UKELA's Response to the Ministry of Justice consultation on proposals for reform of Judicial Review, December 2012

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Environmental Litigation Working Party and the Planning and Sustainable Development Working Party.

UKELA makes the following comments on the proposals.

Preliminary Observations

UKELA is concerned about the short timescale for this consultation, which has occurred over a significant holiday period. This has meant that UKELA has not been able to consult its members as fully as it would like, and we have not been able to submit as full a response as we would like. Nevertheless, there are some important issues raised by this consultation upon which we would want to comment.

UKELA's response deals with two forms of judicial review ('JR'): (1) challenges to environmental decisions by the Environment Agency and DEFRA, and (2) challenges to decisions to permit development, often on grounds which are, on a broad view, environmental.

As to the former, they are very small in number. The Environment Agency is involved in single figure, or thereabout, judicial reviews per year. The key factor determining the bringing of such judicial reviews has been the funding mechanism and costs liability, not time limits.

The focus of this consultation response is upon JR of the grant of planning permission, i.e. (2) above. There are no more than 200 of these JRs a year. By way of comparison, in the year ending September 2011, district level planning authorities granted 350,700 planning permissions (DCLG *Statistical Release* Feb 2012; 432,300 planning applications were decided in total).

UKELA observes that the rate of issue of planning JRs is not reflective of the general increase in JR generally. That is very largely a result of increased asylum and immigration claims. They clearly form the bulk of JR claims, are responsible for the present trend and heavily influence the statistics as to rates of success. Planning JRs have a higher rate of success and it is not accurate to characterise such JRs as being dominated by weak and misconceived claims.

It is also a feature of this area of litigation that all parties make use of the Administrative Court. Disappointed objectors challenge the grant of planning permission, developers challenge decisions which adversely affect their own

interests and local authorities challenge decisions of the Secretary of State on appeals (albeit that such challenge is via statutory review pursuant to s288 of the 1990 Act, but in respect of which there is no material difference as to objective, grounds or remedies for the purposes for this consultation).

All species of claimant and defendant use judicial review and judicial review time limits in similar ways. So, a defendant decision maker may seek to use delay arguments as a means of disposing of a claim which would otherwise be arguable - the time limit is used as a defence against an arguable legal error. A claimant (objector, developer or local authority) may issue proceedings in the Administrative Court with an eye on the tactical advantages gained by the delay to the process which follows from the decision.

The potential relationships between parties are numerous and highly variable. The circumstances are likewise wide ranging. UKELA considers that the most effective management of the use and misuse of JR is via authoritative judgments of the court. So much is consistent with a jurisdiction which is entirely concerned with the review of the lawfulness of administrative decisions.

We note with regret that the Consultation Paper fails to deal with the main procedural problem in judicial review at the moment, which is the status of promptness in the light of the courts' judgements in Uniplex and Berky. Nor is there any analysis of the Aarhus Convention or the existing access to justice provisions in EU legislation (particularly the EIA Directive).

Response to consultation questions

Q1. Do you agree it's appropriate to shorten the time limit for planning cases to bring it in line with the time limits for an appeal against the same decision?

UKELA considers that a strict time limit is inappropriate in such cases. There is no direct comparison that can be made with the circumstances of a challenge to the decision of the Secretary of State on appeal (a s288 application) where an absolute time limit of 6 weeks is imposed. Such challenges are brought by parties who have taken part in an appeal process, who know the material which was at issue, who received a copy of the decision letter and who expected it to arrive. Such parties are able to equip themselves to deal with an adverse result - they can be ready.

In respect of JR of planning decisions, rather different circumstances prevail. Neither the developer nor the planning authority is going to judicially review a decision to grant planning permission. Those who might wish to challenge a decision will usually have been significantly less involved in the process than those who participate in a planning appeal. Hence, in UKELA's view, it is inappropriate that there be a short, strict time limit. In UKELA's view, it would give rise to a real sense of injustice and to actual injustice.

Furthermore, many of the 150-200 planning judicial reviews received by the Administrative Court each year are not about challenges to planning permissions per se, as they concern matters such as costs in planning appeals and challenges to EIA screening and similar matters. They are therefore not comparable to the 6 weeks proposal.

UKELA considers that there are other means of achieving the objective of preventing legal challenge from unjustifiably delaying important economic activity. The courts already have the power to expedite important applications and to hold 'rolled-up' permission and substantive hearings where necessary. They also have the discretion to refuse to grant permission, and – ultimately – relief, if there has been 'undue delay' in making 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' (section 31(6) of the Senior Courts Act 1981 – formerly the Supreme Court Act 1981). Prejudice to important economic interests would clearly fall within this category.

Q2. Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol?

No. This point applies as much to the time taken by defendants to consider the alleged illegality as for claimants to formulate their view and take advice. It is foreseeable that more rather than less claims would result.

Q3. Do you agree that the Court's powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

UKELA regards the provision of such a discretion to be essential. An absolute time limit can create real injustices – for instance where a claimant was never notified of

the decision. However, the attractions of a discretionary power to extend time are more apparent than real. From a claimant's point of view, it is better to issue within time but with poorly considered material, and to make up the deficiencies before the papers are considered. From a defendant's and interested party's point of view, the lack of certainty is unattractive. The development cannot go ahead until permission has been refused. It is hard to see how that the court's decision on permission could be made within six weeks of the issue of the claim, allowing 21 days for the filing of the Acknowledgment of Service - it would require the court to work to a 21 day turnaround to achieve a decision on permission within 6 weeks of the issue. It is better to allow sufficient time for the parties to exchange properly considered protocol correspondence and allow for the parties to moderate their stances than to force the issue of hastily drafted claims. For these reasons, it is considered that it is better to provide time for the protocol stage to work.

Q4. (No response)

Q5. Suggestions on amending the wording of CPR 54.5 to make clear that in cases of continuing breach of multiple decisions should be brought within 3 months of the first instance and not from the end or latest incidence of the grounds.

This proposal would be of little effect in respect of planning decisions, which are made once and not revisited, as in asylum matters. UKELA has no view on this question.

Q6. Risks in taking forward this proposal

See above.

Q7-9. Removal of oral renewal of permission where a case has already had a prior judicial hearing

These proposals are concerned with decision-making which is outside the scope of planning. UKELA does not express a view.

Q10. Claims which are entirely without merit

In this field of law, it is our experience that there is often a real possibility of persuading the judge at the oral hearing that a different interpretation of the law should be taken and that the case is arguable. Whilst the Judges will all have a good awareness of administrative law, there are very few who have any specialist knowledge of planning or environmental law. The ability to present and argue these submissions orally is a very valuable part of the judicial review process. It would be even more important for planning cases were the proposal to reduce the time limit for bringing claims to be introduced, as there will be increased pressure to submit a claim on paper before it can be properly prepared or discussed.

On the other hand, it is our experience that it is rare that legal advisors will recommend that an environmental claim is renewed if a judge has found all of the grounds to be entirely without merit.

One matter that the MOJ may wish to consider further is the deterrent effect of the court's existing discretion over costs. If a claimant does seek an oral renewal of a claim which has already been declared to be 'entirely without merit', the court has the power to order costs against the claimant. This is a real deterrent, and we are aware of instances where this has already occurred in these circumstances. This is perhaps a point that any revisions to the Practice Direction to Part 54 can highlight, even though it should remain the case that costs are not normally awarded against the claimant for the oral permission hearing.

We would therefore recommend that no change is made to the current rules on this point, and that it is left to the judges to continue to apply the current rules robustly.

UKELA would also invite the MOJ to consider the effect of one of the alternative approaches which is already being used in Divisional Court cases, under the existing court rules. The Divisional Court can require a claimant to enter into a recognisance if a renewal is made when, on the papers, the court has found the case to be 'entirely without merit'. If this approach were to be broadened to JR cases, this would also need to take account of the nature of the claim being brought, and the need to ensure that environmental cases were not 'prohibitively expensive'.

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

UKELA has no comment on this question. There is no evidence in the Consultation Paper to support this change.

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

Yes, as occurs at the moment.

Question 13: Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

As we have not commented on Option 1, UKELA has no view on this question.

Fees

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

UKELA has not had the time to consider this point further. It is important to ensure that the whole judicial review process is not 'prohibitively expensive', and not just any individual stage.

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

No Comment.

Equality Impacts

Question 16: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

UKELA has no comment on this specific question. We note that it is limited to considering groups of individuals with the defined 'protected characteristics', and not equality in a more general sense.

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