for a court to grant interlocutory injunctive relief is highly technical (as above, SECTION B.3) and would require specific drafting and legal representation in order to be properly dealt with. Often, an interlocutory injunction will not be granted for being entirely unnecessary in planning cases. The general reasons why an injunction may be applied for and granted are dealt with both in SECTION B.3 and in the draft pleadings in the preceding section. For specific cases however, if you think that an injunction is necessary, please instruct a solicitor as soon as possible.

(3) Building the hearing bundle

As the applicant, it is your responsibility to prepare a full bundle for the hearing of the judicial review. Part D of PD 3/18 contains direction for the preparation of hearing bundles, and the general practice is to include all pleadings, relevant evidence and any orders / directions of the court.

PD 3/18 contains a detailed catalogue of how to structure your final bundle, and can be summarised as follows:

(1) Trial Bundle 1 part I will contain in sequence:
   a. The final Order 53 Statement, showing any and all amendments as directed and allowed by the court and in colour;
   b. The notice of motion;

c. All orders and directions from the court, from the very start of the case;

d. If directed (and in all planning cases),

   i. A chronology of all events relevant to the case;

   ii. A schedule of agreed material facts – which are all the facts relevant to the case and as agreed between all the parties – you will need to prepare your draft of relevant facts in advance of building the final bundle, so that you can share this with the other parties and get their agreement and work on any changes suggested by the other parties. Remember that the schedule is only of relevant facts, not argument; if there are any facts which are not agreed between the parties, include these in a separate document called a 'schedule of contentious material facts'

   iii. A list of *dramatis personae* or key individuals in the case (e.g. planning officers, department officials, etc. where they appear in the case papers, with a line on who they are or what they do)

   iv. A glossary of any terms or acronyms – in planning cases, these documents are vital

e. Your and all other parties' skeleton arguments

(2) Trial Bundle 1 Part II will be the leave bundle as in SECTION D.3.

(3) Trial Bundle 1 Part III will be any affidavits and exhibits from you in response to any affidavits and exhibits served by the other parties. If you cannot include any such affidavits and evidence in Trial Bundle 1 for lack of space, these will go into a bundle known as Trial Bundle 3, so that the 'Trial Bundle 3' below will become Trial Bundle 4.

(4) Trial Bundle 2 will be any and all affidavits and exhibits from the Respondent.

(5) Trial Bundle 3 will be any and all affidavits and exhibits from the Interested Party(ies).

(6) In planning cases, take out all policy documents, maps, photographs, brochures, leaflets, etc. and put them into a freestanding 'Policy' bundle or bundles:

a. Where you can include all policy documents, maps and photographs into ONE file, divide that file into two parts:

   i. Part I will have only policy documents;

   ii. Part II will have maps, photographs, etc. in colour;

b. Where policy documents, maps, etc. cannot be included in one file due to lack of space, make sure you have ONE file containing only policy documents with maps, photographs, etc. in colour, in another file

(7) Each file is to be separately paginated in a self-contained way (the first page of contents of each file to start with page 1) and each file accurately and comprehensively indexed.

The court will usually direct that the case is reviewed for preparedness before the main hearing, and if the volume of the papers is too large, the court may direct a 'core bundle' be prepared, the contents of which the court will also direct, either specifically or generally. If you are unsure about the exact contents of the core bundle, do not be afraid to ask for clarification from the court. You may also wish to provide a draft index to the other side(s) and their legal representatives so that everyone can agree to the contents of the bundle. It is important that you take note of any directions on preparing core bundles from the court, as it is your responsibility to prepare the core bundle, just as with the main hearing bundle (above).

Finally, as with the Book of Pleadings for the leave application (SECTION D.3), it is vital that the hearing and/or core bundles be prefaced with accurate indices. There are few things more frustrating (for the court and the parties) than having to determine where in the bundle a particular document is because the index is inaccurate, particularly in the middle of a hearing.

You should be aware that a hearing bundle has to be lodged with the court and the other parties at least 7 working days before the hearing, unless the court directs otherwise (Part E paragraph 6 of PD 3/18).

(4) Skeleton arguments and authorities bundles

While not mandatory for leave hearings, skeleton arguments and bundles of authorities are mandatory for substantive hearings of a judicial review.

A skeleton argument is more or less as described: a written document containing the main points of legal argument on which a party relies, and on which the party will build the 'flesh' through oral arguments before the court. There is no fixed rule concerning the length of skeleton arguments; it is a matter of judgement for you, depending on the issues in the case. In complex cases a skeleton argument of 30 pages would not be unusual. But in straightforward cases, you should try to limit your skeleton to no more than 15 pages. It is important to remember that the skeleton argument is designed to be skeletal. It is not designed to — nor should it — contain a detailed discussion of all of your arguments. If your skeleton argument is too long, there is a danger that you will have nothing to say during oral argument.

Part A of Practice Direction 1/2016 (reproduced in Appendix VI of PD 3/18) sets out general rules for drafting skeleton arguments which we summarise and add to as follows:

(1) You must set out the full title and case number of the case, as well as the party providing the skeleton argument (for example, "Applicant's skeleton argument");
(2) You must specify that you are "acting in person";
(3) Where you reference a particular document in the hearing bundle, you should have it in the form [BUNDLE/PAGE NUMBER];
(4) If you refer to legislation in the skeleton argument, you should make sure you cite the relevant article/section/regulation, for example "section 27 of the Planning Act (NI) 2011";
(5) When citing case law, there are certain rules and conventions which lawyers are expected to follow – for personal litigants, we advise that you have an accurate citation in your skeleton argument, rather than going into detail about the rules of proper citation. When researching case law, any judgment which is publicly available from the court websites in Northern Ireland, England and Wales, the UK Supreme Court and the Court of Justice of the European Union (usually these courts will be relevant when considering case law) will contain 'neutral citations' which (in the UK) are in three parts: Year; Court; Judgment number, for example 2018 NICA 26. Use these where possible, and do not spend too much time trying to get copies of law reports (for which you have to pay a subscription fee) unless absolutely necessary – in that judgments dated before 2000 for example may be found only in law reports (a non-exhaustive list of such reports is contained in the APPENDIX);
(6) However, when you are citing case law, make sure you cite the relevant part of the case law, for example, you may wish to rely on certain paragraphs, which you should make clear in the skeleton argument;
(7) Focus on the main principles on which you seek to rely – for example, irrationality, illegality, improper procedure, and so on;
(8) Do not define the main principles above or cite the cases where these principles were first (or most famously) stated – the Judge will know them and the main cases where these principles are defined – instead, focus on how those principles are engaged in your case – for example, "*the respondent failed to take into account that there was no effective pre-application community consultation as required by section 27 of the Planning Act (NI) 2011 and thus the decision to grant planning permission was irrational*";

(9) As with an affidavit, structure your skeleton argument into a coherent narrative instead of simply listing a series of points; consider taking the court through all of your grounds of challenge in sequence, explaining how each ground is established according to the law and the facts of your case. You should ideally use section headings to pinpoint the court to which part of your case you are arguing;

(10) It is a good idea to use some reasonable shorthand, particularly for long-winded phrases or full names, for example "*the decision to grant planning permission ("the decision")*"

(11) Skeleton arguments are usually drafted by barristers, typically with several years' experience and training in drafting and making submissions in court. While the court will not expect a personal litigant to draft or argue to the standard of an experienced public law barrister, it will nevertheless expect your skeleton argument to have structure and coherence, while being concise.

Along with your skeleton argument, the court requires a few schedules. In planning and environmental cases three schedules will usually be required: a schedule of your authorities; a chronology of relevant events; and, a list of key persons involved in the case (sometimes referred to as a *dramatis personae*), for example planning officers, consultants, and so on.

An example of a skeleton argument is provided below:

No 2019/…../01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

In the Matter of an Application by XY
For Judicial Review

APPLICANT'S SKELETON ARGUMENT

Introduction

1. This is an application for judicial review by Ms A challenging the decision of [DATE] by the Department for Infrastructure to grant planning permission ("the decision") for [PROPOSED DEVELOPMENT]. The applicant is acting in person and the challenge is taken on four grounds, each of which is dealt with below.

Factual background

2. This should be fairly brief, as the detailed facts ought already to be within your grounding affidavit/other affidavits. You should also briefly cover the procedural history of the decision which you are challenging and the steps you have taken before lodging your application with the court. If you are required to amend your case after leave so that certain aspects of the case (for example one or more grounds of challenge) are abandoned before the substantive hearing, it is important that you do not include these in your skeleton argument.

Ground 1: Irrationality

3. The decision failed to take into account the lack of an effective pre-application community consultation ("PACC") by the developer, in breach of section 27 of the Planning Act (NI) 2011. The decision thus failed to take into account a material consideration and was as a result irrational according to *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

……

Etc.

Conclusion

4. The court is thus respectfully requested to uphold the challenge on the above grounds and grant the remedies sought by the applicant.

[YOUR NAME]

[DATE OF SUBMISSION OF THE SKELETON ARGUMENT]

Your skeleton argument should be lodged with the court at the same time as your hearing bundle, that is, at least 10 working days before the hearing, unless the court directs otherwise.

Authorities bundles are bundles of the cases, legislation and any legal texts (for example textbooks) on which you seek to rely in support of your case and your skeleton argument. You should have an accurate index, divided into sections for each kind of authority: i.e., case law, legislation, texts, etc.

Do not overload your case with masses of judgments which may only contain one principle (which may not be at the heart of your case, but on the fringes of your case). It is always better to pick a few cases which strongly support your arguments rather than dozens of weak cases which may

not. The act of persuading a court does not lie in a numbers game, but on the strength of your argument. When looking up judgments, make a note of which court delivered the judgment – any judgments from the Supreme Court, House of Lords or Court of Justice of the European Union are binding on (must generally be followed by) courts in Northern Ireland – judgments from England and Wales or Scotland however are only persuasive, not binding. Also be aware of the age of the judgment you are considering – it is likely (sometimes highly likely) that a case from the 1920s, though landmark for its time, has subsequently been overruled as bad law, or been superseded by a later Act of Parliament. In other words, do your research with reasonable diligence. It is not a proper use of the court's time to go through your arguments and inform you that they have all been superseded by more recent law.

When preparing a bundle of authorities, it is good practice (and expected from the court) to agree a joint bundle of authorities with all other parties in the case. As you will be acting in person, the public authority may (but not necessarily will) offer to do the bundle for you, otherwise you will have to do the bundle yourself. In either case, remember to mark with an asterisk (*) the essential authorities, that is, the ones you absolutely require the court to read and on which you will rely. The court also likes the main passages within the relevant case law to be highlighted, for ease of reading and reference during the case.

In some (rare) cases, personal litigants have been known to make arguments based on bizarre, sometimes illogical interpretations of legal rules and legal history, basing imaginative and inventive arguments on Magna Carta or other documents which are centuries old (see for example *The Man Known as Anthony : Parker v The Man Known as Ian McKenna and the Enforcement of Judgments Office* [2015] NIMaster 1). Do not be tempted to give the court a history lesson as the costs consequences can be severe.

G. At the hearing

(1) Preliminary matters

Preparing for a hearing can be nerve-wracking for litigants in person. Being prepared does not, however, mean making yourself ill the night before. Having come this far, you will know better than most people the main points of your case. The point of preparation is to be able to persuade the court as well as possible: coherently, logically and smoothly. To that end, we recommend the following steps for good preparation:

(1) Make a list of the main points of your case; use these as anchors for your oral arguments in court;

(2) Refer to your skeleton argument as the crux of your argument, but do not repeat the skeleton argument in court; build on your skeleton argument by going into detail of how the law, when applied to the facts, supports your argument;

(3) Plan your oral arguments to be concise and to the point; in what may be a lengthy hearing, eloquence does not mean poetry; short and relevant lines are often more memorable for the Judge than long-winded sentences;

(4) Be persuasive, but not melodramatic: you are encouraged to inject your real life into your argument and say how the challenge affects you in a real way (this is after all, your case); do not however plan on saying something like "*the conspiracy of the developers is monstrous*" – the court is often less than impressed with over-the-top language;

(5) Make a note of the other parties' skeleton arguments, which you will have received in advance of the hearing – and see if you can counter the arguments while making your own submissions. The court will often appreciate if an argument can be dealt with before having to hear it in full;

(6) Use as many highlighters, different coloured pens, post-it notes and other stationery on your skeleton argument, hearing bundle and authorities as possible. These are often most helpful for quickly signposting you to where you want to be while on your feet;

(7) Prepare a speaking note. Your skeleton argument may only be a few pages, and your authorities bundle may be short, but having a single document which covers all the points you want to make, with details such as relevant paragraph numbers in affidavits, case reports and relevant page numbers of exhibits, etc. in court is invaluable. You may wish to have a marked-up version of your skeleton argument as your speaking note, with

all the relevant paragraph numbers, case references and exhibit references for your convenience;

(8) Practice your submissions with your family or friends, especially if you have no public speaking experience. Remember however that you will not be addressing everyone in the court – only the Judge; and finally

(9) Get a good night's sleep!

(2) Dress

Most people will have a fair idea about appropriate court dress; however, it is useful to go over some basic principles: dark, muted colours are most appropriate (think navy, dark grey or black), and appropriate clothing will often be business attire.

(3) Addressing the court and arguing your case

All Judges in the High Court are styled Mr/Ms/Mrs/Madam Justice [Surname] and addressed as "my Lord" or "my Lady" except when you are addressing them directly in the second person ("you") in which case you say "your Lordship" or "your Ladyship". So for example: "My Lady, this case concerns a simple breach of statutory duties" not "Your Ladyship, this case…"; but "Your Lordship will of course have seen…" not "You will of course have seen…".

It is important to note the gender of the Judge whom you are addressing. Lady Hale, who is the current President of the UK Supreme Court once recalled in an interview a decade ago that "in the High Court, they had got round to calling me 'my Lady' in court – *if they noticed*" (Georgetown University Law Center, 2008 https://www.youtube.com/watch?v=pYR414Q8v6A) . While this may seem like a humorous anecdote, it shows the importance of paying attention to the Judge, and the degree to which easily-preventable (though important) mistakes can be made. If in doubt as to identity of the Judge, be sure to ask the Judge's clerk (the person who sits below the Judge, facing the court).

In judicial reviews, it is always the applicant who speaks and presents their case first – it is after all their challenge. The respondent then follows with a response, followed by any interested party and any third-party intervener permitted that has been permitted to make an oral submission. The applicant then has a final chance to rebut the arguments of all the other parties before the

hearing comes to a close. The court may have set a time-limit on each party's oral submissions and it is important to keep to these limits. The court has limited time and resources to devote to a large number of cases and will not ordinarily allow any party to go over their allocated time without good reason.

When presenting your case, keep your speaking note or, marked up skeleton argument as the case may be, in mind (and in front of you) and positively outline the main points in your case: "My Lady, I am the applicant in this case, acting in person, and I am challenging the respondent's decision to […] Today, I will be making submissions on four grounds to your Ladyship – illegality, irrationality, improper procedure and breach of a legitimate expectation. If I could begin with my first ground, the respondent acted illegally because…" Signposting the Judge back to your main points neatly encapsulates your grounds of challenge and references your written submissions (pleadings, affidavits and skeleton argument). Do not be afraid to signpost the Judge to your skeleton argument: "I provide an overview of my second ground in paragraphs 6 and 7 of my skeleton argument, my Lady, and I only wish to make submissions on two points in this ground – the first being the habitats assessment which your Ladyship will find at page 112 of Trial Bundle 1 Part II and the second being…"

When speaking, pay attention to the Judge's pen – you will need to alter the speed at which you are speaking depending on whether the Judge is continuing to make notes or not. It is very common for the Judge to make notes of your submissions, despite having the recordings of the hearing to refer to. The Judge may ask you to slow down so as to take notes – you should also pause in between points in order to allow the Judge time to finish taking notes on your previous point and because pausing between points allows the Judge to appreciate your previous point – thus being an effective public speaking tool.

If you managed to formulate any rebuttals to the other parties' skeleton arguments before the hearing, make sure you allow yourself enough time to include these rebuttals in your submissions. This way, the party whom you are rebutting may be put on the defensive in relation to your rebuttal before being able to make a positive case, but it is also an efficient use of the court's time for you to have covered your opponent parties' point(s) before being asked to by the Judge. However, remember that this is not your only chance at rebutting your opponents' points, so make a note of what they say and consider how you want to rebut these points when you are next asked to speak by the Judge.

When you have finished speaking, it is good practice to inform the court that you have finished. Conventionally, a barrister might say: "Unless there is anything further with which I might assist

the court/your Ladyship/your Lordship, that concludes my case", although you may wish to keep things simple and say: "That concludes my case, my Lady/my Lord, unless there is anything further".

(4) *McKenzie* friends

If you are acting personally, you may consider bringing along a *McKenzie* friend – someone who is not usually legally qualified and is not representing you in court. Instead, the job of a *McKenzie* friend is to provide moral support, take notes with the Judge's permission, assist with case papers or quietly advise you on the conduct of any part of the case being heard.

Remember that, generally, *McKenzie* friends are not legal representatives and as such are not required to have professional indemnity insurance in relation to acting for you, are under no professional obligations and thus should not be depended on to conduct litigation on your behalf or speak in court on your behalf, unless the court gives them permission to do so. They can be reasonably remunerated for their services if you agree with them as such, but this remuneration does not amount to professional fees charged by solicitors or barristers. Recent developments in this field include the formation of a Society of Professional McKenzie Friends with a directory of *McKenzie* friends who charge fees and are insured (though none we have come across who are based in Northern Ireland), and a strong warning from the High Court in England that if a *McKenzie* friend holds themselves out to be a legal professional with experience, they would owe their client a comparable duty of care (*Wright v Troy Lucas and Rusz* [2019] EWHC 1098 (QB)). *McKenzie* friends offer a useful service where engaging legal representation is too costly. However, we would caution against over-reliance on *McKenzie* friends as they have no professional regulatory body overseeing their conduct and are not required to be insured. You should also be aware that solicitors and barristers generally do not act as *McKenzie* friends.

The duties of *McKenzie* friends, and the role they play are laid out in greater detail in Practice Note 3/2012 and you and your intended *McKenzie* friend should carefully read this Practice Note before appearing in court.

H. Judgment and other matters

(1) Judgment

The court will notify you by email when it will deliver the judgment (sometimes referred to as 'handing down' judgment). The Judge may have directed that the parties need not attend, though the court does not usually forward copies of the judgment by email, so you will need to attend so as to get a copy of the judgment yourself. You will also need to attend because at the end of the handing down of a judgment in judicial reviews, the Judge will have at least one, if not more, questions for the parties:

(1) On what the final remedies order might be if you win on at least one ground of challenge (this may involve discussions between you and the other parties for the precise framing of the order and may even involve another hearing before the Judge to finalise the order); and/or

(2) On the costs of the case (if you win or lose) – costs are dealt with in greater detail in SECTION I.

(2) Appeal

In the days and weeks following the judgment, you or the respondent (or both) may wish to appeal the judgment. There are complex rules around what can be appealed to the Court of Appeal and what cannot be appealed. This aside, there are even more complex assessments to be made on whether an appeal is worthwhile considering case law, costs and any grounds of appeal. For this reason, we do not go into any detail on the appeals process except to say that under the Rules of Court, you have six weeks in which to serve a notice of appeal on the party against whom you are appealing, before lodging the notice with the court. We strongly urge you to obtain legal advice in this timeframe if you are considering lodging an appeal.

I. Costs

(1) The normal rules in costs

The legal term 'costs' means a wide range of expenses from court fees to fees for solicitors and barristers. The normal rule in cases is described as 'costs follow the event' which simply means that the losing party pays the winning party's costs. We stress that this is the normal rule, meaning that the court can deviate from it in certain circumstances. The court may order no costs be payable by any party, which means that each party is responsible for their own costs only and does not pay any other party's costs. The court may even order the winner to pay the loser's costs (or some proportion of the loser's costs) if the winner behaved unreasonably. These are, however, all exceptional cases and not the norm.

(2) Costs protection

You can get what is known as 'costs protection', in other words, be protected from having to pay any other party's costs, either entirely or to a limited extent. Typically, costs protection is available in one of two ways: obtaining legal aid or obtaining a protective costs order ("PCO"). Legal aid is administered by the Legal Services Agency Northern Ireland and you will need a solicitor in order to make a legal aid application. It is available for people who are below a certain income threshold and have good prospects for their case. Although legal aid provides complete costs protection, in that you will never have to pay any other party's costs or the fees of your solicitors and barristers even if you lose every aspect of your case (unless you are charged a 'contribution' towards legal aid depending on your financial means), legal aid can be difficult to obtain for a simple but very good reason: it is drawn from public money (taxes) and thus the government needs to justify spending taxpayer money on private cases and cannot be seen to be insufficient in its enquiries.

A protective costs order is one which is granted by the court and is a way of limiting parties' costs before the conclusion of a case. As such, the court has a very broad discretion on what the order may contain, depending on what is fair between the parties in the overall context of the case. A PCO may involve completely insulating one party from having to pay any other party's costs (somewhat like with legal aid) but typically involves an order that both party's costs are

limited to a certain amount (capped costs), with the loser paying the winner's capped costs. While PCOs are usually entirely at the discretion of the court (see some very useful guidance from PILS), in planning or environmental cases which engage the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998), PCOs are more readily available than in other cases.

The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 ("2013 Regulations"), as amended in 2017, provide for costs protection in judicial reviews of any decision, act or omission by a public authority which is entirely, or in part, subject to the provisions of the Aarhus Convention, which is an international treaty governing public access to environmental information, public participation in certain decision-making such as planning permission and access to justice in environmental matters. Although not directly a part of UK domestic law, the Convention applies in part through various EU legislation, and thus will be engaged in most planning and environmental cases. However, it is important to explicitly state that the Convention applies, otherwise you will not obtain the benefit of the costs protection regime for Aarhus cases. There are two ways in which you invoke the Convention – firstly, by explicitly stating that it applies in pre-action correspondence (as in SECTION C.3 above) and secondly, by making an application for a PCO, as set out below.

Under the 2013 Regulations, there is a reciprocal costs cap where the applicant's liability for the respondent's costs (if the applicant loses the judicial review) is capped at £5000 for individuals and £10,000 for groups and the respondent's liability for the applicant's costs (if the applicant wins the judicial review) is capped at £35,000. Amended in 2017, this cap can now be modified, with the applicant's liability reduced and the respondent's liability increased if the court is satisfied that not modifying the cap would make the case prohibitively expensive for the applicant. Thus, the amended regulations are significantly more advantageous to applicants, particularly because the meaning of 'prohibitively expensive' is not left to an absolute discretion of the court, but subject to certain set guidance, including that a case is to be considered prohibitively expensive if the applicant's likely costs exceed the applicant's financial means (Regulation 6(a)).

It is important to appreciate what the 2013 Regulations actually mean in practice: if you, acting as a personal litigant, win your case, you will not automatically receive £35,000 from the other side. You will receive the money you have spent in making your case (including court fees, reasonable travel and accommodation expenses if incurred, costs of photocopying, stationery, etc.) up to £35,000. You will not receive any money above this amount even if you have spent more, unless

the court feels that the cap ought to be lifted to avoid the case being prohibitively expensive to you. Similarly, if you obtain legal representation for your case, the £35,000 cap does not mean that your actual legal fees (professional fees of your solicitor and barrister(s)) will be £35,000 – they can be (and in planning case sometimes are) higher. All the cap means is that the other side will pay you a maximum of £35,000 if you win, and you may have to pay your legal team the difference between this figure and their final fees.

Remember that the basic (and more or less automatic) costs protection reciprocal cap applies if and only if the judicial review engages Aarhus matters, and so the question of whether a case is an Aarhus case is important for determining whether costs are to be limited. Thus, the respondent in a judicial review may deny that the case involved Aarhus matters and the court may direct that you make a formal application to request costs protection. The court may direct that this application simply be a written document or a formal summons. If the latter, use the form specified in SECTION F.2, substitute the reference to 'Order 24' with 'Order 53 Rule 8(1)' and use the following for the body of the summons:

"*LET ALL PARTIES CONCERNED APPEAR before the Judge in chambers on the day of 2018 at am/pm at the Royal Courts of Justice on Chichester Street, Belfast BT1 3JF upon the hearing of an application by the above named Applicant for an order pursuant to Regulation 3 (2) and (4) of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (as amended) that the applicant's costs be limited to £35,000 and the respondent's costs be limited to £5000, save that the costs recoverable from the respondent be subject to Regulation 4 (3) of the 2013 Regulations, with costs of this application reserved*"

Regulation 4(3) allows for an increase to the £35,000 cap in circumstances where the respondent disputes that the case is an Aarhus case, and is proved wrong. The reference to "costs reserved" simply means that the exact costs of the formal application for costs protection are reserved to be determined by the Taxing Master (costs judge) at the end of the case.

If you get an interlocutory order granting you costs protection as above, you need to include this in Trial Bundle 1 Part I of the hearing bundle.

(3) Available sources of funding

Not everyone can afford to commit several thousands of pounds to a judicial review (the actual costs of which can be and often are much higher). Thus, you may wish to look at any available sources of funding. We have already mentioned the Legal Services Agency Northern Ireland if

your income falls below a certain threshold and your case is deemed to have merit – please consult a solicitor however if you wish to apply for legal aid. Other sources of funding include crowdfunding, through various platforms online such as CrowdJustice (https://www.crowdjustice.com/) and GoFundMe (https://www.gofundme.com/) or even informal crowdfunding in your local community. You may wish to form a group to raise money or share the costs of a judicial review where the case may affect a large number of people or a whole community (though be careful when considering whether to use the group as the applicant – see SECTION A.4) without legally formalising the group in any capacity (such as an unincorporated association or limited company). You may also consider whether any insurance policies of which you are the policy holder contain legal costs cover (such as with house insurance policies). Another potential avenue for funding is after-the-event (ATE) insurance, if obtainable for these cases, though you should be aware that ATE insurance is bought from a solicitor in order to cover your opponent's costs and your solicitor's disbursements if you lose. Finally, you may be able to approach the PILS Project for limited costs protection. PILS is a non-profit membership-based organisation dedicated to public-interest litigation and is an invaluable part of the legal landscape in Northern Ireland. If PILS decides to accept your case, it normally insulates you against having to pay any costs to other parties only. However, as PILS is membership-based, you will need to approach one of their members to seek assistance from PILS.

(4) A final note on costs

The reason we have set out the costs section at the end of this guide is so that you have an appreciation of the time, effort, technical experience and expertise which all go into conducting judicial review cases. This is the only way anyone can properly appreciate how much a case might cost.

It is also a chance to consider a proper cost-benefit analysis of acting personally in a judicial review. We sound a cautious, not disparaging, note when we say that the emotional and physical cost of conducting litigation by yourself often exceeds the monetary cost in professional fees, particularly with the variety of ways in which costs can be spread, as in the preceding section. Remember that most solicitors' firms will not charge for an initial consultation, and you may be able to negotiate fees even when charged. Finally, there is a significant point you should consider when deciding whether to conduct litigation by yourself or obtain legal representation: lawyers

are required by law and their professional obligations to be objective and impartial in their consideration of clients' cases; what this means is that lawyers will be able to objectively analyse and finesse your case in a way that you may not, as you are personally invested in your case. This is not an attempt to patronise you; it is merely a recognition of an age old saying: two heads are better than one.

Thus, even if it is just to get some general advice about the conduct of litigation, we strongly recommend you consider obtaining legal advice at any and all stages of a judicial review.

J. Brexit

We have included this short section given that a significant amount of environmental and planning law is derived from or made pursuant to EU law. Although there has been much academic debate and commentary on how EU law might 'apply' following the departure of the UK from the EU, we only touch upon the main points here given both the complexity and uncertainty surrounding this issue at the time of writing. We strongly advise you to seek legal advice in the event that your case raises a point about the application of EU law after Brexit.

So far as the current legal landscape is concerned (**at the time of publication**), the only statute which deals with post-Brexit 'EU law' is the European Union (Withdrawal) Act 2018 (although there is helpful guidance available). While the design of the 2018 Act is (understandably) complicated the punchline is that most EU law, whether directly enacted by the EU institutions (the European Parliament or Council of the European Union or both) or enacted domestically within the UK apply on and after exit day in almost the same way as it would apply prior to exit day. It is, however, important to appreciate that after exit day, any EU law as it applies in the UK cannot be directly sourced from EU legislation or the Treaties, but from the 2018 Act itself. What this might mean in practice is this: EU law as we currently know applies to any case which arises before exit day, but only 'retained EU law' under the 2018 Act would apply to cases which arise on or after exit day. This is important when you cite or rely on laws in support of your argument – following exit day, you may not be able to rely on EU Directives of Regulations as these are superseded by laws made under the 2018 Act.

Finally, the 2018 Act contains fairly detailed provisions of how judgments of the Court of Justice of the European Union will impact upon UK courts after exit day (the impact will vary depending on the court). Rather than go into this in any detail, we simply say that the precise way in which courts apply case law determined by EU courts will have to be worked out, likely involving further legislation and determination by UK courts, including the Supreme Court.

We end this section with the following advice: please do not spend too much time worrying about the post-Brexit application of EU law and in the event that you find yourself involved in a case where a complex point arises, please seek legal advice.

K. Conclusion

Throughout this guide, we have attempted to set out the main points in the conduct of judicial reviews in terms of practice, procedure and general advice. While we have attempted to be as accessible as possible, a lot of the main principles and underlying reasons for the manner in which courts conduct judicial reviews, as well as how lawyers conduct such cases, go back to the development of the court's supervisory jurisdiction over the centuries. Thus, we by no means recommend this guide as exhaustive or a legal authority.

It is useful to remember at all times that you have a right to access the courts to settle disputes of law and fact which affect you – this is an ancient, well-established and zealously-guarded right which the courts and the legal profession uphold at all costs. The question for you is how to exercise this right – whether through legal representation or by yourself. This guide is simply a product of our firm belief that individuals and groups which wish to conduct litigation in what is often a highly technical area should not be completely disadvantaged simply because (for a variety of reasons) they do not wish to or cannot engage legal representation.

We hope that this guide helps you to better understand and appreciate planning and environmental judicial review cases and allows you to consider whether or not to litigate such cases with a little more confidence. To that end: good luck!

L. Appendix

(1) Legislation

1. European Union legislation
    a. Consolidated Directive 1992/43/EEC (Habitats Directive)
    b. Directive 2000/60/EC (Water policy framework directive)
    c. Directive 2001/42/EC (Assessment of plans and programmes on the environment)
    d. Directive 2003/4/EC (Environmental Information Directive)
    e. Directive 2003/35/EC (Public participation in drawing up plans and programmes relating to the environment)
    f. Directive 2006/118/EC (Groundwater Directive)
    g. Directive 2011/92/EU (EIA Directive, as amended, consolidated version)
2. UK legislation
    a. The Nature Conservation and Amenity Lands (Northern Ireland) Order 1985
    b. The Wildlife (Northern Ireland) Order 1985
    c. The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 **NB: only original version (without amendments) available publicly**
    d. The Environment (Northern Ireland) Order 2002
    e. The Environmental Information Regulations 2004
3. Northern Ireland legislation
    a. The Wildlife and Natural Environment Act (Northern Ireland) 2011
    b. The Planning Act (Northern Ireland) 2011
    c. The Clean Neighbourhoods and Environment Act (Northern Ireland) 2011
    d. The Local Government (Northern Ireland) Act 2014
    e. The Planning (Local Development Plan) Regulations (Northern Ireland) 2015
    f. The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 **NB: only original version (without amendments) available publicly**

(2) Case law

i. Judgment sources

The British and Irish Legal Information Institute is a highly useful free database of decisions across UK, Irish and EU courts.

Many judgments of the High Court and Court of Appeal in Northern Ireland are publicly and freely available on the Judiciary NI portal.

NB: in Northern Ireland judgments, neutral citations are marked "Year/Court/Judgment number". So for example, [2018] NIQB 65 is read as follows: judgment of the Queen's Bench Division of the High Court of Northern Ireland, number 65 of the year 2018.

Many judgments of the High Court and Court of Appeal in England and Wales are publicly and freely available on the Courts and Tribunals (Judiciary) portal.

NB: You should be careful in looking to England and Wales authorities for the reason that judgments of England and Wales courts can only be persuasive, and not binding, on an issue which falls to be determined by the courts in Northern Ireland. In neutral citations, judgments in judicial review cases are marked "Year/Court/judgment number/Division" so for example [2018] EWHC 2465 (Admin) which is read as follows: judgment of the Administrative Court of the England and Wales High Court number 2465 of the year 2018.

Many opinions of the Court of Session in Scotland (which deals with judicial review cases) are publicly and freely available on the Scottish Courts and Tribunals portal.

NB: The Court of Session does not hand down judgments but delivers 'opinions' in cases. Further, you should be careful in looking to Scottish authorities for two main reasons:

(1) Scottish authorities may only be persuasive, not conclusive, on an issue which falls to be determined by the courts in Northern Ireland; and

(2) In Scottish judicial review, a case does not need to be a 'public law' matter in order to avail of the jurisdiction of the court – thus judicial review in Scotland is legally more expansive than in Northern Ireland (or England

and Wales) and the same standards do not apply in Northern Ireland – see *West v Secretary of State for Scotland* [1992] SC 385

You should also be aware that a case is first heard by the Outer House of the Court of Session (abbreviated as CSOH) before being appealed to the Inner House of the Court of Session (abbreviated as CSIH); thus, in a case where you find two opinions with 'CSIH' and 'CSOH' in their respective citations, the CSIH citation is the higher authority. Thus, the *West* case cited above was marked with the neutral citation [1992] ScotCS CSIH_3 which is read as follows: opinion of the Inner House of the Court of Session in Scotland number 3 of the year 1992.

Judgments of the UK Supreme Court are available publicly and freely on the Supreme Court website.

NB: Judgments of the UK Supreme Court are marked with the neutral citation "Year/Court/Judgment number" so for example [2015] UKSC 69 is read as follows: judgment of the UK Supreme Court number 69 of the year 2015. Judgments of the UK Supreme Court are binding on the courts in Northern Ireland.

Judgments of the Court of Justice of the European Union can be found on the Curia search portal.

NB: The Court of Justice of the European Union (CJEU) is the collective name for two EU courts: the General Court and the Court of Justice (informally the European Court of Justice or ECJ) – the ECJ is the court which hears the majority of national court references and hands down the judgments relevant to national cases, including judicial review. Judgments of the CJEU are binding on the courts in Northern Ireland. The General Court normally hears cases against EU institutions, and thus will not be hugely relevant to your research.

ii. Law reports

We caution against paying large subscription fees or paying for law reports (as most of the important judgments after 2000 are publicly available and thus you may only need to consult a law report very rarely). Law reports relevant to planning and environmental cases include the following:

Lewison J and John Pugh-Smith, Property, Planning and Compensation Reports (Sweet & Maxwell)

Purdue et al., Journal of Planning and Environmental Law (Sweet & Maxwell)

Environmental Law Reports (Sweet & Maxwell)

More generally, the Incorporated Council of Law Reporting for England and Wales publishes several law reports, of which the most important are (for judicial reviews) the Queen's Bench Reports (QB), Appeal Cases (AC) and Weekly Law Reports (WLR). For Northern Ireland cases, the equivalents are the Northern Ireland Law Reports and the Northern Ireland Judgments Bulletin.

iii. Legal textbooks

Legal textbooks include the following:

John F Larkin QC and David A Scoffield QC, *Judicial Review in Northern Ireland – A Practitioner's Guide* (SLS Legal Publications (NI) 2007)

Gordon Anthony, *Judicial Review in Northern Ireland*, (Hart Publishing 2008)

Richard Burnett-Hall and Brian Jones, *Environmental Law*, 3rd Edition, (Sweet & Maxwell 2012)

NB: It is not essential to buy all of the above – particularly as texts such as *Burnett-Hall on Environmental Law* and *Larkin and Scoffield on Judicial Review* are written for lawyers and not personal litigants. We advise against spending large sums of money on a book which is targeted at practitioners but it may be worth trying to borrow a copy.

(3) Policy documents

Most planning policy documents relevant to planning decisions are found at the Planning Portal, with statutory development plans found on the website of your local council.

A useful guide on the application of EU law, both legislation and cases, is available in the Commission Notice on access to justice in environmental matters.

M. Glossary of terms

Below is a list of terms which have not been extensively defined in the guide. They are listed alphabetically, and not in the order in which they appear in the guide.

Affidavit: A sworn statement of truth, in which the swearer, known as the 'deponent' sets out (or 'deposes to' or 'avers' in legal terminology) facts known personally to the deponent, or facts which the deponent believes to be true.

Applicant: the party (individual or group) applying for judicial review or making the application for judicial review

Book of pleadings: the initial bundle of documents which contains the application for leave to apply for judicial review

Damages: money awarded in a civil case (including, but rarely, in judicial reviews) to compensate a party for another party's unlawful conduct.

Ex Parte: without requiring parties to attend – an application for leave is generally heard *ex parte*, in other words, without the court requiring the parties to attend court to make any oral submissions. Literally, 'with respect to or in the interests of one party' (Latin).

Functus officio: the legal terminology used to describe a situation where a public authority cannot remake a decision which it has made, because it is legally forbidden from doing so. Literally, 'having performed his office' (Latin).

Grampian condition: a condition attached to a notice of planning permission which forbids the start of a development until off-site works have been completed on land not controlled by the planning applicant (i.e., the developer which made the planning application). Named after *Grampian Regional Council v Aberdeen City Council* (1984) 47 P & CR 633.

Interim/interlocutory: a step taken while the main case proceeds through the court (e.g. an application for discovery in a judicial review)

Leave: permission of the court required to proceed to a full hearing of a judicial review case.

Litigant in person/personal litigant: an individual who takes a case to court without legal representation.

McKenzie friend: a person who may or may not be legally qualified, but does not act for a personal litigant and does not conduct any litigation on their behalf. A *McKenzie* friend may assist with case papers, provide moral support or quietly advise the personal litigant on conduct in court. Named after *McKenzie v McKenzie* [1971] P 33, [1970] 3 WLR 472, [1970] 3 All ER 1034 (CA).

Notice of motion: a document notifying all relevant parties of an applicant's intention to 'move' the court (a motion) for judicial review on a specified date in the document. Required to be served on the court and all relevant parties within 14 days of the grant of leave.

Notice party: a party whose interests are directly affected by an ongoing judicial review; 'directly affected' means that party's interests are affected without any intervening person/body.

Order 53 Statement: a statement of grounds which sets out the reasons for taking a judicial review.

Particulars: the precise meaning of the word 'particular' is often caught in a tangle of legalese. The clearest and simplest meaning is this: a particular is a fact which is essential and relevant to your case, without which your case cannot be properly explained to the court (sometimes known as a 'material' fact). However, a particular is not evidence. The essential difference between a particular and evidence is this: a particular is a fact which you seek to prove and evidence relates to facts which prove your case. When the court directs you to 'better particularise' or 'provide better particulars of' your case, the court is essentially requiring you to better explain what your case is without referring to any evidence which you will use to prove your case. A simple example to illustrate the difference is: "*Policy PPX which concerns the provision of open spaces*" is a particular describing the relevant policy but "*Policy PPX which at paragraph 22.6 states "there must be open space of at least 30% of a given development area*" is evidence, because you have relied on the contents of the policy itself instead of providing a description of what the policy relates to.

Pleading: a document which sets out the assertions which a party seeks to prove in the course of a case.

Practice direction/practice note: directions from the court on aspects of case management and the general conduct of litigation in court.

Pre-action: before an action is formally begun by lodging the appropriate documents in court – an important stage where the parties to an intended case are expected to negotiate with good faith to try to resolve their dispute without litigation.

Remedy/relief: what a party seeks from the court in a case brought by the said party.

Respondent: the 'defendant' in a judicial review; known as 'respondent' as the party responds to the applicant's challenge.

Rules of the Court: officially the Rules of the Court of Judicature (Northern Ireland) 1980; these are the rules under which the High Court and Court of Appeal function, setting out how a case can be started, progressed and concluded, case management, litigation conduct and so on. A copy of the Rules can be found on the Justice NI portal.

Skeleton argument: a document which outlines the main points of a party's case – an overview to give the court an idea of the foundations of the party's oral submissions in court.

Standing: the legal capacity of a party to bring a case before the court.

Summons: a document commanding all the parties named on it to appear before the court on a specified date and time in order to determine a cause or matter (such as an application).

Trial/hearing bundle: a bundle of documents which is necessary to conduct a full hearing or trial – in this case, a bundle of all relevant documents necessary for the court to fairly consider a full judicial review.

Ultra vires: unlawful; literally "beyond the powers" (Latin).

N. AN OVERVIEW OF JUDICIAL REVIEW

Richard Honey BL

Introduction

1. Claims for judicial review are one of the key remedies which belong to public, or administrative, law. It is one of the concrete expressions of the idea of the rule of law, which holds that power must always have limits, that these limits must be respected and that the ordinary judges (not a special public law court) have the role of guaranteeing this respect.

2. Helena Kennedy QC put it this way in an article:

"A structure of law, with proper methods and independent judges, before whom even a government must be answerable, is the only restraint on the tendency of power to debase its holders… The judges have to curb governmental excess; they are the guardians of the rule of law and it is crucial that they do not allow themselves to be co-opted by the government."[1]

3. As is so often the case, rights come out of remedies, so the history of the development of administrative law is the history of the evolution of the availability of relief from the Court of King's and Queen's Bench via the claim for judicial review and its predecessors. Although many rights given to individuals to challenge acts of the executive now have a statutory basis, the fundamental principles of judicial review rest upon common law principles; statutory intervention by the executive and Parliament affects this remedy only in relation to procedure.

4. In addition to the importance of judicial review in its own right, it plays an important role in guaranteeing compliance with fundamental rights, whatever their source. This

[1] 'The judges must protect us from the politicians', *The Independent on Sunday*, 24 November 2002.

procedural safety net has acquired greater importance since the Human Rights Act 1998. An argument that a public body has acted in breach of article 6 of the European Convention on Human Rights (procedural guarantees in the determination of civil rights) may be answered by pointing out that the public body in question is subject to judicial review by the courts; the European Court of Human Rights has accepted that this normally satisfies article 6.[2] More broadly, it is often in the context of judicial review cases that human rights questions come before the courts for determination.

5. The origins of judicial review go back to a series of writs which the Royal courts developed in mediaeval times as methods of controlling inferior courts, tribunals and judicial officers. They were called prerogative writs, because the courts were acting in the name and on behalf of the Crown and in the interests of the rule of law (ie there was as strong a public as a private interest in such cases). If someone is unlawfully detained, by the police or in prison, it is important that the possible illegality of that detention should be capable of being investigated and, if necessary, remedied. However, this is as much because the idea of the rule of law requires that officials do not exceed their powers as it is to free an individual who is wrongly held.

Scope of judicial review

6. A judicial review is in essence a claim to review the lawfulness of an enactment, or a decision, action or failure to act in relation to the exercise of a public function. Judicial review can be defined as the procedure through which the High Court supervises the public law actions and inactions of public authorities and other bodies that are exercising statutory powers, performing public duties, and/or taking decisions on matters of public interest.[3]

7. Judicial review is a remedy that is only available in limited circumstances. The decision of which review is being sought must be amenable to judicial review, that is, it must be a

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[2] *Albert & Le Compte v Belgium* (1983) 5 EHRR 533.
[3] See *Judicial Review in Northern Ireland*, 2nd edn, by Gordon Anthony, at 1.04.

public function. It should not be used where other remedies are available. The person seeking review should have sufficient standing to bring the claim. Each of these is considered in turn below.

Reviewable bodies

8. Originally, the ambit of judicial review was focussed on bodies whose powers were derived from statute. The key question today is whether the body is exercising public functions. If a body is a public body, then it will generally be exercising public functions. Public bodies include central and local government, and other bodies established by statute. Most inferior courts and tribunals are reviewable.[4] The Parliamentary Commissioner for Standards is not, as his functions form part of the proceedings of Parliament.[5]

9. The more difficult area is that of non-statutory bodies who exercise public functions. Examples of such bodies which have been held to be exercising public functions include the Panel on Take-Overs and Mergers[6] and the Advertising Standards Authority.[7] The judgement in such cases depends on whether the body exercised public law functions or the exercise of its functions had public law consequences. This could be so even if the body in question had no statutory or basis or role. Whether the particular function has a governmental aspect is also of importance.[8] This becomes significant in cases where a local authority has contracted out public functions to private entities, such as in the provision of care homes, in which the private entity may be exercising functions of public concern, but not of a public nature which would warrant judicial review.[9]

[4] University visitors are a particular class of body, see for example *R (Varma) v HRH Duke of Kent (Visitor) and Cranfield University* [2004] EWHC 1705 (Admin), [2004] ELR 616.
[5] *R v Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 WLR 669.
[6] *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815.
[7] *R v Advertising Standards Authority, ex parte Insurance Services plc* (1990) 2 Admin LR 77.
[8] *R v Chief Rabbi, ex parte Wachmann* [1992] 1 WLR 1036; *R v Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909.
[9] *R v Servite Houses, ex parte Goldsmith* [2001] LGR 55.

10. Where the relationship with the individual and the body is contractual there will not be a sufficiently public element to make the decision amenable to judicial review, such as between a pupil and a private school.[10] Nor when the source of the body's powers is an agreed submission to jurisdiction, which is again effectively contractual in nature.[11]

Reviewable actions

11. It is also necessary for the public body to be exercising public law functions in making the decision or taking the action challenged. This would include non-statutory functions provided they were public in nature. However, not every decision or action on the part of a public body will be a public function susceptible to judicial review. There must be a sufficient public law element. It is clear that some actions, such as those by a public body as employer, are not reviewable. But there are grey areas, such as where statute is engaged or where public law issues are in dispute.[12] An area of particular controversy has been that of procurement by public authorities and the entering into of commercial arrangements. Relevant factors include whether the process is subject to statutory provisions and whether there is a public law element to the action or decision.

Private law remedies

12. Where a public body is acting other than in a public function, for example as an employer, a private law remedy is usually available and should be used rather than judicial review. It is an abuse of process to use the wrong procedure for a claim, and the court can strike the claim out.[13] Relevant factors in deciding whether there has been an abuse of process include advantages gained as to limitation and the flouting of procedural rules.

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[10] *R v Muntham House School, ex parte R* (2000) *The Times*, 26 January 2000, [2000] LGR 255.
[11] *R v Insurance Ombudsman Bureau, ex parte Aegon Life* [1994] COD 426. See also *R v Football Association, ex parte Football League* [1993] 2 All ER 833.
[12] See for example *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 and *R v Crown Prosecution Service, ex parte Hogg* (1994) 6 Admin LR 778.
[13] The claim in *O'Reilly v Mackman* [1983] 2 AC 237 was struck out as prisoners had no private law rights against the prison board of visitors, and should have claimed judicial review.

For cases on the borderline, the court should adopt a considerate approach, and may transfer private cases to be dealt with by way of judicial review where appropriate.[14]

Alternative remedies

13. Judicial review is usually regarded as a remedy of last resort and as a result other available mechanisms for redress should normally be exhausted before a claim for judicial review is made. This will normally include appeal processes from decisions and may extend to situations where the same issue can be raised in defence to any proceedings which might be brought by the public authority.[15]

14. There is however no absolute bar to claims where alternative remedies exist. It may be appropriate to seek judicial review where an urgent remedy is required and otherwise unavailable. The court retains jurisdiction to grant relief but may in its discretion refuse relief or to grant permission. Some cases have been allowed to proceed where an alternative remedy existed,[16] although exceptional circumstances must be shown.[17] One relevant factor is whether the case demands technical expertise which is best suited to an appeal procedure.

Exclusion of judicial review

15. Sometimes a statute conferring a decision-making power may seek to exclude any review of decisions made under it. The courts have been reluctant to construe statutes as

[14] See *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747, CA.
[15] See for example *R (Balbo) v Secretary of State for the Home Department* [2001] 1 WLR 1556.
[16] See for example *R v Leeds City Council, ex parte Hendry* (1994) *The Times*, 20 January 1994, where the existence of an unexercised statutory right to appeal to the Magistrate's Court for the refusal of a taxi licence did not prevent a judicial review claim.
[17] *Harley Development Inc v Commissioners of Inland Revenue* [1996] 1 WLR 727.

excluding judicial review and a clear provision to that effect will be required.[18] It has, however, been held to have occurred in some cases.[19]

Standing

16. To be able to bring a claim for judicial review the claimant must have a sufficient interest in the matter to which the claim relates. Generally, a proposed claimant must be directly affected by the decision through an alteration of their rights or obligations, or by a deprivation of a benefit or advantage which he has a legitimate expectation of continuing to enjoy. Standing is a ground on which both permission and substantive relief may be refused, but the test at the permission stage is lower – essentially to exclude troublemakers. The importance and merits of the claim can alter the degree of standing required.

17. A sufficient interest has been given a wide and flexible interpretation by the courts.[20] In planning and environmental cases, a reasonably low threshold is usually applied, including those with a general interest in the issue to be determined.[21] The position was recently summarised as follows:[22]

"Section 18 (4) of the Judicature (Northern Ireland) Act 1978 provides that an applicant for judicial review must have a sufficient interest in the matter to which the application relates. This requirement is then repeated in Order 53 Rule 3(5) of the Court of Judicature Rules. The leading decision on the approach to standing in this jurisdiction is *Re D's Application* [2003] NICA 14. Carswell LCJ noted that in recent years the courts have tended to take a more liberal attitude to matters of standing and tentatively suggested the following propositions:

[18] *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533.
[19] *R v Registrar of Companies, ex parte Central Bank of India* [1968] QB 1114.
[20] See *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses* [1982] AC 617.
[21] See for example *R v Selby District Council, ex parte Samuel Smith* [2001] PLCR 6 and *R (Edwards) v Environment Agency* [2004] 3 All ER 21.
[22] *JR65's Application for Judicial Review* [2016] NICA 20.

(i) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case;

(ii) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing;

(iii) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant;

(iv) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

18. Representative groups are generally held to have sufficient standing.[23] The position is more complicated in respect of pressure groups as claimants, although the range of pressure group claimants found to have sufficient standing has been widening in recent years. Factors to be taken in to account include the nature and remit of the pressure group, the authority of their views, their status, the importance of the issue and the absence of any other challenger. Greenpeace in relation to Sellafield,[24] and the World Development Movement in relation to funding for the Pergau Dam,[25] have been allowed as claimants. The cases are to be decided on their individual merits, but an important point is whether those affected by a decision would otherwise be able to bring the matter before the court.

Traditional grounds of review

19. In order to succeed in a claim for judicial review, the claimant has to have grounds which show that the official or body has acted *ultra vires*. The grounds for challenge can be

[23] For example, *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1990] 2 QB 540.
[24] *R v Her Majesty's Inspectorate of Pollution, ex parte Greenpeace* [1994] 1 WLR 570.
[25] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386.

summarised as follows, using the three heads identified by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (*CCSU*).

Illegality

20. The decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it. Within this head are the following grounds.

21. Excess of power: going beyond powers granted, eg the Prison Rules 1964 allowed prison authorities to read letters to check that they were bona fide, but this did not extend to checking that letters did not breach security.[26]

22. Abuse of power: a council had the power compulsorily to purchase land for carrying out improvements, but it was an abuse of power for the council to use the power to purchase land adjacent to a development site to obtain for itself the expected increase in the value of the land as a result of the adjacent development.[27]

23. Frustrating the intention of a statute: using a discretionary power under legislation other than to achieve Parliament's intention.[28]

24. Error affecting jurisdiction: where an error is made as to a fact which is essential to empowering the step taken, eg making an error in the criteria to be applied on considering whether a company was entitled to compensation for land in Egypt seized by Israeli troops,[29] or where the existence of a certain fact is a condition precedent to the power to act.

[26] *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198.
[27] *Municipal Council of Sydney v Campbell* [1925] AC 997.
[28] *Padfield v MAFF* [1968] AC 997.
[29] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

25. Unauthorised delegation of power: where a power is given to someone by a statute it cannot be delegated to someone else, eg where a statutory board was given the power to dismiss dockers, it could not be delegated to a disciplinary committee.[30]

26. Error of law: where the decision or action is founded upon an incorrect interpretation of the law.

Irrationality

27. There are two main elements to this head: failure to exercise, and abuse of, discretion, each with two particular aspects.

28. Acting as if discretion is fettered: a failure to exercise any discretion at all in reaching a decision as the decision-maker believes that they are constrained by some other rule.

29. Over-rigid adherence to policy or rules: where a decision-maker formulates a policy to assist in the decision-making process, a rigid application of the policy rather than consideration of each case on its merits is a failure properly to exercise their discretion, eg a policy by a council not to allow any permits for the sale of pamphlets in public parks.[31]

30. Irrelevant considerations taken in to account, or a refusal to take in to account relevant considerations:[32] in exercising discretion only relevant factors, as allowed by any relevant governing rules, should be taken in to account, eg where a local council banned hunting

[30] *Vine v National Dock Labour Board* [1957] AC 488.
[31] *R v London County Council, ex parte Corrie* [1918] 1 KB 68.
[32] *Seddon Properties v SSE* (1981) 42 P&CR 26 at 27, as endorsed by the Court of Appeal in *Centre 21 v SSE* [1986] 2 EGLR 176 at 199F-G; *Bolton MBC v SSE* (1990) 61 P&CR 343 at 352; *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223 at 233.

on ethical grounds rather than for the benefit or improvement of the land as was allowed,[33] or where a local council boycotted Shell's products because of their involvement in South Africa.[34] Relevant considerations to which regard must be had are sometimes set out in the governing statute. A decision may be quashed by the court if it is shown to have misunderstood or been ignorant of an established and relevant fact.[35]

31. Unreasonableness: the decision made is one that is so unreasonable that it could have been made by no reasonable decision-maker;[36] or the conduct was such that no sensible authority acting with due appreciation of its responsibilities would have adopted it; or the decision is so outrageous that no right thinking person would support it;[37] or the body has acted in a way that no reasonable body in that position, properly directing itself on the relevant material, could have acted. This is a very high threshold test. The court will require "something overwhelming" from the claimant before allowing a claim of this sort.[38] The courts are generally unwilling to interfere with administrative decisions, although they are more willing to intervene when human rights are at stake.[39]

32. Acting in bad faith, abuse of power or acting for an improper purpose may also be said to fall under this head.

Procedural impropriety

33. This head deals with unfairness in the process of decision-making or taking an action. There is one particular aspect relating to procedural rules and three elements of the requirement to observe the rules of natural justice.

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[33] *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037.
[34] *R v Lewisham LBC, ex parte Shell (UK) Ltd* [1988] 1 All ER 938.
[35] *Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 439.
[36] The test formulated by the Court of Appeal in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[37] *R v Greenwich LBC, ex parte Cedar Holdings* [1983] RA 17.
[38] *Wednesbury* at 230.
[39] See *R v Lord Saville of Newdigate, ex parte A* (1999) *The Times* 22 June 1999.

34. Failure to observe procedural rules: if the procedural rules are mandatory, any failure to observe them will be *ultra vires*, eg where a chief constable was summarily dismissed without following the procedure set out in disciplinary regulations.[40]

35. Procedural rules may be implied but generally only to ensure that the rules of natural justice are observed and that the decision was reached fairly. The essential rules of natural justice are as follows.

36. Acting as a judge in his own cause (or other bias):[41] a decision-maker has a personal or proprietary interest in the outcome of the decision and is therefore biased, eg where the Lord Chancellor who gave judgment in a case was a shareholder in the successful company,[42] or where a lay member of the Restrictive Practices Court applied for a job with the company acting as expert witness for one of the parties in a case she was hearing.[43] The test is whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased.[44]

37. The law on apparent bias can be summarised as follows:

    (i) The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[45]

    (ii) When considering the question of apparent bias it is necessary to look beyond pecuniary or personal interests, to consider whether the fair-minded and informed observer would conclude that there was a real possibility of

[40] *Ridge v Baldwin* [1964] AC 40.
[41] See for example *R v Bow Street Magistrates, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.
[42] *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759.
[43] *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700.
[44] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 2 WLR 37.
[45] *Porter v Magill* [2002] 2 AC 357. See also eg *JR65's Application for Judicial Review* [2016] NICA 20.

bias in the sense that the decision was approached without impartial consideration of all relevant issues.[46]

(iii) Public perception of the possibility of unconscious bias is the key.[47]

(iv) The fair-minded and informed observer will adopt a balanced approach, he will be neither complacent nor unduly sensitive or suspicious.[48] His approach will be based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public.[49]

(v) It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real possibility of bias. Everything will depend on the facts and circumstances of the individual case, which may include the nature of the issue to be decided.[50]

(vi) The test for apparent bias involves a two stage process. First, the court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly, it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.[51]

(vii) Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so.[52]

(viii) No weight should be attached to the evidence of the decision-maker in which it is said that he approached the decision with an open mind.[53]

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[46] *Geogiou v London Borough of Enfield* [2004] EWHC 779 (Admin), para 31.
[47] *Lawal v Northern Spirit* [2004] 1 All ER 187 193F-H, 196C-D; see also *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 at 787F-G.
[48] *Lawal* at 193G-H.
[49] *Locabail* at 477B-C.
[50] *Locabail* at 480 B-C and G-H.
[51] *Flaherty v National Greyhound Racing Club* [2005] EWCA Civ 1117 at para 27.
[52] *R v Barnsley Licensing Justices, ex parte Barnsley LVA* [1960] 2 QB 167 at 187.
[53] *Porter* at 495 B-C; *Georgiou* at para 36; *Locabail* at 477H-488A.

(ix) In most cases the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.[54]

(x) The involvement of a single member of a committee who is disqualified by bias would vitiate the decision made.[55]

38. Breach of the right to a fair hearing: a person having a decision made concerning them, whether in court or for example on an application for a licence, should generally be given notice of the decision-making process, be informed of the case against them, given adequate time to prepare their case, and given an adequate opportunity to put forward their case. Whether fairness demands an oral hearing or the ability to cross-examine witnesses will depend on the circumstances.

39. Failure to give reasons: there is no general duty to give reasons for an administrative decision, but there are substantial exceptions to this rule where fairness or natural justice will oblige the decision-maker to give reasons,[56] including where a statute requires reasons. The Court of Appeal in reviewing the ECtHR cases on Article 6 has said: '… the right to a fair hearing generally carries with it an obligation to give reasons'.[57]

40. As to the adequacy of reasons, the law was summarised by Lord Brown as follows:[58]

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some

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[54] *Locabail* at 480 G-H.
[55] *ex parte Kirkstall Valley* at 327J-328A.
[56] See eg *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71.
[57] *North Range Shipping* at para 20.
[58] *South Bucks District Council v Porter* [2004] UKHL 33 at para 36.

relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

Other grounds

41. There are a range of other, more detailed grounds of judicial review that can be relied upon in particular contexts. For example, in local government, it is possible to argue that a decision is unlawful because of errors in an officer's report to the relevant committee, based on the following:

    (1) A decision by Members will be unlawful if the report upon which it is based fails to place adequate or sufficient information before Members or is materially deficient: *Georgiou v Enfield LBC* [2004] P&CR 380 at paras 69, 85 and 94.

    (2) There is an obligation upon officers to produce fair, accurate and objective reports; citizens are entitled to expect objectivity in such reports: *R v Camden LBC, ex p Cran* (1996) 94 LGR 8.

    (3) An officer's report must not significantly mislead or fail properly to inform Members: *Morge v Hampshire CC* [2010] EWCA Civ 608 at para 63.[59]

[59] See also *R (Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314 at para 42.

(4) There is a duty to provide in officers' reports sufficient information and guidance to enable the members to reach a decision: *R v Durham CC, ex p Lowther* [2001] EWCA Civ 781 at para 53.

(5) A decision-maker should subject relevant material considerations to proper analysis and consideration: *R v SSHD, ex p Iyadurai* [1998] Imm AR 470 at 475 (para 25) and *R v Birmingham CC, ex p Killigrew* (2000) 3 CCLR 109 at 117G-118F.

42. There is also case law on the interpretation of policy. It is essential that a policy is properly understood by a decision-maker. If a decision-maker failed properly to understand a relevant policy its decision would be unlawful and the Court should quash its decision unless it is quite satisfied that the failure to have proper regard to the policy had not affected the outcome in that the decision would have been the same in any event.[60]

43. In any particular field of public law decision-making, there is likely to be specialist case-law which identifies potential grounds of judicial review within the context of the over-arching principles noted above. There may also be particular statutory provisions which apply, breach of which would give rise to grounds for judicial review.

Mistake of fact

44. An area of judicial review which has been developing in recent years is in relation to challenging the factual findings of decision-makers. Traditionally this has been outside the ambit of judicial review. It was effectively necessary to categorise the error as a failure to have regard to a material consideration. However, it was held that there would

[60] *Gransden v SSE* [1986] JPL 519 at 521; *Tesco v Dundee CC* [2012] UKSC 13.

be an error of law where a decision-maker had misunderstood or been ignorant of an established and relevant fact in *Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 439.

45. In the case of *E v Secretary of State for the Home Department*[61] it was clearly stated that an error of fact could be a separate ground for review based on unfairness. In order to succeed on this ground it is necessary to establish: (i) a mistake as to an existing fact; (ii) the fact must be uncontentious and objectively verifiable; (iii) the claimant must not have been responsible for the mistake; and, (iv) the mistake must have played a material part in the decision-maker's reasoning.

46. It is also possible to argue that a decision is unlawful if it was reached without adequate or sufficient evidence to support it,[62] or without a proper evidential basis or upon a view of the facts which could not reasonably be entertained or on the basis of a material error of fact,[63] or if there is no evidence to support factual findings made or they are plainly untenable.[64]

<u>Consultation</u>

47. The lawfulness of consultation is another area where developments have been seen in judicial review recent years. In *R (Harrow Community Support Ltd) v Secretary of State for Defence* [2012] EWHC 1921 (Admin) Haddon-Cave J said that "when decisions will have a specific impact on a definable group, fairness and natural justice may entail a duty to consult with those affected by the decision depending on the context of the decision" (para 28). He went on to say (para 29):[65]

[61] [2004] QB 1044. See also eg *Dept for Education v Cunningham* [2016] NICA 12.
[62] *Office of Fair Trading v IBA Health* [2004] 4 All ER 1103 at para 93; *Reid v Secretary of State for Scotland* [1999] 2 AC 512 at 541G-H.
[63] *R (McLellan) v Bracknell Forest BC* [2002] QB 1129 at 1155C.
[64] *Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 439G.
[65] See also eg *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 and *R (Cheshire East Borough Council) v Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin).

"A duty to consult does not arise in all circumstances. If this were so, the business of government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will no obligation to consult."

48. Consultation requires that there must be a real opportunity for those consulted to make representations to the decision-maker. The decision-maker should keep a "responsive and open mind",[66] and a "receptive mind".[67] The representations should form "part of the matrix of the decision-making process".[68] Four fundamental rules of consultation have been set out by the courts:[69]

    (i) consultation must be carried out at a time when proposals are still at a formative stage;

    (ii) the consultation must give sufficient reasons for any proposal to allow intelligent consideration and response;

    (iii) adequate time must be given for consultation and response; and

    (iv) the product of consultation must be conscientiously taken into account in finalising the proposals.

49. The kind and amount of consultation required depends on the circumstances. It has been held, however, that provided the fundamental requirements of consultation are observed, a decision-making authority has a comparatively wide discretion as to how the process is carried out, bounded only by irrationality.[70] The threshold to be applied was

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[66] *R v Warwickshire City Council, ex p Boyden* (1991) COD 31 at p32.
[67] *R (Partingdale Lane Residents' Association) v Barnet LBC* [2003] EWHC 947 (Admin) at para 45.
[68] *R v Warwickshire City Council, ex p Boyden* (1991) COD 31 at p32.
[69] *R (Wainwright) v Richmond upon Thames LBC* [2001] EWCA Civ 2062 at para 9; see also *R (Montpeliers and Trevors Association) v City of Westminster* [2005] EWHC 16 (Admin) at para 21, *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 and *General Council of the Bar of Northern Ireland's Application* [2015] NIQB 99 at para 274.
[70] *Wainwright* at para 11. See also the decision of Stephens J in *XY's application for judicial review* [2015] NIQB 75 at [88] in relation to ministerial consultation and defective decision making concerning school closures and amalgamations in Belfast.

considered by Sullivan J in the *Greenpeace* case on the consultation on the future of nuclear power, where he said:[71]

"A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out."

50. Fairness is an intrinsic part of consultation,[72] but "in reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went 'clearly and radically' wrong".[73]

Legitimate expectation and proportionality

51. Legitimate expectation is now a distinct aspect of judicial review, having its roots in the rule against the abuse of power.[74] It acts to control the exercise of discretionary powers in particular cases. The starting point is that where a public body adopts a particular policy or commits itself in advance to a particular course of conduct in certain cases it should be required to abide by that stated position without departing from it. The issue arises where there has been some promise by a public body as to how it would behave in the future and the body then proposes to behave in a different way: reneging without

[71] *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) at para 62.
[72] *R (Edwards) v Environment Agency* [2006] EWCA Civ 877 at paras 90-94 and 102-106.
[73] *Greenpeace* para 63. See also eg *Devon CC v SSCLG* [2010] EWHC 1456 (Admin) and *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472.
[74] See *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237; *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2002] UKHL 8, [2003] 1 WLR 348; *Finucane's Application for Judicial Review* [2017] NICA 7.

adequate justification by an otherwise lawful decision on a promise or practice adopted towards a limited group of individuals.[75]

52. The essence of a legitimate expectation is that where a public authority has made a promise which represents how it proposes to act in a particular respect in the future, the law will require the promise to be honoured unless there is an overriding public interest in not doing so and it is proportionate having regard to a legitimate aim pursued in the public interest.[76] The doctrine encompasses not just fairness as to procedure but also fairness as to outcome.

53. The doctrine has been applied to require decision-makers to stand-by representations or established practices when making decisions, or, where there is a proposed change, give those affected the right to be heard. Examples include in relation to the criteria contained in a Home Office circular governing decisions about adoption from abroad,[77] or consultation with a union prior to changes in conditions of service.[78] This is an extension to the traditional public law limitations on public bodies to act fairly, consistently and rationally.

54. It is convenient to analyse the doctrine according to there being two types of legitimate expectation: substantive and procedural. Procedural legitimate expectations arise from representations made about the procedure that a public body will adopt before taking a substantive step. Substantive legitimate expectations arise where a representation has been made about the substantive merits of a case.

55. In *Coughlan* Lord Woolf MR described three categories of expectation:[79]

    (i) where the authority is only required to bear in mind the representation or policy and the court will only intervene on traditional *Wednesbury* rationality grounds;

    (ii) where the expectation is one of consultation, in which circumstances the court will require the opportunity for consultation unless there is an

[75] *Coughlan* at 245 para 69.
[76] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at 242-243; *Nadarajah & Abdi v Home Secretary* [2005] EWCA Civ 1363 at paras 68-70.
[77] *R v Secretary of State for the Home Department, ex parte Khan* [1984] 1 WLR 1337.
[78] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[79] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at 241-242.

overriding reason to resile from it (procedural fairness) and rational grounds for so deciding; and

(iii) where the expectation is of a substantive benefit, when the court will consider whether the frustration of the expectation is so unfair that to depart from it will amount to an abuse of power, including weighing the requirements of fairness against any overriding public interest relied on to justify the departure and deciding whether the interest is sufficient to justify the departure.

56. The key elements required in order to establish a legitimate expectation are:

(i) the representation must be clear, unambiguous and unqualified;[80]

(ii) the claimant must be entitled to rely on the representation or it is reasonable for the claimant to rely on the representation – the issue of legitimacy;

(iii) the claimant has relied on the representation – usually to his detriment.

57. The expectation may arise from an established practice as well as from an explicit representation,[81] although generally substantive legitimate expectations have been held to arise only from express representations. An expectation can arise even though the claimant was unaware of the representation.[82] In order to found a legitimate expectation, the particular representation must be within the scope of the public body's statutory powers.

58. It will be more likely that a binding expectation will be held when the expectation has been acted upon detrimentally.[83] Finding a binding legitimate expectation in the absence of detrimental reliance will be "very much the exception rather than the rule".[84] Detrimental reliance will often be required but is not essential. It is no more than a factor to be considered in the overall balance.[85]

59. A *procedural* legitimate expectation is more readily to be found than a substantive legitimate expectation. That is perhaps because it creates a lesser burden on the affected public authority. The essence of a procedural expectation is that an affected person

[80] See *R v Inland Revenue, ex parte MFK Underwriting* [1990] 1 WLR 1545.
[81] *R v Inland Revenue Commissioners, ex parte Unilever* (1996) 86 TC 205.
[82] Such as the policy in *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744.
[83] *R v Secretary of State for Education, ex partie Begbie* [2000] 1 WLR 1115 at 1124.
[84] *Begbie* at 1124B-C, *per* Peter Gibson LJ.
[85] *Nadarajah & Abdi* at para 70.

should be given notice of the change of position and the opportunity to make representations in relation to it.

60. Most cases of an enforceable *substantive* legitimate expectation will be cases where the expectation is confined to a few people, usually those in a particular category and with the same interest. Matters of general policy can be contrasted with situations where only a few people are affected, and there are discrete and limited facts, no implications for an innominate class of persons, and no issues of general policy, so that the court can see with certainty the full consequences of any order it may make.[86]

61. Determining a claim for a legitimate expectation will involve the court in examining the terms of the promise or representation made, the circumstances in which it was made and the nature of the discretionary act under challenge. A decision must be reached on what the representation was, whether it is binding and what the court should do if it is. It may be that there was no promise actually made as to future conduct.

62. Cases involving legitimate expectation arguments have been pushing the boundaries of what can give rise to a binding legitimate expectation. In *R (Wheeler) v Office of the Prime Minister*[87] a challenge was brought based on statements made to Parliament by the Prime Minister about holding a referendum on the adoption of the Lisbon Treaty.

63. A binding legitimate expectation is, of course, subject to some exceptions where the expectation may be departed from or overridden. Public authorities must remain free generally to change policy or modify or abandon previous positions. However, the promise or practice must be honoured unless there is a good reason not to do so.[88] An overriding public interest is required to justify the decision to depart from an expectation. A legitimate expectation may only be denied where to do so is the public body's legal duty or it is a proportionate response having regard to a legitimate aim pursued by the body in the public interest.[89] The former is more likely to permit the frustration of the expectation.[90] Courts will also be slow to interfere in cases where a public authority

[86] *Begbie* at 1131A.
[87] [2008] EWHC 1409.
[88] *Nadarajah & Abdi* at para 68.
[89] *Nadarajah & Abdi* at para 68.
[90] See for example *R v Devon CC ex p Baker* [1995] 1 All ER 73 at 88-89.

departs from a binding legitimate expectation when the decision to depart is within the "macro-political field" of government policy.[91]

64. Proportionality falls to be judged according to the competing interests in the case.[92] Factors relevant to whether a departure from a promise is justified include: the importance of the promise; whether the representation amounts to an unambiguous promise; whether it was limited to a particular group; the consequences to the authority (including whether they are only financial); and detrimental reliance. If there are "macro-political" issues of policy the enforcement of the expectation will be more difficult.

65. Proportionality is a concept found in both EC and human rights law and as such is applied by the domestic courts dealing with those areas. The intention is for the administrative act to be proportionate to the legitimate outcome to be achieved, to maintain a proper balance between any adverse effects and the purpose pursued. Proportionality was recognised by Lord Diplock in the *CCSU* case in 1985 as a possible new ground of judicial review.[93]

66. Proportionality in domestic law is often regarded as being no more than a characterisation of the traditional grounds for judicial review, including irrationality and abuse of power. This is most obvious where there is an excessively onerous infringement of individual rights. It is however making headway towards being recognised as a concept expressly to be applied in domestic law. Administrative decisions which were considered to be out of proportion to the matters in question have been held unlawful in domestic law.[94] Even the approach to the lawfulness of planning conditions and acquisition of land by compulsory purchase incorporate elements of proportionality.

67. *R (Daly) v Secretary of State for the Home Department*[95] was a case where the House of Lords expressly held on the orthodox application of common law principles and domestic judicial review that a rule was unlawful because it was wider than necessary to meet its legitimate objectives and could not be justified as a necessary and proper response.[96] In

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[91] See for example *Finucane (Geraldine's) Application* [2015] NIQB 57 at [186] per Stephens J and [2017] NICA 7 at [115] per Gillen LJ.
[92] *Nadarajah & Abdi* at para 69.
[93] *CCSU* at 410E.
[94] *R v Barnsley MBC, ex parte Hook* [1976] 1 WLR 1052, 1057 (decision to suspend a stallholder's licence); *R v Brent LBC, ex parte Assegai* (1987) 151 LGR 891 (resolution to ban a person from local authority property).
[95] [2001] 2 WLR 1622.
[96] 1627H, 1631B-C, 1633F.

that case, Lord Steyn thought that there was an overlap between proportionality and the traditional grounds of judicial review, and that most cases would be decided in the same way whichever approach was adopted. He did identify a number of differences, however, including that:[97]

(i) proportionality may require the reviewing court of assess the balance which the decision-maker struck, not merely whether it was within the range of reasonable responses; and

(ii) proportionality may require attention to be directed to the relative weight accorded to considerations.

68. Lord Cooke concluded his speech in the case by saying:[98]

"And I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation."

69. We are not in this position yet, but are perhaps moving towards it year by year.

Richard Honey BL

richard.honey@ftbchambers.co.uk

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[97] 1635C-E.
[98] 1637A.