COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

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Ministry of Justice
102 Petty France
London SW1H 9AJ

23rd January 2013

Dear Mr Odulaja,

Re: Consultation Paper on Judicial Review – Proposals for Reform

This submission is made on behalf of the Coalition for Access to Justice for the Environment (CAJE). CAJE includes a number of leading environmental NGOs in the UK including WWF, Friends of the Earth, Greenpeace, Royal Society for the Protection of Birds, Capacity Global, Environmental Law Foundation and Campaign to Protect Rural England. We are recognised as a significant commentator on UK access to justice issues.

CAJE's goal is ensure that access to justice in environmental matters is fair, equitable and not prohibitively expensive; that it is genuinely accessible to all; and that the justice system, so far as possible, works to protect the environment in accordance with the law.

The importance of Judicial Review

CAJE welcomes the opportunity to respond to this consultation paper. Judicial Review represents one of the most effective mechanisms available for individuals and civil society groups to utilise the law to protect the environment. As the consultation paper itself recognises, the foundations of democracy require that citizens have access to effective mechanisms to ensure the decisions of public bodies are lawful. It is recognized that a lawful process of decision making is a minimum requirement for environmental protection.

The stated intention of the consultation paper is purported: "*not to deny, or restrict, access to justice, but to provide for a more balanced and proportionate approach. We want to ensure that weak or frivolous cases which stand little prospect of success are identified and dealt with promptly at an early stage in proceedings, and that legitimate claims are brought quickly and efficiently to a resolution. In this way, we can ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law*".

Despite this aim, these proposals will have adverse repercussions for access to justice generally – and for access to environmental justice in particular. This is troubling in

light of the consultation paper's failure to either substantiate any relationship between perceived 'problems' arising from the Judicial Review process and other factors or to provide anything more than anecdotal evidence for its proposals.

For example, Paragraph 3 of the consultation paper makes the wholly unsubstantiated assertion that judicial review can have the effect of "*stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery*." No examples are given.

Furthermore, paragraph 7 asserts that "*reducing the burden of Judicial Review"* will "*put in place the right conditions to promote growth and stimulate economic recovery*". Similarly, paragraph 34 states that judicial review "*comes at a substantial cost to public finances, not just the effort of defending legal proceedings, but also the additional costs incurred as a result of the delays to the services affected. In certain types of cases, in particular those involving large planning developments or constructions where significant sums may be at stake, any delays can have an impact on the costs of the project*" and paragraph 36 states: "*The volume of Judicial Reviews and the delays they cause is not only an issue for the authority making the decision. Delay can affect infrastructure and other projects crucial to economic growth, as well as other private and voluntary sector organisations*".

It is presumably on the basis of these assumptions that a number of proposals are made in relation to planning cases (paragraphs 52 – 60). However, the consultation paper contains no data on planning or environmental cases and no data to support the assertion that any relationship exists between JR and economic growth. We examine this important issue below.

Reports published by members of CAJE have previously noted the absence of any centrally held judicial statistics on environmental cases[1]. However, in 2008 the Working Group on Access to Environmental Justice (the "Sullivan Working Group") accessed data on Town & Country Planning cases between 2002 and 2007 (below).

Category	**2002**	**2007**
Land	40	37
Pollution	4	6
Town & Country Planning	119	112
Total	**163**	**155**

These figures confirm that between 2002 and 2007 environmental cases comprised a tiny proportion of the total number of cases. The figures also confirm no significant change in the volume of cases between 2002 and 2007. On the basis of these figures, there is no justification for asserting that planning and environmental cases are either stifling economic growth or that they make any meaningful contribution to "*the burden of judicial review*" – in fact quite the contrary.

[1] See: (1) Civil Law Aspects of Environmental Justice (Environmental Law Foundation) available via the Defra website at: www.dwfra.gov.uk/environment/enforcement/justice.htm; (2) Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal (Macrory and Woods) available online at ucl.ac.uk/laws/env/tribunals/docs; and (3) Ensuring access to environmental justice in England and Wales – Report of the Working Group on Access to Environmental Justice. Available online at: http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf

These figures are supported by research on the number of Judicial Reviews in the planning field undertaken by the Public Law Project (PLP) and the University of Essex. A current study of JR cases dealt with by the court on substantive hearings (as opposed to claims that were issued and/or considered for permission) shows that in a sample of 500 final hearings over a 20 month period there were 44 planning judicial reviews. During 2011 there were 30 planning judicial reviews, of which only six were brought against central government[2].

Other planning matters will have been litigated by way of the specialised planning appeal system, but these are not JR claims and reform of the process would not directly affect these. Moreover, reforms designed to reduce the number of hopeless claims are unlikely to have much effect on the quantitatively few (but qualitatively important) planning matters that will still end up in the Administrative Court.

More broadly, the evidence does not support the contention that either central government or public authorities are being overwhelmed by judicial review cases. Very few public authorities are challenged more than a handful of times per year. Research on Judicial Review litigation against local authorities over six years (2000-2005 inclusive) showed that 85 per cent of local authorities only attracted one or two challenges per annum[3]. Moreover, over half of the challenges to local authorities' decisions concerned housing-related issues, including homelessness.

Aside from local authorities, the other main targets of JR are the Secretary of State for Justice, the Secretary of State for the Home Department, the Parole Board and Prison Governors. None of these departments are involved in planning or procurement decisions. Few other central government departments are challenged more than rarely.

These data altogether do not paint a picture of a government being overwhelmed by judicial reviews, nor do they support a credible claim that judicial review presents a significant impediment to economic progress.

The consultation paper itself acknowledges there is very little data available in relation to Judicial Review. For example, the Equality Impact Assessment refers variously to: "*There is only limited information available on how Judicial Review cases progress through the courts*" (paragraph 27); "*We do, however, acknowledge that we do not collect comprehensive information about court users generally and specifically those involved in Judicial Review proceedings, in relation to protected characteristics. This limits our understanding of the potential equality impacts of the proposals for reform*" (paragraph 110); and "*We also acknowledge that there is little collated information about the resolution of those Judicial Reviews brought on grounds to ensure that carry out their Public Sector Equality Duties under the Equality Act 2010*". We refer also to the reliance on "*anecdotal evidence*" (see paragraphs 64 and 79) and the admission that no data is recorded centrally on withdrawn JRs at paragraph 30.

The EIA has a similar absence of evidence. For example, "*This impact assessment provides a qualitative assessment of the main costs, benefits and impacts. This is due to a lack of detailed financial information on the JR process and because there*

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2 The effect and value of judicial review in England and Wales, V. Bondy and M. Sunkin, to be published Summer 2013

3 Maurice Sunkin et al, Public Law (2007) 545, 550

is insufficient information at this stage to anticipate the extent of potential behavioural responses."

Quite simply, we are perplexed as to why the Ministry of Justice has published these proposals, seemingly in the absence of any qualifying data.

The Aarhus Convention and EU Environmental Law

We are also concerned that while planning proposals of the type and scale envisaged by the government as "*large planning developments or constructions*" (paragraph 34) would almost certainly fall within the scope of the UNECE Aarhus Convention[4] and the EC Public Participation Directive[5] ("PPD") – there is no mention of either instrument in the consultation paper. This is surprising given the UK is in breach of both the Convention[6] and the PPD[7], primarily on the basis of its position on costs, but also on rules on timing in JR procedures. Both of these issues are covered by the consultation paper (sections 4 and 6 respectively).

CAJE also has a number of other general concerns about the consultation paper. These include:

- **The role of Judicial Review** – the consultation paper appears, at best, confused as to the role that Judicial Review plays in both checking the power of the state and establishing legal clarity. Paragraph 32 of the consultation paper states that "*even where the claimant is successful, it may only result in a pyrrhic victory with the matter referred back to the decision-making body for further consideration in light of the Court's judgment*". This seems an extraordinarily narrow view of the importance of JR. A "pyrrhic victory" suggests that the decision maker is free to make the same unlawful decision again. This is not the case. Judicial Review 'strikes down' the original decision as unlawful, thus requiring the decision maker to reconsider the issue again within a lawful framework. It should also be remembered that the court will not quash the decision under challenge, even if persuaded that there was a failure to take into account a relevant matter, if there is no real possibility that the decision-maker would reach a different decision if that matter was taken into account (*Bolton MBC v SSE*[8]).

- **Data misconceptions** – the consultation paper refers to the "*significant growth in the use of Judicial Review to challenge the decisions of public authorities*" (paragraphs 28 and 29). While conceding this is mainly due to an increase in the number of challenges made in immigration and asylum matters (which are not an expressly targeted area for reform under these proposals), the consultation paper fails to confirm that the proportion of applications for 'other matters' remains unchanged from 2010[9] and has, in

4 UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

5 EC Directive 2003/35/EC

6 See findings of the Aarhus Convention Compliance Committee in Communication C33 dated 18th October 2010 available at: http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html

7 Case C-530/11, *Commission v UK*

8 (1990) 61 P&CR 343

9 The number of applications for 'other matters' in 2010 comprised 2,091 out of a total of 10,548 and in 2011, 2,213 out of a total of 11,200 (roughly one fifth respectively in both 2010 and 2011)

fact, remained unchanged since 2005. In fact, since the mid-1990s the number of claims has remained fairly stable at the 2000 per annum mark[10]. As Harlow and Rawlings have stated, these numbers are "*infinitesimal*" compared with the scale of government decision making[11]. It is quite clear that beyond immigration and asylum, there has been no radical growth in the use of JR and quite possibly no increase at all. Furthermore, according to the Ministry of Justice's own statistics the number of substantive JR hearings is steadily decreasing. In 2010 the number of substantive JR hearings decreased by 6 per cent on 2009[12] and in 2011 the number decreased by 14 per cent on 2010[13]. This further undermines the government's blanket assertion that "*there has been a significant growth in the use of judicial review to challenge decisions of public authorities*" (paragraph 26 of the consultation document). We are troubled that the consultation paper seriously misrepresents the situation with regard to 'other matters', including environmental claims;

- **Wide ranging reforms** – CAJE is concerned that these procedural reforms may "*need to be supported by a programme of more wide ranging reforms*" (Foreword). While CAJE would welcome any reforms seeking to address the recognised deficiencies of JR in terms of access to environmental justice, we would urge the government to ensure that any further proposals are formulated in the context of a robust evidence base. Anything less would be irrational;

- **Timeframe for responding to the Consultation Paper** – CAJE is also concerned that the timeframe for responding to the consultation paper is six weeks including the Christmas and New Year period. Such a short consultation period will almost certainly impair the ability of individuals and civil society groups to respond effectively and fails to respect the principles of the Compact between government and the voluntary and community sector[14] and the public participation pillar of the Aarhus Convention[15].

Time limits for bringing a claim

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

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

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10 The effect and value of judicial review in England and Wales, V. Bondy and M. Sunkin, to be published Summer 2013.

11 Harlow and Rawlings, Law and Administration, p.712.

12 Judicial and Court Statistics 2010, Ministry of Justice (2011). Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf

13 Judicial and Court Statistics 2011, Ministry of Justice (2012). Available at: www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf

14 "Where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach." The Compact (Cabinet Office 2010), para. 2.4

15 Article 6(3) Aarhus Convention

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

CAJE does not agree with the proposal to shorten the time limit for planning cases to bring them into line with the time limits for statutory appeal.

In findings concerning the UK's compliance with the Aarhus Convention[16], the Compliance Committee held that while the three months requirement[17] is not in itself problematic under the Convention, the courts' discretion to reduce the time limit (by interpreting the requirement that an application be filed 'promptly') introduces uncertainty and, thus, does not meet the requirements of Article 9(4) of the Convention. The Compliance Committee was also troubled by the Courts' discretion to apply various moments at which a time may start to run, depending on the circumstances of the case and found that in the interest of fairness and legal certainty it is necessary to: (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.

The ideal approach would therefore be to amend the time limits relating to both statutory appeals and Judicial Review to three months – thus ensuring legal certainty and sufficient time for appellants and claimants to prepare their cases.

We also do not agree that the Courts' discretion to allow an extension of time to bring a claim is sufficient to ensure that access to justice is protected. Such discretion is at present only exercised in very rare circumstances. This approach conflicts with the requirement to provide claimants with requisite certainty as established in the cases of *Commission v Ireland*[18] and *Uniplex*[19].

While it is clear from the above that there is a strong requirement of certainty by virtue of the above case-law, it cannot be inferred from this that such a requirement would justify shortening the existing time limits. In our view, shortening the time limits in planning cases would very likely breach the Access to Justice requirements of the Aarhus Convention and therefore of relevant EU law.

It is also worth noting commentary from public law academics such as Craig, in Administrative Law, 4th ed, who points out, at p 794:

> "*The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted* ultra vires *now has the strongest incentive to seek a judicial resolution of the matter immediately, as opposed to attempting a*

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16 See paragraphs 138-139 available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

17 Civil Procedure Rule 54.5(1)

18 Case C-427/07, paragraphs 93-94.

19 Case C-406/08 - the Court built on this by finding that a review could only be effective where a claimant was informed of sufficient reasons for their elimination from the tender process to be able to determine whether or not to challenge the decision (paragraph 31). Time would start to run only when the claimant knew, or ought to have known, of the alleged infringement of those proceedings (paragraph 32). If national provisions do not make allowance for such time the Court should exercise its discretion to allow an equivalent period.

negotiated solution, quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit."

Finally, with respect, CAJE would argue that the consultation paper is essentially targeting the wrong problem. The vast majority of delays occur *after* proceedings are issued. The answer is not to reduce the timescales for lodging an application - but to direct more resources to the Administrative Court to address the backlog or to consider moving certain classes of cases to other fora. While the number of environmental cases remains low, it has been argued that there could be a number of advantages of hearing them in the Environmental Tribunal[20].

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

No.

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

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

CAJE has serious reservations about this proposal. First, there appears to be no particular problem identified in the consultation paper, at the very least in relation to environmental cases.

Second, while it is not entirely clear what is being envisaged, we are concerned in principle that under this proposal public authorities would essentially escape judicial review if they maintained their unlawful acts or omissions for longer than three months. This is abhorrent to the rule of law.

Third, public authorities could lose the opportunity to remedy the breach (if possible) before court proceedings are issued.

One need only look at the environmental context for examples of where this rule could cause difficulties. The leading case of *R v Hammersmith and Fulham London Borough Council, ex p Burkett* makes clear that the time limit for challenging a planning decision by way of Judicial Review runs from the date of permission itself, not the date of resolution authorizing its grant or any other date when a preliminary ground arose to make a challenge. The case of *Catt v Brighton and Hove City Council* confirms this in relation to screening opinions. The introduction of the type of rule being consulted upon above would only create confusion in this area.

Moreover, in the light of CJEU jurisprudence such an approach falls foul of Community law in that the proposal is likely to infringe Community law principles of

[20] Day, C. (2011). *Tackling barriers to environmental justice*. Available on WWF's website at: http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5383

equivalence, effective legal protection and effectiveness in terms of the objective to be achieved by Directives.

There is also significant uncertainty as to: (i) whether it would remain possible to challenge the lawfulness of statutory instruments and/or policies that are older than three months; and (ii) what should happen when knowledge only arises after three months.

The danger is that this proposal would actually lead to an *increase* in cases being issued on a protective basis (with associated increases in cost and delay) and, thus, a reduced likelihood that the parties will find a satisfactory remedy to their problem via negotiation/ADR/mediation – all of which is inimical to the post-Woolfe litigation reforms, the objectives of the Civil Procedure Rules and the Pre-Action Protocol.

Applying for permission

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

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

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

CAJE foresees difficulties in relation to the definition of "prior judicial determination". This will almost certainly lead to significant satellite litigation, again with associated cost implications and time delays. Similarly, we believe there will be difficulties in distinguishing between the issues considered in the original hearing and any subsequent appeal. Once again this could lead to unnecessary and unhelpful satellite litigation.

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

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

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

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

CAJE is significantly concerned about this proposal. Judges are not infallible, as the consultation paper's own statistics reveal. Paragraph 31 of the consultation paper

states that of the 2,000 renewed applications made in 2011, 300 (some 15%) were granted following an oral renewal. This confirms the importance of the oral hearing as an established common-law right and a fundamental safeguard to ensure that arguable cases proceed.

Oral advocacy is central to the English and Welsh adversarial legal system. In the case of *Sengupta v Holmes*, Lord Justice Laws stated at paragraph 38:

> "*He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it.*"

Judicial Review cases are not road traffic matters – they concern complex legal arguments of unlawful behaviour by public bodies. Restrictions on judicial review are of constitutional importance, and should not be confused with measures to cut red tape. Individuals and civil society groups should not be denied their fundamental constitutional right to check an abuse of power on the basis of costs-cutting. Furthermore, oral hearings of this nature are generally very short (20-30 minutes) and therefore proportionate.

Secondly, in our experience, even cases deemed "wholly without merit" can ultimately be successful. The case of *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change*[21] highlights the importance of oral renewal. It is clear that, if oral renewal had not been available, the judicial review of an unlawful government decision would have run aground, causing enormous and irreparable harm to the UK's solar industry. The judicial review challenge, which was originally refused permission on the papers, was granted permission with expedition at oral renewal and subsequently succeeded in both the High Court and Court of Appeal, with the Government being refused permission to appeal to the Supreme Court.

CAJE is also concerned that this proposal will have a "chilling" effect on potential litigants. Paragraph 88 of the consultation paper refers to the implications of certifying that a case is totally without merit, including costs implications. Members of CAJE have published reports demonstrating that potential claimants who have been advised that they have an arguable case, have been deterred from bringing litigation for fear of an adverse costs order[22]. This proposal will only exacerbate that problem, thus causing the UK to fall into further breaches of the Aarhus Convention.

Finally, the consultation paper fails to provide any evidence that there is a problem in this regard (we would question how many cases certified as totally without merit actually proceed to an oral hearing?) but, in any event, the court has the powers to prevent any repeated abuse through vexatious litigant orders etc.

Fees

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

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21 [2011] All ER (D) 190 (Dec) (orders attached)

22 ELF/BRASS report

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

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

CAJE is particularly concerned to note the government is considering the scope for adjusting fees further over time so that they reflect "*the full costs of providing the service*" (paragraph 106). While it is unclear what these costs may entail, we would point out that increasing the fees for judicial review at a time when the UK is being infracted by the EU over the high costs of legal action in environmental cases is clearly obstructive. Given the extraordinarily high fees imposed by the Supreme Court (which can total in excess of £7,000) such increases would force the UK into a two tier system – and thus squarely further in breach of EU law for the purposes of environmental cases. There should be no changes to fees in environmental cases until the EU's infraction proceedings have concluded.

Equalities Impact Assessment

We note that the consultation paper says that "*due to the limited data, the Government is unable to assess the impact that these reforms would have on people with protected characteristics*". We do not feel that the government should proceed with these proposals unless it is able to assess such impact. From the experience of Friends of the Earth, communities facing environmental injustice, who often face difficulties in accessing the courts as it is, are likely to include large proportions of groups with protected characteristics.

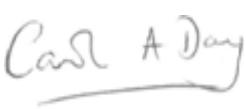
Conclusion

To conclude, CAJE has serious concerns about the validity of these proposals. Firstly, the consultation paper fails to identify any real 'problems' inherent within the JR process (aside from the areas of immigration and asylum). Secondly, it fails to provide any evidence to substantiate its proposals. Thirdly, it will have significant adverse consequences for access to environmental justice, thus exacerbating the UK's present breaches of the Aarhus Convention and EU environmental law. Finally, in our view these proposals will lead to an *increase* in the number of applications for Judicial Review brought as a result of fears over delay and confusion over definitions.

We urge the Government to take these proposals no further.

Please do not hesitate to contact CAJE if you require any further information about the points made in this response.

Yours sincerely,



Carol Day
Solicitor
WWF-UK (on behalf of CAJE)

WWF RSPB Friends of the Earth Environmental Law Foundation CPRE GREENPEACE capacity global living in a clean and healthy environment is everyone's right