Wildlife and Countryside Link Parliamentary Briefing: Criminal Justice and Courts Bill - Part 4 - Judicial Review

June 2014

Wildlife and Countryside Link (Link) brings together 44 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following members of Link:

- Buglife – The Invertebrate Conservation Trust
- Campaign to Protect Rural England
- Client Earth
- Friends of the Earth
- John Muir Trust
- Open Spaces Society
- Ramblers
- Royal Society for the Prevention of Cruelty to Animals
- Royal Society for the Protection of Birds
- Salmon and Trout Association
- The Wildlife Trusts
- Woodland Trust
- WWF-UK

Concerns

Link is concerned that Part 4 of the Criminal Justice and Courts Bill will deter civil society from bringing and intervening in environmental cases (regardless of the merits) by making the threat of legal costs uncertain and intimidating. The fact that individuals and NGOs could be dissuaded from challenging the decisions of public bodies on environmental issues of high public interest, such as HS2, the badger cull and a third terminal at Heathrow, is a matter of wider constitutional significance. These amendments could also push the UK into further non-compliance with key provisions of EU and international law[1] (as recently confirmed by the European Court of Justice[2]) and result in a further loss of public trust with decision-makers.

Please note:

The clause numbers quoted here relate to those in the published version of the Bill of 19.06.2014 (Bill 192 2013-14, as brought from the Commons http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0030/15030.pdf

Action

Link therefore seeks the removal of clauses 64-70 from the Bill altogether.

However, should this not be practicable, we suggest the addition of a revised clause 70 (on page 70, at line 15) as follows:

1 Aarhus Committee findings in the following cases: ACCC/C/2008/27 and ACCC/C/2008/33

2 *R (Edwards + Pallikaropoulos) v Environment Agency + others* [2013] ECR I- 0000. (Case C-260/11)

"Application of provisions to environmental claims

Sections 64 to 70 of this Act shall not apply to judicial review proceedings which have as their subject an issue relating wholly or partly to—

(a) the state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of sub- paragraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in sub-paragraph (b) above."

This amendment was tabled but not voted on in the Commons.

Detailed briefing

Background

Part 4 of the Bill includes proposals that would constrain the effectiveness of Judicial Review (JR). These changes apply across the board, despite the fact that procedures in relation to environmental cases are protected by EU and international law. These provisions will compound recent amendments to JR, have little or no apparent evidential basis and are widely opposed by environmental and public interest groups.

Procedural defects (clause 64)

Clause 64 seeks to amend the Senior Courts Act 1981 so that a case could not proceed unless it was considered that it was "highly likely" that the outcome would have been different if the correct procedure had been followed.

Link does not support this provision of the Bill for a number of reasons. Firstly, the net effect of a requirement for a substantive assessment of the case would be delay and extra cost for, at best, very little benefit. Secondly, the judiciary is already able to consider cases against a "no difference" threshold. That is, the courts can currently refuse a judicial review hearing if the outcome to a certain decision is 'inevitable'. Thirdly, a substantial number of cases involving procedural flaws usually mean a failure to properly consult or hear the views of individuals. The imposition of a "no difference" threshold would be a very subjective assessment from the Court at the permission stage (so without hearing any evidence) and making them step into the shoes of the decision-maker as articulated by the judge in *Holder v Gedling Borough Council & Ors* [2014][3].

In any event, the outcome sought in some cases is a declaratory judgment, which may have limited impact in that particular case, but which recognises the importance of determining

[3] EWCA Civ 599, paras 24-25

points of principle and may lead to future action. One such case is Client Earth's air quality challenge[4], which resulted in a declaration of breach from the UK Supreme Court.

Finally, JR is about fairness. If an unfair procedure is followed it is inevitably hard to find instances where it is clear that the outcome would have been the same under a fair process. So, for that reason the courts are rightly reluctant to hold that it would have made no difference. But the fact that the court already has a flexible power to reach this conclusion in appropriate cases means that this clause is in practice unnecessary.

Information about financial resources (Clauses 65 and 66)

Clause 65 requires JR applicants to provide the court with any information about the financing of the application. Clause 66 requires the court to consider whether to order costs to be paid by potential funders identified in that information. These proposals extend beyond any current requirement in civil cases and represent a damaging and unprecedented practice.

Link is concerned that the requirement to disclose financial information about non-parties will deter people from being willing to fund JR – and thus prevent applicants from being able to bring cases. JR is already a daunting prospect for local people and campaign groups and is only used as a last resort. Further, we believe the proposal conflicts with EU law[5], in that individuals and/or NGOs (who may not even be party to the proceedings) will be exposed to uncertainty as to whether they face any financial liability as a result of the claimant losing the case (and, if so, to what extent).

We recognise the need for appropriate transparency and for the court to have access to proportionate information. We are concerned, however, that these provisions could result in campaign and community groups being unable to fundraise and secure local support in order to progress cases because individuals (who might be members of an NGO) will be fearful that they could become liable for further costs being imposed on them by the court and be reluctant to provide details about their financial affairs.

Interveners and capping of costs (Clause 67)

Clause 67 enables the High Court and Court of Appeal (subject to exceptional circumstances) to order an intervener to pay any costs that the court considers have been incurred by a party to the proceedings as a result of the intervener's involvement. Interventions have played an important role in establishing the law - in *Garner*[6], an intervening Coalition of NGOs contributed views on the appropriate levels for Protective Costs Orders (PCOs) in environmental claims.

The usual procedure is that individuals and groups who apply to intervene in a case do so on the basis that they will only be responsible for their own legal costs and will not seek to recover costs from either party. Link believes the assumption that those seeking to intervene in a case may have to pay additional costs conflicts with the aims of the Aarhus Convention. The rationale behind the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention enforced by law. Access to justice helps to create a level playing field for the public seeking to enforce these rights. Individuals and groups can fulfil this vital function not only by bringing cases, but also by highlighting or emphasising important environmental legal and/or factual issues by way of intervention. Measures that will frustrate the ability of civil society to ensure the rights enshrined in the Convention are enforced are obstructive and retrograde. Moreover, this proposal gravely limits judicial discretion (despite a lack of

4 *R (Client Earth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25

5 See *Commission v UK* (Case C-530/11)

6 *Garner v Elmbridge Borough Council* [2011] EWHC 86 (Admin)

evidence that judges are misusing their discretion) and arguably represents interference in the separation of powers.

Further, there is no evidence to suggest that interveners impose additional costs on the parties[7] and we question why the Government wishes to proceed with it in light of the Government's recognition that interveners can "add value, supporting the court to establish context and facts".

What is needed?

Clause 70 of the Bill seeks to give some protection to environmental claims by enabling the Lord Chancellor to make regulations providing that clauses 68 and 69 do not apply to JRs which in his/her opinion relate entirely or partly to the environment. However, as environmental claims currently enjoy absolute protection under Part 45.43 of the Civil Procedure Rules, this section introduces an unwelcome degree of uncertainty. Additionally, it unnecessarily requires additional regulations to be made. **As set out above, we therefore recommend that clauses 64 to 70 of the Bill be deleted.** Failing that, we recommend the amendment above be tabled in place of existing clause 70. Note that the revised clause 70 (above) has no bearing on the introduction of a permission stage for statutory appeals (including environmental cases).

For further information, please contact:

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[7] See Ministry of Justice Impact Assessment (Key Assumptions and Data for option 1c – cost provisions against interveners) available at: https://consult.justice.gov.uk/digital-communications/judicial-review/results/jr-impact-assessment-2.pdf