Judicial review in planning and environmental matters

Introduction

Public decisions made by administrative bodies and the lower courts, may be judicially reviewed by the High Court. In a judicial review, the court is not concerned with the merits of the decision but rather with the lawfulness of the decision-making process, for example how the decision was made and the fairness of it.

The basic principles of public decision-making are:

- The decision-maker must have authority to make the decision that affects you. If the decision-maker has the authority to make the decision, it must not go beyond the limits of its authority
- You are entitled to fair procedures in how the decision is reached. This means that the decision-maker must not be biased and the decision-maker must give you a fair hearing. You must be given an adequate opportunity to present your case. You must be informed of the matter and you must be given a chance to comment on the material put forward by the other side.
- The decision maker must comply with all legal requirements governing the decision and its making.

If the decision-maker does not have authority or does not give you fair procedures or does not comply with the law, you may bring judicial review proceedings in the High Court to challenge the decision. You must show that you have an arguable case, that is, that your case has grounds. You must also show that you have 'sufficient interest' in the proceedings, that is, that you were affected in some way by the decision you are challenging. Non-governmental organisations which have been promoting environmental protection for 12 months in respect of relevant matters are not required to demonstrate a sufficient interest.

The High Court will examine the decision and how it was reached and will decide whether or not it was legal or unconstitutional. The High Court may then quash or cancel the decision – by issuing an order known as 'certiorari'. The High Court can also order a decision maker, who is obliged to make a decision but has failed or refused to do so, to actually make the decision – this is known as an order of 'mandamus'. An order of prohibition may also be granted in appropriate circumstances – for example an order prohibiting a decision maker from making a decision. Other orders that are available include declarations, injunctions of an interim, interlocutory or permanent nature, or an award of damages.

Conventional and statutory review

Judicial review is divided into two main categories:

- **Judicial review in the ordinary or conventional sense:** This is the traditional type of judicial review developed over time by the judges and case law. The procedure governing conventional judicial review can be found in Order 84 of the Rules of the Superior Courts. Further information on the procedure is available in Judicial review of public decisions.
- **Statutory judicial review:** Specialised statutory schemes of judicial review relating to specific areas of public decision-making which have been singled out by the Oireachtas as warranting specialised schemes because of the policy concerns involved. Statutory schemes and the procedure involved are covered by legislation specific to that area. Statutory schemes apply to such areas as asylum, pollution control, planning and the takeover of companies.

Statutory judicial review schemes supplement Order 84 of the Rules of the Superior Courts with their own specific procedural rules. These statutory schemes narrow the availability of judicial review through such features as:

- Time limits for an application for leave to bring judicial review proceedings are shorter
- Requirements to notify the decision-maker of the leave application
- Higher thresholds applied by the High Court when considering whether to allow leave, for example, substantial grounds rather than an arguable case

Procedures in planning and environmental matters

Waste licensing

Decisions of the Environmental Protection Agency in relation to waste licensing under the Waste Management Act 1996 and the Waste Management (Licensing) Regulations 2004 (SI 395/2004) are subject to conventional judicial review in accordance with the provisions of Order 84 of the Rules of the Superior Courts.

Planning and Development Act consents

A specific statutory procedure applies to applications for judicial review of decisions made by the planning authorities or An Bord Pleanála. Sections 50 and 50A of the Planning and Development Act 2000 (as amended) set out this procedure, which differs from that provided for in Order 84 of the Rules of the Superior Courts. In particular the time limit for instituting a judicial review in respect of a decision under the Planning and Development Act is 8 weeks from the date of the decision or the doing of an act by a planning authority or the Board. This time may be extended by the Court if it is satisfied there is good and sufficient reason for doing so, and the circumstances that resulted in the failure to make the application for leave within the 8 weeks were outside the control of, the applicant for such extension.

Integrated Pollution Prevention and Control licence applications

Applications for judicial review in respect of the Environmental Protection Agency in relation to Integrated Pollution Prevention and Control (IPPC) licence applications are regulated by statute. Section 87(10) of the Environmental Protection Agency Act 1992 (as amended) provides for judicial review or other legal proceedings to be initiated by any person, seeking to question the validity of a decision of the Agency to grant or refuse a licence or a revised licence, within a period of 8 weeks. This period may be extended, on application, by the High Court, where it considers that there is good and sufficient reason for doing so. There is no requirement on the person initiating these proceedings to demonstrate an interest or indicate a potential personal impact or having a sufficient interest.

How to apply

If you wish to begin judicial review proceedings, you may want to contact a solicitor who will in turn brief a barrister to draft the papers for the case. It is also possible for you to represent yourself if you wish to keep your legal costs down.

Costs

There is no fixed rate of charges for legal fees in Ireland. As with all other service providers, it is advisable to obtain some quotes before deciding on legal representation. Your solicitor must advise you in writing of the fees you will be charged for their services. If it is not possible to give you a definite sum, they must estimate a sum or at the very least describe the basis upon which charges or fees will be calculated.

Generally in litigation the normal rule with regard to costs is that 'costs follow the event', for example the successful party is generally entitled to their costs. Of course if you lose that means that generally you become liable for the costs of the winning party.

The Planning and Development Act as amended, by way of section 50B, provides special rules in order to comply with the Public Participation Directive and with the Aarhus Convention. In cases involving the Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Integrated Pollution Prevention and Control directives (IPPC), a member of the public seeking a review of a public decision will generally not be liable for their costs if they lose and may be entitled to their costs from the losing party if they win. An applicant may also be awarded their costs in cases of exceptional importance and where it is in the interests of justice. This was amended by Section 29 of the Planning and Development (Amendment) Act, 2018 to apply the Aarhus Convention special cost rules to judicial reviews of decisions, actions or omissions made under national law implementing the appropriate assessment provisions of the Habitats Directive.

There are, however, some exemptions to this rule and an order of costs may be awarded against a party to proceedings in certain circumstances including:

- Where a case is deemed to be vexatious or frivolous
- The manner in which a party has conducted the proceedings, or
- If a party is in contempt of court

In the Environment (Miscellaneous Provisions) Act 2011 these rules were extended to reviews of decisions in certain other environmental cases.

A list of the types of cases to which these rules apply is provided for at section 4 of the Environmental (Miscellaneous Provisions) Act. Section 4 was amended by the Planning and Development (Amendment) Act, 2018. The rules arising under the requirements of the Aarhus Convention (concerning legal costs) now also apply to challenges of decisions, actions or omissions made under statutory provisions giving effect to Article 6.3 and 6.4 of the 1992 EU Habitats Directive relating to Appropriate Assessment.

Section 7 of the Environment (Miscellaneous Provisions) Act 2011 provides for a procedure where a person can apply to a court, prior to taking proceedings, to determine if the case in question qualifies for the special cost rules. This means that an applicant can find out at an early stage what the financial risks are likely to be if they proceed with the case. If the Court does not agree that the case falls under the cost rules, the applicant can reconsider the proceedings and the associated costs risk.

To further reduce costs, it is open to anyone taking a case in environmental matters to enquire from legal practitioners if they are willing to take the case on a 'no foal, no fee' basis. Under such an agreement, if you win your case you will be entitled to recover your costs from the losing side, and if you lose your case, your legal representatives have agreed not to seek their fees.

See courts.ie for information on the court fees payable.

The Environment (Miscellaneous Provisions) Act 2011 also requires that judicial notice be taken of the Aarhus Convention.

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