[redacted]

19th October 2020 from Mary-Rose Sinclair.

[redacted] Telephone [redacted]

Your terms of reference

Terms of Reference for the IRAL

Published on 31st July 2020 at https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review

The Review should examine trends in judicial review of executive action, ("JR"), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law. It should consider data and evidence on the development of JR and of judicial decision-making and consider what (if any) options for reforms might be justified. The review should consider in particular:

1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.

2 Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.

3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.

4. . Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.

NOTES:

A. Scope of the Review: (1) The review should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers. (2) The review will consider whether there might be possible unintended consequences from any changes suggested.

The opening paragraph above states…. the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law.

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RESPONSE from me PERSONALLY

1. Every application to Judicial Review has to go through a preliminary sieve to see if tis acceptable. As the terms of reference point out a Judge cannot quash a decision because it is wrong, but only if a decision is illegal, procedurally unfair or so unreasonable as to be irrational. Unfortunately some government decisions do come under that criteria as I see it:

   The expelling of people of the Windrush generation who had the right to stay in the UK

   The decision to shut down parliament. This closed down the representation of the people by parliament, discriminating against those of us who don't support some of the UK government's policies and need a voice to represent our opposition. .

   The removal of British Citizenship from people who when children were recruited in this country, to become ISIS followers and members. I note that Mark Thatcher, who was fined for helping to fund a failed coup in Equatorial Guinea and Simon Mann apparently the leader of the Mercenary group involved, kept their British passports. Different rules for different British Citizens .

   Human Rights- under threat

   Allowing homes without daylight (windows) to be developed from existing buildings

   There are many other concerns .

RESPONSE AS CHAIRMAN OF CPRW (Campaign for the Protection of Rural Wales) PEMBROKESHIRE BRANCH

2. I know the terms of reference as set out above are mainly related to Judicial Review of central Government decisions but there is concern that any changes might result in its removal, or might reduce an individual's or a group's right to challenge poor planning process and illegal decisions..

JUDICIAL REVIEW AND PLANNING

Judicial Review is currently a necessary safeguard of individual rights in the Planning System because there is no Third Party Right of Appeal in planning, nor any tribunal system to mediate on behalf of third parties. The role of the Ombudsman is to acknowledge the mess made by unfair process in planning and grant some financial recompense to those affected. It does not necessarily put right or correct the problem, it does not quash planning decisions as Judicial review can. .

Judicial Review is needed in planning in order to right grossly unfair and wrong interpretations of Planning law which restrict people's ability to comment on applications and thus demonstrate adverse impacts.

A ATTEMPT TO BY-PASS PROPER CONSULTATION

EXAMPLE

In 2017 ENERGIEKONTOR UK LTD applied to Carmarthenshire County council to extend the height of their two consented but unbuilt wind turbines at Rhydcymerau, Carmarthenshire from 100m height to 125m height. But was refused consent as it was contrary to policy.

ENERGIEKONTOR UK LTD - JUSTIN REID
4330 PARK APPROACH
THORPE PARK
LEEDS
LS158GB
Application No: **W/34341** registered: 30/08/2016 for:
Proposal : VARIATION OF CONDITION 2 ON W/31728 (TURBINE HEIGHT)
Location : LAND NORTH OF ESGAIRLIVING, RHYDCYMERAU, LLANDEILO,

The Company then appealed this decision under section 73 of the Town and Country Planning Act (TCPA) and was granted consent by the Planning Inspector who heard the case

APP/M6825/A/17/3173247 Decision 14th February 2018.

As Chairman of the Pembrokeshire Branch of CPRW we had objected to this increase in height under Section 73, on behalf of the Carmarthenshire Branch which was then inactive, because it would be done without a proper analysis the impact this height gain would have on local residents, the environment and landscape of the area, and without non statutory (Public) and statutory consultation. People were denied the right to be consulted on the potential impacts of this raise in height. .

We could not afford to take it to Judicial Review but fortunately Professor Finney did take it in 2018 before Sir Wyn Williams, Finney v Welsh Ministers. . But the Judge at that hearing, Sir Wyn Williams decided against him and allowed the Appeal decision and the 25% increase in turbine height under section 73 of the TCPA to remain as a consent.

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However Professor Finney took it to the Court of Appeal where he won, we are pleased to say, and the consent for the increase in height for the wind turbines was overturned.

I quote below from Landmark Chamber website, which is available on-line, a summary of the decision

2.2 Finney v Welsh Minsters: Court of Appeal clarifies interpretation of s.73 of the Town and Country Planning Act 1990

On 5 November, the Court of Appeal (Lewison, David Richards & Arnold LJJ) handed down judgment in ***Finney v Welsh Ministers*** [2019] EWCA Civ 1868. A developer had been granted conditional planning permission to construct two wind turbines. The description of development in the permission specified that the turbines were to have a height of 100m. One of the conditions required the development to be carried out in accordance with specified plans. The developer then applied under s.73 of 1990 Act to vary this condition to insert plans showing turbines with a height of 125m. This application was allowed on appeal by the Welsh Ministers.

The Appellant challenged this decision in the High Court on the ground that the grant of permission was *ultra vires* because the imposition of this condition would require a change to the height specification in the description of development. The claim was dismissed by Sir Wyn Williams (sitting as a High Court Judge). However, this decision was reversed by the Court of Appeal, which has held that s.73 may not be used to obtain a varied planning permission when the change sought would require a variation to the terms of the “operative” part of the

permission. This is arguably the most significant decision relating to this commonly-used power since ***R v Coventry City Council, Ex P Arrowcroft*** [2001] PLCR 7 and will be of considerable interest to practitioners.

Ben Fullbrook acted for the Appellant, instructed by Leigh Day

Richard Turney acted for the First Respondent, instructed by the Government Legal Department

Taken From landmark Chamber website

If Judicial Review had not been available this injustice might have continued in the planning system, setting a precedence under Section 73 of the TCPA , leading to 25% increase in the height of developments, numbers of buildings, and extent of development, without the need for fresh appraisals of impact. . If the High Court had not quashed the consent, the rights of people to understand and comment on what exactly is being planned next to them, could have been curtailed, thus discriminating against public participation in the planning process..

B.THE COST OF JUDICIAL REVIEW IS TOO HIGH FOR MANY PEOPLE

Judicial review is only open to those who can afford it even if a case is considered acceptable to proceed. If it were to be curtailed, made more expensive or limited any further , it would be a backward step and a blow against those people able to afford Judicial review. At present those who cannot afford to bring Judicial Review of planning malfeasance have no redress at all. They are outlaws, being outside the protection that this law gives them but is actually only granting to those with sufficient funds to use it. This situation is discriminatory. People have to get leave to apply for Judicial Review which removes the frivolous and all that do not meet the strict criteria. .If a planning Tribunal was constituted it would not be a substitute unless it was given the the power to quash decisions.. But such a Tribunal could look at other wrongs in planning decisions , which JR cannot do.

EXAMPLE

The Local planning Authority (LPA) Pembrokeshire County Council, wrote to householders in a south Pembrokeshire village of [redacted] concerning a fresh housing development to the rear of their properties, explaining they would be dormer bungalows. This demonstrated that there would be no overlooking of the original properties to the extent that privacy might be damaged. One dormer bungalow had

already been completed and local residents were satisfied. Unfortunately one of the dormer bungalows morphed into a house during the planning process, not reported to the householder affected , with upstairs windows set partially into the roof, from which there was a close view directly into the kitchen and living room of one of the existing bungalows. I wrote to ask for a condition on consent that the glass in the windows be clouded so visibility was reduced, but this was not done. The existing resident took it to the ombudsman who declared that it was his own fault as he should have gone to see the plans himself. In other words, you should not trust the word of the LPA. He had to build an extension he could not afford in order to enable his granddaughters to stay as there was no longer any privacy in his small living rooms.

He could not afford Judicial Review and his case may not have been accepted There was no redress for him. He remained unhappy, even distraught about it. [redacted]

EXAMPLE

In [redacted], a bungalow above and close to a terraced home was consented with windows looking directly into the living room, kitchen and bedrooms of the house just downslope from it. The LPA set a condition requesting crazed glass in the windows facing people's gardens to the side of the development, but not for those looking directly and closely into the private home below it, where children resided. Unbelievable, but unfortunately true. Although the LPA maintained that a copy of the application was delivered to the affected neighbour, no copy was received. If the LPA doesn't quash their own consent on grounds of overlooking (can they do this?) the only alternative was Judicial Review but that is now too late, after the affected householder tried to negotiate , so it will have to be continually drawn curtains, no daylight or sunlight for the children. A Judicial review, if acceptable could have quashed the consent. There is no other way to stop it.

C.WHY IS THERE NO LIMIT ON THE NUMBER OF TIMES A DEVELOPER CAN APPEAL DECISIONS ON THEIR PROPOSED DEVELOPMENT?

EXAMPLE

Is money the only stop to continual Judicial reviews and Appeal , because the result is despair in the planning system and a belief that money will eventually buy consent. Continuous Appealing by developers leaves local residents frightened and in despair that it will never end and that refusal to a developer is just a challenge to go on and win. .Is it insurance cover that allows developers to keep returning to the courts to overturn planning decisions? I attach below part of a Press Release from the Campaign for the Protection of Rural Wales, Pembrokeshire branch detailing the number of times the developers of a proposed wind farm were allowed to appeal to courts for their project despite rulings from Judges against them.

PRESS RELEASE

11th July 2018

Rhoscrowther Wind Farm refused leave for a third Appeal

Second Appeal Planning Inspectorate ref: APP/N6845/A/15/3025045

Comments from CPRW

Mary Sinclair, the Chairman of the Pembrokeshire Branch.

We are pleased that the developers, Rhoscrowther Wind Farm have been reused leave to Appeal by the Court against the Welsh Ministers Decision, to in effect refuse their application for a wind farm at Rhoscrowther. The original decision to reject the scheme was made by Pembrokeshire County Council in January 2015. Since then due to the persistence of the developers there have been two Public Inquiries, at least six approaches to Court and a refusal by the Welsh Ministers to support the scheme.

Notes for Editors

The developers, Rhoscrowther Wind Farm applied for planning consent in January 2014 to erect five 100m wind turbines about 500m from the Pembrokeshire Coast National Park Boundary,and in front of the Valero oil refinery at Rhoscrowther, on the narrow Angle Peninsula , South Pembrokeshire

Planning Timetable

January 2015 Local planning Authority's decision to refuse consent for Rhoscrowther Wind Farm's application. Pembrokeshire County Council, the Local Planning Authority refused consent because of the adverse impact on the National

Park and on the local historic landscape. The adjoining Pembrokeshire Coast National Park, a large number of local residents and non statutory bodies also objected to the scheme.

February 2016 First Appeal. Rhoscrowther Wind Farm Appealed against that decision to refuse them consent. This appeal was dismissed by a planning Inspector after a six-day public local Inquiry in February 2016.

April 24th 2016 Rhoscrowther Wind Farm applied to the High Court for leave to appeal against the Planning Inspector's decision. Reading Judges read the paper and make judgement without a Court Hearing**.** Mr Justice Coulson read the papers on 24th April 2016 and gave his Judgement which included the following: 'I do not consider that the matters raised by the claimant can be properly described as matters of law. They are, on analysis, an illegitimate attempt to question the Inspector's finding of fact and to reopen the planning decision'.

June 9th 2016 Despite the judgement given to them Rhosrowther Wind Farm went to the High Court for leave to Appeal. In the High Court of Justice, Queen's Bench Division His Honour Mr Justice Hickinbottom dismissed their attempt to go for a second appeal concluding with the words: 'For those reasons, like justice Coulson I consider the grounds essentially to be a challenge to the merits of the decision , rather than a challenge in law. None of the grounds is arguable: and I refuse the application to pursue the section 288 application.'

14th October Rhoscrowther Wind Farm made a further attempt to try and overturn the decision against them but a 'Reading' Judge gave a judgement against them on 18th January 2017 (order number 20162507) in their application for Leave to Appeal further. They had 7 days to appeal this decision.

On 31st January 2017 Rhoscrowther Wind farm returned to the High Court again. Case number 20162507 Rhoscrowther Wind Farm appealed the Court's latest decision and applied for permission to go to a further planning appeal. Lord Justice Lewison (an acknowledged authority on Housing and Tenancy Law), despite the fact that all the issues had been considered by the earlier Judges, this time on 23rd March 2017 referred them back to the Court in Cardiff on two matters – the presence of the Enterprise Zone and the Heritage issue.

June 28th 2017 The Planning Inspectorate did not defend the second Cardiff Court hearing (heard we believe in Swansea) so that they conceded the points and Rhoscrowther Wind Farm got their consent for the second planning Inquiry to attempt to overturn the Planning Inspector's decision to refuse them consent.

December 2017 A second Inquiry, starting from scratch and with a new Inspector Ms Kay Sheffield, was then held for four days at Angle Village Hall in December 2017. Her recommendation was to dismiss the appeal. This was accepted by **Lesley Griffiths, the Welsh Government's Cabinet Secretary for Energy, Planning and Rural Affairs on 20 April 2018,** four years and three months after the original planning application was made.

The Inspector's Report following the second Planning Inquiry

The Inspector refused the Appeal for the following reasons:

> The development would cause substantial harm to the setting of the historic Grade 1 listed Rhoscrowther Church and the group of associated assets.
>
> She found that the proposal would cause substantial visual harm to landscape character and the visual amenity of significant parts of the nearby National Park, including parts of the Angle Peninsula, Angle Bay and Freshwater West. Harm would also occur to views from more distant National Park locations and from substantial lengths of the Pembrokeshire (and Wales) Coast Path.
>
> While acknowledging the material benefits that the scheme offered, the Inspector concluded that these were outweighed by the considerable harm the scheme would cause to the nationally important heritage assets. to significant parts of the nearby National Park and sensitive receptors (people) within it.

May 2018 Rhoscrowther wind Farm applied to the High Court for leave to Appeal against the Welsh Ministers Decision to accept the Planning Inspector's decision to reject their application to overturn the decision to refuse their scheme consent. Their Appeal to the High Court was refused as being totally without merit and amounting to a disagreement with the decision of the Planning Inspector.

On past experience we will be very surprised if they stop there.

The proposal

The proposal is for 5 wind turbines each 100m (328ft) to rotating blade tip height overlooking the Grade 1 Rhoscrowther church. The site is on open undeveloped farmland slopes between the operational Valero Oil Refinery and the ridge road running along the Angle Peninsula **part of which** forms the boundary of the Pembrokeshire Coast National Park.

CONCLUSION

Judicial Review is too expensive, but we need the eyes of experts in law to look at some concerning planning decisions. There is no other mechanism through which people can appeal decisions which are incorrect and impact severely on them. (Conditions set on planning consents are not always enforced. It is a matter of shame to the planning system as this violates people's involvement in it as conditions are often placed to limit or lessen impacts on local residents , on their landscapes, environment, wildlife)

1. Please keep the Judicial Review system – there is nothing else which will quash wrong planning decisions and allow people to retain their right to comment on any major changes to applications. People need to hold governments to account. What can a government, governing for the good of its people have to fear if it governs within the law.

2. Please make it cheaper for ordinary people to apply and if granted leave, to take to court. A two tier system with developers paying more would be appropriate.

3. Please prevent developers with insurance or plenty of funds from using the appeal system repeatedly in order to obtain consent for a scheme which has been refused for good planning reasons.

People's involvement in planning is a right as they have to live alongside the results of planning decisions. That involvement should be encouraged. I have never met any NIMBYs – (not in my back yard), a term of abuse used by a politician who wished to prevent local residents from commenting on and possibly objecting to proposals. But I have met people, concerned about the lack of enforcement of conditions, set to mitigate adverse effects; concerned at the lack of provision of infrastructure for new homes leading to local flooding, increased class sizes in schools, problems with sewerage; and concerned over the failure to retain trees, hedges, etc within a development leading to the dumbing down of the environment and the loss of local species.

Judicial Review is a process whereby planning consents and government decisions can be scrutinised and ultimately quashed if found illegal. It is very much needed.

Thank you

Mary Sinclair

Chair of the Pembrokeshire Branch of CPRW