Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

Evidence submitted by the

Environmental Law Foundation

Introduction

1. The Environmental Law Foundation (ELF) is a national legal charity. Its primary purpose is to make free legal advice and support available to communities throughout the United Kingdom (UK) who have concerns relating to the environment – whether at the local, regional or national level. In furtherance of the access to justice provisions of the UNECE Aarhus Convention,[1] ELF enables grassroots communities to have equal access to the courts and to participate effectively in environmental decision making through legal challenges to bad environmental decisions. We also work to make environmental legal assistance affordable for socially and economically disadvantaged communities.

2. Each year, ELF receives around 250 enquiries from members of the public on environmental matters. This number has been growing, particularly during the recent periods of national and local lockdown, as communities increasingly want to see environmental action and change. Approximately half of these enquiries are related to planning and it is these planning enquiries that produce our judicial review (JR) casework. There may be up to 20 JR cases each year in which members of the public receive pro bono legal advice with our assistance. Several cases subsequently fall away because they are without merit. Through this process, we assist the judicial process to sift potential JRs.

3. On 7 September 2020, the Secretariat of the Independent Review of Administrative Law Panel (IRAL) issued a call for evidence to "all listed parties" in addressing the question of whether "judicial review strike[s] the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government".[2]

4. The call for evidence indicates that the Panel is considering "public law control of UK-wide and England and Wales powers only". The evidence contained in this document is therefore limited to the way in which JR is applied "to reserved, and not devolved, matters".

The role of JR in environmental law

5. ELF assists members of the public to understand local environmental decision making. We assist grassroots communities to effectively participate in the environmental decisions

[1] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, available at <https://www.unece.org/env/pp/introduction.html>.
[2] Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf>.

that affect them. We are the only UK charity offering a national service to the public across the vast range of concerns that arise in environmental and public law.

6. Communities have a vested and personal interest in their local environment and how it is developed. Indeed in contacting ELF communities are motivated by a desire to protect something that they love and is important to them. In our experience communities want to participate in the decisions that affect them and make for stronger communities if they do. Indeed it is a fundamental tenet of local democracy. ELF receives hundreds of enquiries a year from local communities concerned about environmental decisions that affect their local area, wanting to have a voice in it and routinely finding that voice ignored by decision makers. It leaves these communities very frustrated.

7. ELF is seeing great pressures for development on green space. Increases in centrally identified housing targets has put massive pressure on local authorities to build on greenfield open space, public space, greenbelt and local nature reserves. We see this particularly in more deprived urban areas where sufficient provision of and access to green space already falls short. Those pressures have never been so acute. The government is aware of our rapidly declining biodiversity in the UK and communities are rightly worried. Local people can improve decision making by bringing local knowledge and memory to the process, having a net positive impact on how decisions are taken.

8. Through its access to pro-bono barristers and solicitors, ELF is able to identify for local people the elements of bad environmental decisions that may be open to legal challenge through JR (or not). This enables democracy in decision making by giving local people equal access to professional legal help at a very early stage of the JR process. By the time claimants have made the decision to JR they have often been engaged with the decision making process for years. JR is often the last resort after a lengthy campaign of engagement by the local community. In our experience local people will do whatever they can to properly engage with local decision making and will go to lengths to avoid JR which is uncertain and very expensive. JR is the option of last resort when all other avenues have failed.

9. It has primarily been left to grassroots communities to protect our local environment though challenging bad decisions. NGO's prioritise national and safer legal challenges. The financial risks of adverse costs involved in being a claimant has a chilling effect. Any limit to this important procedure for revisiting bad environmental decisions would severely hinder local people's access to environmental justice and local democracy. Defective decision making would go unchallenged, meaning worse outcomes for our environment and nature.

10. There is already an inequality in who can afford to challenge through JR due to the default caps already in place (£5,000 for an individual claimant and £10,000 for an organisation). We see poorer communities unable to meet those costs. Already for many communities those risks will be too high. Still, the JR process is crucial to the protection of the environment: this cannot be overstated and indeed has never been so important. JR is the only available recourse to overturn bad environmental decisions in law.

11. ELF sees so many grassroots cases that we have a unique perspective on environmental law and what is occurring at that grassroots level. Communities who engage in local decision making effectively – who are encouraged to do so, by being given a voice and listened to – make for more cohesive and stronger communities. ELF sees individuals develop their skills and confidence at this engagement level, such that many communities

strengthen together over something that they love and will put effort into saving for future generations.

12. Through this process, civil society is improved. Involvement in decision making is a function of civil society and the ability to challenge bad decisions is enshrined within the UK conception of the rule of law. Mechanisms must be maintained for civil society to have a voice. Any additional limits to access environmental justice through changing the JR process would deny civil society a voice in decision making with impacts at the local level.

13. We are at a critical time for environmental protection. It has never been so important. The government and local decision makers have not taken adequate measures to protect the natural environment. The UK is failing on its long-term biodiversity targets and seeing "relentless" declines in wildlife, according to government data that shows public sector investment in conservation falling in real terms by 33% in five years. If protecting nature is to be left to local people then the ability to challenge bad environmental decisions should be improved, not limited.

The scope of previous reforms

14. There have been significant reforms over the past 10 years that have impacted greatly on the public's ability to challenge environmental law decisions through JR. ELF campaigned for many years to have the rules changed on adverse costs in environmental JR public law challenges.

15. Before changes were introduced, there had been no adverse costs capping on the award of costs against the losing party. ELF presented evidence that this factor meant many good claims did not proceed, with defendants often using adverse costs as a way to discourage claims. ELF produced 2 reports on how adverse costs created a huge barrier to access to environmental law challenges for local communities.

16. ELF was pleased when, in 2013, the Civil Procedure Rules (CPR) introduced costs caps for environmental cases that involved Aarhus Convention claims. This was a welcome and positive step and to some extent moved the UK towards compliance with the Aarhus costs rules. However, in 2017, the Civil Procedure (Amendment) Rules (CPAR) introduced a number of lamentable changes to this protective costs regime:

    (i) The amendments to the Aarhus cost capping rules introduced the requirement that a claimant submit a schedule of means with their claim;
    (ii) A defendant could then apply to vary the costs cap upwards;
    (iii) Time limits on planning JR were reduced from 3 months to 6 weeks (from 31 July 2013).

The impact of previous reforms

Schedule of Means

17. Enshrined within the Aarhus Convention, to which the UK is a signatory, is the tenet that access to environmental justice should not be "prohibitively expensive". The Courts operate under the system of awarding adverse costs against the losers of litigation, including in public law cases. Potential claimants in public interest cases therefore have to

contemplate the chilling prospect of paying the defendant's costs if their claim is unsuccessful, even before they contemplate their own costs, which often runs into tens of thousands of pounds.

18. The CPAR introduced the requirement for a claimant to submit a schedule of means supporting an Aarhus claim. This has unsettled many claimants. When people are making a decision to pursue a claim in the public interest – and not in a private interest capacity, where there is financial incentive – it is often difficult to find a claimant willing to take the financial risk. To so publicly declare their means is also intrusive and local people find it so. The fact that this document is treated confidentially between the parties is helpful, but it remains a psychologically off-putting factor.

Variation of costs cap

19. The change introduced at the same time now means a defendant can apply for a variation to the cost cap, which has had an further destabilising effect on claimants' decision to pursue JR. The uncertainty created by not knowing at the outset what your adverse costs may be, because that they may be varied at any time, creates additional barriers.

20. We are also seeing an increase in the number of defendants who successfully apply to vary the claimants' costs cap upwards. Moreover, in the recent case of *R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey,*[3] the judge ruled that an interested party could also apply to vary the costs cap. Decisions such as these make it increasingly difficult for claimants.

Reduction of time limits

21. The reduction in time limits for commencing a JR against planning decisions has particularly undermined access to justice for local people. On the 1 July 2013, regulations reduced the time limit in which one could apply for the JR of planning decisions from 3 months to 6 weeks. At the time this change was introduced, government stated that this would stem the growth in applications for JR and reduce the delay and uncertainty for development projects. This was an unsubstantiated statement at the time and, since then, no further evidence has been produced that there had been a growth in environmental and planning JRs. Instead, these changes have impacted on the ability of communities to organise, which is crucial when resources and knowledge are limited and access to expert advice is not readily available. This should be compared to the near unlimited resources of those who take the benefit of the decision.

Loss of expertise

22. ELF has seen and has evidence of a serious loss of environmental expertise at the local authority level in the last 10 years. Significant cuts to local authority budgets have seen departments cut and experience lost. This loss of experience has had a detrimental impact on the ability of decision makers to make good decisions for the environment and resulted in an increase in bad environmental decisions being made. The fact that more JR's are not being brought reflects how difficult it is to bring JR proceedings.

23. Indeed the potential costs liability of having an adverse costs award make against a claimant, even if limited to £5,000, is seriously beyond the level of money that many people are prepared or able to lose. JR is never undertaken lightly by claimants and the idea that

[3] CO/3213/2019 [2020] EWHC.

there are all obstructive is simply not the reality on the ground. JR is all consuming and the financial risks are high.

24. Data shows that only 1 in 4 environmental JRs are successful. In October 2019, in the absence of any official data on JR, a report on the impacts of legal reform on access to environmental justice in England and Wales was published by the RSPB and Friends of the Earth. The report, entitled 'A Pillar of Justice'[4], analysed anecdotal reports from before 2013 and data obtained from the Ministry of Justice since 2013. Its findings do not correlate with the government narrative of delay and obfuscation.

The proposed reforms

25. The various proposals for reform raised in the IRAL Terms of Reference are considered in the paragraphs that follow. However, we note that these proposals strike at the very heart of JR as it currently operates within our legal system. At the outset, we would underline the point that any proposals for reform must be supported by cogent evidence indicating a problem in the current system that the reforms are intended to resolve.

26. With this in mind, we would take the opportunity to refer the Panel once again to the Ministry of Justice's data that the number of environmental JRs (and potentially non-environmental JRs) is in fact falling. Taken together with the evidence set out below, it is clear that efforts to reform the JR process should endeavour to improve, not weaken, access to environmental justice.

Whether the rules and procedure of JR should be codified in statute

27. The grounds of JR identified in the call for evidence have been developed and refined gradually over the course of many years. The evolution of legitimate expectations and the elaboration of *Wednesbury* unreasonableness are just some examples of the way in which certain grounds have been judicially developed so that they are more effective in reviewing the substantive legality of decisions than was possible under their original formulation. Meanwhile the potential recognition of other grounds, such as proportionality, has been the subject of lengthy academic and judicial debate.

28. ELF is not convinced that the codification of JR grounds would clarify or enhance the state of the law in any meaningful way. Rather, in rejection of its illustrious heritage, this approach may reduce the potential for the evolution of administrative law in the future. Administrative law is an area in which the courts regularly engage with complex and novel points of law in the context of changing government policy and social values. We firmly believe that it is important that this genesis is allowed to continue in the interests of the justice system as well as its participants.

Whether certain executive decisions should or should not be justiciable

29. The effective application of the rule of law is a fundamental tenet of modern democracy and has long been a cornerstone of the UK legal system. In the words of AV Dicey, one of the UK's leading constitutional legal scholars, the rule of law requires that "every man, whatever his rank or condition, is subject to the ordinary law".[5] The corollary of this

[4] Available here

[5] AV Dicey, *Introduction to Study of the Law of the Constitution* (10th edn, Liberty Fund 1959) 193.

imperative is that no natural or legal person is exempt from the application of the law. ELF can therefore identify no basis for the exemption of certain acts of government from the control of JR, which currently serves as the only mechanism of challenging the lawfulness of executive decision making.

Whether any other reforms are required to the JR procedure

30. **Costs:** ELF is concerned by the UK's continued failure to comply with the requirement in Article 9(4) of the Aarhus Convention that legal costs in environmental cases must not be "prohibitively expensive". Each day, ELF assists members of the public and community groups to access legal advice and support relating to all manner of environmental issues. Where possible, this advice and support is provided by lawyers on a pro bono basis or at a reduced rate. At present legal aid is not available unless permission is granted to bring JR proceedings. The availability of legal assistance to grassroots communities is therefore highly contingent on its affordability, both to the lawyers offering it and the individuals accepting it.

31. In 2009, ELF produced a report in collaboration with the Centre for Business Relationships Accountability, Sustainability & Society (BRASS) on 'Costs Barriers to Environmental Justice.' In the report, the authors concluded that costs "remain[ed] as substantial a barrier as ever before to the achievement of access to environmental justice." Since then, environmental costs rules have been the subject of two cases before the Court of Justice of the European Union (CJUE) and undergone significant reform.[6]

32. ELF observes, however, that such reforms have been criticised consistently by the Aarhus Convention Compliance Committee (ACCC).[7] In its most recent review:

    (i) Despite welcoming the extension of Aarhus costs protection to challenges brought under section 288 of the Town and Country Planning Act 1990, the ACCC noted that a number of types of claims, such as private nuisance, are still exempt from costs protection;[8]
    (ii) The ACCC lamented the gap in costs protection for unincorporated associations;[9]
    (iii) The ACCC reiterated that the current levels of default costs caps (£5,000 for individuals and £10,000 for organisations) can still be prohibitively expensive for many claimants;[10]

[6] Case C-260/11 *R (Edwards and anor) v Environment Agency and ors* EU:C:221; Case C-530/11 *European Commission v UK* EU:C:2014:67.
[7] ACCC Decision IV/9i (available at <http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/Excerpts/Decision_IV-9i_Compliance_by_UK_e.pdf>), Decision V/9n (available at <http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf>) and Decision VI/8k (available at <https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance_by_United_Kingdom_VI-8k.pdf>), arising from MoPs in 2011, 2014 and 2017 respectively.
[8] ACCC Second Progress Review of the Implementation of Decision VI/8k (available at <https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_the_Party_concerned/Second_progress_report/Second_progress_review_on_VI.8k_UK_adopted.pdf>) paras 37-39.
[9] ibid paras 40-42.
[10] ibid para 45.

(iv) The claimant cap variation in CPR 45.44(2) could only be acceptable if caps were adjusted downwards to account for this. However, the ACCC noted that the current trend is for costs caps to be varied almost exclusively upwards;[11]
(v) The ACCC expressed concern that variation of a cost cap could take place late in proceedings or even after judgment and that the ability for courts to consider afresh the matter of prohibitive expense on appeal under CPR 52.19A "fails to ensure sufficient clarity of costs protection for claimants";[12]
(vi) The ACCC remarked that rule requiring separate costs caps for multiple claimants had "no basis".[13]

33. In line with these concerns, ELF strongly urges the Panel to introduce rules under which a costs cap is set at the outset of proceedings and only varied *downwards* where the need for a lower cap is proved by the claimant(s). The possibility to reconsider costs on appeal should only be available in exceptional circumstances and where it would not expose the claimant(s) to prohibitive expense. The reciprocal costs cap of £35,000 should be removed altogether as it perversely risks many cases becoming too expensive to win.

34. **Standing:** It is the case that the court will only grant leave for a claimant to bring JR if they have sufficient interest in the claim. The applicant's interest will be assessed when the court considers the papers at the permission stage, in the context of all factual and legal circumstances. Sufficient interest is easily identified in all ELF cases as we deal primarily with local people affected by local decision making. However, this test is still limiting to a degree, for their might be many others who are impacted and interested in a decision. It is designed to ensure that frivolous and vexatious litigation against public bodies is avoided and ELF would not endorse any changes that would make the test harder to satisfy.

35. **Time limits:** Communities already struggle to issue proceedings for JR in planning cases within the very short 6 week time limit. Claimants have to adhere to the pre-action protocol which means within 3 weeks of the decision they have to have a clear idea of their grounds of challenge if they are to send a pre-action protocol letter setting them out. ELF would recommend only an extension of this time limit in order to allow communities sufficient time to access legal advice.

Conclusion

36. There is no evidence that we have seen to date, produced by the government or otherwise, that shows that JR challenges in environmental decision making is on the rise. In fact, research carried out by RSPB and FoE concluded the opposite: Aarhus JR claims have now fallen back to 2013/14 levels. There appears to be a decrease, not an increase, in the use of JR in environmental cases.

37. As unprecedented challenges face our environment and nature, the government should be encouraging the proper and effective participation of local people in environmental decision, by enabling them to hold local decision makers to account and, where necessary, challenge bad decisions when they are discovered. The foundations of democracy require citizens to have access to effective mechanisms to ensure the decisions of public bodies are lawful, and the environment needs its citizens to stand up for its protection.

[11] ibid paras 46-49.
[12] ibid paras 52-57 and 62-67.
[13] ibid paras 58-61.

Environmental Law Foundation

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