

Guide to Judicial Review in Scotland

Contents

| | |
|---|----|
| Judicial Review in Scotland | 1 |
| 1. Introduction..... | 1 |
| 2. What is judicial review? | 2 |
| 3. Exhaustion of other remedies..... | 3 |
| 4. Grounds for JR | 3 |
| 5. Who can you challenge?..... | 6 |
| 6. What can you challenge?..... | 6 |
| 7. Who can use JR? | 7 |
| 8. Requirement for permission | 7 |
| 9. Who represents you in court? | 7 |
| 10. Time limit for starting a JR | 8 |
| 11. Remedies..... | 8 |
| 12. Funding a JR..... | 9 |
| 13. Examples of successful environmental JRs..... | 10 |

1. Introduction

The Environmental Rights Centre for Scotland (ERCS) aims to increase awareness of environmental rights and to ensure that people can effectively exercise them.

This is a guide to judicial review (JR) in Scotland. It is intended to provide a concise and accessible summary of a legal process which can be complicated and intimidating to pursue.



This is not a comprehensive legal guide. ERCS provides free advice to individuals, community groups and organisations on environmental and related planning law. Please [contact us for advice if you have a JR-related query](#).

2. What is judicial review (JR)?

JR is a mechanism for ensuring that public bodies act lawfully, and for holding them to account where they fail to do so.

JR allows for decisions by public bodies to be challenged in court. It is an important tool which can be used to force public bodies to recognise and stop unlawful actions, after all other remedies have been exhausted. It can have the wider effect of encouraging more careful decision-making in the first place because of the understanding that decisions can later be tested in court.

JR is only concerned with whether a decision or action of a public authority was reached in accordance with the law. JRs are not concerned with the substance of the decision or action of the public authority.

It is possible for a public authority to make a bad decision which is lawful.

The key features of JR are that:

- It is a process which takes place in court where a judge reviews a decision, an action, or a failure to act by a public authority.
- It is a last resort which can only be used when all other alternative remedies have been exhausted.
- It is not concerned with the merits or substance of a decision. The court instead focuses on the legality of the decision being challenged.
- The individual or organisation challenging the decision is referred to as the ‘petitioner’, and the public authority being challenged is the ‘respondent’.



- JRs take place in the Court of Session in Edinburgh. A court action for JR is raised in the Court's Outer House.
- JR is very expensive.
- There is a short time limit for starting JR proceedings. JR proceedings must be started within three months of the date on which the JR grounds first arose.
- It is important to take early legal advice if you are considering a JR.

3. Exhaustion of other remedies

Judicial review is a remedy of last resort. It is only available where all alternative avenues of challenge have been exhausted and if there is no alternative statutory appeal.

A JR petitioner should usually have attempted to resolve the matter outside of the courtroom.

It is good practice to write to the public authority prior to starting a JR to notify them of potential grounds for JR and of your intention to start JR proceedings if certain steps are not taken.

4. Grounds for JR

JR is not concerned with the merits of a decision. It is not the same as an appeal.

A petitioner must demonstrate that there are 'grounds' for JR. Some of the grounds for judicial review are set out below.



4.1 Illegality - the decision/action was unlawful

A decision or action can be unlawful for several reasons:

- The public authority acted in a way which **misinterpreted and failed to give effect to the law**.
- The public authority **failed to properly exercise its discretion**. An example of this is where a public authority has an over-rigid policy which does not allow the authority to consider the merits of particular cases. This is known as ‘fettering discretion’.
- The public authority **exercised its powers for the wrong purpose**. The powers given to a public authority are there to serve a specific purpose. Sometimes the purpose is expressly stated, but it may also be implied. Public authorities must adhere to the purpose of their powers when making decisions.
- The public authority **took irrelevant factors into account or failed to take relevant factors into account**.

4.2 Irrationality

The public authority made a decision which was **so unreasonable/irrational, that no reasonable person could have made it**.

This is sometimes described as ‘absurdity’, ‘perversity’ or ‘Wednesbury unreasonableness’.

If a decision was taken due to a significant error of fact or law, that may be sufficient for this ground to be met.

This is a very difficult test to meet. It is rare for JR cases to succeed on this basis.



4.3 Procedural impropriety

A decision may be procedurally improper for several reasons:

- The public authority **failed to follow a statutory procedure**. Laws may require that a certain process must be followed before a decision can be made. An example of this is the requirement to carry out an environmental impact assessment before planning permission can be granted for certain large developments.
- The public authority **failed to provide adequate reasons for its decision**. Where a decision-maker is required to give reasons for their decision, they must provide adequate reasoning. Reasons must be proper, adequate and intelligible – they must allow an informed reader to establish why a decision was made.
- The public authority **failed to carry out a fair consultation**. If a public authority has a legal duty to consult, or if they decide to carry out a consultation, it must be done in a way that meets the common law principles on consultation. Consultations must be done at a time when proposals are at a formative stage, they must give sufficient reasons for any proposal to permit consideration and response, they must give adequate time for consideration and response and the responses must be conscientiously taken into account when finalising any proposals arising from the consultation.¹
- The decision was tainted by **actual bias or the appearance of bias**. Decisions should be made impartially and without bias. Actual bias is rare and involves a decision-maker having a direct interest in their decision, such as a financial interest. Apparent bias requires a court to consider whether a fair-minded and informed observer would conclude that there was a real possibility that a decision-maker was biased.² An example of apparent bias could be a personal friendship between a councillor deciding a planning application and the developer.



4.4 Legitimate expectation

A legitimate expectation arises where a public authority has made a clear statement that it will or will not do something. In the absence of good reasons to the contrary, a person who has relied on that statement may be able to enforce their legitimate expectation through the courts.

An example of a legitimate expectation is a clear statement by a public authority that it will consult before making a particular decision.

5. Who can you challenge?

JR can be used to challenge the decisions, acts and omissions of public authorities. In some circumstances, it can also be used to challenge certain private bodies.³

This guide is solely concerned with the use of JR to challenge public authorities. In environmental law matters in Scotland, these include:

- UK and Scottish government departments and ministers;
- Non-departmental public bodies (e.g. the Scottish Environmental Protection Agency, NatureScot and Environmental Standards Scotland); and
- Local authorities (councils).

6. What can you challenge?

You can challenge a decision, act, or failure to act by a public authority.

In some circumstances, legislation of the Scottish Parliament can be challenged.

Sometimes the challengeable decision or act can be difficult to identify, for example how a specific government policy has been produced, or whether a governing body has carried out all of its duties correctly because the applicable regulations are difficult to find.



7. Who can use JR?

A petitioner must have a ‘sufficient interest’ in the matter for them to be able to pursue the JR. The sufficient interest test is often referred to as ‘standing’.

This requires a person to be able to show that they have an interest in the decision being challenged. If the JR involves a challenge to a planning decision, that might require an individual to show that they objected to the planning application earlier in the planning process or that they will be affected by the planning decision.

Often environmental organisations will have standing on matters related to the protection of the environment.

This can be a complex matter which it is important to take legal advice on.

8. Requirement for permission

Once a JR case is started, the petitioner must obtain the Court’s permission for their case to progress.⁴

At this stage, the Court must decide:

- whether the petitioner has a ‘sufficient interest’ in the outcome of the petition (discussed in the previous section); and
- whether the petition has a real prospect of success based on the grounds of review.

If permission is granted, then the case will progress to a substantive hearing where the JR grounds will be discussed in detail.

9. Who represents you in court?

We advise you to take legal advice as early as possible if you are considering a JR.



Usually a petitioner is represented by a solicitor and an advocate. A solicitor can provide advice on whether there are grounds for the JR, the JR process and its costs. The solicitor is the petitioner's main point of contact as the case progresses. An advocate represents a petitioner in the Court and drafts the court papers.

If the petitioner cannot access a solicitor and an advocate, self-representation is possible. We do not advise self-representation in JR due to the complexity, cost and risk of the process.

10. Time limit for starting a JR

It is important to avoid delay if you are considering JR because there is a short time limit for starting JR proceedings.

JR proceedings must be started within three months of the date on which the JR grounds first arose.⁵

The Court of Session has the power to extend the time limit if it considers this would be "equitable having regard to all the circumstances".⁶ The ability of the Court to extend the time limit should not be relied upon and every effort should be made by a petitioner to ensure that the three month deadline is met.

11. Remedies

If the JR is successful, several remedies may be granted by the Court:⁷

- **Declarator** – a declaration by the Court that the decision made by the public authority was unlawful.
- **Reduction** – an order which invalidates or sets aside the decision that was challenged. The Court will not replace the original decision with one of its own - it would only require the public authority to review its original decision.



- **Specific performance/implement** – an order which requires something specific to be done.
- **Suspension and interdict** – an order which requires an activity to stop.
- **Interim order** – a temporary order applied for at the outset of the case. Interim interdicts are the most common type of interim order.
- **Damages** – an order for the payment of money. This is rarely issued as a result of JR.

12. Funding a JR

JR is very expensive and carries significant financial risk.

A petitioner faces liability for their own legal fees which usually include the services of a solicitor and an advocate.

They also face liability for the legal expenses of the other side if the JR is unsuccessful, due to the ‘loser pays’ rule. The loser pays rule requires that the party who loses a case must pay their opponent’s legal costs.

JRs which include a challenge to an act or omission on the grounds that it contravenes environmental law are exempt from court fees.⁸

Several steps which can be taken to make JRs more affordable are listed below.

12.1 Legal aid

Legal aid can be applied for using a solicitor who does legal aid work. They will be able to explain whether a person would be eligible and will assist with the application process.

The Scottish Legal Aid Board has an [online civil legal aid eligibility estimator tool](#).

Even if approved for legal aid, you may still need to pay some money towards your legal costs.



If civil legal aid is granted for a judicial review, it will pay for the costs of your legal team. Civil legal aid also provides protection from the risks of having to pay your opponent's legal costs if you lose.

12.2 Protective expenses orders

A protective expenses order ('PEO') is a court order which caps the liability of a petitioner to pay the respondent's legal costs if the JR does not succeed. A PEO can protect you from the open-ended liability that comes with the loser pays rule.

To obtain a PEO, a petitioner must apply to the Court and demonstrate that the JR will be 'prohibitively expensive' for them if they are not awarded a PEO.

If the Court decides to grant a PEO, the default cap on liability is set at £5,000 (this becomes the maximum amount the petitioner would have to pay the respondent if the JR is unsuccessful).

There is also a default 'cross-cap' of £30,000, which is the maximum sum the petitioner can recover from the respondent if the JR succeeds.

The Court has the power to vary the default caps.

12.3 Crowdfunding

Crowdfunding involves the use of small amounts of money from a large number of individuals to fund a JR. It is becoming an increasingly popular route to funding JR cases and has been used to raise very large sums of money.

A popular online crowdfunding platform for legal cases is [crowdjustice](https://www.crowdjustice.com/).

13. Examples of successful environmental JRs

13.1 Trees for Life v NatureScot

Trees for Life, an environmental NGO, sued NatureScot regarding the licensing of the killing of beavers.⁹



Trees for Life obtained a PEO for the case. The PEO stated that Trees for Life would not have to pay any of NatureScot's legal costs if the JR was unsuccessful.

In 2021, the Court found that NatureScot had failed to give reasons for the issuing of licences to kill beavers in Scotland, and as a result, all current licences were 'reduced' (i.e. invalidated by the Court). NatureScot must give detailed reasons for any future licences.

13.2 Caz Rae v Glasgow City Council

This 2023 JR concerned the proposed demolition of four residential tower blocks in the absence of an Environmental Impact Assessment (EIA). Glasgow City Council published an EIA screening opinion where they decided that no EIA was needed prior to the demolition.

Caz Rae challenged Glasgow City Council's failure to provide adequate reasons in their EIA screening opinion (among other things).

Glasgow City Council conceded the judicial review at an early stage of the JR proceedings and agreed to re-screen the demolition for an EIA. The original screening opinion was 'reduced'.

13.3 Open Seas v the Scottish Ministers

Open Seas, an environmental NGO, challenged a decision taken by the Scottish Ministers which varied the general conditions applicable to all Scottish sea fishing licences (among other things).¹⁰

Open Seas argued that granting licences for scallop dredging and bottom trawling was unlawful because it was not taken in accordance with the Scottish Government's National Marine Plan (NMP). Under the Marine (Scotland) Act 2010, the Scottish Ministers have a duty to take authorisation decisions in accordance with the NMP, unless relevant considerations indicate otherwise.¹¹

The Court found that the Scottish Ministers did not consider the NMP when varying the sea fishing licences, which made that decision unlawful.



References

¹ *R v North East Devon Health Authority, ex p Coughlan* [2001] QB 213, at paragraph 108.

² *Porter v Magill* [2001] UKHL 67.

³ *West v Secretary of State for Scotland* 1992 S.C. 385.

⁴ Court of Session Act 1988, Section 27B.

⁵ Court of Session Act 1988, Section 27A(1)(a).

⁶ Court of Session Act 1988, Section 27A(1)(b).

⁷ Rules of the Court of Session, r.58.13.

⁸ The Court of Session etc. Fees Order 2022, Article 7. Court fees are fees that are payable for submitting applications to the court and for lodging documents at different stages of the court procedure.

⁹ *Trees for Life* [2021] CSOH 108.

¹⁰ *The Open Seas Trust* [2023] CSOH 39.

¹¹ Marine (Scotland) Act 2010, Section 15.