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By email and post: admin.justice@justice.gsi.gov.uk

Dear Mr Odulaja

Re: Ministry of Justice consultation paper "Judicial Review: proposals for reform"

Please accept this letter as a formal response on behalf of the City of London Law Society Planning and Environmental Law Committee to the above consultation launched on 13 December 2012.

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

Members of the Planning and Environmental Law Committee have extensive experience in judicial review litigation, particularly in the context of one type of case that is specifically mentioned in the consultation: local authority planning decisions. Our experience bears out the concerns expressed by Government about the cost and delay of judicial review litigation and its use by claimants for tactical reasons; we also believe that there is clear evidence that the risk of judicial review results in more complexity, cost and delay in the planning system through the attempts by local authorities and developers alike to reduce that risk as far as possible by an ever increasing amount of information, assessment and analysis. At the same time we do believe that any exercise of public powers and duties should be subject to the checks and balances provided through the medium of judicial review.

Generally, we welcome the Government's proposals and in particular the efforts to reduce delay in the judicial review procedure and to introduce more rigour to the screening of judicial review claims at the permission stage. Our more detailed comments are set out below in response to the questions raised in the consultation paper.

Time Limits

Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

We wish only to comment on planning cases.

By way of clarification of the text contained in paragraphs 52-56 of the consultation paper, the right of appeal from a local planning authority decision to the Secretary of State is only available to the person who submitted the planning application ("the applicant"). That right of appeal has to be exercised within 6 months of the decision notice or the expiry of the statutory period within which the local authority should have determined the planning application. It is true to say that any other party can ask the Secretary of State to call in the planning application for his own consideration but otherwise there is no third party right of appeal. If the planning application or planning appeal does come before the Secretary of State his decision is challengeable (as the consultation paper notes) under Section 288 Town and Country Planning Act 1990. Such challenges must be brought within 6 weeks of the decision and can be brought by any person aggrieved by the decision. It is rare in such cases for the challenging party to issue any form of pre-action letter.

In our view, it is appropriate to shorten the time limit for judicial review claims in relation to local authority planning decisions to 6 weeks. Not only would this be consistent with the right of challenge to a Secretary of State's planning decision but it would mirror the challenge periods for other decisions in the planning system such as:

- Legal challenges to national policy statements under the Planning Act 2008;
- Legal challenges to development consent orders under the Planning Act 2008;
- Challenges to the adoption of local plans under the Planning Act 1990 and the Planning and Compulsory Purchase Act 2004; and
- Legal challenges to neighbourhood development orders, neighbourhood development plans and community right to build orders under the Localism Act 2011.

Apart from consistency with these aspects of the planning system, where development is permitted by a local authority planning decision, its funding and viability is often sensitive to delay and uncertainty; the reduction of the judicial review period will help to minimise this.

Although we are broadly in favour of the proposal, we remain concerned that the suggestion in the consultation paper risks a situation where there is still uncertainty and delay in relation to claims brought against local authority planning decisions. Instead of the 6 week period running from the date "when the claimant knew or ought to have known the grounds of the claim", the 6 week period should run from the date of the local authority's planning decision (in the case of a planning permission, the date of grant). This would provide the certainty to all parties concerned. To the extent that a claimant (having participated in the planning application process) is in the unusual position of not knowing the detail of the local authority's decision at the point of granting planning permission, then that claimant should be expected to seek an extension of time from the Court and to persuade the Court that it is just as equitable to grant that extension.

Question 2: Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol? If not, how should these arrangements be adapted to cater for these types of case?

In practice we suspect that there will be more instances where the requirements of the pre-action protocol are not observed if the judicial review period for planning cases is reduced to 6 weeks. However, we consider it is reasonable to expect a claimant to comply with the pre-action protocol procedure for the following reasons:

- Any claimant should be expected to make the best use of their opportunity to influence the local authority's planning decision during the planning application process. Claimants ought therefore to be closely involved in the decision and to have notice of when that decision is taken. Within the 6 week period such a claimant should have ample time to formulate any grounds of claim and put the local authority defendant on notice through a pre-action letter; and

- Whilst, it may be argued by some that the 6 week period is insufficient both to identify sufficient funding for the litigation and to instruct a lawyer, we consider this concern will be much reduced by the Ministry of Justice's proposal to introduce cost protection for litigants in environmental judicial review claims (we refer to the outline proposals published by the Ministry on 28 August 2012); a large number of planning judicial review claims will qualify as claims to which the Aarhus Convention applies. In any event, to the extent that a claimant finds itself in difficulties, that claimant can ask the court to extend time where there are good and proper reasons for doing so.

The only change we would suggest to the pre-action protocol is that given the reduced 6 week period, the model form of pre-action protocol letter in planning cases should reduce the time within which a defendant is expected to respond to say, 7 days from the date of receipt.

Question 3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

Yes, we believe that the certainty of a 6 week period for bringing a judicial review claim running from the date of a local authority's planning decision, coupled with the Court's powers to allow a claim to be brought out of time, are sufficient to ensure the protection of access to justice. For public policy reasons it is right that a claimant who brings the claim out of time should demonstrate that it is just and equitable for this to be allowed.

Question 4: Are there any other types of case in which a shorter time limit might be appropriate? If so, please give details.

We have no suggestions for other types of case in which a shorter time limit for judicial review claims might be appropriate. However, in the context of questions 5 and 6 we do consider that there needs to be clarification in circumstances where a local authority planning decision is taken on the basis of a number of earlier decisions; we explain this further in question 5.

Time limits in cases where there are continuing grounds

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach

of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

In principle we have sympathy with this but in the context of planning cases, the local authority's planning decision (through the grant of planning permission) often stems from a series of procedural decisions which the local authority has taken during the course of the planning application. These would include decisions in relation to environmental impact assessment, consultation and committee procedures. Clarity is therefore needed around whether this proposal would require a claimant who has concerns about procedural decisions taken by a local authority to initiate a judicial claim when those decisions are taken rather than waiting for the substantive decision to grant planning permission. On balance we feel that the current wording in part 54.5 of the Civil Procedural Rules should be left as it is and the issue of multiple decisions and when time should start to run in individual cases should be left to the Court (as is currently the case).

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

For reasons described in question 5, without further clarification, in planning cases we do consider that the proposal would risk a proliferation of judicial review claims relating to planning application procedures before the planning application had actually been determined. Whilst this would have the advantage of flushing out issues at an earlier stage of the planning process, we think that this is outweighed by the delay and frustration that could be caused to the local authority's consideration of the planning application.

Applying for Permission

Option 1: restricting the right to an oral renewal where there has been a prior judicial hearing of substantially the same matter

Question 7: Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a "prior judicial hearing"? Are there any other factors that the definition of "prior judicial hearing" should take into account?

We have no comments to make on this question; in planning cases we consider the existence of prior judicial hearings are likely to be rare.

Question 8: Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

In principle we agree with this but see our response to question 7.

Question 9: Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

A Judge in these circumstances will require assistance in identifying whether there has been a relevant prior judicial hearing and therefore, whilst we are concerned that this would place a burden of proof on the defendant, we see no other practical alternative.

However, we expect the incidence of this in planning cases to be low - see our response to question 7.

Option 2: restricting the right to an oral renewal where the case is assess as "totally without merit"

Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as "totally without merit", there should be no right to ask for an oral renewal?

Yes we strongly agree with this proposal and it has particular relevance in planning cases where the delay between a refusal of the permission of papers and the listing of an oral renewal hearing can have a significant impact on the funding and viability of the development that is the subject of planning permission under challenge. The consultation paper rightly identifies that, absent this proposal, it typically takes several months to dispose of a judicial review claim even where that claim has little or no merit.

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

Our view is that this reform would be entirely appropriate in the context of the local authority's planning decisions, for the reasons identified above. In addition, we would encourage the Ministry of Justice to look at applying the new streamlined permission stage for judicial review to other planning "statutory challenges" (such as appeals under Section 288 Town and Country Planning Act 1990, referred to above), where there is at present no permission stage and therefore no opportunity to filter out a spurious challenge.

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

In public policy terms we see no justification for allowing an oral renewal hearing in circumstances where a claim has been assessed as totally without merit. It is in the interests of local government administration and other interested parties for unmeritorious claims to be disposed of as soon as possible.

Combining options 1 and 2

Question 13: Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

We do not envisage a difficulty if the two proposals were implemented together. However, to the extent that the Government wishes to choose between option 1 and option 2 we consider option 2 to be far more effective and wider in scope. Indeed, in our view, the circumstances described in option 1 could in a particular case constitute a reason why a claim is "totally without merit".

Fees

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

In principle we agree with the suggestion that a fee should be charged for an oral hearing as a contribution towards the cost of holding that hearing. However, it does not follow, in our view, that a fee for a subsequent full hearing should be waived in light of this. Members of our committee are extremely concerned about the adequacy of resources in the Court system and in particular the availability of judges. That in itself has a significant impact on the time taken for a judicial review claim to be determined. If in some small way an additional fee for an oral renewal hearing or an increased fee for the full hearing could improve the resources at the disposal of the Court, then we consider that this would be to the benefit of those concerned with the judicial review of planning cases.

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

See our response to question 14.

Equality Impacts

Question 16: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

Our only comment in relation to this question is that the consultation paper does not make reference expressly to the Aarhus Convention on access to environmental justice and in formulating the Government's response to this consultation we think it is important that the Ministry addresses its mind to implications of the Convention and the consistency of these proposals with its requirements.

Please feel free to contact me using the contact details above should you require clarification on any of the points raised in this letter.

Yours sincerely,

Rupert Jones
Chairman of the CLLS Planning & Environmental Law Committee
On behalf of the City of London Law Society

THE CITY OF LONDON LAW SOCIETY
PLANNING & ENVIRONMENTAL LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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