Public Law Project

Consultation on amending the Civil Procedure Rules to establish environmental review: Response on behalf of Public Law Project

1. Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

2. This submission addresses the questions concerning the procedure for environmental review, drawing on our expertise as judicial review practitioners. We support the recommendations made by Greener Alliance and Wildlife and Countryside Link in their submission. Comments here should also be taken alongside our published briefing on the substantive content of the relevant provisions of the Environmental Bill.[1]

3. There is no need to consider this submission confidential (**Question 1**). **Questions 2-6** are answered above.

Questions 7-8: Interested Parties and Interveners

4. Interveners play a vital role in judicial review (JR) cases. They may provide:

> "specialist knowledge of non-domestic authority which may assist the court by way of comparative analysis; a particular understanding of the impact of legislation in practice; a particular perspective, for example religious, as regards the issues at stake; expertise in the area of law concerned; [the] filling of a gap in representation, for example where a child may not be separately represented and that perspective is not before the court; or particular operational expertise relating to the factual scenario."[2]

[1] Public Law Project, "The enforcement provisions of the Environment Bill PLP Briefing for House of Lords Committee Stage", https://publiclawproject.org.uk/content/uploads/2021/06/Public-Law-Project-Briefing-on-enforcement-aspects-of-Environment-Bill.pdf

[2] Knights, "Interventions in Public Law Proceedings" (2013) 18(2) JR 200, 201-202

5. This positive view of the role of interveners is one firmly held by PLP as well as many judges.[3]

6. However, the role of interveners and interested parties may be even more important in environmental review cases, and as such, any rules should be drafted in such a way so as to allow flexibility in this respect (indeed, perhaps greater flexibility than in a standard JR case).

7. The reasons for this are self-evident. The environmental review procedure seeks to promote transparency, accountability and good governance. It vital that the range of parties affected by a decision can participate meaningfully in proceedings if they so wish. It should be borne in mind that environmental decisions affect different parties in different ways, and each should be provided the opportunity to put forward their views - the perspective of a national campaigning organisation may differ from that of local people affected by a certain decision, for example.

8. It is envisaged that claims brought to the court by the OEP are likely to be complex (as it is envisaged that straightforward cases would be resolved without the need to bring an environmental review in the first place) and, like many environmental law JRs, involve challenges to systemic conduct, or a matrix of different individual decisions. Not only does this mean that as much as possible should be done so that the court is in a position to consider as much relevant information as possible (something interveners and interested parties can assist with) but also means that the role of specialists and experts may be enhanced. As Lady Hale once put it, "the more important the subject, the more difficult the issues, the more help we need to try and get the right answer".[4]

9. In JR, the utility of interventions is judged according to whether they can provide a meaningful contribution, distinct from that offered by the parties in the case. In environmental review cases, the OEP will necessarily be the claimant party. The OEP is, obviously, an expert body and is well-equipped to bring cases, but it will not be able to represent the views of the different parties affected, nor will it necessarily share the specific expertise of dedicated environmental law organisations. Wider rules for interveners and

[3] R (Air Transport Association of America) v Secretary of State for Energy and Climate Change [2010] EWHC 1554 at [8]; Response by the senior judiciary to the Ministry of Justice's consultation paper, "Judicial Review: Proposals for Further Reform", November 2013, [37]; Lady Hale, "Who Guards the Guardians?", Public Law Project Conference 2013, available at https://www.supremecourt.uk/docs/speech-131014.pdf.

[4] Lady Hale, "Who Guards the Guardians?", Public Law Project Conference 2013, available at https://www.supremecourt.uk/docs/speech-131014.pdf.

interested parties would allow those with the necessary interest or expertise to compliment the OEP's central submissions.

10. Finally, we would highlight and endorse one particular recommendation made by Greener UK: those people who submit complaints to the OEP which lead to environmental review should automatically be presumed to have a sufficient interest in the case so as to be included as an interested party.

Question 9: If you consider there should be a role for interveners, should the application procedures differ in any way from those for judicial review?

11. PLP has raised serious concerns about recent changes to rules relating to interveners, and new requirements about submitting evidence under PD54A. In short, interveners are now required to submit the evidence they wish to rely upon as part of their application. We are concerned that this requirement will have a serious negative impact on the quality, timing and number of interventions made.

12. Requiring the front-loading of evidence places interveners in an unenviable position of having to research, collate and submit the totality of evidence before they even know whether they will be granted permission to intervene at all. Gathering this evidence takes up (often considerable) time, yet there is a duty upon interveners to apply "promptly", unduly increasing pressure on the already-limited resources of intervening groups. Further, interveners will not always be able to secure copies of pleadings and relevant documents, in turn making it harder to formulate submissions and gather evidence.

13. Taken together, the provisions are likely to have a negative effect on the content of interventions and harbour a chilling effect on potential interveners. We believe that, owing to the particular usefulness of interveners in environmental law issues, the requirement to front-load evidence should not be carried over to environmental review. We agree with Greener UK that a better approach would limit the materials an intervener must provide in support of their application to intervene perhaps by requiring only a summary or list of evidence on which the intervener will rely (rather than the evidence itself).

Questions 10-11: costs

14. In relation to costs, we would query whether the statement in the consultation document drawing a distinction between the practice of awarding costs in judicial review proceedings in the High Court and in the Upper Tribunal

respectively is in fact correct.[5] Regardless, we think there is a strong argument that, at least in certain respects, it would be inequitable for the OEP to pay costs in unsuccessful cases, especially if it is clearly in the public interest for the case to be brought or there is some useful purpose to its determination.

15. As to costs against interveners, PLP have raised concerns about this issue before,[6] and we repeat them here.

16. Broadly, whilst it makes sense for interveners to be penalised where they are engaging in bad faith and conducting clearly unreasonable behaviour, such as trying to deceive parties or the court, the current conditions upon which a costs order can be made are broader than this. If an intervener is "not of significant assistance", the intervention relates to "unnecessary" matters, or if the intervener is taken to act "as the principal applicant", costs can be ordered against them.

17. There is significant uncertainty around what this criteria means and how it should apply in practice, but there has been a notable chilling effect on intervening parties, and especially those with less financial means, unwilling to take the significant financial risk. Some of the conditions have the potential to operate very unfairly: it is not easy, without the benefit of hindsight, to know whether a point is going to be taken seriously or is going to be particularly persuasive to a judge.

18. This is only aggravated in environmental cases, where costs can run very high and smaller parties may face bearing even greater risk. As explained above, the submissions of interveners are likely to have particular importance in environmental review cases; the applicable costs regime should not discourage less affluent interveners from making submissions, as the current JR regime risks doing.

19. We believe costs in environmental review cases should only be ordered against interveners where there has been improper conduct on the part of interveners, rather than being based on the utility of their submissions in practice.

Question 12: claims without a hearing

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[5] See Tribunal Procedure (Upper Tribunal) Rules 2008, rule 10(3)(a), as substituted by the Tribunal Procedure (Amendment) Rules 2009/274, rule 7.

[6] Public Law Project, Bingham Centre for the Rule of Law and JUSTICE, "Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act, Part 4", https://www.biicl.org/documents/767_judicial_review_and_the_rule_of_law_-_final_for_web_19_oct_2015.pdf?showdocument=1

20. CPR 54.18 sets out the rules in JR regarding the resolution of claims without the need for a hearing. In order to do this, all parties need to agree to it.

21. In theory, where all parties agree, a court should be able to deal with a claim without the need for a hearing. At the same time, we suggest that, owing to the desirability of cases being dealt with in a transparent way, and the role of environmental review in setting standards for future conduct, the courts should always consider whether it remains in the public interest to insist upon a hearing, to take relevant evidence, and make public pronouncements.

22. We agree with Greener UK:

> "It could very well be the case that a public authority accepts that the alleged conduct did occur and that it was, or may have been, unlawful but that, in spite of this, there is still real and tangible value and public interest in the court reviewing the case."

23. Of course, this does not need to be done with a full hearing, but doing so might, in appropriate circumstances, enhance clarity, send a clear message, and reduce the risk of future breaches of a similar kind occurring.

Questions 13-14: further comments

24. We agree with Greener UK that the duty of candour is paramount in environmental review cases. Although the OEP does have powers to procure information, courts should be empowered to insist on the highest standards of disclosure by public bodies. Again, this is important for transparency, ensuring public confidence, and guiding future actions.

25. We would encourage, particularly during its initial period, the publication of relevant statistics relating to the use of environmental review and the results of cases. This is important not only for transparency and ensuring public confidence in the system, but will be a useful monitoring device by which the adequacy of the system can be assessed in the future.

26. We have commented separately on the inherent weakness of statements of non-compliance.[7] Whilst the Civil Procedure Rules must not depart from statute in any way, we would emphasise the importance of ensuring

[7] Public Law Project, "The enforcement provisions of the Environment Bill PLP Briefing for House of Lords Committee Stage", https://publiclawproject.org.uk/content/uploads/2021/06/Public-Law-Project-Briefing-on-enforcement-aspects-of-Environment-Bill.pdf

compliance with environmental review rulings, and would hope the CPR underscore the importance of this, regardless of what form the final Bill takes.

27. Finally, we have also criticised the limited remedial powers available to judges deciding environmental review cases.[8] Again, whilst acknowledging that the CPR cannot, and should not, depart from statute, we would strongly urge that the relevant rules highlight any discretion available to judges, and provide guidance as to how it should be exercised.

[8] Ibid.