A note on environmental judicial review, including common grounds of challenge, remedies and a summary of practice and procedure.

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OVERVIEW

DEFINING ENVIRONMENTAL JUDICIAL REVIEW

Environmental judicial review (JR) is public law litigation in the field of environmental law that scrutinises the lawfulness of decisions by government, local authorities, environmental regulators and other public bodies.

In recent years, environmental JR has developed into a distinctive body of law with its own features, principles and rules.

One of the most important characteristics of JR is that it is about the lawfulness of an administrative decision, not its merits. The courts can only interfere with a decision if it can be shown that the public authority has contravened the law.

For more information on JR generally, see Practice note, An introduction to judicial review.
Environmental judicial review

**ALTERNATIVE ROUTES OF REDRESS**

JR should be treated as litigation of last resort to be used after other remedies have been exhausted. Other routes by which the actions and decisions of public bodies can be scrutinised include:

- **Statutory challenges under specific statutory provisions.** Examples include a challenge under section 288 of the *Town and Country Planning Act 1990* or section 44 of the *Harbours Act 1964*.

- **Case stated proceedings in the Divisional Court from decisions of magistrates’ courts.** These proceedings have been important in the field of statutory nuisance where a person served with an abatement notice can appeal to the magistrates’ court and then by way of case stated from the magistrates’ court on a particular question of law or jurisdiction (see *R (Fullers Farming Ltd) v Milton Keynes Council* [2011] EWHC 3784).

- **Proceedings under Civil Procedure Rule (CPR) 8 for a declaration from the court.** Where the law is uncertain, these proceedings can establish whether a particular form of conduct is, or is not, lawful.

**FEATURES OF ENVIRONMENTAL JUDICIAL REVIEW CLAIMS**

Particular features of environmental JR claims include:

- More complex types of JR proceedings. These often involve significant amounts of factual, policy and technical material.

- Points of EU law are often raised. Key topics include environmental impact assessment (EIA), waste and habitats. The cases often involve scrutiny of the language of EU directives and judgments of the Court of Justice of the European Union, generally referred to as the ECJ, in search of the meaning to be given to European derived concepts (such as “development consent” or “project”) and the application of EU legal principles (such as direct effect, effectiveness and sympathetic interpretation).

- Costs and funding can be significant practical obstacles for claimants who are often interest groups or local residents. As a consequence, environmental JR is leading the way in developing some level of costs protection, including protective costs orders (PCOs) (see Protective costs orders (PCOS) below).

- The claims often involve interested parties who have been granted environmental permits or planning permissions which are under challenge.

**TYPES OF CLAIM**

Environmental JR claims can be categorised into the following.

**Challenges by interest groups or individual members of the public**

This has grown into one of the most significant areas of litigation over the last ten years. Usually, the defendants will be the Secretary of State, local authorities or the Environment Agency (EA).

Examples of claims include a challenge:

- To a screening decision made under the EIA regime that a proposed project is not likely to have significant environmental effects, for example in *R (Loader) v Secretary of State for Communities and Local Government and others* [2012] EWCA Civ 869 (see Legal update, Environmental Impact Assessments: correct test for screening decisions confirmed (Court of Appeal)).

- To a failure to conduct an appropriate assessment under the habitats regime or a challenge to the adequacy of the assessment, for example in *R (Akester) v Defra* [2010] EWHC 232 (see Legal update, High Court rules on legality of introduction of new Lymington ferries).

- To a consultation process in relation to an environmental decision, for example in *R (Greenpeace Ltd) v Secretary of State* [2007] EWHC 311 (see Legal update, Government forced to consult again on plans to build new nuclear power stations).

- To a decision to serve an abatement notice under the statutory nuisance regime, for example in *Ethos Recycling Ltd v Barking and Dagenham Magistrates Court* [2009] EWHC 2885 (Admin) (see Legal update, Local authorities do not need the Secretary of State’s consent to serve statutory nuisance abatement notices).

**Disputes between the regulator and regulated industry**

In one series of cases, the EA categorised a particular material as “waste” while its producer argued it had been recycled and ceased to be waste, in *OSS Group Ltd v Environment Agency* [2007] EWCA Civ 611 (see Legal update, Court of Appeal rules on status of waste derived fuels).
Typically, such cases do not raise controversial factual issues and can be determined on the basis of agreed facts, for example, in *Environment Agency v Anti Waste Ltd* [2007] EWCA Civ 1377 (see Legal Update, Court of Appeal confirms that “piggybacking” at landfills is allowed).

**Disputes between the regulated party and a decision maker**

Typically, the JR challenge is to a decision made on appeal, usually by, or on behalf of, the Secretary of State. For example, in *R (Repic Ltd) v Secretary of State for Business Enterprise and Regulatory Reform and another* [2009] EWHC 2015 (Admin), the claimant argued that the Secretary of State and the EA had failed to discharge their obligations to enforce the Waste Electrical and Electronic Equipment (WEEE) regime (see Legal update, High Court clarifies whether over-collection is in breach of the WEEE Regulation).

**Challenges by commercial competitors**

JR can be used as a “spoiling tactic” in relation to rival schemes. A spectacular example of such a challenge is *R (Rockware Glass Ltd) v Chester City Council and Quinn Glass Ltd* [2005] EWHC 2250 in which the High Court quashed a decision to grant an environmental permit to the interested party, Quinn Glass, to operate the largest container glass factory in Europe. The effect of the decision was to shut the factory down.

The Court of Appeal in *R (The Noble Organisation) v Thanet District Council* [2004] EWCA Civ 782 criticised the abuse of the remedy of JR as a commercial weapon by rival developers and urged rigorous examination by the judge at the JR permission stage (see Legal update, The need for an environmental impact assessment at the reserved matters stage).

However, the attitude of the courts can depend on the merits of the claim. In *R (The Garden and Leisure Group Ltd) v North Somerset Council and another* [2003] EWHC 1605 (Admin), the High Court stated that while the litigation could be seen as the pursuit of competition by other means, the challenge had to be viewed in the ordinary way on its legal merits.

**OVERLAP BETWEEN JUDICIAL AND PARLIAMENTARY SCRUTINY**

Some environmental decisions are high-level strategic policy decisions with widespread effects. Examples include government policy decisions on new nuclear power stations, on future airport capacity in the UK or a new motorway network.

As a general constitutional rule, when the exercise of the power of a Minister or a policy decision is subject to scrutiny by Parliament, it is not for the courts to subject the decision in question to a test of reasonableness or otherwise impugn its substance. This ensures that the legislature and the judiciary are separate and independent from one another and the courts take the view that they should be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament (Sir John Donaldson MR in *R v HM Treasury, ex parte Smedley* [1984] EWCA Civ 7).

Consequently, the courts cannot question the legitimacy of an Act of Parliament, require a Bill to be laid before Parliament or forbid an MP from introducing a Bill or defer or delay a Bill. In *Marchiori v Environment Agency and another* [2002] EWCA Civ 3, the claimant challenged decisions by the EA to authorise the discharge of radioactive waste from two military installations where Trident nuclear warheads were manufactured. Laws LJ stated (at paragraph 38):

> “the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy…The first, and most obvious [reason] is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects the more respect will be given…to the democracy to decide its outcome…There is not and cannot be, any expectation that the unelected judiciary play any role in such questions remotely comparable to that of government”.

However, the courts have steadfastly rejected the argument that they cannot involve themselves at all in high-level strategic political decisions. Nonetheless, there are limits to their role, and to the consequent ability of those affected to challenge the decisions arrived at. In *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), Greenpeace sought an order quashing the government’s decision to support new nuclear power stations. Sullivan J stated that (paras 53 and 54):

> “It would be surprising if the procedural steps leading to a decision of such planning and environmental significance were immune from legal scrutiny, so that the Government could promise consultation in a White Paper and then renege on that promise in a subsequent policy document upon the basis that the latter was a “high-level” or “strategic” decision for which it was politically, but not legally, accountable. I would readily accept the proposition that in the absence of any statutory or other well-established procedural rules for taking such strategic decisions it may well be very difficult for a claimant to establish procedural impropriety. Similarly, given the judgmental nature of “high-level, strategic” decisions it will be well-nigh impossible to mount a “Wednesbury irrationality” challenge absent bad faith or manifest absurdity…These practical considerations do not mean that decisions such as those contained in the Energy Review are unreviewable by the courts simply because they are matters of “high policy”

(See Legal update, Government forced to consult again on plans to build new nuclear power stations.)
In R (Unison) v Secretary of State for Health [2010] EWHC 2655, the court contrasted its refusal to interfere with the laying of the NHS Bill before Parliament with the Greenpeace case. It considered that although the nuclear new build decision would be subject to Parliamentary scrutiny and was a high-level political decision, it was not necessarily the precursor to legislation. Consequently, that would have an immediate and practical effect on decision-making, namely planning inquiries into applications for planning permissions for new nuclear power stations.

The fact that a decision is in a White Paper is no bar to it being challenged, as with the challenge to the 2003 Future of Air Transport White Paper in R (Medway Council and others) v Secretary of State for Transport [2002] EWHC 2516 (Admin). The claimants in the Medway case sought an order quashing the decision in the White Paper to exclude one of the key airports, Gatwick Airport, from the consultation document.

The courts have, however, recognised there is a spectrum of decisions underlying a policy position. White papers may contain a broad spectrum of decisions, which range from matters of primary fact (where the court would be as well equipped to answer the questions as the decision taker), to questions of political and economic judgment (where the court’s approach is to acknowledge that it is singularly ill-equipped to answer the questions raised, in the absence of bad faith or manifest absurdity by the decision maker).

ACCESS TO JUSTICE AND PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING: THE AARHUS CONVENTION

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as the Aarhus Convention, plays an important role in shaping developments in environmental JR.


The Aarhus Convention’s scope extends to projects likely to have significant effects on the environment (Article 6 and Annex 1).

Article 9 is titled “Access to justice” and provides as follows:

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

   (a) Having a sufficient interest or, alternatively,

   (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

   have access to a review procedure before a court of law and/or another independent and impartial body established by law, to

   challenge the substantive and procedural legality of any decision, act or omission (within the scope of the Convention).

   What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national

   law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention ...

4. ... the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive

   relief as appropriate, and be fair, equitable, timely and not prohibitively expensive...

The EU has ratified the Aarhus Convention and, consequently, its provisions form an integral part of EU law and give the European Commission the right to ensure that member states comply with the Aarhus obligations in areas within Community competence.

Article 9 is implemented by Article 11 of the EIA Directive (Directive 2011/92/EU on on the assessment of the effects of certain public

and private projects on the environment) and Article 15a of the Integrated Pollution Prevention and Control Directive (Directive 96/61/

EC concerning integrated pollution prevention and control).

The Aarhus Convention has particularly affected environmental JR relating to costs protection and procedural fairness.

For more information on the Aarhus Convention, see Practice note, Aarhus Convention: summary and UK implementation.

COMMON GROUNDS OF ENVIRONMENTAL JUDICIAL REVIEW

ERROR OF LAW

The courts will intervene where the decision maker has made an error of law. These are matters which the public authority either

gets right or wrong, and indeed could get right but for the wrong reasons. In determining the meaning of a particular statutory

expression, the concept of the reasonable and discretionary judgment of a public authority, as embodied in the principle of

Wednesbury unreasonableness (see Wednesbury unreasonableness and discretionary judgement below), simply has no part to play.

Examples include:

- Whether as a matter of law a particular material is, or is not, waste (for example, in OSS Group Ltd v Environment Agency

  [2007] EWCA Civ 611 (see Legal update, Court of Appeal rules on status of waste derived fuels).
Whether a development falls within one or other of the classes of projects that are subject to the requirements of an EIA. In *R (Goodman) v London Borough of Lewisham* [2003] EWCA Civ 140, the issue before the court was whether a planning application to construct a storage and distribution facility fell within the category of EIA development known as an urban development project (see Legal update, Requirement for an environmental impact assessment for storage and distribution facilities).

However, some expressions might be so imprecise that, in applying them to the facts (as opposed to determining their meaning), a range of possible conclusions might be legitimately acceptable. In such cases, the court should only substitute its own judgment for that of the decision maker where the decision is so aberrant that it cannot be classed as rational (see Auld LJ in *Goodman* at paragraphs 8 and 9).

As well as “hard edged” questions of law, the courts will intervene in the determination of phrases that have an autonomous meaning, often because they are derived from EU law and have an EU law meaning. Environmental JR can involve scrutiny of the language of directives and judgments of the ECJ in search of the autonomous meaning. In *North Yorkshire County Council ex parte Brown* [2000] 1 AC 397, Lord Hoffman explained the approach of the court to the autonomous meaning of EIA and the concepts of development consent and project:

“The appeal therefore turns on the concept of “development consent” in the Directive. This is a concept of European law which has to be applied to the planning systems of all the Member States. To ascertain its meaning, it is necessary to examine the language and in particular the purpose of the Directive. One must then examine the procedure for determining conditions as part of the United Kingdom planning system and decide whether it should be characterised as a granting of development consent within the meaning of the Directive.”

The principle of autonomous construction was stated by the ECJ in *Luxembourg v Linster* (C-287/98), at para 43:

“The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform meaning throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question.”

A public authority will make an error of law and fail to understand properly its policy if it attaches a meaning to the words of a policy which they are not capable of bearing.

If there is a dispute about the meaning of a policy, it is for the courts to determine what the words mean and not only if the public authority has taken a view that is perverse or irrational.

The Supreme Court in *Tesco Stores Ltd v Dundee City Council (Scotland)* [2012] UKSC 13 took this approach to the interpretation of a development plan. Lord Brown stated (at paragraph 19) that:

“That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”

In *R (The Manchester Ship Canal Company Ltd and another) v Environment Agency* [2012] EWHC 1643, the High Court took a similar approach to the interpretation of the EA’s flood defence policies. The High Court applied Lord Reed’s approach in Tesco Stores to its task of deciding whether the EA had acted unlawfully in classifying sluice gates as formal flood defences under its policies and undertook a rigorous review and assessment of the EA’s relevant policies.

**WEDNESBURY UNREASONABLENESS AND DISCRETIONARY JUDGEMENT**

**Wednesbury unreasonable**ness is a standard of unreasonable use in assessing an application for JR and takes its name from the case of *Associated Provincial Picture House v Wednesbury Corp* [1948] 1 KB 223.

All administrative discretionary power is circumscribed by:

- The statute that confers it.
- General common law requirements, like the requirement to act fairly.
If the statute conferring the discretion, expressly or implicitly, requires the public authority to take into account certain matters, then the authority must do so. Likewise, if the statute indicates the factors that are irrelevant to decision making, the public authority must disregard them.

The classic exposition of Wednesbury unreasonableness is that an administrative decision maker is allotted a discretionary area of judgment and so long as the decision maker stays within those bounds, its decision will be lawful. The area of discretion has traditionally been wide in that it encompasses all decisions which, on their merits, are not so unreasonable that no reasonable authority could ever have taken them. JR is concerned with the lawfulness of such actions, not with the merits of the decision in question.

However, more recently the standard has come to be known as “variable Wednesbury unreasonableness”. The standard of review and the area of discretionary judgment varies depends upon the subject matter in question. In broad terms, there will be more intense judicial scrutiny where fundamental rights are concerned (for example, the right to liberty) and a less exacting standard in cases involving macro-economic issues (for example, emissions trading).

The courts have adopted a relatively “hands off” approach to many decisions challenged in environmental JR. The courts tend to interfere only where the decision maker can be shown to have acted irrationally in the traditional Wednesbury sense. For example, in EIA, the questions of whether a development should be subject to an EIA because it is likely to have significant environmental effects, and whether the authority has sufficient information in any environmental statement to decide that, are matters of judgment for the local planning authority which has the knowledge of the local area and the expertise to assess the question. Similarly, the question of whether information provided by the developer is sufficient is not a question of primary fact on which the court is free to differ from the view of the planning authority (see Sullivan J in R (Malster) v Ipswich Borough Council and another [2001] EWCA Civ 1715 and Dyson LJ in R (Jones) v Mansfield District Council and another [2003] EWCA Civ 1408).

The courts have shown a similarly deferential approach to the judgment of the EA and Natural England acting as expert bodies. See: R (Akester) v Department for Environment Food and Rural Affairs [2010] EWHC 232 (Admin) for deference to Natural England (see Legal update, High Court rules on legality of introduction of new Lymington ferries).

R (Levy) v Environment Agency [2002] EWHC 1663 for deference to the EA.

The courts defer to decision makers:

- In areas of complex and highly technical scientific judgment. For example, see Sullivan LJ’s comment in R (Downs) v Secretary of State for Environment Food and Rural Affairs [2009] EWCA Civ 664 at paragraph 43. In that case, the Court of Appeal reversed the High Court's decision because it had strayed into a merits review (see Legal update, Court of Appeal overturns pesticides ruling against Defra).

- In relation to decisions by prosecuting or enforcement authorities whether to prosecute or take enforcement action, for example, in R (Repic Ltd) v Secretary of State [2009] EWHC 2015 (Admin) (see Legal update, High Court clarifies whether over-collection is in breach of the WEEE Regulations).

**ERROR OF FACT**

A public authority will make an error of fact that can be challenged by JR if it has misunderstood, or been ignorant of, an established and relevant fact which gives rise to unfairness.

- The criteria laid down by E v Secretary of State for Home Department [2004] EWCA Civ 49 are that:
  - There must have been a mistake as to an existing fact, which can include a mistake as to the availability of evidence on a point.
  - The fact or evidence must have been uncontentious and objectively verifiable.
  - The claimant (or his advisors) must not be responsible for the mistake.
  - The mistake must have played a material part in the decision.

Error of fact can also arise in a planning context where a local planning authority grants planning permission or serves an enforcement notice on the wrong factual basis (see Eley v Secretary of State for Communities and Local Government and others [2009] EWHC 660 (Admin)).

**PROCEDURAL FAIRNESS**

Environmental decision makers must act fairly in the procedure they adopt to make the decision.
The requirements of fairness are specific to the particular circumstances and context. They are, therefore, flexible and will vary depending on, amongst other things, the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

In the context of environmental JR, the courts have demonstrated that they require a high degree of procedural fairness, which may be explained by the influence of the Aarhus Convention (see Access to justice and public participation in environmental decision making: the Aarhus Convention above). The importance attached to public participation in EIA is expressed by the following comment by Lord Hoffmann in Berkeley v Secretary of State for the Environment [2001] 2 AC 603, 615 that:

“The directly enforceable right of the citizen which is accorded by the [EIA Directive] is not merely a right to a fully informed decision on the substantive issue. [The decision] must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.”

The courts have notably taken a strict approach to procedural fairness in environmental decision making in relation to:

- Public consultation.
- The requirement for decision makers to give reasons for their decision.

Consultation

Consultation is required where:

- A statute indicates that it is required.
- A legitimate expectation of consultation has been created. This may be created either by a particular promise or a previous practice of consulting. In broad terms, the situations in which a legitimate expectation arises are exceptional.

Public authorities, and especially central government, enjoy wide discretion to formulate and reformulate policy. For more information, see Practice note, Legitimate expectations).

In matters of environmental policy making, there may also be a stand-alone obligation for public authorities to consult arising under the Aarhus Convention (see Access to justice and public participation in environmental decision making: the Aarhus Convention above). However, this has not gained widespread acceptance since Sullivan J made the suggestion in Greenpeace v Secretary of State for the Environment (2002) EWHC 2516 that:

“Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters (“the Aarhus Convention”). … Given the importance of the decision under challenge — whether new nuclear build should now be supported — it is difficult to see how a promise of anything less than “the fullest public consultation” would have been consistent with the Government’s obligations under the Aarhus Convention”.

The courts are prepared to consider challenges to the procedures adopted during a consultation, provided the public authority is under an obligation to consult or chooses to consult.

Where the public authority chooses to consult, the courts take the view that once a consultation is embarked upon, it must be done properly.

It is not for the public authority to claim a discretion in how it acts during the consultation process (R (Medway Council and others) v Secretary of State for Transport (2002) EWHC 2516 (see Legal update, Duty to consult: when does it arise and what does it entail?!)).

Although the courts are prepared to review the conduct of a consultation, they are clear that the decision maker has a broad discretion in how to conduct the consultation.

The test laid down by Sullivan J in the Greenpeace case (at paragraph 62) sets a high threshold for judicial interference; the courts will only intervene if something has gone “clearly and radically wrong”.

“A consultation process which is flawed in one or even 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. This applies with particular force to a consultation with the whole of the adult population of the UK. The [Secretary of State] had a very broad discretion as to how best to carry out such a far reaching consultation exercise. 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 it went clearly and radically wrong”.

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The precise demands of consultation will depend on the circumstances, but the underlying principle is that the consultation process must be fair. In *R (Coughlan and others) v North & East Devon Health Authority [1999] EWCA Civ 1871*, the Court of Appeal set out the requirements of a fair consultation which are that:

- The consultation must be at a time when proposals are still at a formative stage.
- The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
- Adequate time must be given for consideration and response.
- The product of consultation must be conscientiously taken into account in finalising any proposals.

**Duty to give reasons for decisions**

The duty of a decision maker to give reasons is a function of due process and, therefore, of justice.

Fairness requires that the parties should be left in no doubt why the case was decided as it was. This is especially so for the losing party since, without reasons, that party will not know whether the decision maker has made an error that could give rise to an appeal on the substance of the case. The general rules about reasons for the decisions of planning inspectors are well known and were summarised by Lord Brown in *South Bucks DC v. Porter (No. 2) [2004] 1 WLR 1953*. Reasons have to be “adequate” and “intelligible”, enabling the reader to understand what conclusions were reached on the “principal important controversial issues”. Inspectors’ 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.” Reasons can be briefly stated, but the degree of particularity required depends on the nature of the issues.

Expert evidence may influence the decision. The courts have consistently made clear that the decision maker is not bound to accept the evidence of expert witnesses, even when there is no contrary evidence (see *Kentucky Fried Chicken v Secretary of State [1977] 245 EG 332*). However, in such a case the decision maker will have a duty to give an adequate explanation of why the expert evidence is rejected.

In *Flannery and another v Halifax Estate Agencies Ltd [1999] EWCA Civ 811*, the High Court observed that:

"...where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other."

A coherent reasoned opinion expressed by a suitably qualified expert should receive a coherent reasoned rebuttal. The courts take the view that a requirement to give reasons concentrates the mind and ensures the resulting decision is much more likely to be soundly based on the evidence.

**REMEDIES AND DISCRETION**

Remedies are an important part of environmental JR. A purely legal victory for the claimant could be pyrrhic in nature, even if declaratory relief is granted. The opponents of a project generally want the project stopped, or at least delayed for reconsideration. However, such remedies are at the discretion of the court. They are not available as of right, even if the court finds the decision maker has acted unlawfully.

**TYPES OF REMEDIES**

Quashing orders and declarations are the most commonly sought remedies in environmental JR.

**Quashing order**

A quashing order is an order that quashes, with retrospective effect, administrative action that is found to be unlawful.

**Declaration**

A declaration is an authoritative judicial statement of the legal position, granted under section 31 of the *Senior Courts Act 1981*, which makes the position of the claimant clear to the world. A court will not issue a declaration if it is unnecessary to do so.

In *R (ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs [2013] UKSC 25*, the court granted a declaration that the UK is in breach of the Air Quality Directive 2008 and indicated that the fact that the government had conceded the breach before the High Court was not a sufficient reason for refusing to grant the declaration. The declaration was necessary in order to make it clear that national or EU enforcement action could be taken immediately (see Legal update, ClientEarth’s judicial review challenge to UK governments air quality plans referred to ECJ (Supreme Court)).
Declaratory relief can be sought to clarify a legal proposition before any wrong occurs, but the courts do not generally welcome academic or hypothetical questions and will only rarely make a declaration in such circumstances.

On rare occasions, the courts will issue a declaration in relation to non-legally binding guidance if:

- While the guidance may have no legal effect, it may have considerable practical effect on the parties or the public at large, and a declaration of the law could help people significantly.
- Heeded, the non-binding guidance may result in the commission of a criminal offence.
- There is a clearly defined issue of law.

The court has also been prepared to review the legality of a non-statutory guidance note issued by the EA under the Integrated Pollution Prevention and Control (IPPC) regime (see R (UK Renderers Association) v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 749).

Mandatory order

A mandatory order to carry out enforcement action is rarely sought, as in Ardagh Glass v Chester City Council and Ellesmere Port Authority [2009] EWHC 745 which is a highly unusual case.

In R (ClientEarth v Secretary of State for the Environment) [2011] EWHC 3623 and [2012] EWCA Civ 897, the High Court and Court of Appeal refused to make a mandatory order to require the UK government to comply with aspects of the EU Air Quality Directive 2008 because to do so would raise serious political and economic questions which are not for the court (see Legal update, ClientEarth’s judicial review challenge to UK government’s air quality zone plans fails (Court of Appeal)).

EXERCISE OF THE COURT’S DISCRETION

A court will exercise its discretion on the basis of all relevant circumstances before it. Generally, the court in cases:

- Relating to EIA, will exercise its discretion by quashing a planning permission granted in breach of the EIA regime on the basis that EIA is an important guarantee of public participation in environmental decision making and the EIA Directive requires, not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure (see Berkeley v Secretary of State [2001] 2 AC 603). However, more recently, the courts have indicated that they will scrutinise the nature of the breach and the statutory context in deciding how to exercise their discretion (see Carnwath LJ in Bown v Secretary of State for Transport, Local Government and the Regions [2004] Env LR 26 and R (Jones) v Mansfield DC [2004] Env LR 21, Lord Hoffman in R (Edwards) v Environment Agency [2008] Env LR 34 and Lord Carnwath in Walton v The Scottish Ministers [2012] UKSC 44).

- Relating to the habitats regime, courts have not adopted the approach in the habitats regime, where there is no right to public participation (see R (Boggs and another) v Natural England [2009] EWCA Civ 1061 and R (Hulme) v Secretary of State [2011] EWCA Civ 638).

- Where events have overtaken the subject matter of the claim, will exercise its discretion not to quash the decision. In R (Edwards) v Environment Agency [2008] UKHL 22, the claimant successfully argued it was procedurally unfair of the EA to refuse to publish environmental quality monitoring reports. The Court of Appeal accepted it was unfair, but refused any remedy on the basis that the EA had published the reports by the time of the hearing and the reports had concluded that the environmental quality standards had not been exceeded.

- Where the outcome would inevitably have been the same as if the breach had not occurred, will not quash the decision (see Smith v North East Derbyshire Primary Care Trust [2006] EWCA Civ 1291). In considering this situation, the court must not start to look at the merits of the decision itself. Therefore, the court only rarely refuse to exercise its discretion on this basis. For example, in R (Jones) v Swansea City Council [2007] EWHC 213 (Admin), the court refused to exercise its discretion where a planning committee had revisited their decision and arrived at the same answer before the JR proceedings had concluded. The principle applies beyond planning cases.

- Where it would cause undue hardship to the defendant or the interested party, will not quash the decision.

The motive of the claimant in bringing the challenge, whether as a local resident or commercial competitor, will not affect the question of relief, unless abuse of process is involved (R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346).

PRACTICE AND PROCEDURE

The influence of the Aarhus Convention and the prevalence of EU law in environmental law have led to significant changes in practice and procedure in environmental JR. In turn, these are also leading to changes in other areas of JR.
STANDING

Standing refers to the entitlement of an individual or organisation to bring a JR claim. Section 31 of the Senior Courts Act 1981 provides that:

“No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.”

Standing is, therefore, left to the court’s discretion. In JR, the courts have, for some time, taken a liberal approach to standing, based on the approach that a person or organisation with no particular personal stake in the issue or outcome may be well placed to bring an apparent misuse of power to the court’s attention.

“Public law is not at base about rights even though abuses of power may and often do invade private rights: it is about wrongs – that is to say, misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court’s only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant’s standing will be weighed up, whether with regard to the grant of relief or simply the form of relief.”

(R v Somerset County Council and ARC Southern Ltd ex p Dixon [1998] Env LR 111 59.)

Consequently, the following have all had standing:

- Well-established and expert bodies like Greenpeace (see R v. HM Inspectorate of Pollution, ex p Greenpeace Ltd [1994] 4 All ER 329), “…an entirely responsible and well respected body with a genuine concern for the environment…who with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well argued challenge”.

- A legal aid claimant, “put up” by the local community with no prior involvement in the decision-making in question (see Legal update, House of Lords rules on duty to consult in PPC applications and interaction with EIA regime).

- Individuals with specific interests, such as in historic railways buildings (see R (Hammerton) v London Underground Ltd [2002] EWHC 2307 (Admin)).

- Unincorporated associations or companies set up on an ad hoc basis to scrutinise and oppose a particular proposal (see Hereford Waste Watchers Ltd v Herefordshire Council [2005] EWHC 191 (Admin) and Residents against Waste Site Ltd v Lancashire CC [2007] EWHC 2558.

However, a more restrictive approach may be emerging. In Coedbach Action Team Ltd v Secretary for Energy and Climate Change [2010] EWHC 2312 (Admin), the High Court took the view that a private limited company set up to protect the local Welsh environment did not have sufficient interest to challenge a decision to construct biomass plant in Bristol. The campaign group only involved itself in the Bristol decision to prevent it becoming material to similar forthcoming decisions on biomass plants in Wales. It had played no part in the decision making process leading to the Bristol consent.

In William Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders [2010] EWCA Civ 6000, the Court of Appeal applied a restrictive approach to the definition of “person aggrieved” under section 288 of the Town and Country Planning Act 1990. The court decided there was a difference between feeling aggrieved and being aggrieved and that the applicant was not a person aggrieved because he had not taken a sufficiently active role in the planning process.

In contrast, Case C-240/09 Lesosochranárske Zoskupenie VLK, the ECJ suggested that the Aarhus Convention requires a liberal approach to standing (see Legal update, Aarhus Convention: ECJ decides that access to justice provisions do not have direct effect).

INTERESTED PARTIES AND INTERVENERS

A challenge to a planning permission or environmental permit will inevitably affect the beneficiary of that permission or permit. Consequently, environmental JR cases frequently involve such interested parties, and sometimes more than one.

An interested party is any person, other than the claimant and defendant, who is directly affected by the claim (CPR r54 1(2)(f)).

The role of an interested party is limited to making submissions in relation to the substantive claim, but only to the extent that the substantive claim directly affects the interested party.
An intervener is usually an organisation with appropriate expertise so as to be able to assist the court in understanding the context of the claim and the implications of any court ruling. CPR r54 17(1) provides that any person may apply for permission:

- To file evidence.
- To make representations at the JR hearing.

Interveners are rare in environmental JR because environmental groups with appropriate expertise often have standing in their own right (for example, Greenpeace).

### DELAY AND PROMPTNESS

It is a central requirement of JR that a claim should be filed promptly and, in any event, not later than 3 months after the grounds to make the claim first arose (CPR 54.5). The test under the CPR is promptness and a claim will not necessarily be made promptly simply because it has been made within the three months period.

Section 31(6) of the Senior Courts Act 1981 provides that:

"Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant:

(a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Promptness can be a particular issue in challenges to planning permissions or environmental permits because a delay in any challenge can have practical implications for the beneficiary of that permission or permit.

In C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority, the ECJ held that the requirement to bring proceedings "promptly and in any event within three months" in the field of public procurement offends the EU principles of effectiveness and legal certainty because promptness is a discretionary and undefined test.

Subsequently, in two environmental JRs, the High Court in R (Buglife) v Medway Council [2011] EWHC 1824 (Admin) and R (U & Partners (East Anglia) Ltd) v The Broads Authority [2011] EWHC 746 (Admin) followed Uniplex and disapplied the promptness requirement on the basis that the challenges were as to whether the relevant public authorities had complied sufficiently with the EIA regime. The cases confirmed that the principles underlying the Uniplex decision were of general application to EU Directives. Accordingly, for cases which raise general principles of EU law, claimants will have up to three months to file their claim (see Legal update, Buglife case clarifies no promptness test for environmental judicial review).

However, the Court of Appeal has decided that the promptness requirement appears still to apply to JR grounds based on purely domestic law. The Court of Appeal’s decision in Berky v Newport City Council [2012] EWCA Civ 378 is now the leading case, albeit that all the observations on promptness were strictly obiter and each Judge took a different view on whether and how Uniplex applied in the purely domestic context (see Legal update, Issues associated with issuing judicial review proceedings “promptly” (Court of Appeal)).

### COSTS

In England and Wales, the principles governing the award of costs are set out in CPR Part 44. The court has a general discretion, but this is subject to certain well-established rules, including the ordinary rule that the unsuccessful party pays the costs of the successful party (CPR 44.3).

For more information on costs in environmental JR, see Practice note, A practical guide to the judicial review procedure: Costs.

### PROTECTIVE COSTS ORDERS (PCOS)

Serious funding issues arise for individual claimants or small neighbourhood groups, in contrast to commercial litigants or major interest group. Recently, the courts have been more willing to depart from ordinary costs principles in cases that raise issues of general public interest, in environmental cases as in other areas of the law.
A protective costs order (PCO) is a court order made at the outset of the proceedings which provides that the party benefitting from the PCO shall, regardless of the outcome of the proceedings, either not be liable at all for the other party's costs or be liable only for a fixed proportion. However, if successful the protected party may be entitled to recover all or part of his costs from the other party.

For more information on the principles governing PCOs, see Practice note, A practical guide to the judicial review procedure: Protective costs orders).

The principles governing PCOs in relation to public interest cases were set out by the Court of Appeal in R (Corner House) v Secretary of State for Trade and Industry [2005] EWCA Civ 192. A PCO could be made at any stage of the proceedings, on such conditions as the court thought fit, provided that the court was satisfied that:

- The issues raised were of general public importance.
- The public interest required that those issues should be resolved.
- The applicant had no private interest in the outcome of the case.
- Having regard to the financial resources of the applicant and the respondent and to the amount of costs that were likely to be involved, it is fair and just to make the PCO.
- If the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably in doing so.

However, while the Cornerhouse principles provide stringent requirements, the Aarhus Convention has led to the relaxation of some of the requirements for grant of a PCO in JRs generally (see R (Buglife) v Thurrock Thames Gateway Development Corp [2009] and Morgan and Baker v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107 (see Legal update, Court of Appeal considers Aarhus Convention and PCOs in private nuisance case).

For more information on how the Aarhus Convention has influenced PCOs in environmental JR, see Aarhus Convention: summary and UK implementation: Aarhus Convention in the UK courts. The leading case is now the Court of Appeal's decision in R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1006, in which the Court decided that the Aarhus Convention and the EU Public Participation Directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases. The Cornerhouse conditions of "general public importance" and "public interest requiring resolution of those issues" are assumed to be satisfied in environmental JR cases and the requirement for there to be a private interest is disapplied (see Legal update, Court of Appeal considers protective costs orders when EIA Directive applies).

It is now difficult for defendants in environmental JR to resist some form of PCO. The issue for the parties is often the terms of the PCO.

The main issue in relation to costs and Aarhus is the question of whether the cost of litigation is, or is not, "prohibitively expensive" to be decided on either:

- An objective basis by reference (for example) to the ability of an ordinary member of the public to meet the potential liability for costs.
- A subjective basis by reference to the means of the particular claimant, or upon some combination of the two bases.

The position is uncertain.

In April 2013, in David Edwards v Environment Agency [2013] EUECJ C-260/11, the ECJ clarified what is meant by the requirement in the Aarhus Convention that the costs of access to environmental justice should not be prohibitively expensive. It said that this was a partly objective, partly subjective test, and set out criteria for the national courts to take into account when assessing costs. If the court in England and Wales does not make a PCO in an environmental JR case, it will have to apply the partly objective, partly subjective approach set down by the ECJ when making orders for costs. However, the ECJ also seems to have said that the courts should take the same approach when making a PCO (albeit within the specific caps under the CPR) (see Legal update, ECJ clarifies prohibitively expensive test under Aarhus Convention).

Also in April 2013, Practice Direction 45 provides for the maximum amount of costs that the court can order a party to pay, placing caps on the:

- Claimant's liability to pay the defendant's costs of £5,000 for individual claimants and £10,000 for organisations.
- Defendant's liability to pay the claimant's cost of £35,000.

The new PCO rules are intended to address the complaints that the UK has not properly implemented the Aarhus Convention and are part of the Jackson reforms on costs (although he recommended qualified one-way costs shifting in environmental JR, rather than PCOs) (see Legal update, Civil Procedure Rules 2013 codify protective costs orders regime for environmental judicial review).
DISCLOSURE

The CPR provide very little guidance on disclosure in JR. CPR 54 Practice Direction relating to JR states simply that disclosure is not required unless the court orders otherwise.

The leading case of Tweed v Parades Commission for Northern Ireland [2006] UKHL 53 has provided some general principles for disclosure in JR.

For more information, see Practice note, Disclosure in judicial review.

REFERENCES TO THE COURT OF JUSTICE OF THE EUROPEAN UNION (ECJ)

Environmental cases can often raise points of EU law reflecting the importance of EU law in underlying the body of domestic legislation.

The relationship between the EU and domestic courts is a reference-based relationship (Article 267 of the Treaty of the functioning of the European Union). Questions about the interpretation and validity of EU law arising in national courts are supposed to be referred to the ECJ. EU caselaw has laid down stringent criteria for when a reference must be made (C-283/81 Cilfit v Ministry of Health).

The lower courts are granted a discretion whether to refer, but a court of final resort must do so unless it has established that the:

- Question is irrelevant.
- EU provision in question has already been interpreted.
- Correct application of EU law is obvious.

The rationale for the strict approach is that EU law will develop uniformly throughout the EU if all national courts refer EU law questions to the ECJ and the ECJ can continually develop EU law.

Very few questions of EU environmental law are being referred by lower and higher domestic courts considering the prevalence of EU law in environmental law. Between 2007 and 2012, the ECJ gave judgment in eight such references. The two most recent references are:

- The ECJ's decision in April 2013 on questions of cost protection in environmental cases, which was referred by the Supreme Court (C-260/11 R (Edwards) v Environment Agency) (see Legal update, ECJ clarifies prohibitively expensive test under Aarhus Convention). The Upper Tribunal referred the question of whether privatised companies are public authorities for the purposes of the freedom of information and Aarhus regimes (Fish Legal v Information Commissioner).

For every case where a UK court decides to refer, there are plenty of examples where referrals are not made. They include several of the recent seminal environmental law cases, including:

- R (Edwards and another) v Environment Agency and others [2008] UKHL 22 (pollution control) (see Legal update, House of Lords rules on duty to consult in PPC applications and interaction with EIA regime).

The courts’ reluctance to refer may be explained by:

- Delay in getting judgment from the ECJ. In 2011 the average time taken to get judgment was 16.4 months (which is an improvement on earlier years).
- Scepticism about the clarity and applicability of any answer from the European Court. Anyone who has had to argue about whether a particular material had ceased to be waste will have some sympathy with the comment of Carnwath LJ in OSS v Environment Agency that “a search for logical coherence in the Luxembourg case-law is probably doomed to failure” which underlay his decision not to make any further reference. It seems likely that the same perception may have underlain Lord Brown’s approach in Morge.

Conversely however, the judgment of the European Court in C-127/02 Waddenzee is central to habitats law and may have reduced the amount of domestic litigation on habitats matters. For more information on references to the ECJ, see Practice note, Seeking a reference to the ECJ.