Response to Call for Evidence by the

Independent Review of Administrative Law Panel

Regarding Judicial Review, the discharge of government functions,

codification, clarity, process and procedure.

Introduction

1. My name is Antonia Murillo, I was a practising solicitor until June 2020 with over 25 years' experience in both private practice and working for local authorities at District and County Councils. My experience includes successfully defending and successfully bringing claims for Judicial Review (JR) over a 20 year period, the latest case being decided in favour of the claimants in December 2019. I have advised on cases considered by the High Court, Court of Appeal and the Supreme Court. At present I am a Doctoral Researcher at the University of Sussex and my thesis is focused on JR in the context of Planning law.
2. The response below includes a response to Section 1 based upon my experience when working for local authorities.

Section 1 – JR and effective discharge of local government functions

Question 1

(a) The local authorities when I was advising (1997 to 2003) were subject to JRs relating to their planning functions, housing duty functions and prosecution function. To the best of my recollection, none of the JRs brought seriously impeded the effective discharge of the local government functions. As regards the JR and the housing duty function, the bringing of the claim led to a review of internal procedures that were more robust as a result.
(b) See (a).
(c) Outside my experience when acting for local authorities. However, I have attended a number of local authority committees and some councillors still appear to have difficulty in dealing with the issues of bias and disclosure of interests which in some cases could lead to a challenge by JR.
(d) Outside my experience when acting for local authorities.
(e) Outside my experience when acting for local authorities.
(f) See (a).
(g) See (a).
(h) The receiving a claim for JR meant collection of evidence for purposes of assessing the strength of a claim and therefore whether or not to concede in whole or in part at the earliest opportunity. As part of that process, we would

also take into account the principle being challenged and the remedy a court might give if the claim was successful. The officer time taken up in this exercise was likely to have an impact on workload but did not seriously impede the effective discharge of the local government function. The remedy would probably be the quashing of a decision that would probably be taken again by the authority, taking into account the decision of the court and any specific criticism set out in the judgment if appropriate. In the JR challenge to the prosecution, had the claimant been successful, it would have been unlikely the authority would have prosecuted a second time. That prosecution was in respect of a breach of a contested Tree Preservation Order. The time frame for filing the Acknowledgement of Service and Defence is tight but doable.

(i) Outside my experience when acting for local authorities.
(j) Outside my experience when acting for local authorities, however, the time limits for bringing a JR, especially a Planning JR favour local authorities and it is difficult to see how this aspect could impede effective discharge of a local government function.
(k) See (h).

Question 2

The prospect of a potential JR meant that the council processes would be reviewed periodically and/or advice taken in relation to new local authority duties or considerations when making decisions. This tended to give officers confidence that decision making processes were robust. Training was often provided by the legal department for officers in respect of new duties, for example when the duties under the Human Rights Act 1998 came into force, all officers of the council were trained from the Chief Executive down. That training, and the new system put in place as a result, was tested in Housing possession cases and was successful as evidence in showing what council officers had taken into account as part of the decision to begin possession proceedings. It therefore follows that compromises in making decisions were not made. To the best of my recollection costs of JRs did not impact decision making.

Question 3

The issue of Planning JR cases could benefit from review. It can be cheaper for a local authority to submit to judgment on a JR rather than revoke the grant of a planning permission. For some detail on revocation please see the Briefing paper from 2016 https://commonslibrary.parliament.uk/research-briefings/sn00905/.[1] If no JR is brought that planning permission remains extant in certain cases where it should not. The Ombudsman has no power to

[1] Accessed 18 October 2020. See Footnote 6 regarding implications for local authorities when they are too late to bring a JR of such decisions.

revoke a planning permission and can only recommend financial recompense which the council may or may not follow.

Planning decisions can affect more members of the public than just those living in the vicinity of a development yet the usual way to effectively challenge the grant of a planning permission is by way of JR. The terms of reference appear to imply that only "the citizen" is likely to challenge by JR. This is not the case and authorities challenge their own decisions and those of other public authorities. In one instance, the District Council had to bring injunctive proceedings to prevent a developer from implementing a Listed Building Consent (LBC), having granted the LBC in error and being unable to bring a JR as being out of time. See *Fenland District Council v Reuben Rose (Properties) Limited [2000] EWCA Civ 92.*[2] That type of case is unusual but is a useful illustration where it would have been helpful if some form of ADR had been available to the parties.

There are more recent cases where local authorities have challenged decisions of the Mayor of London[3] by JR or decisions of the Secretary of State in respect of the grant of planning permissions, although the latter challenges would be statutory challenges under S 288 Town and Country Planning Act 1990. See the Court of Appeal decision in *DLA Delivery Ltd v Baroness Cumberlege of Newick (1) And Secretary of State for Communities and Local Government (2) [2018] EWCA Civ 1305.*[4] The effect of a successful statutory challenge in respect of a planning decision is the same as a successful JR challenge.

Section 2 – Codification and Clarity

Question 3

No, there is no case for statutory intervention in Planning JR cases. A good example of why that should be so is the case of *R (oao Thornton Hall Hotel Ltd) (1) and Wirral Metropolitan BC (2) v Thornton Holdings Ltd.*[5] Had the JR process been codified, there would have been no opportunity for the courts to exercise discretion and ensure an equitable outcome in this particular set of circumstances. Often, neither statutes nor secondary legislation add clarity. One only has to look at the numbers of JRs brought in respect of the SIs governing Environmental Impact Assessments to see that such legislation can be the trigger for JRs.

[2] https://www.bailii.org/ew/cases/EWCA/Civ/2000/92.html accessed 18 October 2020
[3] https://www.rbkc.gov.uk/newsroom/all-council-statements/council-wins-right-challenge-mayor-london-planning-decision accessed 18 October 2020
[4] https://www.bailii.org/ew/cases/EWCA/Civ/2018/1305.html accessed 18 October 2020
[5] https://www.bailii.org/ew/cases/EWCA/Civ/2019/737.html accessed 18 October 2020

Question 4

As regards Planning decisions, it is clear which are subject to JR and which are not. CPR 54 (5) which deals with time limits for filing could be reviewed. The time limit for challenging the grant of planning permission by JR is 6 weeks yet the challenge of the local plan process is

"(a) promptly; and
(b) in any event not later than 3 months after the grounds to make the claim first arose."

This is the original time frame for bringing planning JRs. There is an argument that the time frame should be restored. 6 weeks is insufficient time to request documents, send a pre action protocol letter and issue proceedings and then have to explain why a full claim hasn't been made with all supporting documentation for the claim. Local Authorities are under a duty of candour to disclose all relevant documents, the larger the authority the harder it can be to disclose documents within a time frame that is of use to all parties to a JR. Arguably if claimants had access to all relevant documents, and time to consider that disclosure, some claims may not be brought where the issuing of proceedings is undertaken to protect a claimant's position whilst waiting for full disclosure.

All planning decisions should be subject to JR.

Question 5

The process is clear to a JR practitioner but possibly not to a litigant in person. The forms could be clearer and the language used could be clearer.

Section 3 – Process and Procedure

Question 6

In respect of Planning JRs, no, please see the answer to Question 4.

Question 7

Absolutely not. The rules regarding costs in JRs on unsuccessful parties are not lenient when taking into account lack of legal aid for Planning JRs, the

median weekly earnings which are lower in real terms than a decade ago [6] and litigation risk. Even with protection afforded by the Aarhus Convention, the risk on costs is still great for "a citizen". Unless lawyers work under a CFA or pro bono, some claims could not be brought or, in some cases defended. There are examples of JR cases where the defendant authority has chosen not to defend in either the initial process in the High Court or in subsequent appeals. Two examples are *R (oao Mid Counties Co-op) v Forest of Dean District Council and Others*[7] and *R (on the application of NHS Property Services Ltd) (Appellant) v Surrey County Council and another (Respondents).*[8] In the latter case, the Court of Appeal had set out what the Interested Party would have to pay the claimant in the event the claimant was successful. The costs liability was twice the usual sum a party could expect under the usual Aarhus costs principles. Even with that protection, the Interested Party took on a significant risk for a case that had implications for publicly held land in England and Wales. In such cases there should be a costs protection that is limited and clear from the outset of JR proceedings.

Question 8

In Planning JR cases costs can vary enormously depending on the complexity of the case and the number of grounds of challenge. One case decided in the High Court was complex in terms of evidence and costs incurred were greater in that case than costs incurred in a matter determined in the Court of Appeal where that claim had been unsuccessful on the papers, unsuccessful on a renewal hearing and then appealed to the Court of Appeal on the papers for Permission. The latter case was heard before the Planning Court came into being and it is to be hoped that the additional steps the claimant had to undertake to get to a successful substantive hearing back in 2010 would no longer be the case with Planning Judges considering Planning cases. Public funding for Planning cases would be a step forward. The quantative data available (in a written answer to Frank Dobson MP in 2012) shows that the number of Planning JR cases were not significant.[9] More recent data collected by the Ministry of Justice would seem to show a small increase in Planning JR numbers although that data needs to considered in more detail. The numbers of Planning JRs should be considered in the round with costs

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6 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2019 accessed 18 Oct. 2020

7 [2015] EWHC 1251

8 [2019] UKSC 58 https://www.supremecourt.uk/cases/uksc-2018-0109.html accessed 19 October 2020

9 https://publications.parliament.uk/pa/cm201213/cmhansrd/cm121126/text/121126w0002.htm#1211271000012 accessed 19 October 2020

and what could be considered as proportionate. As referred to above, the issue of standing is rarely an issue in Planning JR cases. Even if it were an issue, that of itself should not be conflated with the issue of costs. Unmeritorious claims are already dealt with under the normal costs rules in that costs follow the event and the losing party would be responsible for the winning parties costs to be assessed if not agreed.

Question 9

Limiting my comments to Planning JR cases, the remedy sought is clear, the quashing of a planning permission or a decision in respect of the local plan process. Planning statutes don't allow for any other remedy at present.

Question 10

By the decision maker:

- more transparency in decision making;
- better training for council officers;
- stronger leadership so council officers are not making decisions in a climate of fear.

By the Claimant:

- to make arguments clear prior to the grant of planning permission.

Question 11

Yes, my experience is of claims settling prior to Permission stage when the authority conceded the claim when the Defence is filed and after Permission was granted. When acting for claimants I would always ask the defendant to reconsider its position after Permission had been granted. Likewise I would review a claim when Permission had not been granted on the papers and advise accordingly. I do not have experience of claims for JR being settled at the door of the court.

Question 12

Yes, ADR would be helpful in certain Planning cases. Please see Section 1, Question 3. It is difficult to see how ADR could be used in the majority of Planning JR cases whilst Planning legislation remains unamended.

Question 13

No, all claimants had sufficient standing in cases where I advised.

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