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Challenging PINS mode of determination and other procedural decisions

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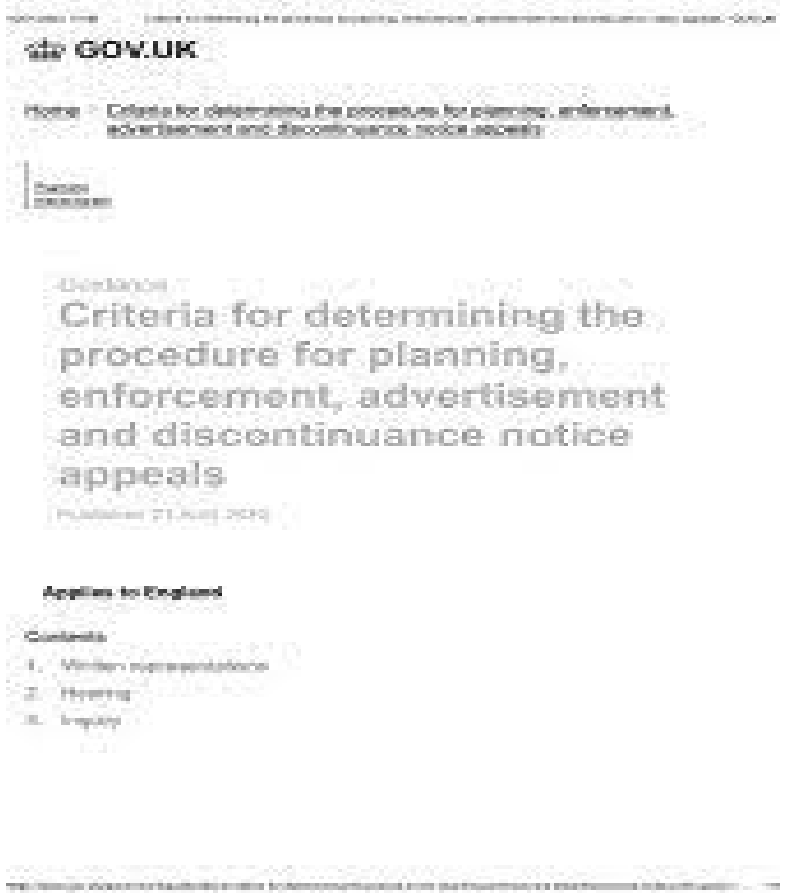
Introduction

The purpose of this talk is to explore:

(1) High Court challenges to mode of determination decisions by PINS – that is to say decisions made under s. 319A of the TCPA 1990; *and*

(2) High challenges to other procedural decisions by PINS and or Inspectors in the course of pursuing a planning appeal.



Mode of determination decisions – the issue (1)

The issue that most often arises where an appellant seeks an inquiry but PINS decide that the case should proceed by way of a hearing.

The Appellant, in its Statement of Case, must set out as full a case for an inquiry as possible having regard to the published criteria *https://www.gov.uk/government/publications/criteria-for-determining-the-procedure-for-planning-enforcement-advertisement-and-discontinuance-notice-appeals/criteria-for-determining-the-procedure-for-planning-enforcement-advertisement-and-discontinuance-notice-appeals* ("the Criteria")

The Criteria suggest an inquiry would be appropriate if:

There is a clearly explained need for the evidence to be tested through formal questioning by an advocate;

the issues are complex, e.g. *"large amounts of highly technical data are likely to be provided in evidence*";

the appeal has generated substantial local interest to warrant an inquiry as opposed to dealing with the case by a hearing.

The Criteria are clear, however, that "*the prospect of legal submissions being made is not, on its own, a reason why a case would need to be conducted by inquiry*".

Mode of determination decisions – the issue (2)

Given financial constraints the LPA will often argue for a hearing;

There seems to be a drive at PINS at present to push cases that really should be inquiries into hearings. There are, of course, obvious resource savings for PINS in doing this. Moreover, it doubtless assists with the monthly reporting of how long appeals take on average to determine. However, it is worth recalling why it is that appellants, and those advising them, often favour an inquiry over a hearing:

1. **there is a perception, denied by PINS as I understand it, that for an inquiry there is a greater likelihood of a more experienced inspector being appointed;**
2. **cross-examination is an invaluable tool in: (i) making one's own case; and (ii) exposing the flaws in the case of the opposition;**
3. **the belief (in my view justified) that the quality, and hence robustness from legal challenge, is generally higher for decisions that are made following an inquiry.**

Mode of determination decisions – the issue (3)

The PINS procedural guide says:

> *"6.2.3. In making our decision, we will consider the views of the appellant and the LPA and the criteria for procedure determination.*
>
> *6.2.4. Where our choice differs from that of the LPA and appellant, we will explain the reasons for our choice.*
>
> *6.2.5. The appellant and the LPA can ask for the choice to be reviewed by a senior officer.*
>
> *6.2.6. We keep our choice of procedure under review throughout the appeal. Subject to notification and procedural requirements, we may change the procedure. We may also, either at the start or at any point throughout the appeal, combine procedures."*

So, if you have asked for an inquiry and PINS determine it should be a hearing:

You should be given reasons for why this has been decided;

You may (and if you ae considering a legal challenge really must) ask for the decision to be reviewed by a senior officer.

Mode of determination decisions – the issue (4)

If an appellant is not content with the decision made by PINS on mode of determination and any consequential procedural decisions (e.g. as to allowing additional time for submission of further evidence where an inquiry was sought – see *Inquiry to hearing: some pitfalls surrounding PINS decisions on mode of determination* by James Maurici KC J.P.L. 2023, 8, 985-1003) then the remedies open are:

(1) to seek a review and so to persuade PINS via correspondence to change its decision; and/or

(2) failing that, to seek, to challenge that decision in the High Court.

In my experience, getting PINS to change its decision, once made, on mode of determination, is very, very difficult.

So, if an appellant is very dissatisfied then a legal challenge may be the only possible remedy.

Mode of determination decisions – the issue (5)

Reasons …

It is important to note that in the Guide there is a clear commitment to give reasons where PINS decision on the mode of determination differs from that requested by the appellant or the LPA.

That gives rise to a clear legitimate expectation that reasons should be given and which would provide a ground for judicial review if this were not to happen, see by analogy R. (Save Britain's Heritage) v SSCLG (2019) JPL 237.

Where such reasons are given, these are often "*crisp*" and along the lines of "*this appeal should follow the hearing procedure because the likely issues are suitable for a round table discussion format*".

This is rarely terribly informative but a legal challenge based on the reasons given being inadequate in this regard would be rather difficult.

Legal challenges to PINS on mode of determination What is the form of challenge? (1)

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The only safe advice on the form of legal challenge is that you should bring a judicial review proceedings within 6 weeks of PINS final decision on mode of determination, so normally the decision of a more senior officer following a review.

What it is not safe to do in this situation is to not challenge the s.319A by way of judicial review but to proceed on with the planning appeal and then only if the appeal goes against you, seek to challenge that final decision on the appeal under s.288 of the TCPA 1990 on the basis of unlawfulness (usually unfairness) in the decision on mode of determination.

This is not a safe course because there is authority to the effect that a challenge to a decision under s.319A of the TCPA 1990 is not usually challengeable under s.288 of the TCPA 1990, but instead only by way of a judicial review.

The case-law is messier than it should be on this … so we need a quick review of the case-law.

Legal challenges to PINS on mode of determination What is the form of challenge? (2)

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There are some cases where a challenge to a s. 319A decision has been entertained (albeit dismissed on the merits) in the context of a s.288 challenge or s. 289 appeal to the decision ultimately made on the s.78 or 174 appeal: see, e.g. Riza v SSCLG [2014] EWHC 909 (Admin) but the better view is that this is generally not allowed.

In Bluebell Cemetery Ltd v SSCLG [2015] EWHC 2339 (Admin) Holgate J. reviewed the authorities:

(1) The Judge began by looking at authorities that had suggested that such decisions had to be brought by judicial review: e.g. *Westerleigh v SSCLG* [2014] EWHC 4313 (Admin);

(2) He then referred to *Co-operative Retail v SSE* (1980) 1 WLR 271. That well-known case was concerned with an application to challenge a decision by the S/S refusing to adjourn the date fixed for a public inquiry. The Court of Appeal held that what is now s. 284(3)(b) of the TCPA 1990 only applies to a decision which disposes of an appeal, that is to say a decision on the final outcome of the appeal. It does not apply to a decision made in the course of the appeal process.

Legal challenges to PINS on mode of determination What is the form of challenge? (3)

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Holgate J. said that on the facts in that case the challenge to the s. 319A decision should have been made by judicial review and not via s. 288 after the appeal had been determined:

> *"67. There are sound practical reasons which, in my judgment, support this legal analysis. Planning appeals involve several parties. In some cases they may indeed involve many participants with many different interests, each party potentially incurring substantial costs. It can readily be understood why the legislature has created a process of statutory review under section 288 which applies to the final determination of an appeal, leaving public law challenges to earlier decisions (where properly arguable) to be dealt with soon after the matter has arisen so that any justifiable complaint can be addressed at that time before yet further substantial costs are incurred, potentially by several parties. However, I accept that some breaches of "relevant requirements," for example, breaches of a duty to act fairly, causing substantial prejudice, will have a continuing effect which taints the final decision or outcome. Drawing a dividing line between the two must await further argument in an appropriate case."*

Legal challenges to PINS on mode of determination What is the form of challenge? (4)

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So, generally such challenges are to be brought by judicial review within 6 weeks of the final decision on mode of determination.

But Holgate J. seems to have held open there may be exceptional cases where complaints related to the mode of determination can be brought via later s. 288 proceedings.

The Riza case, see above, was not cited in Bluebell.

It does not seem that this was an exceptional case as contemplated by Holgate J. but rather it would appear that the S/S failed to raise the issue of whether the s. 319A challenge was inappropriate for a s. 288 challenge.

Outcomes of mode of determination challenges (1)

The reality, however, is that challenging a s.319A decision whether by judicial review or exceptionally by way of s.288 (or s.289), is always going to be difficult.

On such matters, as on other procedural decisions, the court will tend to accord a wide margin of appreciation to the decision-maker.

Looking at the cases and the outcomes …

Outcomes of mode of determination challenges (2)

(1) Riza: the mode of determination challenge was entertained as part of a s. 288 challenge but failed on the merits.

Outcomes of mode of determination challenges (3)

(2) Westerleigh:

Judge opined the challenge on fairness of mode of determination should *not* have been pursued by s.288 after the appeal was determined. However, the judge did not in fact dismiss the claim on that basis. Instead, the judge went on to consider the issues raised.

C asserted that inspector should have decided that nature and complexity of the evidence required appeal to proceed by way of a hearing/public inquiry and not by written reps. There had in that case been substantial local opposition to the scheme which had been rejected by the LPA and, it was contended, that in following the written reps procedure inadequate consideration had been given to the choice of alternative sites.

The court determined that there had not been a failure to have regard to the Criteria on mode of determination. The judge held that conclusion had not been unreasonable, irrational or otherwise unfair.

Judge found it was appropriate for the inspector to exercise his professional judgment in deciding how the appeal should proceed and the Criteria did not make it mandatory for a public inquiry to be held even where there was significant local opposition.

Outcomes of mode of determination challenges (4)

(3) Chhokar v SSCLG [2015] J.P.L. 345.14

Enforcement case. C appealed under s.289 of the TCPA 1990 against dismissal by an inspector of his EN appeal under s.174. LPA had issued EN on the basis that he had breached planning control by using a detached structure, within a property he owned, as a separate residential unit which was not incidental to the enjoyment of the main dwelling.

When he appealed C said he wanted the matter dealt with by written reps.

PINS wrote to C about the merits and disadvantages of using written reps.

LPA submitted their written statement of case which stated that C had confirmed that use of the separate unit had ceased. That was not the case and C did not raise the error.

The inspector rejected the C's appeal.

C in his s.289 appeal alleged that the inspector had acted unlawfully in determining the appeal without holding an oral hearing.

Line in *Riza* S/S seems not to have raised issue that mode of determination not for s. 289 but should have been subject of a judicial review.

Outcomes of mode of determination challenges (5)

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Judge rejected the claim:

C had elected for written reprs. It had been open to him to request an oral hearing but he did not, even after he knew that there was a factual dispute. C had thus made an informed decision as he had been provided with a letter of advice from PINS.

Noted that the Planning Act 2008 removed the automatic right to an oral hearing in planning appeals.

The judge held that to the extent that the C had a general right to an oral hearing under Art. 6 of the EHCR, he had unequivocally waived it.

Fairness did not require a hearing, regardless of the parties' wishes. There was no requirement under the Criteria, the judge held, to hold an oral hearing.

Noted also "*PINS initiative to seek to determine more appeals by way of written representations*".

Inspector had to have regard to the Criteria, but he was an expert tribunal acting in a quasi-judicial manner with a broad discretion over the manner in which the appeal is conducted.

Outcomes of mode of determination challenges (6)

(4) North Norfolk DC v SSHCLG [2019] JPL 87. Following a six-day public inquiry into conjoined appeals, a planning inspector had allowed the appeals and granted permission.

The LPA challenged under s.288 of the TCPA 1990. The S/S conceded and the decision was quashed by consent in May 2017.

PINS decided initially that the appeals should be re-determined at a further public inquiry before a different inspector. The new inspector examined the file and concluded that the issues could be dealt with by written reps instead.

The LPA and the interested parties, who were local objectors, disagreed. PINS determined that, because there had been no significant change in circumstances since the original decision was made, and there were no complex issues involved and no need to test or clarify evidence, a public inquiry was unnecessary; it concluded that the issues raised could be dealt with adequately through the written reps procedure.

The LPA challenged that decision by way of judicial review contending that the Inspector had not properly interpreted or applied the Criteria for determining the procedure for re-determining planning decisions quashed by the High Court. The claim failed.

Outcomes of mode of determination challenges (7)

The judge noted that the question was whether PINS' decision, and its reasons, showed that the PINS procedural guide and the Criteria had been misinterpreted or not applied.

The new inspector, who was to decide the appeals, was able to assess all the evidence and written submissions placed before the previous inspector, with a view to suggesting the mode of re-determination. He had made his recommendation having considered the complexity of the issues and the need for formal questioning. The judgment about how complex the issues actually were, the need for testing through advocates, and how they could be resolved with further written reps and a site visit, was very much a matter for the inspector's expertise. It was thus an unchallengeable judgment and a necessary part of the decision as to the mode of redetermination.

Whilst extensive local interest was sufficient of itself to justify an inquiry, even where the issues were not complex and written reps would otherwise be adequate, the level of public interest would not render an inquiry mandatory.

The Inspector had given sufficient reasons for its decision that an inquiry was not required. It was an entirely reasonable judgment that no further oral submissions were required to deal with the legal issues (see [23], [29], [32], [37], [42])

Outcomes of mode of determination challenges (8)

I have not in fact been able to find any judgments that are examples of a successful legal challenge to a s. 319A decision.

However, there are a number of other cases that are worth noting in this context …

There are a number of cases where judges (mostly it should be noted Deputy Judges who were members of the Planning Bar) have made statements to the effect that the cases before them should really have been determined by an inquiry or at least a hearing.

However, despite this there are no reported examples of a successful challenge to a s.319A decision.

Outcomes of mode of determination challenges (9)

(1) Ricketts v SSE [1998] JPL 768 an appeal had been determined (by agreement) by written reprs. Graham Eyre QC, sitting as a Deputy HC Judge, raised concerns about the use of the written reps procedure in some cases. The case report is in the old JPL form:

"He (Graham Eyre, Q.C.) would be the last person to point to the shortcomings of that procedure. The procedure was appropriate in very many cases. It has very considerable administrative advantages in terms of time and costs. As a procedural mechanism it was wholly to be supported. On the other hand there was no doubt that an inquiry did give to the parties an opportunity to test the material rather more directly, effectively and efficiently. That seemed to be an inherent characteristic of an appeal by way of inquiry as against an appeal by way of written representations. The general problem was that there were many cases coming by way of appeal to this Court which on analysis demonstrated that material was not sufficiently tried or tested, or indeed that the material was not tried or tested at all. *Thus there had been an increase in the number of cases where recourse was had to this Court in order to make submissions on documents, their interpretation, their shortcomings and matters of that kind. It was suggested that the inherent limitations of the written representations appeal procedure could constitute a ground for coming to this Court because material was not put forward or properly tested. He (Graham Eyre, Q.C.) wished to make it clear beyond doubt that the Court simply would not entertain a case where the ground of challenge was that there was an insufficiency of material contained in the written documents before the Inspector or the Secretary of State and regard to other documents would cure the deficiency. It was the responsibility of the parties to an appeal to identify the material upon which reliance was placed at the stage of presenting the written representations. The Court was no place for 'second thoughts' …"*
(emphasis added)

Outcomes of mode of determination challenges (10)

(2) Richmond upon Thames LBC v SSCLG [2007] J.P.L. 1146.The court was considering a case where one of the main issues was the economics of affordable housing. The judge HH Judge Gilbart QC, sitting as a Deputy HC Judge, held that the Inspector had failed to interpret the policy properly and to calculate the contribution in accordance with the policy. The judge added:

"I should add that I have some sympathy with the Inspector. This was a classic case where cross examination would have exposed the flaws in the developer's argument, but that is not what happens at an informal hearing. This was one of those types of planning dispute where the Inspector should have insisted on an inquiry, where there would have been formal cross examination which would have tested the two rival methods of calculation."

Outcomes of mode of determination challenges (11)

(3) Pratt v SSCLG [2016] EWHC 637 (Admin). The development proposed was the change of use of an agricultural building. The judge, Charles George QC, siting as a Deputy HC Judge said:

" The appellant had initially requested a planning hearing but I understand that this request was turned down since the Planning Inspectorate, perhaps rather surprisingly, considered the matter appropriate for the written representations procedure. There was no challenge to this decision and there was no later application that the appeal should continue at a local inquiry or at a hearing as provided for by Section 319A (4) of the 1990 Act. In these circumstances the task of the Inspector was not easy, absent the assistance which might have been afforded to him by cross-examination at a public inquiry or by interplay with the parties at a hearing."

Outcomes of mode of determination challenges (12)

(4) Mahajan v SSTLGR [2002] J.P.L. 928.

Enforcement appeal determined using written reprs. The judge's view was, it self-evidently should have gone to inquiry.

EN directed against a further ground floor extension to the rear of the C's dwelling.

The inspector concluded that the development had not been substantially completed four years previously and that planning permission should be refused because of the impact on the amenity of neighbouring property.

In the s.289 appeal, it was alleged that the reasons given by the inspector were legally inadequate, in relation to the time at which the building had been completed, and that those deficiencies in reasoning arose from the fact that the appeal was dealt with by reps. It was said that it was unfair for the inspector to have proceeded in that way, even with the consent of the C.

C had asked for a hearing rather than an inquiry, and a date was fixed. He then wrote to the PINS asking to revert to written reps due to his ill health. The LPA had sought an inquiry in order that cross-examination could take place.

Outcomes of mode of determination challenges (13)

Following the non-attendance of the C, PINS confirmed that the appeal would proceed by means of written reps and C made no objection.

The inspector stated "*bearing in mind the limited weight that I can assign to untested evidence of fact, I am bound to say that there is insufficient firm evidence to lead me to the view that the canopy had been in place on the material date*".

The court decided that the inspector was in error to attach only limited weight to the written statements on behalf of the appellant because they were untested. In a written reps case, all the evidence is untested by cross-examination.

In downgrading the value of the evidence, the inspector had made the case almost impossible for the appellant to win, due to the procedure adopted.

The judge considered that the evidence should have been assessed explicitly.

The case was remitted to PINS for further consideration.

Outcomes of mode of determination challenges (14)

(4) R. (Waltham Forest LBC) v FSS [2006] JPL 1593

Issue was whether a decision arrived at after written reps should be reviewed on the basis that the decision letter did not deal adequately with ambiguities raised in evidence.

The LPA's challenge was rejected.

In an editorial comment on the case, the JPL noted that having agreed to the written reps procedure the parties had little cause for complaint if their evidence was less appreciated than if might be in a hearing or inquiry.

However, where a point occurred to an inspector, or was not raised by a party, he or she may need to consider whether to invite further written reps or propose a change of procedure to address it.

The JPL comment concluded that the case illustrated why parties should consider carefully the appropriate mode of appeal for the particular case and not necessarily pursue either the quickest or cheapest course.

Other procedural challenges (1)

The following procedural decisions may be the subject of judicial review within 6 weeks of those decisions:

(1) a refusal to adjourn an inquiry: see *Co-operative Retail* (see above);

(2) a decision to adjourn an inquiry: see *R v SSE, ex p Mistral* [1984] JPL 516;

(3) a letter from the S/S indicating that he would be disposed to grant conditional planning permission once a satisfactory agreement had been concluded between the appellant and the highway authority: *Solihull v SSE* [1987] J.P.L. 208;

(4) the position on refusal to entertain an appeal is more complex, see the Planning Encyclopaedia at P284.05.

Other procedural decisions (2)

Cala v the Scottish Ministers 2002 SC 42

At an inquiry post-exchange of proofs and on first day of the inquiry the appellant, Cala, sought to lodge a report on the suitability of the site for recreational use and lead a witness to speak to its terms. The reporter refused to allow this.

The appeal proceeded and was refused.

Cala challenged relying on refusal to admit document and witness.

The Ministers argued that a decision of a procedural character such as refusal of an adjournment or refusal to admit a witness or document should have been the subject of a judicial review.

The Court distinguished Co-operative Retail holding that a procedural decision may be founded on, in a challenge against the final decision, if it is a reason of a kind to justify holding that the inquiry was flawed in such a way as to vitiate the final decision. The challenge failed on its merits.

Remainders:

(1) Adams v ICO EA/2013/0060. Using the EIR to seek to obtain PINS in-house legal advice on mode of determination decision;

(2) R. (Padden) v SSHLG. This was a planning appeal brought in respect of an application for retrospective planning permission for an EIA development. PINS initially proposed that the case should proceed by way of written reps. Mr Padden, a local objector, resisted and eventually the process was changed to a hearing. Mr Padden remained unsatisfied with this and lodged judicial review proceedings seeking to challenge the s.319A decision. Lang J granted permission. The case was settled when the S/S offered to reconsider the mode of determination. Having done so, PINS reaffirmed the hearing process. The appeal then proceeded to a hearing. The appeal was dismissed and is now subject to s.288 proceedings.

(3) Link Park Heathrow LLP v SSLUHC [2023] EWHC 1356 (Admin). The Inspector following a 2 day hearing, the Inspector made a decision that was found to be flawed on many grounds. Leading counsel before the High Court had appeared at the hearing and so was able to assist the Court considerably in understanding the ways in which the Inspector had gone astray, see e.g. paras 15 and 17. Clearly should have been inquiry …

Thank you

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