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Judicial Review and Nationally Significant Infrastructure Projects

Submission to the Ministry of Justice call for evidence on the recommendations of the independent review by Lord Banner KC

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Questions

1. Do you have any comments regarding the Review's methodology or its findings?

1. We commend the work of the Independent Review into legal challenges against Nationally Significant Infrastructure Projects. Within a short time frame, the Review conducted serious engagement with an array of appropriate stakeholders. The report is careful to outline its methods, assumptions and limitations, where relevant.

2. We agree with Recommendation 1, that '*for so long as the UK remains a member of the Aarhus Convention, there is no case for amending the rules in relation to cost caps in order to reduce the number of challenges to NSIPs*.' The 'Aarhus Rules' (Section VII, CPR 45) were substantially amended in 2017, requiring, *inter alia*, claimants to file a statement of financial means, and empowering the court to vary maximum costs liability. We endorse the views expressed in the Constitutional and Administrative Law Bar Association (ALBA) submission to the 2021 Independent Review of Administrative Law: revisiting the Aarhus Rules would be premature while the latest reforms are 'bedding in', and further reform appears to be unnecessary, as ALBA practitioners reported that the Rules are operating well in practice.[1] Moreover, while the Independent Review asserts that 'there is little doubt that the cost caps… have contributed towards the proliferation of challenges to DCOs (and other planning decisions)'[2], there is evidence that potential costs risks nonetheless continue to have a chilling effect on potential judicial review claims.[3]

3. We agree with Recommendation 2, that '*there is no convincing case for amending the rules in relation to standing to reduce the number of challenges to NSIPs*'. As outlined in the Ministry of Justice call for evidence on this review, a more exacting statutory test for limiting standing in judicial reviews of NSIPs to those who have 'participated substantially' in decision-making process leading to the relevant Development Consent Order (DCO) decision would be ineffective at limiting challenges, difficult to define, and risk infringing access to justice.[4]

4. We are of the view that there is a case for reviewing the DCO decision-making process more generally, particularly to ensure that the DCO examination process is made more accessible to the public.[5] Providing improvements in front-end

[1] ALBA, 'The Independent Review of Administrative Law Call for Evidence: Response on behalf of the Constitutional and Administrative Law Bar Association' (October 2020) para 139.
[2] Lord Banner KC, 'Independent review into legal challenges against Nationally Significant Infrastructure Projects' (Ministry of Housing, Communities & Local Government, 28 October 2024) para 59.
[3] On this point, see S. Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' 86(2) Modern Law Review 307, 339-340, in which several examples of abandoned claims in the planning and environment context are provided.
[4] Ministry of Justice, 'Judicial Review and Nationally Significant Infrastructure Projects: A call for evidence on the recommendations of the independent review by Lord Banner KC' (October 2024) p13-14.
[5] Independent Review into NSIPs (n 2) para 31.

decision-making to address the underlying causes of legal challenges is likely to reduce legal challenges and other delays to NSIPs more widely than the judicial review procedural reforms suggested by the Review.

2. Do you agree with the Review's conclusion that there is a case for streamlining the process for judicial reviews of DCO decisions? Please provide evidence, where available, to support your answer.

5. We accept that there is a case for streamlining the process for judicial review of DCO decisions, although as earlier research has indicated reforming the process of judicial review can only achieve limited results without broader attention to the reasons why there is a demand for judicial review. [6] The Review's findings on the 'downstream' impact of legal challenges on projects appear to be compelling; in particular the risk of wasted costs, and increase in construction costs, which, depending upon the nature of the scheme, might also significantly impact the public purse.[7] We accept that DCOs are granted to projects that are deemed to be of significant public interest, and that some streamlining may bring the benefit of providing greater clarity for parties, including impacted third parties.[8]

6. We agree with the Review's observation that what matters more than the number of challenges is that each DCO is of national significance. Regarding the numbers we note that the number of judicial reviews involving DCO challenges is very small relative to the overall judicial review caseload and we cannot confidently agree with the Review's finding that 'DCO challenges have become more prevalent in recent years'.[9] Taking the figures provided on the number of s.118 judicial review claims brought in the High Court in Figure 1, it is too soon to tell whether DCO challenges are on the rise, or whether the year 2022, in which there was a peak of 10 claims brought, is an outlier year. Given these relatively small numbers the case for streamlining the process for judicial reviews of DCO decisions should not be made on the basis that DCO challenges are on the rise.

7. We invite the Government to proceed with caution when it comes to instituting reforms to the judicial review process for NSIPs. In our view, the case for streamlining rests on the unique status of NSIPs and the competing public interests involved. The case is not made out for extending such reforms to other areas of judicial review, including other Significant Planning Court Claims. Any changes made should be expressly confined to DCO decisions.

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[6] Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation,* (Public Law Project, 2009), p8 https://publiclawproject.org.uk/content/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf

[7] Independent Review into NSIPs (n 2) paras 48-52.

[8] ibid paras 53-54.

[9] ibid para 58.

3. Do you agree with the Review that the number of permission attempts should be reduced for judicial review of DCO decisions? If so, should this be reduced to two (maintaining the right of appeal) or just one?

8. In responding to this question and questions 4 and 5, it is worth remembering that the written procedure for seeking permission was introduced following recommendations of the Bowman Committee that were concerned with improving the efficiency and speed of judicial review proceedings.[10] Claimants retained the right to renew refused paper applications in open court and this has provided an important check ensuring compliance with the long-standing principle that claims that public bodies have exceeded or abused their legal powers should be determined in public hearings and not exclusively on the papers.[11] With this in mind we disagree with the Review's view that the current approach to permission attempts is 'excessive'.[12]

9. There may be a case for reducing the number of permission attempts for judicial review of DCO decisions, but we would emphasise that it is difficult to establish a solid empirical case for doing so, given the very small sample size of only 30 legal challenges against 130 DCO decisions. Based on the statistics provided in the Review, out of the 11 claims which had permission refused at the paper stage, only 2 claimants opted not to renew their applications.[13] This amounts to 18% of cases refused on the papers, and only 2 of the 30 challenges overall. This appears to show that the paper permission stage is not filtering cases to the same extent as in other areas of judicial review. For instance, looking at the overall progression of all civil judicial reviews (excluding Immigration and Asylum cases), 62% of cases refused permission at paper stage opted not to seek oral renewal, amounting to 40% of challenges overall.[14] Looking at the more recent case load, between 2020-2023, 69% of cases refused written permission opted not to seek oral renewal, amounting to 47% overall.[15] On the face of it, then, there may be a case for reducing the number of permission attempts, but our view is that the raw numbers are too low to establish general reliable trends in DCO judicial reviews. The justifications for reducing the number of permission attempts should therefore be carefully made out on the basis of the public interest arguments for streamlining judicial review in relation to this unique category of decision.

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[10] *Review of the Crown Office List* (LCD, London, 2000). See further: Tom Cornford and Maurice Sunkin, 'The Bowman Report, Access and the Recent Reforms of the Judicial Review Procedure', *Public Law*, (2001), 11-20

[11] See Lord Atkin, H.L. Deb, Vol 88 Col 119 (15 June 1933).

[12] Independent Review into NSIPs (n 2) Recommendation 3.

[13] ibid para 33.

[14] These figures have been derived from the Ministry of Justice Judicial Review Interactive Data Tool, looking at data from years 2000-2024, and excluding criminal and immigration/asylum judicial review types. Of 32,796 claims that reached permission stage, 20,700 were refused at paper stage. 7698 proceeded to an oral renewal hearing.

[15] These figures have been derived from the Ministry of Justice Judicial Review Interactive Data Tool, looking at data from years 2020-2023, and excluding criminal and immigration/asylum judicial review types. Of 4,085 claims that reached permission stage, 2,768 were refused at paper stage. 852 proceeded to an oral renewal hearing.

10. If the number of permission attempts is to be reduced for judicial review of DCO decisions, this should be reduced to two attempts: an oral hearing and maintaining the right of appeal. The Review's evidence shows that claimants in this area of judicial review commonly make use of the right of appeal to the Court of Appeal, and over 50% who do are ultimately granted permission by the Court of Appeal, at least on some grounds.[16] Looking at permission in relation to DCO judicial review overall, the Review finds that approximately 70% of claims were ultimately granted permission to proceed, and only 30% did not obtain permission to proceed at all.[17] Two observations can be made regarding these figures: a) the quality of claims is often not apparent at the initial consideration of the claim; and b) The overall permission success rate in this class of case appears high compared with the permission success of judicial review claims in general, suggesting that claims in this area may be significantly stronger and more meritorious than judicial review claims in general.

11. We do not think there is a case for reducing permission attempts to one stage. As the Review outlines, there are good reasons for maintaining at least a second opportunity to seek permission to bring a judicial review claim in this area.[18] Indeed, high profile cases in the dataset demonstrate the risk of removing the right of appeal at permission stage. Alongside the high-profile example of the *Finch* case[19], which reached the Supreme Court, there are other examples in the case load which demonstrate the importance of the right of appeal. For instance, in *Suffolk Energy*, which is currently awaiting a decision on permission to appeal to the Supreme Court, permission was also refused on the papers and at a renewal hearing.[20] If there was only one permission stage, such cases, which clearly raise difficult legal questions justifying their consideration by the Court of Appeal and Supreme Court, would not have been heard. More generally, it is our view that DCOs for major infrastructure projects hold wide-ranging impacts for a complex array of stakeholders and impacted parties. We therefore consider it would be inappropriate to limit access to judicial review of the lawfulness of decision-making in this field by providing a single opportunity to seek permission to bring a challenge.

4. If you agree that the number of permission attempts should be reduced for judicial review of DCO decisions, do you think that this change should also be applied to judicial review of other planning decisions?

12. We do not think there is an argument for extending a reduction in the number of permission attempts to judicial review of other planning decisions. Looking at the overall Ministry of Justice data on progression of judicial reviews categorised as "Town and Country Planning Significant", 50% of cases refused permission at

[16] Independent Review into NSIPs (n 2) para 33(5).
[17] ibid para 34.
[18] ibid para 71.
[19] *R (Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20.
[20] *R (on the application of Suffolk Energy Action Solutions SPV Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1796 (Admin).

paper stage opted not to seek oral renewal, amounting to 24% of cases overall. At renewal stage, 40% are granted permission.[21] These figures more closely align with trends in the general civil judicial review case load and indicate that the permission stage filters a significant number of claims, while the oral renewal stage operates as an important second check on written permission decisions.

5. What would be the impact on access to justice if the number of permission attempts were reduced, either for just DCO judicial reviews or wider categories of judicial review?

13. If abolition of the written procedure is being considered it is clearly important to consider whether and how this will affect the efficiency of the court system and especially the burdens upon the judiciary. Given the relatively small of number of cases any adverse efficiency affects may not be great but nonetheless this is a factor that requires careful consideration.

14. Abolition of the written procedure may also have other effects. Research by Bondy and Sunkin on practitioner perceptions of the permission process revealed[22], contrary to the expectations of the researchers, that the majority of practitioners who were interviewed (including a majority of claimant solicitors) expressed satisfaction with the paper process. The reasons included the following: the procedure saves time and cost; it acts as a quick filter of weak claims and provides a quick indication whether a claim "will fly"; and it helps to achieve early resolution and settlement. Those claimant solicitors who expressed disapproval of the paper process usually did so because they considered the loss of oral advocacy to have adversely affected the prospect of obtaining permission. Many solicitors expressed anxiety as to whether judges sufficiently understood the claims being made on reading the papers.

15. Unsurprisingly, perhaps, solicitors representing defendants approved of the paper only process in even greater numbers than claimant solicitors. They did so because they thought it saved money and/or time and helped to filter out hopeless cases. That said a minority of defendant solicitors were critical of the process, saying it wastes time when claimants renew regardless of merit and that it is unsuitable for complex cases. It was said that advocacy in open court generally benefits both the parties. On this aspect of the research Bondy and Sunkin concluded:

> Overall[…] the paper procedure received approval from the majority of the interviewees, but with stronger endorsement from defendant solicitors and with greater regret over the loss of advocacy on the part of claimant solicitors. Consistent across both groups of

[21] These figures have been derived from the Ministry of Justice Judicial Review Interactive Data Tool, looking at data from years 2000-2024, and excluding criminal and immigration/asylum judicial review types. Of 564 claims that reached permission stage, 273 were refused at paper stage. 137 proceeded to an oral renewal hearing, and 56 were granted permission at that stage.

[22] Bondy and Sunkin (n 6) pp 60-64.

solicitors was an emphasis on the importance of the right to renew orally as a check on the quality of decision taking at the written stage.

16. The above findings need to be treated with a degree of caution, not least because they are based on research that was undertaken nearly twenty years ago and because it was concerned with judicial reviews in general and not in the specific area now under consideration. That said, the findings do help flag factors that may well be significant and are worthy of consideration. The research indicates that if the written procedure is to be retained so too should a right to renew in open court. The research did not explore the actual or perceived consequences of abolition of the written procedure and retention of an oral hearing with or without a right of appeal to the Court of Appeal.

17. Overall, abolition of the paper stage will have access to justice implications, notably the loss of access to a quicker and less costly early assessment of the potential strength of a claim. The loss of the paper permission stage may have a chilling effect upon potential judicial review claimants, given the cost risks should permission be refused, and the heightened costs associated with oral permission hearings. Further, it has recently been clarified by the Supreme Court that interested parties may be able to recover their costs for participating in the permission stage of judicial review and statutory challenges provided that the costs are reasonable and proportionate.[23] Given the multiplicity of stakeholders involved in NSIPs, claimants may therefore be disincentivised from bringing a claim for judicial review concerned that proceeding straight to the oral permission process leaves them exposed to higher and potentially multiple sets of costs. These access to justice risks are potentially balanced out by the retention of a right to appeal a permission refusal to the Court of Appeal.

18. As we outlined in response to question 3, reducing the number of permission attempts to one runs the significant access to justice risk that cases clearly worthy of judicial scrutiny go unheard. As outlined in response to question 4, we do not think there is a justifiable case for reducing the number of permission attempts of other planning decisions.

6. Do you think the CPRC should be invited to amend the CPR to raise the permission threshold for judicial review claims challenging DCOs?

19. We do not think the CPRC should be invited to amend the CPR to raise the permission threshold for judicial review claims challenging DCOs. The Review outlines several risks in raising the permission threshold, including that to do so would result in permission decisions collapsing into a more granular assessment of the merits.[24] If the written permission application stage is to be removed, as is being suggested by the Review, then there is already an increased likelihood that oral argument at the permission stage becomes more substantive in character.

[23] *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36.
[24] Independent Review into NSIPs (n 2) para 80.

This would be compounded by the introduction of a new higher permission threshold, resulting in fuller written arguments at permission stage. This is likely to place significant practical pressure on parties in the context of an already truncated judicial review timeline and risks the airing of the potential merits of a claim without a settled evidence base. The Review remarks that due to the legal and factual complexity of DCO judicial reviews, claims are commonly already document-heavy at permission stage.[25] We defer to the expertise and experience of planning and environment practitioners on this point but note that the evidence base is not always settled in advance of the permission stage. For instance, there have been several cases, both relating to DCOs and in the planning context more widely, where there has been significant argument over whether fair and just disposal of the case required disclosure of certain documents, particularly ministerial submissions.[26] Raising the permission threshold might therefore place greater time pressure on claimants to request pre-permission disclosure of potentially sensitive documents, resulting in an uptick in pre-permission correspondence, or risk the potential merits of the claim being argued more fully without the full evidence base.

20. The current threshold test – that permission will be granted if there is an arguable ground for judicial review which has a realistic prospect of success – should be retained. Arguable claims that public bodies have exceeded or abused their powers or failed to act fairly or breached human rights should not be excluded from the courts unless doing so is clearly necessary and proportionate. The Review does not present sufficient evidence of 'arguable but weak' DCO review claims being granted permission; rather, the extent to which judicial reviews of DCO decisions reach Court of Appeal stage or higher indicates the extent to which legally complex issues are raised in these cases.[27]

21. Moreover, raising the permission threshold to 'likely to succeed' is not likely to reduce cost and delay as intended. The 'arguable and realistic' standard is widely understood and applied by the judiciary. Creating a new test for this defined set of challenges would generate significant uncertainty, potentially triggering satellite claims that access to justice is being unduly restricted, or that claimants are being denied access to the courts to uphold their rights contained in the European Convention on Human Rights. Such litigation could have significant cost and delay implications, which runs contrary to the Review's aims of reducing delays arising from legal challenges against DCO decisions.

[25] Ibid para 81.

[26] For recent examples, see *Friends of the Earth v SoS Levelling Up, Housing and Communities & others* [2023] EWHC 3255 (KB); *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) [170]-[177]. The disclosure of ministerial submissions is not commonly required in the planning context, but there may be instances where the context of the case requires it. See, for example, *Ball v Secretary of State for Communities and Local Government* [2012] EWHC 3090 (Admin) [66].

[27] Independent Review into NSIPs (n 2) Appendix 3.

22. In short, raising the permission threshold would be wrong in principle and it would also generate serious uncertainty, potentially higher costs and greater risks of delay. Without much clearer justification it is highly questionable whether these risks are worth taking. In our view they are not.

7. What, if any, are the potential benefits of raising the permission threshold for judicial review claims challenging DCOs?

23. The main potential benefits of limiting access to the courts could be a reduction in litigation and saving of resources and time. Were these to be achieved there would be clear public interest benefits, including limiting the amount of NSIPs impacted by the 'downstream' effects of litigation. However, in view of what is said in response to question 6, we are not clear that such benefits would materialise, and very careful consideration must be given to the risks involved.

8. What, if any, are the potential impacts on access to justice of raising the threshold for judicial review claims challenging DCOs?

24. See our response to question 6.

9. What, in your view, are the potential benefits of introducing an NSIP ticket which would restrict the ability to hear judicial review cases concerning DCO decisions to a small specialist pool of judges (four to six judges)?

25. We defer to those with practical experience and expertise on the operation of the Planning Court and the allocation of cases on the question of the benefits of introducing an NSIP ticket. There is, however, a general benefit to NSIP cases being heard by justices with appropriate expertise, given the highly technical nature of evidence in relation to issues such as climate change. In the recent *Whitehaven* decision, for example, Holgate J (as he then was) was well-placed to grapple with detailed technical evidence on the question of calculating the effect of a proposed development on global greenhouse gas emissions, given his extensive planning law experience.[28]

26. The availability of specialist judges appears to be a more acute issue at appellate level. For instance, there is currently no specialist environmental law judge on the Supreme Court. This did not prevent the Supreme Court from overturning decisions by expert planning judges in the lower court in the *Finch* case, a judgment noted for its significant practical ramifications for companies involved in fossil fuel projects, requiring more complex and costly environmental impact assessments.[29]

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[28] *Friends of the Earth v SoS Levelling Up, Housing and Communities & others* [2024] EWHC 2349 (Admin). Practitioners have favourably received Holgate J's approach to the technical evidence in this case, see Stephanie Bruce-Smith, 'A Finch in the coalmine? Friends of the Earth v SoS Levelling Up, Housing and Communities & others [2024] EWHC 2349 (Admin)', Francis Taylor Building Environmental Law Blog, 24 October 2024.

[29] *Finch* (n 19). See Ben Chester Yeong, 'UK Supreme Court's Finch ruling: a watershed moment for fossil fuel projects and climate action' (2023) 10 JPL 1093.

11. Do you agree with the Review that the CPRC should be invited to amend the CPR so that DCO judicial reviews are automatically deemed Significant Planning Court Claims?

12. The report states that in practice all DCO judicial reviews are treated as Significant Planning Court Claims. What would be the benefit of formalising this existing practice? In particular, how would this change help to reduce delays or the impact of delays?

27. Taking questions 11 and 12 together, we agree that the CPRC should be invited to amend the CPR so that DCO judicial reviews are automatically deemed Significant Planning Court Claims. Placing this practice on a formal footing by amending CPR PD 54D paragraph 3.2 would have the practical benefits of offering parties greater clarity that the target timescales for Significant Planning Court Claims, outlined in CPR PD 54D paragraph 3.4 always apply to DCO judicial reviews. This is not likely to help reduce delays but may provide parties with more certainty to plan for the impact of a legal challenge to the delivery of an NSIP.

13. Do you agree with the Review that the CPRC should be invited to consider amending the CPR to introduce automatic case management conferences in judicial review claims challenging DCOs? If so, do you agree that case management conferences should be convened in the way suggested by the Review, including the requirement for pre-permission case management conferences and further case management discussion once permission for judicial review or permission to appeal has been granted?

28. In general, we defer to experienced practitioners on the question of whether the Review's suggestion of one automatic pre-permission CMC and one further CMC if permission is granted would operate effectively in this context. We would, however, highlight that there is a potential risk that introducing an automatic pre-permission CMC might add extra pressure on the pre-permission judicial review timeline for practitioners, and may drive up costs, given the extra resource and collaboration between parties that will be required to accommodate this procedural addition. It is not clear how the pre-permission CMC process would operate alongside the requirements of the pre-action protocol process, which already sets out the standards of conduct expected of parties at pre-action stage. Work by the Civil Justice Council on suggestions for reform of the Pre-Action Protocol for Judicial Review has recently been concluded and presented to the Civil Procedure Rule Committee.[30] It is therefore likely to be premature to consider the introduction of automatic pre-permission CMCs before the CPRC

[30] Civil Justice Council, 'Review of Pre-Action Protocols Phase Two Report (Final)' (November 2024) pp 18-23, https://www.judiciary.uk/wp-content/uploads/2024/11/CJC-Review-of-Pre-Action-Protocols-Phase-Two-Report-1.pdf

has considered how to take forward the recommendations in the review as relates to judicial review.

29. In wider judicial review research, there is evidence of an appetite amongst practitioners for the front-loading of procedural matters in factually complex and/or document-heavy judicial reviews to, for example, iron out questions of timetabling, evidence and disclosure, and narrow the scope of issues between parties. O'Loughlin's recent report on the operation of the duty of candour in judicial review found that some practitioners felt that greater use of an early CMC at permission stage in cases that require it would be beneficial to address disputed facts or questions of disclosure.[31] It is our tentative view, then, that CMCs would be better-placed at or after the point that permission has been granted.

30. It should be noted that the use of CMCs is not common in judicial review. The Administrative Court Office should be therefore consulted regarding any potential changes to the CPR to introduce automatic case management conferences, to ensure there is sufficient workload and scheduling capacity to implement regular CMCs in this context.

17. Do you agree with the Review that the Planning Court and the Court of Appeal should be invited to publish regular data on key performance indicators as outlined in the report? Please provide any evidence of likely benefits and potential costs, where available, to support your answer.

31. We agree that the Planning Court and the Court of Appeal should be invited to publish regular data on key performance indicators. Having transparent, accurate, and regular justice data, including on key performance indicators, will aid the Ministry of Justice in its commitment to 'enhancing the way data and evidence is used, to shape policy and operational decisions and drive improvements to justice outcomes'.[32] Access to KPIs will also allow stakeholders and impacted parties to more accurately assess the potential timeline of claims.

[31] EA O'Loughlin, 'Transparency and Judicial Review: An empirical study of the duty of candour' (Nuffield Foundation, October 2024) p27, https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/OLoughlin-Transparency-and-judicial-review-Oct24.pdf

[32] Ministry of Justice, 'Areas of Research Interest' (December 2020) p2, https://assets.publishing.service.gov.uk/media/6102976ee90e0703aee75908/areas-of-research-interest.pdf