Note on the application of Judicial Review in the Planning Act 2008 with respect to Nationally Significant Infrastructure Projects

A, overview of the approach to JR considerations in the construction and operation of the Planning Act 2008[1] (the Act) to assist the review in response to the request for evidence.

Background

The Act introduced Development Consent Orders (DCOs) for Nationally Significant Infrastructure Projects (NSIPs) to be considered in the context of National Policy Statements (NPSs) which would be a parliamentary approved statement of need and consideration for NSIPs within defined areas of infrastructure. So it has two elements – policy being explicitly defined and this being separate and, where possible, ahead of a development proposal which is then considered against that policy together with other named consideration such as the local planning framework but within a defined hierarchy of considerations (s104). This formal construction of a defined policy framework was one of the recommendations arising from various reviews of large-scale planning following the Heathrow Terminal Five inquiry.

Construction of PA2008 and Decision Points

The Act postdates the Human Rights Act (HRA)t, takes account of international treaty obligations on environmental matters and was written in an era of the move towards online access and this was taken as the starting point by the original Infrastructure Planning Commission in setting up a specific website to host all the relevant information. This was maintained post the IPC and relocated to the Planning Inspectorate. It contains all pre-application details (including the Register of Projects and advice given under s51), the relevant primary and secondary legislation and consolidated Advice Notes as well as the individual project details for all live projects. Decided DCOs are maintained together with essential supporting detail which includes the relevant Secretary of State Decision Letter including their statement of reasons.

The construction of the Act followed the longstanding advice in relation to good practice of consultation on major projects (from MHCLG and its predecessors) with an emphasis on early engagement, a requirement for statutory consultation together with formal consideration of the adequacy of that consultation before acceptance of any application for a DCO could proceed to examination. The requirements within the Act to publicise each stage, the detailed specification of who must be notified and the rights of parties to register the views and receive information are all intended to meet obligations in relation to a fair process. Most stages have a minimum and/or a maximum time period for the stage to be carried out and these are all set out in a moving timeline on the website so that the process can be tracked in detail including via automatic notifications. In particular, the specific additional safeguards given to persons whose property rights and interests may be affected are clearly set out in the context of HRA matters and supported by obligations on the promoter, the Examiners and the SoS before these are engaged.

The structure of the formal decision stages of the Act – the summary of the Acceptance checklist, the Examiners Report and the SoS Decision Letter for example are all set out in a structured form which aim to give reasons for the decision itself and the relationship of the elements leading to the overall decision against each of the relevant legislative or policy tests. The Examination Library provides a hyperlinked reference document to the large number of application, representation, examination and decision documents all of which are available on the central website.

[1] https://www.legislation.gov.uk/ukpga/2008/29/contents

Limitations on Challenge

The Act contains a number of partial 'ouster' provisions – s13 in relation to NPS and s118 in relation to the DCO application and the decision. These mirror the two parts of the Act in setting policy and then determining an individual application. In each case the grounds and timing of any challenge are given expressly –being up to a maximum of six weeks from the relevant decision. In the case where the SoS declines to accept an application then only the refusal to accept can be challenged, no provision is made on a decision to accept an application at that point – such a challenge is provided for at the point at which the final decision on the DCO is made (s118(3)).

Experience of Challenges

In relation to the Act there have been some challenges in relation to the NPSs – for example the Aviation NPS recently before the Court of Appeal. The majority of challenges have been to the decision to grant or decline the DCO itself. None have been brought on a decline to accept although a few applications have been withdrawn just before the conclusion of the acceptance period and these are then usually resubmitted within a short period of time.

There are only two 'successful' challenges determined to date. In one case where a DCO was declined (Preesall) resulted in reconsideration of the case by the SoS and in the other, the Aviation NPS was not quashed but lost its approved status with a route set out by which it might be reconsidered (this has been appealed). All other challenges have been 'unsuccessful' to date although there are several now in process. In some cases, the challenge to the DCO consent engaged matters which the Court considered should have been the subject of a challenge to the original NPS and were rejected.

In each JR case the judgment has assisted the understanding of the legislation and its operation. The first substantive challenge (Heysham Link Road) had five grounds to which the Court responded to both individually and in a codicil setting out an overview of the then new legislation. Other challenges (such as Able Marine) have clarified interpretation of the Act wording - 'a plain English reading' and 'on the face of it'. Having access to the Planning Court in the first instance provided timely access to a specialist group within the Administrative Bench which has given substantive judgments of which only a few have gone to higher courts to date.

Summary of Experience

In the context of the Act the following elements contribute to the use of a specified challenge period:

- Relatively recent legislation which is constructed in accordance with wider principles and obligations
- A clear policy process which has defined stages for engagement and consideration including parliamentary approval
- A forward list of DCO applications together with advice logs and information on their progress
- Specific rights and obligation on parties to engage during the process with access to the relevant materials at each point
- A single point of information with links to legislation, policy, guidance, advice and individual project information
- A defined timeline that can be tracked in real time so that each stage of the process is known to within a relatively small range of uncertainty
- A standard format for the presentation of decision stages which clearly sets out the basis of each element of the decision process and its legislative and/or policy underpinning
- For the final decision, the vast majority of the supporting documentation is available in advance in an accessible format with only the 'decision period' documents added at the final stage

- Access to a specialist judicial bench with reasonably predictable timelines for initial review and full hearings

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