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

This call for evidence begins on 28 October 2024

This call for evidence ends on 30 December 2024

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A call for evidence produced by the Ministry of Justice.

About this call for evidence

To:	The Nationally Significant Infrastructure Projects regime operates in England, in Wales in relation to specified types of infrastructure, and in very limited circumstances in Scotland. This call for evidence will therefore be of greatest relevance to members of the judiciary, legal professionals, planning authorities, NGOs and anyone else with an interest in planning matters in England and Wales.
Duration:	From 28/10/24 to 30/12/2024
Enquiries (including requests for the paper in an alternative format) to:	**Judicial Review Policy** Ministry of Justice Constitutional Policy Division 9th Floor, 102 Petty France London SW1H 9AJ Email: BannerReviewCfE@justice.gov.uk
How to respond:	Please send your response by 30 December 2024 to: **Judicial Review Policy** Ministry of Justice Constitutional Policy Division 9th Floor, 102 Petty France London SW1H 9AJ Email: BannerReviewCfE@justice.gov.uk
Response paper:	The Government intends to publish a response to this call for evidence as soon as practicable after the closing date.

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Foreword

The previous Government commissioned Lord Banner KC to conduct an independent review into the delays to nationally significant infrastructure projects caused by legal challenges. Delays to these major projects have serious implications, including holding back the delivery of essential benefits to the country and imposing considerable additional costs.

This Government recognises the pressing need to consider ways to tackle delays to nationally significant infrastructure projects and welcomes Lord Banner's report, which was published today by the Ministry of Housing, Communities and Local Government. We are grateful to Lord Banner who, supported by Nick Grant, has delivered a timely, comprehensive, and thoughtful report on this important issue. We are grateful to them for their work, which draws on many years' experience of planning cases in the courts, and also to those who engaged with Lord Banner in the course of the Review and who contributed towards its conclusions.

Building the infrastructure necessary to deliver the Government's Growth and Clean Energy missions means ensuring we have the right policy, legal, and operational frameworks in place. Any changes that we decide to make must, however, strike the right balance between reducing delays to infrastructure projects and maintaining access to justice in line with our domestic and international legal obligations. This requires careful consideration, and we want to open the discussion more widely before taking decisions on any options for reform, including those that have been identified by Lord Banner.

We are therefore launching this call for evidence to enable stakeholders with an interest to respond to the findings and recommendations of the Review, and thereby help inform the Government's approach to this important matter.

Lord Ponsonby, Parliamentary Under-Secretary of State in the Ministry of Justice and Matthew Pennycook, Minister of State for Housing and Planning

Executive summary

In response to drawn-out planning inquiries in cases such as the Sizewell B nuclear power station and Heathrow Terminal 5, the Planning Act 2008 established a bespoke consenting route for major infrastructure projects within the categories of energy, transport, water, wastewater, and waste, which are referred to as Nationally Significant Infrastructure Projects (NSIPs). The NSIP regime was designed to provide a clear framework for project promoters to take investment decisions and greater certainty for local communities about how plans for NSIPs affecting their areas are developed and considered. The need for the different categories of NSIPs is set out in National Policy Statements, which are subject to an Appraisal of Sustainability, consultation and parliamentary scrutiny and against which applications can be designed and judged.

NSIPs require development consent from the relevant Secretary of State rather than planning permission from the local planning authority. A Development Consent Order (DCO) is intended to provide a ‘one stop shop’ consent, removing the need to make separate applications for planning permission and for other consents and licences required to deliver major infrastructure projects. The NSIP consenting process involves extensive upfront engagement with stakeholders, including the relevant local authority, followed by rigorous examination of a proposal by the Planning Inspectorate, acting on behalf of the relevant Secretary of State. The Inspector or Inspectors that examine and report on an application provide a recommendation and a draft DCO, for cases in which it is recommended that a DCO is granted, to the Secretary of State, who will then determine whether to grant consent for an NSIP using the draft DCO.

By 27 May 2024, there had been 137 DCO decisions made under the NSIP regime since its introduction in 2008. Of these, 34 decisions have been subject to judicial review, the majority of which (30) were against decisions to grant development consent rather than to refuse it. Where a court grants permission for a judicial review to proceed to a substantive hearing, the project in question could be subject to considerable delay as the claim progresses through the courts.

Only four judicial reviews against DCO decisions have been successful, resulting in those decisions being overturned by the court. However, even where a judicial review is unsuccessful, the resulting delay has downstream impacts on the delivery of NSIPs, including significant cost implications. Given their national importance, it is crucial that NSIPs which have lawfully been granted DCOs can be delivered without undue delay, in order to promptly secure their essential benefit to the country and to avoid incurring wasteful additional costs.

In early 2024 the previous government appointed Lord Banner KC to lead an independent review ('the Review') into whether NSIPs are unduly held up by 'inappropriate' legal challenges, and if so, the main reasons for this and how the problem could be effectively resolved. The Review ran from 12 February to 27 May 2024. Its report, which was published today by the Ministry of Housing, Communities and Local Government,[1] sets out a number of potential options for reform which the Review suggests could help to reduce delays arising from legal challenges to DCO decisions.

The Review makes the case for reform, but the Government is of the view that further analysis of a broader evidence base is necessary before decisions can be taken on the Review's recommendations. Therefore, we are launching this call for evidence to seek views on the Review's findings and recommendations and to gather additional suggestions for changes that could help to address delays arising from judicial reviews against DCO decisions.

The Government is committed to maintaining access to justice in line with our domestic and international legal obligations. We will not be seeking views on two options which the Review considered, but recommended should not go ahead, which we agree would unduly restrict access to justice and/or put the UK in breach of its international legal obligations (the Review's recommendations 1 and 2). We would welcome comments on any potential impact on access to justice arising from the Review's other recommendations (recommendations 3 to 10), on all of which we are seeking views as to their merits.

The Ministry of Justice recently published a separate call for evidence on options to ensure the UK's compliance with its obligations under the Aarhus Convention.[2] In launching the present call for evidence, it is anticipated that any change that we decide to take forward to reduce delays in the judicial review process for NSIPs could also improve access to justice by reducing the time and, therefore, cost involved in bringing a challenge against DCO decisions, whether on environmental or other grounds. We are keen to hear views from all those involved in the NSIP process and regime.

[1] https://www.gov.uk/government/publications/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects

[2] Access to Justice in relation to the Aarhus Convention - GOV.UK (www.gov.uk)

Introduction

This call for evidence sets out the recommendations put forward by Lord Banner's Review of Legal Challenges to Nationally Significant Infrastructure Projects (NSIPs), seeks views on most of its recommendations and invites additional proposals that could help to reduce delays to NSIPs. For more information on each of the recommendations and the Review's analysis, respondents can read the full report which is available at https://www.gov.uk/government/publications/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects.

The NSIP regime operates in England, in Wales in relation to specified types of infrastructure, and in very limited circumstances in Scotland. This call for evidence will therefore be of greatest relevance to members of the judiciary, legal professionals, planning authorities, NGOs and anyone else with an interest in planning matters in England and Wales.

A Welsh language translation of this call for evidence is available upon request.

Proportionate Impact Assessment, Equality Analysis, and Welsh Language Impact Tests will be completed as required as part of the Government response to the call for evidence.

Background

Nationally Significant Infrastructure Projects

The Planning Act 2008 ('the Planning Act') established a separate consenting route for major infrastructure projects in the fields of energy, transport, water, wastewater, and waste, which are referred to as Nationally Significant Infrastructure Projects (NSIPs). To qualify as an NSIP, a proposed project must meet certain thresholds defined in Part 3 of the Planning Act.[3] NSIPs require development consent from the relevant Secretary of State rather than planning permission from the local planning authority.

The NSIP regime was introduced in response to drawn-out planning inquiries in cases such as the Sizewell B nuclear power station and Heathrow Terminal 5, which took seven and eight years in planning respectively. It was designed to provide a clear framework for project promoters to take investment decisions, and greater certainty for local communities by:

- setting statutory deadlines for examination and determination of proposals;
- pulling together all required consents for a project into one Development Consent Order (DCO) (by comparison, Heathrow Terminal 5 involved 35 different applications across seven pieces of legislation);
- requiring extensive upfront consultation with stakeholders and rigorous examination of the proposal by the Planning Inspectorate; and
- requiring the relevant Secretary of State to set out the national need for NSIPs in National Policy Statements, agreed by Parliament, against which applications can be designed and judged.

The NSIP consenting process takes a front-loaded approach in which the developer consults on a proposed application before submitting that application to the Planning Inspectorate (acting on behalf of the Secretary of State), who will then examine the application and recommend to the relevant Secretary of State whether development consent should be granted. Where the relevant Secretary of State decides to grant consent for an NSIP, this will be through a DCO, which is typically made as a statutory instrument.

The DCO not only provides consent for the project but may also incorporate other consents and licences and may include authorisation for the compulsory acquisition of

[3] The Planning Act also provides powers for the relevant Secretary of State to amend the thresholds and to bring other projects into the remit of the NSIP consenting process.

land, provided certain tests are met. The DCO will specify the details of the development consented and any requirements (similar to planning conditions) that must be met in implementing the consent.

Judicial review against DCO decisions

Judicial review is a constitutionally important mechanism which allows an individual or organisation affected by a decision taken by a public body to challenge the lawfulness of that decision in court. As with other planning decisions, an application for judicial review against a DCO decision must be made within six weeks of that decision being taken.

It is up to the court to consider the application and determine whether the claim should be heard; this is commonly known as the ‘permission stage’. At the permission stage the court will consider several factors, including whether the claimant has standing (i.e. sufficient interest in the matter) and whether there is an arguable case for judicial review. Where permission is granted, the claim will proceed to a substantive hearing.

Judicial reviews against DCO decisions are considered by the Planning Court, a specialist sub-division of the High Court with selected High Court Judges who are specifically authorised to hear planning cases. Following the substantive hearing, should the court find the decision to be unlawful, it will usually overturn (or ‘quash’) the decision. Should a claimant wish to challenge the High Court’s decision to refuse permission for judicial review and should either party wish to challenge the High Court’s judgment following the substantive hearing they may seek an appeal at the Court of Appeal and subsequently at the Supreme Court, where appropriate.

By 27 May 2024, there had been 137 DCO decisions made under the NSIP regime since its introduction in 2008. Of these decisions, 34 were subject to judicial review, the majority of which (30) were against decisions to grant development consent rather than to refuse it. Where a claim is granted permission to proceed to a substantive hearing, the project in question could be subject to considerable delay as the claim progresses through the courts.

Only four judicial review claims against DCO decisions have been successful, resulting in those decisions being overturned by the court. However, even where the claim is unsuccessful, the resulting delay has downstream impacts on the delivery of NSIPs, including significant cost implications.

The independent review by Lord Banner KC

Early this year Lord Banner KC, a senior barrister specialising in planning and environmental law, was appointed by the then Prime Minister, the Rt Hon Rishi Sunak MP, to conduct an independent review into the causes of legal challenges brought against the NSIP regime and to explore the scope and options for improving existing processes. He was supported in this work by Nick Grant, a leading junior barrister in the same field. The Review's Terms of Reference[4] required it to answer the following question.

> "Are NSIPs unduly held up by inappropriate legal challenges? If so, what are the main reasons for this and how can the problem be effectively resolved?"

The Review ran from 12 February to 27 May 2024. It looked at the progress of legal challenges against DCO decisions through the courts using data provided by government departments, cross-referenced with data provided by stakeholders. Whilst the Review did not conduct a formal consultation, it gathered views from the judiciary, government departments and a range of stakeholders through a combination of interviews and written submissions.[5]

In its report, which was published by the Ministry of Housing, Communities and Local Government on 28 October,[6] the Review explained that the concept of 'inappropriate' legal challenge was not a helpful one and did not use it to frame its recommendations. The Government agrees with the Review that 'inappropriate' legal challenge is an unhelpful and misleading concept. As explained above, applications for judicial review are subject to a permission stage in which the court will assess the merits of the case before determining whether it can proceed to a substantive hearing. It follows that if the court considers that a case should proceed it is, by definition, an appropriate challenge, regardless of whether the case is ultimately successful.

The report sets out 10 options for reform which were identified in the course of the Review and considered with stakeholders. It recommends that two options be rejected. The Government agrees and is not seeking views on those options. The report argues that those options which are recommended for implementation could help to accelerate the handling of legal challenges to DCO decisions and provide greater certainty in the process. This in turn, the report says, would increase stakeholder confidence in the NSIP

[4] Review on the causes of legal challenges brought against the NSIP regime and the scope and options for improving existing processes - GOV.UK (www.gov.uk)

[5] The list of stakeholders engaged by the Review is provided in Appendix 2 of the Review's report.

[6] https://www.gov.uk/government/publications/independent-review-into-legal-challenges-against-nationally-significant-infrastructure-projects.

regime and reduce costs and other impacts of delays resulting from unsuccessful legal challenges. The Government is of the view that addressing delays could also help to improve access to justice by reducing the time and, therefore, cost of bringing a challenge against DCO decisions, whether on environmental or other grounds.

The Review makes the case for changes to the judicial review process in order to reduce delays to NSIPs whilst maintaining access to justice and ensuring that the UK upholds its domestic and international obligations. However, the Government is of the view that further analysis of a broader evidence base is necessary before a decision can be taken on the Review's proposals. Therefore, we are launching this call for evidence to seek views on the Review's findings and recommendations and to gather additional suggestions for proposed changes that could help to address delays arising from judicial reviews against DCO decisions.

The Review's analysis, which has been reproduced throughout this call for evidence, is based on data that was accurate as of 27 May 2024 when the Review submitted its report to the Government.

Access to justice

The Government is committed to ensuring that access to justice is maintained in line with its domestic and international legal obligations. The two options referred to above, which the Review rejected and recommended should not go ahead, were rejected on the basis that they would unduly restrict access to justice and/or put the UK in breach of its domestic and international legal obligations. Whilst the Government agrees with those recommendations (Recommendations 1 and 2) and is not seeking views on their merits we would particularly welcome comments on any potential impacts on access to justice – whether positive or negative – arising from the other eight recommendations.

The Review's Recommendations

The case for intervention

The Review identified that of the 34 judicial review cases concerning DCO decisions, 30 had been brought seeking to overturn the Secretary of State's decision to grant a DCO. Of these, just four were successful: two by the Government's consent and the other two because the High Court quashed the Secretary of State's decision. The Review found that around 30% of cases were unsuccessful at the permission stage.

The Review found that in relation to judicial reviews of DCO decisions, the average determination time for an application for permission on the papers is around eight to nine weeks from the date of issue, compared to the target timescale of seven weeks under Practice Direction (PD) 54D. It also found that the High Court is, on average, hearing judicial reviews within 10 to 11 weeks of the expiry period of the detailed grounds of resistance, compared to the target timescale of 10 weeks under PD 54D. The report notes that there are significant deviations from the average at both the permission stage and the substantive hearing.

In relation to the Court of Appeal, the report says that since 2020 it has taken on average around 11 weeks for the Court to determine an application for permission to appeal and 34 weeks to deliver its judgment, but with some cases taking substantially longer. The time taken for the Supreme Court to deal with applications for permission to appeal, according to the report, is on average 16 weeks, with a range between six and 27 weeks.

The report argues that although only a quarter of DCO decisions are subject to judicial review, with only four being successful at the time of the report, each one concerns a project of national significance and hence delays resulting from unsuccessful challenges are a clear detriment to the public interest. The report notes several downstream impacts of judicial reviews of DCO decisions on the projects under challenge, which are outlined below.

- The 'lost time' impact of legal challenges to DCO decisions is not linear (i.e. a two-year case could lead to more than two years' delay in the start of work) due to factors such as the seasonal nature of certain environmental surveys and supply chain constraints.
- There may be wasted cost, such as aborted costs for supply chain components or workers which have been booked in advance and for which the contract cannot be changed.
- The preceding effects would result in an increase in the construction costs of the project, exacerbated by other factors such as inflation. The report says that at the time

of providing evidence to the Review, National Highways calculated that the increase in costs to its schemes arising from legal challenges is between £66 million and £121 million per scheme.

- The essential benefits of the schemes would not be realised in the time envisaged. The report notes a particular concern in the energy sector where there will inevitably be impacts on both consumers from rising costs and on the environment if the renewable energy infrastructure cannot be brought online in time, requiring energy to be obtained from other source.
- Third party landowners could be subject to uncertainty as to when their land will be acquired.
- There could be chilling effects for investors who operate in a global market.

Based on these considerations, the Review concluded that there is a case for streamlining the process for judicial review of DCO decisions to reduce the time it takes for unsuccessful claims to be concluded.

Questions

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

Amending the cost caps

Recommendation 1

"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."

As a party to the Aarhus Convention[7], the UK is required to ensure that certain types of claims, including eligible environmental judicial reviews, are not 'prohibitively expensive'. The Environmental Cost Protection Regime was introduced in 2013 to meet this requirement and provides default caps on the legal costs that an unsuccessful party would

[7] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention')

have to pay to a successful party, namely £5,000 for individual claimants, £10,000 for claimant organisations (such as environmental NGOs) and £35,000 for defendants (such as local authorities).

The report notes that the cost caps available for judicial reviews within scope of the Aarhus Convention may have contributed to the proliferation of challenges against DCOs and other planning decisions. However, it argues that changing the rules on cost caps would only reduce the number of challenges to NSIPs if the effect was to increase the cost of litigation so as to deter potential claimants, which would not be consistent with the UK's obligations under the Aarhus Convention. According to the report, stakeholders also had little appetite for fundamental changes to the cost caps for this reason.

The Government agrees with the Review and does not intend to implement such a change to the cost caps. We are therefore not seeking views on this recommendation. The Government is committed to ensuring its policies are consistent with our obligations under the Aarhus Convention and has published a separate call for evidence on other possible changes to the cost caps that could help us reach compliance. Those interested in this matter are encouraged to respond to that call for evidence, which can be found at https://www.gov.uk/government/calls-for-evidence/access-to-justice-in-relation-to-the-aarhus-convention.

Amending the rules on 'standing'

Recommendation 2

"There is no convincing case for amending the rules in relation to standing to reduce the number of challenges to NSIPs."

Under the Senior Courts Act 1981, in order to have standing to bring a judicial review, a person must have 'sufficient interest in the matter to which the application relates'. Currently, to have standing the claimant normally needs to have participated in some way in the process leading to the DCO decision in question. There is no specified level of involvement required to merit standing.

The Review considered whether a more exacting statutory test should be introduced so that only claimants who have 'participated substantially' in the process would have standing. The report says that neither the Review nor stakeholders the Review engaged with identified any DCO judicial review in which the claimant would not have had standing if the more stringent test had been applied. The Review, therefore, concludes that amending the rules in this way would not have any meaningful effect on the number of judicial review challenges against DCO decisions.

The question of whether the rules on standing should be amended was looked at in a government consultation on judicial review in 2014[8] and was later considered by the Independent Review of Administrative Law (IRAL)[9] led by Lord Faulks KC which reported in 2021. Ministers in the Coalition Government concluded in response to the 2014 consultation that amending the rules on standing was not the best way to limit the potential for judicial review to be misused by those making a claim in bad faith with a view to hindering the process of proper decision-making. The IRAL recommended, and the then Lord Chancellor agreed, that the Government should not seek to legislate to amend the rules on standing and that this question should be left to the courts to determine.

The Government's view is that it would be difficult to define what is meant by "substantial participation" in practice and how this differs from the current test. More importantly, imposing a more exacting statutory test for determining standing without clear policy justification would risk an infringement on the right of access to justice. Given that amending the rules on standing in this way is not expected to reduce the number of DCO judicial reviews, according to anecdotal evidence presented in the report, we agree with the Review that the rules on standing should not be amended and are not seeking views on this recommendation.

Reducing the number of permission attempts

Recommendation 3

"The current three bites of the cherry to obtain permission to apply for judicial review is excessive and should be reduced to either two or one."

Claimants for judicial review currently have up to three attempts to obtain permission: (1) in writing before the High Court, (2) at an oral permission hearing (OPH) before the High Court if permission is refused at the written stage, and (3) at a hearing before the Court of Appeal if permission is refused at OPH.

The Review argues that retaining all three attempts is not necessary to ensure fair and effective handling of claims, and that each attempt extends the duration of a judicial review claim by several weeks or, in some cases, several months. The Review recommends that the number of permission attempts for DCO judicial reviews should be reduced to either two or just one. In both scenarios, the written stage would be eliminated, and a DCO

[8] Judicial Review – proposals for further reform: the Government response (justice.gov.uk)

[9] The Independent Review of Administrative Law (publishing.service.gov.uk)

judicial review claim would proceed directly to an OPH. With just one permission attempt, there would be no right of appeal against a refusal of permission at the OPH.

The Review argues that it would be preferable to retain the right of appeal and have two permission attempts, citing concerns from stakeholders that if there were only one opportunity to gain permission, judges may be more inclined to err on the side of caution and grant permission in marginal cases. The Review notes that primary legislation would be required to reduce the number of permission attempts to just one, whereas reducing the number of permission attempts to two could be done by a change in the Civil Procedure Rules (CPR), which is a matter for the independent Civil Procedure Rule Committee (CPRC).

The permission stage is an important mechanism within the judicial review process which saves time and cost by preventing unmeritorious claims from going to a full hearing. Reducing the number of permission attempts and imposing target timescales for the remaining stages (see recommendation 8 below) would in effect limit the total amount of time available for obtaining permission. If the proposed change could result in time and cost savings for litigants and the courts, whilst maintaining adequate access to justice, there could be merit in considering this change not only in the context of NSIPs but also for judicial reviews of other planning decisions in general.

The Government is, however, of the view that more evidence is required to inform a decision on the implementation of this proposed change. We would, therefore, welcome views on the expected benefits and potential risks of this change, both in the context of the NSIP regime and in wider judicial review cases. Please provide evidence, where available, to support your answers.

Questions

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?

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?

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?

Raising the permission threshold

Recommendation 4

"There *may* be a case for raising the permission threshold for judicial review claims challenging DCOs, which could be achieved by amendments to the CPR."

The Review considered whether the threshold for permission to apply for judicial review of DCO decisions should be raised so that only those claims likely to succeed are allowed to proceed to a substantive hearing. The aim would be to prevent arguable but weak or mediocre claims from reaching a full hearing.

The report notes the risk of a mismatch between the test for permission for judicial review challenging DCO decisions and the test for permission in other judicial review and statutory review cases. It also highlights a concern raised by some stakeholders that the more granular consideration of the merit of the claim with a higher permission threshold would make the permission stage more cumbersome, potentially reducing its current utility. On balance, the Review concluded that while there may be a case for raising the permission threshold, further consideration is required in the light of whether other recommendations are taken forward.

The Government is of the view that in addition to the practical risks highlighted in the report, there is a more fundamental concern that raising the permission threshold in this way could unduly restrict the right of access to justice.[10] As expressed in the judgment of the Supreme Court in the *Unison* case: "the right of access to justice…is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication" (para 29). The Government would however welcome views with supporting evidence, where available, on the likely benefits and potential risks of raising the permission threshold as discussed in the report.

Questions

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

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

[10] R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51

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

Specialist NSIP judges in the High Court

Recommendation 5

"There are respectable arguments either way on the question of whether or not there should be a specialist NSIP ticket within the Planning Court, pursuant to which around 4-6 judges with in-depth NSIP experience would be eligible to hear judicial review challenges to DCO decisions.

"On balance, I conclude that the case in favour of an 'NSIP ticket' is not yet made out."

There are currently 35 full time High Court judges authorised to consider planning cases. Only four of these specialised in planning as practitioners prior to joining the judiciary.

The Review considered whether an 'NSIP ticket' should be created. This would restrict the ability to hear judicial review cases concerning DCO decisions to a small specialist pool of judges (four to six judges), rather than all those who are currently authorised to hear planning cases. The report states that some stakeholders felt that this would be justified due to the heightened public interest in NSIP cases and their particularly specialist nature.

The report, however, cites stakeholders' concerns with the potential for 'judicial groupthink' and the risk of bottlenecks for judicial resources. The report also highlights the fact that in practice, judicial reviews concerning DCO decisions have all been treated as Significant Planning Court Claims[11] which are all reviewed by the Planning Liaison Judge to ensure they are allocated to judges with an appropriate level of expertise. On balance, the Review concluded that the case for an 'NSIP ticket' is not yet made.

The Government would welcome views on whether this idea should be taken forward, whilst recognising that the authorisation of judges to hear certain types of case is part of judicial allocation and deployment which is a matter for the judiciary. We would particularly

[11] Significant Planning Court Claims are planning cases which relate to developments likely to have a significant economic impact, raise important points of law, generate significant public interest or present technical material of significant volume or complexity. Rules concerning Significant Planning Court Claims are set out in CPR PD54.

welcome views from members of the judiciary. Please provide evidence, where available, to support your answers.

Questions

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)?

10. What would be the impact on the operation of the Planning Court if an NSIP ticket were to be introduced?

‘Significant Planning Court Claim’ designation

Recommendation 6

“The CPRC should be invited to amend CPR PD 54D paragraph 3.2 to add a new subparagraph providing that DCO judicial reviews are automatically deemed Significant Planning Court Claims.”

For Significant Planning Court Claims, there are target timescales set out in PD 54D. Noting that in practice all judicial review cases concerning DCO decisions have to date been treated as Significant Planning Court Claims, the Review recommends that this should be put on a formal footing to provide greater certainty for stakeholders in the NSIP regime.

Given the national significance of NSIPs and the complexity of the claims against them, there is a case for formalising the existing practice of designating all judicial review cases concerning DCO decisions as Significant Planning Court Claims. The Government would, however, welcome views on the practical benefits of formalising this existing practice.

Questions

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?

Pre-permission case management conferences

Recommendation 7

"The CPRC should be invited to amend CPR Part 54 and/or PD 54D to introduce automatic pre-permission case management conferences in judicial review claims challenging DCOs."

The aim of case management conferences is to require the parties to consider at an early stage practical matters such as timetabling, procedural rulings, range of evidence to be considered, and the scope for narrowing the issues. The Review considers that introducing this mechanism to judicial review claims challenging DCO decisions could help to ensure the smooth and efficient running of cases when they progress through the courts. The Review recommends that there should be automatic pre-permission case management conferences which would reconvene for further discussion once permission for judicial review has been granted and again if permission to appeal has been granted.

Following recommendations as part of the Rosewell Review[12], which looked at how planning inquiries are handled, the Planning Inspectorate introduced case management conferences for all planning inquiry appeals under the Town and Country Planning Act, including virtual conferences. These are now standard practice at the Planning Inspectorate and serve to bring various parties together at an early stage to consider how best to approach these potentially large-scale events. Their introduction has helped to drive more efficient management practices across organisations.

The Government would welcome views on the introduction of pre-permission case management conferences for judicial review claims challenging DCO decisions.

[12] On 12 February 2019, MHCLG published Bridget Rosewell's 'Independent review of planning appeal inquiries' which contained 22 recommendations on how the planning appeal inquiry process could be improved and decisions made more quickly. The report and the Planning Inspectorate's Action Plan (April 2019) in response, are available to view at https://www.gov.uk/government/publications/independent-review-of-planning-appeal-inquiries-report.

Questions

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?

Introducing target timescales

Recommendation 8

"The CPRC should be invited to amend the CPR to introduce a new Practice Direction accompanying CPR Part 52, dealing with appeals to the Court of Appeal from the Planning Court, which sets timescales for the determination of applications for permission to appeal, and (where permission is granted) thereafter substantive appeals. These target time scales should at minimum apply to DCO judicial reviews."

Recommendation 9

"The President of the Supreme Court should be invited to consider amending the Supreme Court Rules to introduce target timescales for the determination of applications to the Supreme Court for permission to appeal in judicial review challenges to DCOs."

The report finds that there are currently long average turnaround times for both the Court of Appeal and the Supreme Court to determine an application for permission to appeal and to deliver a judgment on that appeal in judicial reviews against DCO decisions. The report also highlights a concern raised by many stakeholders that there is a lot of uncertainty regarding the timelines in the Court of Appeal, where some cases are being dealt with much more swiftly than others.

Recommendations 8 and 9 seek to reduce the average turnaround time and provide stakeholders with greater certainty by having target timescales in the Court of Appeal and the Supreme Court for judicial review cases concerning DCO decisions. The Review considers that there could be a case for such timescales to be applied to all appeal cases

designated as Significant Planning Court Claims. The proposed target timescales are as follows.

- For permission to appeal and appeals against the refusal of permission to apply for judicial review: determination to be given four weeks from the application for permission to appeal; and
- For the hearing of a substantive appeal: a judgment to be given four months from the application for permission to appeal.

The Government considers that a better understanding of the causes of the current delays at the Court of Appeal and the Supreme Court is needed to determine whether imposing target timescales would help to ensure consistent timely processing of DCO judicial reviews at the appellate courts. In addition, although the report suggests that the relatively limited number of DCO judicial review claims means that these timescales should not be too onerous on the courts, we would welcome views, particularly from the senior judiciary, as to how the introduction of target timescales might affect the operation of the appellate courts. Please provide any evidence, where available, to support your answers.

Questions:

14. What, in your view, are the factors leading to the length of time currently taken by the Court of Appeal and the Supreme Court to determine an application for permission to appeal and to deliver a judgment on that appeal with regards to judicial review claims against DCO decisions?

15. Do you agree with the Review that the CPRC and the President of the Supreme Court should be invited to consider introducing target timescales in the Court of Appeal and the Supreme Court, respectively?

16. What would be the impact on the operation of the appellate courts if the target timescales proposed by the Review were to be introduced?

Key performance indicators

Recommendation 10

"The Planning Court and Court of Appeal should be invited to publish data on a three-month rolling basis which, at minimum, should indicate the number and percentage of cases which in the last 3 month period have met the target timescales either for NSIP cases specifically or Significant Planning Court cases generally, or both; as well as what the average and maximum turnaround times have been in that period (for both permission and the substantive stages)."

Noting that data on the progression of judicial review claims against DCO decisions from the High Court to the appellate courts is not currently published in an easily accessible format, the report recommends that key performance indicators are published on a three-month rolling basis by the Planning Court (which, as noted above, is a specialist sub-division of the High Court) and the Court of Appeal. This would include data on the percentage of cases which have met the target timescales for NSIP cases and/or Significant Planning Court cases generally and on the average timescales of cases. The form of data to be published in relation to the Court of Appeal would be subject to whether recommendation 8 is taken forward.

This recommendation to invite the Planning Court and the Court of Appeal to improve the way they publish data on the progress of DCO judicial reviews and/or planning cases would not directly address the issue of delays, but it could, as the report notes, provide stakeholders with greater transparency and help inform consideration of further procedural reforms. The report also suggests that this could be easily implemented at little or no additional cost. The Government would welcome views on the likely benefits and potential costs of this proposal.

Questions

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.

Other options for reform

In addition to the options for reform identified by the Review, the Government would welcome views on other possible changes that could help reduce judicial review related delays to the delivery of NSIPs and provide parties greater certainty in the process. Any proposed change must, however, ensure the right of access to justice is maintained in line with the UK's domestic and international legal obligations.

Questions

18. Are there any other potential changes to the judicial review process which could help reduce judicial review related delays to the delivery of NSIPs that have not been considered by the Review?
19. What are the likely benefits of the proposed change(s)?
20. What are the implications for access to justice arising from the proposed change(s)?

National Policy Statements

Although the Review made specific recommendations about changes to the judicial review process for the NSIP regime, it also made important observations as to the possible causes of legal challenges. In particular, the report notes a common frustration among stakeholders regarding National Policy Statements which, they said, are not regularly reviewed and updated, resulting in some DCOs being granted by reference to National Policy Statements which pre-date major milestones such as the Paris Agreement on Climate Change. The report also cites concerns with the perceived ambiguity in the wording of some of the National Policy Statements, which also appears to have been a significant prompt for legal challenge.

Following a period during which National Policy Statements were not subject to regular review, over the past year, National Policy Statements for energy, water resources, and national networks (covering projects on strategic roads, strategic rail and strategic rail freight interchanges) have been reviewed, updated and newly designated. This Government has committed to reviewing and updating policy statements more regularly and is currently conducting a 12-month process to ensure the policy framework necessary to deliver 2030 infrastructure ambitions is in place. We have also committed to changing the National Policy Statement framework, to provide for more regular five-yearly updates across all National Policy Statements, putting in place a system which provides as much certainty as possible to the infrastructure delivery sector.

The Government recognises that the judicial review process is only one of the areas in which improvements could help to reduce delays to the delivery of NSIPs. It will be looking holistically at changes to the NSIP regime.

Questionnaire

We would welcome responses to the following questions set out in this call for evidence.

The case for intervention

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

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.

Reducing the number of permission attempts

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?

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?

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?

Raising the permission threshold

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

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

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

Specialist NSIP judges in the High Court

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)?

10. What would be the impact on the operation of the Planning Court if an NSIP ticket were to be introduced?

‘Significant planning court claim’ designation

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?

Pre-permission case management conferences

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?

Introducing target timescales

14. What, in your view, are the factors leading to the length of time currently taken by the Court of Appeal and the Supreme Court to determine an application for permission to appeal and to deliver a judgment on that appeal with regards to judicial review claims against DCO decisions?

15. Do you agree with the Review that the CPRC and the President of the Supreme Court should be invited to consider introducing target timescales in the Court of Appeal and the Supreme Court, respectively?

16. What would be the impact on the operation of the appellate courts if the target timescales proposed by the Review were to be introduced?

Performance indicators

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.

Other options for reform

18. Are there any other potential changes to the judicial review process which could help reduce judicial review related delays to the delivery of NSIPs that have not been considered by the Review?

19. What are the likely benefits of the proposed change(s)?

20. What are the implications for access to justice arising from the proposed change(s)?

Thank you for participating in this call for evidence.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details

Please send your response by 30 December 2024 to:

Judicial Review Policy
Ministry of Justice
Constitutional Policy Division
9th Floor, 102 Petty France
London SW1H 9AJ

Email: BannerReviewCfE@justice.gov.uk

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Publication of response

A government response to this call for evidence will be published as soon as practicable following the closing date of the call for evidence.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Alternative format versions of this report are available on request from BannerReviewCfE@justice.gov.uk.