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Independent Review of Administrative Law Panel
Ministry of Justice
102 Petty France
London
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IRAL@justice.gov.uk

27 October 2020

Dear Sir / Madam,

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

I write on behalf of WWF-UK in relation to the Call for Evidence issued on 7 September. WWF is one of the largest environmental NGOs in the world with offices in over 70 countries. WWF-UK has over 1 million members over 200,000 of whom are children and young people who care passionately about the world they are inheriting and the climate and nature crises that we face.

WWF-UK has a long and successful track record of using the law to advance its charitable purposes and to help it achieve its strategic goals. WWF uses law in a variety of ways at national and international level to support its advocacy and campaigning. This may include application to the courts as in the judicial challenge to a continuing failure to ensure favourable conservation status in a number of England's most sensitive and important wetland areas; or when we intervened in the challenge brought by Friends of the Earth, Plan B and others to the decision to adopt a NPS giving the go ahead to an increase in airport capacity in the south east (specifically at Heathrow).

WWF contends that there is nothing improper in the use of law in this manner. The rule of law is fundamental in a civilised society - writers down the ages have observed that the alternatives are tyranny or anarchy. In any event, government commits to adhering to the law¹. This commitment necessarily involves being held accountable to the law and one of the means by which this is achieved is judicial review.

WWF is concerned about the rights of citizens to take action to protect the environment (which itself is voiceless) and that the changes which the Review appears to be exploring, taken together with other measures (such as ministers taking greater

¹ See Ministerial Code - <https://www.gov.uk/government/publications/ministerial-code>

control of the new environmental regulator (Office for Environment Protection) in the Environment Bill serve to erode citizens' existing rights.

WWF has seen and is broadly supportive of the submission of Friends of the Earth, England Wales & Northern Ireland of 22 October to the independent review. It reiterates that the "Pillar of Justice" report of November 2019 found that claims relating to government's obligation under the Aarhus Convention were at levels seen in 2013 – 14 (based on MOJ data). In other words, no overall increase in judicial review claims in this area over the better part of 10 years. Evidence from the previous decade (gathered by the Environmental Law Foundation) points to much the same trend – that is to say no overall increase in environmental judicial review over the course of the second half of the 2000s (and, in fact, a moderate decline)².

Whilst the Review appears to be seeking evidence on whether the courts are mis-used or over-used by way of judicial review, WWF sees no such evidence in relation to environmental challenge (as the report referred to makes clear). It rejects out of hand any notion that certain areas of government decision making should be above the law or immune to challenge as fundamentally inimical to the rule of law³.

Further such a proposal is likely to lead to less rigorous and or participatory policy outcomes. WWF struggles with the notion (implied in the call for evidence) that judicial review simply delays the proper delivery of government business. On the contrary, WWF's experience is that JR can and does improve policy outcomes. In 2010 WWF commenced legal proceedings against DEFRA in relation to its failures concerning water quality. The act of issuing proceedings prompted a re-think on the part of the public authority; the allocation of more resource; and a better policy adopted as a result.

WWF struggles with the notion that the increase in the volume of JR (whatever data this claim may hinge on) over the course of the last 40 years is of concern in itself. WWF recalls that the UK has changed significantly over the course of the last 40 years (including through population increase) and it would be strange, at the very least, if the court system (including judicial review) had not changed too. To seek to turn back the clock and advocate for a system of challenge of executive decision making which took no account of the wider changes in society in the intervening period would seem odd to say the least.

WWF reminds the Review that judicial review is used by a range of actors in society (including business) which may harbour genuine doubts about the legality of the decision taken (see for instance the challenge of Gatwick Airport to the Airports NPS decision). WWF contends this is no more (and no less) improper than the use of judicial review by civil society or members of the public. Environmental JR is a small proportion of the overall volume of JR (see RSPB / FoE – Pillar of Justice above). Further, WWF notes that the changes outlined in the Planning White Paper are intended to speed up the planning process and reduce the number of contested

² "Costs barriers to environmental justice" – ELF 2009:

https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/correspondence/FrELF_Report2009.pdf

³ "To every subject of this land, however powerful, I would use Thomas Fuller's words over three hundred years ago, 'Be ye never so high, the law is above you.'" Per Lord Denning – Attorney General's reference, January 1977.

challenges. This is likely to reduce the volume of planning JR (for better or for worse) and the Review should take account of these parallel changes.

WWF sees the law concerning grounds for challenge (for example) as clear and well understood by users of the system. Codification, though potentially conducive to greater clarity for claimants, often has the effect of limiting or overlooking important elements of the common law because of the organic and context specific way in which the judge made law develops. It would need to be handled with great care. WWF considers that judges already have a flexible range of remedies (codified by the Civil Procedure Rules) and are very careful about imposing remedies in cases where prejudice would arise, or where a case is academic for instance. WWF struggles to see the case for change in this regard.

WWF is strongly opposed to further limiting scope to intervene in judicial review proceedings. Greater costs risk for interveners was introduced through the Criminal Justice and Courts Act 2015 and government's legal representatives sought to maximise costs pressure on WWF when we applied to intervene in the Heathrow Third Runway challenge in the Court of Appeal. For information, WWF chose not to intervene earlier because of the range of claimants and issues at first instance. We believed that with the narrowing of issues and arguments on appeal, that was the more efficient and effective time to contribute to the court's thinking.

The pace of environmental JR was accelerated through reforms which required planning challenges to be brought within 6 weeks (rather than 3 months as previously). The Planning Court was set up to accelerate the handling of planning challenges and more rapid decision making by the courts may be advantageous to all parties. But WWF struggles to see scope for further acceleration without serious thought being given to potential encroachment on fair trial rights and access to justice.

Legal costs in the UK remain high comparatively speaking, thus the cost protection rules for environmental JR put in place in 2015 are vital to ensuring access to justice and something approaching parity of arms (in accordance with human rights principles) as between government and wider society.

Given the access to justice provisions of the Aarhus Convention, WWF considers that environmental JR must be left as is (and, if anything, progressively improved) to ensure government continues to discharge its international law duties in this regard. In order to rise to the climate and nature crises we face over the coming decades, we must put in place and protect an accessible, inexpensive and responsive judicial system which enables legal challenge in this space to be disposed of rapidly and justly for the current and future generations.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'D. Tripley'. The signature is fluid and cursive, with a large loop at the end of the last name.

Debbie Tripley

Director of Advocacy

WWF-UK