Independent Review of Administrative Law

Response by the British Property Federation to Call for Evidence

BPF

British Property Federation

1. The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £100bn to the economy in 2018 and supported more than 2 million jobs. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

2. Whilst we were not directly contacted by the Panel in relation to its Call for Evidence and as far as we know there was no formal Government press statement, the Call for Evidence was brought to our attention by our members. It is important that this review hears from business, rather than for responses to be dominated by voices within the legal profession, public bodies and claimant groups.

Relevance of administrative law to BPF members

3. The rule of law is important for business in delivering predictability of legal, regulatory and administrative outcomes and it is important that our courts retain their international reputation for independence and impartiality. Administrative law plays a necessary role, particularly in regulatory areas such as the operation of the town and country planning system. Our members may from time to time have to resort to judicial review and other administrative law remedies in order to protect their rights (which may include challenging decisions and policies of the Government and/or secondary legislation) but more frequently may find the judicial review system used "against them" by, for instance, those objecting to the grant of planning permission and related approvals and decisions by public bodies (most frequently local planning authorities).
4. Our members therefore have both direct experience of administrative law and a direct interest in ensuring that we have an administrative law system that exemplifies integrity, fairness and efficiency. The speed and quality of decision making by the Court is critical to our members; particularly where private contractual obligations are unable to be satisfied pending final determination of any legal challenge.

Responses to questions

1.Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

5. Our substantive comments and suggestions are set out in our responses below. However, we want specifically to applaud the work of the Planning Court and the progress that it has made since its establishment in 2014 in ensuring that cases are dealt with (at first instance at least) in a timely manner and heard by a specialist list of judges. It may be that other areas of administrative law would gain from an equivalent approach.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

6. We have the following proposals, the majority of which do not necessarily require changes in the law:

   i. It would be in the public interest for the Administrative Court to be more transparent, by way of modern information systems and digitisation, such that

      1. There is public access to information as to individual claims which have been filed - our members need to have recourse to this information in a form which they can rely on, given that agreements in relation to the sale, letting and development of land, and in relation to funding and financing, are frequently expressed to be conditional upon the expiry of the judicial review period without a claim having been brought (or, where a claim has been brought, that claim having been disposed of by the court leaving the decision intact). At present, for knowledge of the existence of a claim, the parties have to rely on either having been appropriately served with a copy of the proceedings as an interested party, by the claimant, after the proceedings have been filed (which is not a formal requirement for all claims under the Civil Procedure Rules), or on informal enquiries of the court itself, which are time consuming for all concerned, have not been available at all since the coronavirus pandemic began and the accuracy of which cannot be guaranteed and thus cannot be relied upon for the purpose of satisfying legal obligations.

      2. There should be public access to interlocutory orders that have been made, particularly any order by a judge to grant or refuse permission for a case to proceed to a full hearing - were such orders to be available, we consider that potential litigants may have a better understanding of how their potential grounds are to be dealt with meaning that fewer unarguable claims are likely to be brought.

      3. Statistics as to the length of time that cases take and eventual outcomes should identify the Planning Court's performance separate from the performance of the Administrative Court more widely.

   ii. Greater resources should be made available to the Court of Appeal to ensure that applications for permission to appeal to the Court of Appeal are dealt with within a tight timescale. Members' experience is that applications for permission to appeal (whether from a ruling of the High Court following a full hearing or from a refusal by the High Court to grant permission for a case to proceed to a full hearing) are routinely made by the disappointed party as they carry little by way of adverse costs consequences, but take many months to achieve an outcome, with no visibility as to when any outcome can even be expected. If timescales are not substantially improved then another way needs to be found of speeding up the way in which cases are disposed of which have already been found to be unarguable at first instance (and that may include reviewing whether the "totally without merit" threshold (meaning that there is then no oral renewal stage) is working as intended or whether a different approach is needed where there is an oral renewal right at first instance for such cases, strictly time-limited to 30 minutes).

   iii. We consider that there should be a review of the operation of crowdfunding in administrative law, particularly focusing on whether there should be any specific requirement as to the information to be given to potential funders as to the nature of the judicial review process, to

ensure that they are not being misled, or that the wording of any crowdfunding appeal should be required to be disclosed to the Court if Aarhus Convention costs protection is sought in relation to a case which is wholly or partly dependent on crowdfunding. (Notwithstanding this point we do recognise that, in the absence of legal aid, crowdfunding, as long as it is properly regulated, does have a necessary role in ensuring access to justice in some cases).

3.Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

7. Our members' experience is that statutory intervention in judicial review is not helpful and does not add certainty and clarity to the existing process and would reduce the inherent flexibility of the Civil Procedure Rules.
8. In town and country planning law some decisions are specifically made subject to a statutory challenge procedure, such as any challenge to a decision of the Secretary of State or his inspectors in relation to a planning appeal (section 288, Town and Country Planning Act 1990 and numerous equivalent statutory provisions) whereas other decisions, such as the grant of planning permission by a local planning authority, are susceptible to judicial review. The tests to be applied by the court are to all intents and purposes the same and there is the disadvantage of small but important critical differences between the procedures, introducing unnecessary uncertainty and "trip hazards" for the participants in proceedings. Over time, procedures have come closer together (for example in relation to the computation of time limits) but there are still, without any justification, material distinctions. For example, the test set out in Section 31 of the Senior Courts Act requires the Court to consider whether it is "highly likely" that a decision under challenge by way of judicial review would have been substantially different, if the conduct complained of had not occurred. However, that test does not apply to statutory appeals.
9. It is also difficult to legislate for every step which may give rise to the need for judicial intervention.

4.Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

10. It is clear what decisions/powers are subject to judicial review and which are not. In principle, decisions which affect businesses' or individuals' rights should be susceptible to judicial review and indeed, in relation to town and country planning law, the supervisory role of the courts is necessary in order to ensure that the right to a fair hearing by an impartial and independent tribunal is upheld, in compliance with the requirements of the Aarhus Convention and the European Convention on Human Rights. For example, if the Courts did not have jurisdiction to review the fairness and lawfulness of public decisions, then the Secretary of State's role as both policy maker and decision taker in relation to planning applications that are determined by him would be unsustainable (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23).

5.Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

11. Yes.

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

12. Planning law claims must be brought within six weeks. The introduction of this deadline in 2013 has given all participants in the process greater certainty than the traditional judicial review time limit of three months (within which claims must be brought promptly).
13. The certainty that this time limit gives is vital to business for the reasons given in our response to question 2 above (at (a)(i)). This time limit is also consistent with the time limit for statutory planning appeals under Section 288 of the TCPA 1990.
14. The High Court has proved sufficiently flexible where circumstances genuinely warrant an extension to the six weeks' time limit.
15. We consider that there may be merit in reflecting the procedure in relation to statutory challenges by requiring that judicial claims should not just be filed within six weeks but also served on the defendant and interested parties within that timescale. Given that this is achievable in relation to statutory challenges there is no reason why it should not be achievable in relation to judicial review.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

16. We have no comments. In our view the rules are applied appropriately.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

17. Intervening in judicial review proceedings as an interested party is expensive and it is rare for the interested party to recover more than a small proportion of the costs that it has incurred, despite having an equal or greater incentive to participate actively in the proceedings than the public body which is the defendant. Subject to access to justice issues, including the application of Aarhus Convention costs caps, we would suggest that the courts should be more willing to award successful interested parties their costs of intervening in proceedings where the decision to participate can be shown to be reasonable having regard to their legitimate interest in the outcome of the proceedings.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

18. We address this in our response to question 10.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

19. The House of Lords determined in *R (Burkett) v London Borough of Hammersmith and Fulham* (23 May 2002) that the time limit for bringing judicial review proceedings commences when planning permission is issued, rather than when the local planning authority resolved to issue it (which may often be months previously because the resolution on any significant development project is likely to be conditional upon prior negotiation and completion of an agreement under section 106 of the Town and Country Planning Act 1990 and possibly other matters). The consequence of that ruling has been that even where the grounds for judicial review have arisen at resolution to grant stage by way of real or perceived flaws either in the officers' report to committee or the relevant planning committee's reasoning in reaching its decision, a potential claimant is able to store up his or her complaint until after permission is issued (by which time the authority is functus officio and unable to rectify the error real or perceived so as to avoid the need for litigation. This is particularly ludicrous where the authority recognises, in response to the pre-action letter received following the issue of the permission, that the decision may have been flawed and yet the parties then have to go through a process of agreeing that the proceedings be commenced so that a consent order can be agreed by the parties and sealed by the court, resulting in the formal quashing of the permission. The problem is accentuated by the reluctance of local planning authorities to agree to revoke planning permissions, even where those entitled to compensation agree to waive that right.

20. This also results in claims being made, and the realisation of the significant public benefits of development being delayed whilst claims work their way through the Courts (often for many months or years), in circumstances where the subject-matter of the claim is something that the local planning authority's planning committee would be able to reconsider and resolve in a much shorter time period, were they to retain jurisdiction to do so. A large number of claims could be disposed of were this to be possible, freeing up resources in the Planning Court to deal with cases where there are genuine and substantive grounds for judicial review, rather than simply an attempt to appeal the merits of a duly and properly made planning decision.

21. The Administrative Court's pre-action protocol for judicial review, a "code of good practice" which "contains the steps which parties should generally follow before making a claim for judicial review", says nothing expressly to discourage the approach of storing up potential grounds of challenge until it is too late for any errors to be rectified other than by way of litigation, in that the protocol is expressed at a general level that does not engage with the specific peculiarities of the planning process. We suggest that the pre-action protocol be amended so as to advise prospective claimants that they should never "store up" prospective grounds of challenge until the planning permission is issued but make them known to the prospective defendant authority and potential interested parties without unreasonable delay and with the objective of giving the parties the ability to address the grounds (if necessary by corrective administrative steps) before the planning permission is issued and thus before it is too late to undo the administrative step of issuing the permission.

22. If further structure is needed around this, consideration might be given to endorsement of a procedure where a local planning authority may choose to make clear to the public in its publicity that if the outcome of a planning committee decision is to resolve to grant planning permission, the planning permission will not be issued before a specified date (say at least four weeks after the date of the resolution) and within that period those with potential complaints as to any aspect of the process up to that point be encouraged to make them known so that they can be considered by an internal review panel within the council (including the council's monitoring officer or suitable nominee). Whilst a subsequent claim for judicial review by a claimant would not be automatically turned away by the court if the claimant is seeking to make a complaint which had not been

raised through that process (after all, the claimant may not have been legally represented at that point or had the necessary information or resources to raise the issue) it could be taken to be a relevant matter for the court to take into account in deciding whether or not to grant permission for the claim to proceed to a full hearing. In practice, by this route many complaints may be able to be satisfactorily resolved (if necessary by returning the matter to committee with the error corrected, rather than necessitating judicial review). This would be entirely consistent with the overriding objective of the Civil Procedure Rules of enabling the Court to deal with cases justly and at proportionate cost.

23. It would also be useful for the law to be changed so as to allow local planning authorities to correct certain errors in planning decisions, equivalent to the power that the Secretary of State has in relation to his decisions and those of his decisions (pursuant to section 56 of the Planning and Compulsory Purchase Act 2004).

11.Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

24. It is rare for a settlement to be reached between the claimant and the defendant in planning cases, due to the binary nature of claims against the grant of planning permission and the lack of an effective procedure for dealing with claims once a planning permission has been issued (see above).
25. Most judicial review proceedings are disposed of at permission stage, in our members' experience. The reasoning given by the judge in his or her order granting or refusing permission is an important steer for the participants as to how the claim is likely to be reviewed at a full hearing and therefore we would wish to see that clear reasons are given as a matter of course. Some are unhelpfully perfunctory. By "disposed of" we mean either that the claimant decides not to proceed any further if permission is refused or (if permission is given) the defendant authority agrees to consent to judgment so that the decision can be taken again.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

26. ADR is in principle difficult to apply to potential claims arising under judicial review where what is at issue is not a dispute between two private individuals (for example a contractual dispute), but matters of public law, which by definition have wider implications.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

27. We believe that the question of standing should remain a matter for the courts.

For further information please contact:

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