Response to the Ministry of Justice consultation on proposals for further reform of judicial review, September 2013

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 on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. This response has been prepared with the help of the environmental litigation and planning and sustainable development working parties.

PRELIMINARY OBSERVATIONS

UKELA notes the constitutional importance of judicial review and its function as the sole means of redress in a number of important areas. These features are the key backdrop to consideration of the issues raised in the Consultation Paper.

The present proposals are based on arguments that judicial review has expanded massively in recent years and that it is open to abuse. The reality is that the increase in cases of judicial review are in the areas of immigration and asylum. In 2011 immigration and asylum cases made up around 77% of all applications for permission for judicial review. Just 3 days after David Cameron's speech John Vine issued a damning report about the UK Border Agency's failure to deal with a

backlog of 147,000 immigration and asylum claims. There is no reference to any of the issues highlighted by John Vine regarding the state of the UK Border Agency and addressing the current crisis that it clearly faces in terms of the back log of claims which could be argued is the real reason for the increase in immigration and asylum cases being referred to judicial review. The University of Oxford study in fact showed that "Other" claims for judicial review have remained relatively stable. If immigration and asylum cases were to be taken out of the equation then the number of judicial reviews is broadly at the same level as it was 20 years ago.

The Government asserts that a large proportion of applications made are without merit and uses court statistics from 2011 which state that in 2011 6,391 applications were refused and only 1,220 were granted permission by the court. These claims however fail to take into account that a number of claims are lodged and are then settled and the claim is then withdrawn before permission is granted. Data is unfortunately not available dealing with the reasons for cases being withdrawn.

As stated above the vast majority of judicial reviews are not about major infrastructure projects but rather relate to immigration and asylum cases. For local people a judicial review may be the only way for local people or businesses to prevent public bodies acting outside of their powers.

CONSULTATION QUESTIONS

Q1: Do you envisage advantages for the creation of a specialist Land and Planning chamber over and above those anticipated from the Planning Fast-Track?

Yes, providing that it is adequately resourced.

However, we do sound some caution. Our experience is that the Administrative Court is generally good at expediting planning cases; and the recent reforms (the Planning Fast-Track) mentioned in the consultation have also assisted – this could be further formalised. If anything, it may be slower than the High Court. The inevitable application of new procedural rules to planning cases as a result of transfer to the Tribunal will also result in more delay and procedural wrangling.

Judges ought to be drawn, if possible, from land, planning and environmental practitioners, but should also sit in the Administrative Court to prevent differences in approach emerging between the different parts of the courts system hearing public law challenges.

The definition of the cases capable of being heard by the Land and Planning Chamber (LPC) should be deliberately drafted widely. Environmental cases, in particular, come in all shapes, and the best assessor of the suitability of a given case for the LPC is likely to be one or other party. Two examples of environmental disputes which should be heard in the LPC may help.

(i) There is a certain amount of litigation (Castle Cement, OSS/ SRM) about "what is waste" brought by a company against the Environment Agency, which is of considerable importance to the nature of the applicable environmental permitting.

(ii) There was a recent judicial review of Defra's new waste regulations on EU grounds.

Q2: If you think that a new Land and Planning Chamber is desirable, what procedure requirements might deliver the best approach and what other

types of case (for example linked to environmental permits) might the new Chamber hear?

UKELA agrees that challenges to the grant of environmental permits should be similarly treated. They often (but not necessarily) occur against a planning background, and the same point about judicial expertise is applicable to them.

The substantive law in judicial review and s.288/289 TCPA challenges is the same. The default procedure should be identical to the current rules for judicial review. Most of them are about precisely the same thing; allegations of defective reasoning, misunderstanding or misapplication of planning policies, procedural unfairness before the Planning Authority or at Inquiry.

There should be a permission stage in all cases, with common rules about acknowledgement of service. The rules on standing should be the same in all such cases – whatever they may be – see below.

The current set of procedures for s.288/289 challenges are unsatisfactory for claimant, defendant and interested party. Save in exceptional cases, an unmeritorious claim does not get filtered out until the hearing. A defendant or interested party does not have to serve a particularised acknowledgment of service, so its legal submissions only emerge shortly before the substantive hearing. This is unfair on the claimant who wants to appreciate the strengths and weaknesses of his case as early as possible, and also means that defendants do not have to concentrate on the merits until late in the day, impeding settlement. UKELA's members have experience of very late concessions being made by defendants in s.

288 challenges which should have been made much earlier, thus cutting out significant delay for both claimant and developer.

Q3: Is there a case for introducing a permission filter for statutory challenges under the Town and Planning Act 1990?

There is a case - yes. However the impact will be an increase in cost to defending such cases. The additional procedural steps may also increase the time taken to complete the case. On the other hand, cases should be more focussed or eliminated early if they are not arguable.

Q4: Do you have any examples/evidence of the impact that judicial review, or statutory challenges of government decisions, have on development, including infrastructure?

The knowledge that a decision can be challenged improves the quality of decision making, and avoids corners being cut. The *Cala Homes* challenges to the revocation of the Regional Strategies, which led to the eventual grant of planning permission for developer, demonstrated that the rush to revoke the RSS had been mistaken (e.g. *R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government and another* [2011] EWCA Civ 639). Conversely, it was only when SAVE Britain's Heritage challenged the policy that demolition did not require environmental impact assessment that the Secretary of State's direction was quashed, and the law properly applied. This may have delayed the intended demolition involved, but it ensured that a decision on this scale was properly assessed and evaluated.

Judicial review proceedings can delay projects and can be used tactically. They should delay projects if the decision-making process was unlawful and unless it is absolutely plain that the decision would have been the same but for the unlawfulness. But most of the causes of delay can be addressed without affecting the underlying need for judicial review – in the right circumstances.

We have seen some examples of the mere bringing of proceedings, and the delay it causes, being used to extract payments from the developer to the claimants. Consideration should be given to the permission threshold and whether it should be set higher than "arguability", such as "real prospect of success" as for appeals.

The real questions are (a) how to knock out the unmeritorious claim at the permission stage and (b) how to minimize court delay getting to a final resolution.

Q5: More generally, are there any suggestions that you would wish to make to improve the speed of operation of the judicial review or statutory challenge processes relating to development, including infrastructure?

There have been a number of recent changes made to improve the speed of operation, which have not yet bedded in, and should be given a chance to work first. There was considerable concern that even some of these steps would have an adverse impact, and it is too early to know whether this is has proved to be the case or not.

A specialist judiciary is certainly better at (a), identifying the weak claim quickly. As for (b), court delays, the various recent steps being taken in 2013 to improve listing times are very much to be welcomed. It is hoped that they will have the desired effect. It is fair to say that prior to them being instituted most of the delay in the

whole process was between the grant of permission and the final hearing. The LPC process (and the coralling of similar cases in one planning/environmental list) should help in the identification of the cases which due to their local or national importance really do need fast-tracking. Current arrangements for expedition seem a bit haphazard and unpredictable: how does one weigh up, say, a school closure case against an immigration case against an infrastructure project? And retaining the current system of s.288/289 challenges continuing in different lists and according to different procedural rules cannot be justified.

Q6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?

The Consultation Paper has identified no recent example of such a challenge. There is no justification for additional obstacles being put in the way of such a challenge. A local authority will think long and hard about such a challenge, not least for costs reasons. Any additional criteria run the risk of distracting the parties and the court from the real question, to be addressed as soon as possible – is there unlawfulness in the decision?

Q7: Do you have any evidence or examples of cases being brought by local authorities and the impact this causes (e.g. costs and delays)?

No we do not. However, we suggest there will always be a mix of co-operation and tension between locally-elected authorities and national government.

Q8: Do you have any views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act

1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?

There should be no material difference between the criteria applicable for legal aid in judicial review and in s.288/9 proceedings. The current criteria are highly restrictive anyway, but the fact that the case has, typically, gone to hearing or inquiry is not a reason for withdrawing legal aid altogether. The premise in the question is that the claimant has already had a fair crack of the whip (albeit an unfunded one) – but his complaint is often that he hasn't.

Q9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter?

There is a seeming lack of evidence by way of data to back up the assertion made by Government that the current system is open to abuse by groups who may not have a direct interest in the issue at hand but simply want to cause delay or disruption to plans or generate publicity for themselves.

Most of our European neighbours have very strict standing rules. That said, CJEU in *Case C-115/09 Bund Für Umwelt* criticised German narrow rules about standing in the Aarhus/Environmental Impact Assessment context. However, the UK has a broad and wide approach. There is little question that our standing rules are more liberal that the Aarhus Convention requires, paras. 66 and 69 of the A-G's opinion in *Commission v Ireland* (Case C-427/07) [2011] 3 C.M.L.R. 46 are instructive. The principal reason for a broad test for standing is central to the whole purpose of

judicial review, which is to respect the rule of law. The second is that the problem of standing arises acutely in environmental cases; an impact on the environment may affect all of us.

Both points are well made by the Supreme Court in *Walton v. Scottish Ministers* [2012] UKSC 44.

Lord Reed said this:

> *"In many contexts it will be necessary for a person to demonstrate the particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it."*

Lord Hope at [152] on the planning and environmental contexts:

> *"An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing*

loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? ***That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf."***

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.

Q10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

Four options are considered in the Consultation Paper.

1. The EU/CJEU test for annulment of an EU measure of "direct and individual concern" (in Article 263(4) TFEU, not Article 230) is highly restrictive.

This test was devised in entirely different circumstances, because of the availability of other ways for an applicant to get his case before the CJEU, typically via a

reference from the domestic court for a preliminary ruling. The ECJ thought and thinks that it is preferable for cases to come to it that way, rather than via the direct annulment route: see, *e,g. Inuit Tapiriit Kanatami et al v. European Parliament, CJEU, 3 October 2013 following Advocate General Kokott, 17 January 2013*. Hence the CJEU's very restrictive approach.

The Government is plainly right in its current view that this is inappropriate for domestic judicial review.

2. The s.7(1) HRA test, under which a person may only bring a claim under the Act if they are or would be a victim of an alleged breach of human rights.

It is submitted that this is by its nature very difficult to apply to the typical planning or environmental challenge, for the reasons articulated by Lord Hope in Walton. It runs the risk of offending Aarhus principles, which have become part of EU law in certain contexts. Nor is the answer about NGOs or campaign groups as clear as the Consultation Paper would have it. NGOs cannot bring Article 2 or Article 8 claims to Strasbourg in their own right. However NGOs have brought Article 6 claims in Strasbourg about unfairness in the domestic proceedings or Article 10 claims about lack of information in the environmental context, which have obtained standing: see, e.g.

- *L'Erabliere v. Belgium*, a challenge to a landfill expansion project brought by an NGO. The Court focussed on the local nature and narrow statutory objectives of the NGO, (coupled with the impact upon its members) so Article 6 was engaged

- *Collectiv Stop Melox et Mox*, (75218/01), a challenge to nuclear reprocessing, where the Court refused to exclude an Article 6 claim; it felt able to apply the requirements of Article 6 with flexibility. It quoted the Aarhus Convention to show that the public's right to information includes the right of NGOs.

It is submitted that the answer would be far from clear if the Government adopted this test. NGOs might well have standing, for some aspects of the dispute. This could be a potentially fertile ground for costly preliminary litigation and/or references to the CJEU.

There are advantages which a well-focussed NGO (whether a local or national one) brings to planning inquiries or the litigation which might follow them. Litigation by a set of individuals objecting to a proposal is no better and quite often a lot worse than acting via a well-organised group.

More generally, one risks arguing about the form of proceedings (brought by an individual, or an individual bringing it on behalf of an unincorporated association or by a limited company) rather than their substance.

3. In statutory planning challenges, the "person aggrieved" test; i.e., prior participation in the decision-making process or an interest in the land in question.

It is submitted that there are difficulties here about generalising to judicial review from the specific context of a second if not third stage planning process. It is not unreasonable where there has been, say, a planning inquiry to expect a challenger to have participated in this, either as part of a local group, or as an individual

participant. However, it is instructive to consider the situation of someone who wants to challenge a grant of planning permission where the main issue is, for example, noise; and whilst this was raised before the LPA by others (who have insufficient time, resources or stomach for litigation), the individual challenger did not send in a letter of objection. He plainly has sufficient interest, but he is not an aggrieved person. This seems an illogical way of determining whether someone can complain about the unlawfulness of a decision.

4. The legal aid test: "....the potential to produce a benefit for the individual, a member of the individual's family or the environment."

This meets certain of the objections outlined above for environmental cases, but would rule out many challenges in non-environmental cases, and the rule of law benefits which they can confer. More importantly, the test equates the ability to gain funding with the ability to take proceedings. There is no logical link between them.

Any attempts to draw a narrower line in these fields (whichever line be taken) will be counter-productive, and give rise to sterile and expensive preliminary debates about standing. Indeed, even if the public authority defendant were not to take a standing point, the interested party developers (without any cash constraint) would take the point, good or bad.

Standing points are also classically appellate points, and the worst of all outcomes for projects is that they get delayed by a point of law about standing going on appeal, even before one gets to the substantive hearing.

In addition the Government does not appear to have considered what the effect of the proposed restrictions on standing would be for applications which are brought

for essentially commercial reasons, such as a supermarket chain applying for judicial review of a decision to grant planning permission to a competitor to develop a new store. Property developers have also been known to apply for judicial review of decisions to grant planning permission for competing schemes.

Other options are to ensure that the question of standing complies with the UK's obligations under the Aarhus Convention.

Q.11 Are there any other issues, such as the rules on intervenors, the Government should consider in seeking to address the problem of judicial review being used as a campaigning tool?

Sometimes judicial review is used as a campaigning tool: see e.g. *R (People and Planet) v HM Treasury* [2009] EWHC 3020 (Admin). That is inevitable; does it constitute an abuse, probably not: see J Lewis "Winning the campaign or winning the case?" J.R. 2007, 12(2), 107-111.

Q.12 Should the consideration of the "no difference" argument be brought forward to permission stage on the assertion of the defendant in the Acknowledgement of Service?

This would be impractical. Moreover, the Courts apply a strict test concerning "no difference", for good reason. Asking whether a procedural failing would have made no difference unless applied strictly involves enquiring into the merits. That the Court should not do. Generally it is defendants who are telling the Courts not to enquire into the merits; an expansion of the "no difference" test will see defendants inviting the Courts to look more at the merits. Once in, it will be difficult then to hold a line.

Q.13 How could the Government mitigate the risk of consideration of the "no difference" argument turning into a full dress rehearsal for the final hearing, and therefore simply add to the costs of proceedings?

For the reasons re Q12, the risk cannot be mitigated.

Q.14. Should the threshold for assessing whether a case based on a procedural flaw should be dismissed be changed to 'highly likely' that the outcome would be the same? Is there an alternative test that might better achieve the desired outcome?

No - this would simply introduce merits reviews.

Q.15. Are there alternative measures the Government could take to reduce the impact of judicial reviews brought solely on the grounds of procedural defects?

No.

Q.16. Do you have any evidence or examples of case being brought solely on the grounds of procedural defects and the impact that such cases have caused (e.g. cost or delay)?

No

Q.17. Can you suggest any alternative mechanisms for resolving disputes relating to PSED that would be quicker and more cost-effective than judicial review? Please explain how these could operate in practice.

ADR has a very limited role in public law; the main studies on it see (Bondy et al) have rightly concluded it is not very useful in public law.

Q.21. Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

We think not; but the current costs rules are odd. If permission is refused at the paper stage cost of the Acknowledgement of Service often follow, but no more costs are likely if there is a renewal. This tends to incentivise renewal. A better rule might be that there are no costs on a paper refusal, but if renewed and that fails then and only then costs are awarded, although perhaps capped (save exceptionally) by reference to the costs of the Acknowledgement of Service.

Q.28 What are your views on the proposals to give greater clarity on who is funding the litigation when considering a PCO?

We think that this is worthy of further consideration.

Q.29 Should there be a presumption that the court considers a cross cap protecting a defendant's liability to costs when making a PCO in favour of the claimant? Are there any circumstances when it is not appropriate to cap the defendant's costs liability?

The current CPR approach to cross caps is appropriate.

Q.31 Should third parties who choose to intervene in judicial review claims be responsible in principle for their own legal costs of doing so, such that

should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

Yes, they should. And this should apply whether they are interveners or interested parties. It is very important that a Claimant should know where he stands at the beginning of proceedings, and (irrespective of the application of an Aarhus or non-Aarhus PCO) know that he should not have contingent liabilities to third parties which are not determined until the end of the case.

Question 32: Should third parties who choose to intervene in judicial claims and who cause the existing parties to that claim to occur significant extra costs normally be responsible for those additional costs?

Generally, yes, but sometimes NGOs intervene and argue points that a claimant should have taken but did not; this adds to costs.

Q 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

They work when the applicable rules are simple and so that the parties do not spend time and costs fighting about the potential incidence of costs. They do not work well where the court has to decide a full range of issues relevant to the case before deciding whether to grant a PCO.

Q 34: Do you have any evidence or examples of the use of costs orders including PCOs, wasted costs orders, and costs against third parties and interveners?

Oldfield v Sec. of State [2013] EWHC (27.3.13)	C: £2K, R, £35K (plus VAT)
R (Holder) v Gedling BC (10.5.13)	C: £5K, R, £40K
Roberts v Elmbridge BC (19.4.13) (2 cases)	C: £5K, R, £35K
R (Prideaux) v Bucks (Nov 2012) (agreed)	C: £5K, R, £35K (inc VAT)
R (Champion) v North Norfolk DC (19.4.13)	C: £5K, R, £35K (plus VAT)
R (May) v Rother DC (17.4.13),	C: £5K inc disb & VAT, no recip
Bowen-West 2011 CA	C - £5K throughout inc CA

Thomas v MMA, CA, private nuisance (agd some cap approp) C: £2.5, R £8K

Waste costs orders: No.

Costs against third parties and intervenors: No.

Q 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

Leap-frogging the Land and Planning Chamber may reduce its usefulness.

Q.36: Are there any other types of case which should be subject to leapfrogging arrangements?

Any matter that gives rise to a point of general public importance notwithstanding that this may not be a matter of national importance.

Q.37: Should the requirement for all parties to consent to a leapfrogging application be removed?

Yes.

Q38: Are there any risks to this approach and how might they be mitigated?

There is a risk that there could be an increase of cases being considered by the Supreme Court.

This will be mitigated by the court of first instance and the Supreme Court retaining discretion to refuse a leapfrog appeal.

Q.41: If the Government implements any of the options for reforming leapfrog appeals, should those changes be applicable to all civil cases?

Yes.

Q. 43: 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 consultation paper?

None known.

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