

Can a Welsh registered social landlord who is not a public body for Office National Statistics be the subject of a judicial review when it delivers a public function?

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A Registered Social Landlord is a hybrid public authority. It is therefore capable of exercising both public and private functions. Only decisions of public bodies are amenable to judicial review to ensure that they act lawfully and fairly. When a Registered Social Landlord is delivering public functions therefore, it should be alive to the risk of challenge by way of judicial review. The Public Sector Classification Guide is a list of bodies that have been classified by the Office for National Statistics (ONS) as public sector bodies within the National Accounts. This includes bodies classified within the general government sector, as either central government or local government bodies, as well as public non-financial corporations and public financial corporations.

A body included in the Office National Statistics (ONS) classification guide will not be able to argue that it is not a public body for the purposes of defending a judicial review challenge. However, the same may also be the case for a body that is not included within the ONS classification guide. This is particularly relevant in Wales as the Regulation of Registered Social Landlords (Wales) Act 2018 amends powers in the Housing Act 1996 to allow the ONS to reclassify Registered Social Landlords as private sector organisations and permit them to access private sector borrowing.

A court is unlikely to be convinced by the argument that simply because a Registered Social Landlord is not included in the ONS classification guide, it is not exercising public functions and therefore prevented from being judicially reviewed. Rather the court will look into the specific nature of the functions being exercised in order to determine whether in the individual case the Registered Social Landlord was in fact exercising functions akin to those of a public body (See: R. (on the application of Weaver) v London & Quadrant Housing Trust). Additionally, in Wales, as a result of the Registered Social Landlords (Wales) Act 2018, whilst it is likely that a Registered Social Landlord will not feature in the ONS classification guidance, it may nevertheless fall within the definition of a 'devolved Welsh authority' for the purposes of s157A of the Government of Wales Act 2006.

“(1) In this Act ‘devolved Welsh authority’ means—

(a) a public authority that meets the conditions in subsection (2),

“(2) A public authority meets the conditions in this section if its functions—

(a) are exercisable only in relation to Wales, and

(b) are wholly or mainly functions that do not relate to reserved matters.

“(3) In determining for the purposes of this section whether functions of a public authority are exercisable only in relation to Wales, no account is taken of any function that—

(a) is exercisable otherwise than in relation to Wales, and

(b) could (apart from this paragraph) be conferred or imposed by provision falling within the Assembly's legislative competence (by virtue of section 108A(3)).

“(8) In this section ‘public authority’ means a body, office or holder of an office that has functions of a public nature.”

Notwithstanding the effect of the Registered Social Landlords (Wales) Act 2018 on reclassifying Registered Social Landlords in Wales as Private Non-financial Corporations, the hybrid nature of Registered Social Landlords means that they will arguably be considered to still be a public authority in Wales by virtue of the fact that they have and exercise functions of a public nature and so in respect of, and when exercising, those particular functions will meet the definition in s157A(8). Additionally, the focus of the courts will rightly be on those functions rather than the ONS classification of the RLS concerned. When exercising its public functions, a Registered Social Landlord in Wales should therefore do so in accordance with public law principles in order to mitigate the risk of successful challenge by judicial review.

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