

**Ministry of Justice**

## **LEGAL SECRETARIAT**

**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?**

### **Call for Evidence**

#### **Response from Brethren's Gospel Trusts – Planning Group**

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#### **Introduction to Respondents**

- 0.1 This response is submitted by the planning group of the Brethren's Gospel Trusts. We are primarily concerned with national and local planning policy for the voluntary sector generally, with particular focus on the needs for faith communities. This is in support of the provision of non-domestic buildings, which are used as Places of Worship, together with private schools.
- 0.2 The Plymouth Brethren Christian Church was founded about 200 years ago and is represented in about 85 towns and cities throughout England with around 14000 worshippers. The fellowship is increasing in numbers and the recent programme of building replacement and new Gospel Halls together with private schools is expected to continue in the future.

- 0.3 The Brethren's Gospel Trusts planning group welcome the opportunity to respond to the current call for evidence from the Independent Review of Administrative Law Panel. The Brethren conduct themselves in accordance with teachings of the Holy Bible and recognise, respect and support government as ordained of God<sup>1</sup>.
- 0.4 The Brethren community have limited recent direct experience of judicial review proceedings. However, the community are frequently engaged with local authorities throughout England and Wales in connection with town and country planning matters including planning applications and making representations on matters of planning policy. From time to time these may result in the need for appeals to the Planning Inspectorate, acting on behalf of the Secretary of State for Housing Communities and Local Government. Representations are also made on behalf of the Brethren community in response to government proposals for changes in the town and country planning legislation and national policy, such as the current proposals set out in the Planning White Paper. There have also been wider matters of concern including Rating of Places of Worship and in respect of Charity Law which have resulted in litigation.

## **1.0 Scriptural basis for Judicial Review**

- 1.1 We submit that an independent and transparent judicial system is an essential and integral element in government, comprising the executive, the legislature and the judiciary; often likened to a three-legged stool.
- 1.2 This principle is supported by the scriptural reference:

*For the Lord is our judge, the Lord is our lawgiver, the Lord is our king: he will save us.*

Isaiah ch 33 verse 22. [King James: Authorised Version]

- 1.3 The principle of an appeal to a higher tribunal is also supported by the following:

*If thou seest the oppression of the poor, and violent perverting of judgement and justice in a province, marvel not at the matter: for he that is higher than the highest regardeth; and there be higher than they.*

Ecclesiastes ch 5 verse 8 [ibid]

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<sup>1</sup> Gospel according to St John ch19 v11.

## 2.0 High Level Guidance

- 2.1 It has been said that people living in all types of community have one thing in common: mutually agreed rules of conduct appropriate to their way of life, with explicit consequences for failure to observe the rules. This is what law is all about.<sup>2</sup>
- 2.2 In the context of local government law generally and planning law in particular, we submit that the satisfactory and equitable operation of the system of administration at national government and local level is only possible provided that there are fair and predictable procedures with clear rules, and remedies are available in the small number of cases where these may be broken. Furthermore, when it is necessary to bring challenges, they need to be resolved with speed, clarity, fairness and efficiency.
- 2.3 *Judicial Precedent* - The basis of all legal argument and decision both in the courts and the planning appeals system is founded upon the application of rules announced in previous decisions, whereby the doctrine of judicial precedent has become a fundamental characteristic of common law.
- 2.4 *Authority of a judgement* – The most important part of any leading judgement is that where the court explains the principles on which their decision has been based. A judgement is in effect an authoritative lecture on the relevant branch of the law, which creates a precedent for the future. Such precedents are not only binding on every inferior court making the decision, but also these provide clear guidance to other tribunals including the Planning Inspectorate and to local government and practitioners in reaching their decisions in a wide range of functions and duties.
- 2.5 *Recent examples* – The following are cited as some recent examples in town planning law and practice which clearly illustrate the value of the courts providing authoritative, clearly reasoned guidance on a range of issues:
- ***Tesco Stores Ltd v Dundee City Council*<sup>3</sup>** - planning policies cannot mean whatever planning officers want them to mean.
  - ***Cala Homes (South) Ltd v SoSCLG*<sup>4</sup>** - improper exercise of statutory powers in revocation of Regional Strategies.
  - ***Suffolk Coastal DC v Hopkins Homes Ltd*<sup>5</sup>** and
  - ***Barwood Strategic Land II LLP v East Staffordshire BC*<sup>6</sup>** - the scope of the 'presumption in favour of sustainable development' in the NPPF.
  - ***Champion v North Norfolk DC*<sup>7</sup>** - compliance with EIA regulations and 'appropriate assessment' under Habitat Regulations.

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<sup>2</sup> Architects Journal Legal Handbook: The Architectural Press: 1978

<sup>3</sup> [2012] UKSC 13.

<sup>4</sup> [2010] EWHC 2866 (Admin).

<sup>5</sup> [2017] UKSC 37.

<sup>6</sup> [2017] EWCA Civ 893.

<sup>7</sup> [2015] UKSC 52.

- ***Dover DC v CPRE Kent***<sup>8</sup> - proper reasons needed for planning decisions.
- ***Norfolk Homes Ltd v North Norfolk DC***<sup>9</sup> - effect of s73 application on previous agreement under s106.
- ***DLA Delivery Ltd v Baroness Cumberlege of Newick***<sup>10</sup> - the need for consistency in decision-making and clear reasons for any differences.
- ***DB Symmetry Ltd v Swindon BC and SoSHCLG***<sup>11</sup> - whether a planning condition can lawfully require a developer to provide a public highway.

2.6 Each of these leading cases have contributed to a fair, transparent and consistent planning system which provide valuable guidance in the application of planning law and practice in a wide variety of proposals both in preparation of a planning application and in the decision-making process, whether in negotiation with a local planning authority or in a planning appeal.

2.7 In addition to central government, local authorities are subject to the scrutiny and control of the courts in the sense of a limited kind of supervisory jurisdiction over certain acts of any executive agency and in the exercise of this jurisdiction may grant orders, may issue directions and injunctions in relation to acts or proposed acts which are *ultra vires* or otherwise contrary to law, and may hear appeals where such a right is conferred by statute. The courts do not take the initiative in any of these matters; they will act only at the suit of a litigant with sufficient “standing”.

2.8 Government at all levels clearly must operate within the law and without an ability of the courts to test the lawfulness of government action and process, political expediency would inevitably result in short cuts being taken which would undermine democracy.

### ***Wednesbury unreasonableness***

2.9 One of the aspects of judicial review highlighted in the questionnaire to government departments is *judicial review for Wednesbury unreasonableness*. Wednesbury unreasonableness is often relied on in Planning challenges. This was considered in a number of the above decisions.

2.10 In the case of ***Cala Homes*** Sullivan LJ stated:

*“Although the weight to be given to any particular material consideration is a matter for the decision-maker, the decision-maker must not “lapse into Wednesbury irrationality”, see Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, per Lord Hoffmann at page 780 F-G; see also Lord Keith at page 764 H.”* [30]

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<sup>8</sup> [2017] UKSC 79.

<sup>9</sup> [2020] EWHC 2265 (QB).

<sup>10</sup> [2018] EWCA 1305.

<sup>11</sup> [2020] EWCA Civ 1331

He continued:

*“In most cases the constraint of Wednesbury rationality will be a very light rein because the Courts normally give very wide latitude to planners’ judgements as to the weight to be given to planning considerations.” [31]*

- 2.11 Lindblom LJ gave the leading judgement in the Court of Appeal in the case of **Barwood Strategic Land II LLP**<sup>12</sup>. He stated:

*“And it is for the decision-maker to decide what weight should be given to NPPF in so far as it is relevant to the proposal. Because this is government policy it is likely to command significant weight, but the court will not intervene unless the weight given to it by the decision-maker can be said to be unreasonable in the **Wednesbury** sense (see paragraph 46 of the judgement in **Bloor Homes East Midlands Ltd.**, and paragraphs 62 and 70 of the judgement in **Crane v Secretary of State for Communities and Local Government** [2015] EWHC 425 (Admin)). [14]*

- 2.12 In his Court of Appeal judgement in **Suffolk Coastal**<sup>13</sup> Lindblom LJ reaffirmed the above principle, stating:

*“It is for the decision-maker to decide what weight should be given to NPPF policies in so far as they are relevant to the proposal. Because this is government policy, it is likely always to merit significant weight. But the court will not intervene unless the weight given to it by the decision-maker can be said to be unreasonable in the **Wednesbury** sense.” [43]*

- 2.13 The case of **DLA Delivery** again raised issues of this nature. Lindblom LJ again gave the leading judgement, stating:

*“Prominent in the case law is the decision of House of Lords in **In re Findlay** [1985] A.C. 318 (at pp.333 and 334). In that case there was no express statutory requirement for consultation, and it was impossible to imply any such requirement into the statute. But the “**Wednesbury principle**” was invoked in support of a submission that no reasonable Home Secretary could have reasonably omitted to consult the Parole Board on the new policy in question.” [21]*

He continued:

*“In the context of planning law, one can point to the judgement of Carnwath L.J., as he then was, in **Derbyshire Dales District Council v Secretary of State for Communities and Local Government** [2010] 1 P. & C.R. 19, which, as the judge acknowledged (in footnote 9 of his judgement), was “consistent with the interpretation of **In re Findlay** as imposing a **Wednesbury** test”. Carnwath L.J. referred (in paragraph 25 of his*

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<sup>12</sup> [2017] EWCA Civ 893

<sup>13</sup> [2016] EWCA Civ 168

judgement) to Cooke J.'s "important statement of principle" in **CREEDNZ**, which "had been adopted by the House of Lords in **Re Findlay**..." and by the Court of Appeal in *R. (on the application of the National Association of Health Stores) v Department of Health* [2005] EWCA Civ. 154. He noted (in paragraph 26) that Cooke J. "took as starting point" the observation of Lord Greene M.R. in the *Wednesbury* case (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 K.B. 223, at 2280 that "[if], in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters". [25]

- 2.14 It is submitted that these examples of the application of the **Wednesbury** doctrine support the contention that the right balance is currently struck.

### 3.0 Impacts on Faith Communities

- 3.1 The examples of caselaw given above are all wide-ranging judgements which did not impact directly on faith communities. The following examples illustrate the manner in which Judicial Review and analogous procedures have directly impacted on the Brethren and other faith communities:

- **Bristol Meeting Room Trust v Secretary of State for the Environment** [unreported] – a challenge to a biased planning appeal decision which the court held 'vitiating' the decision and a subsequent challenge to the reappointment of the same Inspector to redetermine the appeal.
- **Holmes v Secretary of State for the Environment**<sup>14</sup> - provision of a proposed place of worship in Green Belt where the proposed development would preserve or improve the open nature of the area within the meaning of the Greater London Development Plan.
- **Barnet Meeting Room Trust v Secretary of State for the Environment**<sup>15</sup> - failure of the Secretary of State to give adequate reasons for his decision and failure to deal with a material consideration and inconsistency with earlier decisions.
- **Land at 57 Bethune Road London N16 5EE**<sup>16</sup> - redetermination of planning appeals in respect of synagogue following a Consent Order quashing the original decision due to the failure of the Inspector to have regard to the Public Sector Equality Duty as required by section 149 of the Equality Act 2010.

- 3.2 As is often the case, the above decisions all relied on binding decisions from earlier judgements; thereby illustrating the vital importance of judicial precedents in the workings of the planning and administrative legal system which is essential to the daily routine of decision making in local planning authorities as well as by the Minister for Housing Communities and Local

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<sup>14</sup> [1983] JPL 476

<sup>15</sup> [1990] JPL 430

<sup>16</sup> PINS appeal decision APP/U5360/C/11/2159648 dated 7 May 2015

Government and his planning inspectors who handle the many planning appeals throughout England and Wales.

- 3.3 A further example of an important planning judgement having a direct impact on proposals is provided by the appeal decision at Land adjacent to Yelverton Business Park, Stoke Hill Lane, Crapstone, Devon<sup>17</sup>, where the Inspector considered and allowed two concurrent appeals on adjoining sites located within the Tamar Valley Area of Outstanding Natural Beauty (AONB). One of these appeals was for a new meeting hall for The Plymouth Brethren Christian Church. The issues before the Inspector included whether the two proposed developments should be regarded as 'major development' contrary to the advice set out in the National Planning Policy Framework at paragraph 172 which states in the context of an AONB: *Planning permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest.* Evidence was given in writing of the caselaw set out in **Aston and Westcott Meadow Action Group v The Secretary of State for Communities and Local Government, Mole Valley District Council and Taylor Wimpey UK Ltd**<sup>18</sup> where the court rejected the submission that the term 'major development' should be given the same meaning wherever it appeared in regulations or planning policy documents. The Inspector's decisions at Crapstone followed the **Aston** decision.

#### 4.0 Conclusions

- 4.1 For all these reasons, we conclude that the current arrangements for Judicial Review do indeed 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.
- 4.2 Furthermore, we would respectfully submit that the function of Judicial Review contributes positively to the smooth running of transparent and equitable executive decisions and administration at both central government and local authority level, through the setting out of clear and reasoned interpretation of statute and policy as well as providing a check and balance to the decision-making machinery of government at all levels.
- 4.3 We would therefore urge the Panel to reflect carefully on the potential impacts of any proposed restrictions on the exercise of Judicial Review in relation to future challenges to the lawfulness of the actions and decisions of government at both central government and local government level.

J R Shephard  
For Brethren's Gospel Trusts – Planning Group

17 October 2020

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<sup>17</sup> PINS appeal decision APP/Q1153/W/17/3180723 dated 29<sup>th</sup> June 2018

<sup>18</sup> [2013] EWHC 1936 (Admin)