Wildlife and Countryside Link response to Judicial Review – Proposals for Further Reform

October 2013

Introduction

Wildlife and Countryside Link (Link) brings together 42 voluntary organisations concerned with the conservation and protection of wildlife, countryside and the marine environment. 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 eight million people in the UK and manage over 750,000 hectares of land.

This submission is supported by the following 14 organisations:

- Bat Conservation Trust
- British Mountaineering Council
- Campaign for National Parks
- Campaign to Protect Rural England
- ClientEarth
- Friends of the Earth
- Open Spaces Society
- The 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

General Comments on the Consultation Paper

Link normally welcomes the opportunity to comment on the evolution of Government policy. However, there is little to welcome in these further proposals for Judicial Review (JR). JR is a critical check of the power of the state, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. 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, on the basis of costs-cutting, to check an abuse of power.

In this respect, we refer to the recent decision to withdraw the Planning Bill 2013 in Northern Ireland announced by Mark Durkan MLA, Minister of the Environment in Northern Ireland, partly on the basis of legal concerns. In his oral statement to the Assembly[1], Mr Durkan stated his belief that caution should be exercised in restricting the right to judicially review planning decisions (clause 15). He also reflected on the views of the NI Human Rights Commission, which had stated that: "*...judicial review plays an important and legitimate role in ensuring the proper administration of government and Clause 15 would, in effect, remove the court's ability to review the legality, the rationality and the reasonableness of planning decisions.*"

[1] See http://www.nienvironmentLink.org/cmsfiles/files/Oral-Statement-22-October-2013-4.pdf

Mr Durkan also referred to the views of The Hon Mr Justice Treacy, a senior Judicial Review Judge in Northern Ireland, on proposals to reform Judicial Review in England and Wales: "*Judicial review is the principal means by which citizens can access the historic constitutional role of the courts to protect against abuses of power by public authorities. It is a vital safeguard, it promotes the public interest, encourages public bodies to act lawfully and within their powers, ensures such bodies are not above the law and protects the rights and interests of those affected by the unlawful exercise of power*." He also added: "*Lord Woolf, the former Lord Chief Justice and Lord Goldsmith, former Attorney General, have warned that the government should proceed with "caution" with any changes that could be seen as restricting the right to hold politicians to account*". Link shares these concerns.

This consultation paper builds on earlier proposals (December 2012), which were similarly advanced in the absence of material evidence or empirical data. The body of evidence for JR as a 'constraint to growth and economic recovery' appears to extend to one case study on page 6. Data concerning the length of time taken for an application to be considered for permission in the papers[2] does not constitute evidence that JR, of itself, acts as a restriction on growth and economic recovery.

The main premise of the consultation paper is that the use of JR is rising and must be curtailed – yet the figures cited in the paper clearly show (again) that the growth in Judicial Review is almost wholly due to immigration and asylum cases. Given that these proposals will apply almost indiscriminately across the board, they represent an unjustified and disproportionate response to perceived problems in other policy areas.

For example, Paragraph 37 of the consultation paper states that of the 400 planning cases lodged in the Administrative Court in 2011, some 15 represented "*major planning and infrastructure cases*". This represents some 0.1% of the total number of cases lodged annually – yet concerns in relation to planning cases appear to comprise a central plank of the Government's proposed reforms.

Aside from an opening paragraph of the consultation paper (in which the crucial role of JR is acknowledged, see above) the proposals represent a systematic attack on the general process. The paper is littered with references to the process of JR being abused by campaigning groups employing delay tactics and a desire to "*seek nothing more than cheap headlines*". Such statements are totally unsubstantiated. In granting Greenpeace *locus standi* in *R v HM Inspectorate of Pollution ex parte Greenpeace*[3], Otton J. recognized Greenpeace as "*eminently respectable and responsible and its genuine interest in the issues raised is sufficient for it to be granted locus standi*".

Moreover, the evidence cited in support of a perceived abuse of the JR process appears to extend to two case studies on page 23 and a statistically insignificant number of applications lodged by NGOs annually[4] (a disproportionately large number of which (40%) we note go on to be successful). As such, the consultation paper appears to support the perverse view that even cases which prove illegality on the part of public bodies are a misuse of public funds. In this respect, we would refer to the Opinion of Advocate General Kokott in Case C-530/11 (*Commission v UK*), which states: "*Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. A public body which is unsuccessful in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought*[5]*."*

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2 See paragraph 16 of the consultation paper

3 (1994) 4 AER 329

4 Approximately 50 cases per year – representing 0.4% of all applications

5 See paragraph 75 of AG Kokott's Opinion

The consultation paper also makes frequent references to the use of unmeritorious JRs to "*delay, frustrate or discourage legitimate executive action*". The paper thus fails to recognize the role of the permission stage in weeding out weak cases at a relatively early stage of the process. Those that proceed to a full hearing and fail have been held to be arguable and merit proper examination. Moreover, Judicial Review is not simply concerned with success or failure – at times significant procedural concessions result. For example, the HS2 case led to concessions amounting to new Standing Orders in Parliament as well as a fundamental increase in what is due to be consulted on as part of the Formal Environmental Statement.

Link believes that the foundations of democracy require citizens to have access to effective mechanisms to ensure the decisions of public bodies are lawful. Moreover, that a lawful process of decision making is a minimum requirement for environmental protection. These proposals not only offend fairness and destabilize democracy still further – they will prevent compliance with EU and international environmental law. It is only a matter of time before the UK will once again find itself before the Aarhus Compliance Committee and the Court of Justice of the European Union (CJEU).

Notwithstanding the above, we feel we must respond to these proposals in light of the seriousness of their consequences. We therefore make these comments in good faith that they will be given due consideration in the decision-making process.

Detailed comments on the Consultation Paper

Introduction

Paragraph 3 of the consultation paper confirms that the fee for an oral renewal hearing consulted on in December 2012 will be implemented as soon as practicable. The paper also states that the Government will revisit whether JR fees are set at the appropriate level as part of a wider review of fees across the civil courts.

Whilst recognising court fees represent a very small proportion of total costs, if the Government continues on a steeply upward trajectory (particularly in relation to the Supreme Court), this is likely to lead to further breaches of Article 9(4) of the Aarhus Convention concerning prohibitive expense. Such breaches are poorly timed given the impending judgment of the CJEU in case C-530/11, *Commission v UK*, concerning prohibitive expense, and will be brought to the attention of the European Commission and the Aarhus Compliance Committee (an issue to which we return later).

Growth in Judicial Review

Chart 1 (page 8) shows the number of applications for permission for JR by case type (2007-2012). The accompanying text confirms that the number of immigration and asylum applications more than doubled between 2007 and 2012 and made up 76% of the total applications in 2012. Chart 1 suggests that the increase in applications for JRs, other than immigration and asylum cases between 2007 and 2012 was in the order of 500 cases per year. However, there is no breakdown of these cases (i.e. what proportion concern planning, environment, education, health etc.) and, as such, further policy reforms in respect of them seem poorly informed. Chart 1 does not support the Government's case that further reforms (or indeed any reforms) in areas other than immigration and asylum are warranted – if anything, it demonstrates the proposals are wholly disproportionate.

Paragraph 13 refers to the number of cases in which an oral hearing was requested following refusal of permission. In 2011, some 300 of the 2,000 renewed applications (around 15%) were granted following an oral renewal. The consultation paper confirms the figure as being around 12% of all applications in 2012. These are well above statistically significant figures and confirm the importance of the oral hearing as an established common-law right and a fundamental safeguard to ensure that arguable cases proceed.

Paragraph 16 of the consultation paper attributes costs to the public sector from defending claims. However, these claims fail to appreciate the inequality of arms existing between claimants and public bodies. Institutions such as the CJEU do not seek to recover the legal costs of civil servants defending a case when the claimant is unsuccessful. These costs are perceived to be part and parcel of what a public body does in the normal course of its duties. Claimants, on the other hand, are not paid to progress claims and frequently risk considerable personal loss in doing so. In this respect, paragraph 39 of the consultation paper refers to the "*chilling effect*" on development associated with the risk of delay and associated costs arising from JR. No evidence is provided to substantiate that such an effect exists.

Planning

Recent improvements – planning fast-track

Link welcomes the introduction of measures to speed up the consideration of planning cases (some of which will be environmental cases) in light of the Aarhus Convention's requirement for legal review mechanisms to be "*fair, equitable, **timely** and not prohibitively expensive".*

Paragraphs 36 and 37 of the consultation paper refer to the fact that some 400 planning cases were lodged in the Administrative Court in 2011, of which between 150 and 200 were applications for JR (with the average time from lodging an application to a preliminary hearing being around 100 days and 370 days from application to a full hearing).

The consultation paper then makes a number of assumptions about the impact of these applications, not least that "… *the current system [of JR] is too slow in determining such challenges, sometimes dragging on for years, and that these delays act as a brake on major infrastructure projects in particular, introducing uncertainty not just for industry but also for residents, businesses and local authorities*". However, LINK would point out that a proportion of these cases will be lodged by developers in respect of a *refusal* of planning permission. It would be helpful if the Government could provide a breakdown of the cases lodged in order to inform an accurate analysis of the data.

Paragraphs 40-45 of the consultation paper discuss the referral of planning cases to appropriate members of the judiciary (within and outside London) by a specialist Planning Liaison Judge and states that in any particular case, the same judge will deal with all aspects of the Judicial Review from start to finish. All of these measures could be helpful if cases are being referred to judges with relevant environmental expertise and experience. In order to ensure that this is the case, we request HM Court's Service publish a list of which judges have been identified as suitable for such cases and the reason(s) for their selection.

We note the Ministry of Justice is also exploring the potential to create a specialist Planning Chamber in the Upper Tribunal into which planning Judicial Reviews and statutory challenges could be transferred. If this were to be a viable option, it would seem a good opportunity to consider whether environmental JRs should also be transferred, thus leading to the creation of a proper Land, Planning and Environment Court at High Court level.

Whilst recognising that JR procedures and the Administrative Court have become more efficient over the years, the reports of Lord Justice Sullivan's Working Group have consistently recognised that further improvements are needed to improve access to justice in line with Aarhus[6]. Suggestions for improvement were made with respect to case management such as early disclosure of information, early consideration of costs and other matters and judges with expertise in

[6] See *Ensuring access to environmental justice in England and Wales: Report of the Working Group on Access to Environmental Justice*, pages 29-32. (2008). Available at: http://www.wwf.org.uk/wwf_articles.cfm?unewsid=1754

environmental law. The creation of a specialist forum for Planning and Environmental cases could provide a mechanism to develop such expertise and address case management concerns simultaneously. Needless to say, should a Planning Chamber be established and expanded to include environmental cases, specialist environmental judges, in addition to land management and planning judges, would need to be deployed to sit in it. Otherwise, we fear it may be viewed by the Government as a forum to dispense with (i.e. expedite and refuse) planning JRs as quickly as possible.

Questions

Question 1: Do you envisage advantages for the creation of a specialist Land and Planning Chamber over and above those anticipated from the Planning Fast-Track?

Yes, but we believe there may be benefits in expanding the scope of any new Chamber beyond planning cases to also include environmental JRs and statutory appeals for the reasons given above.

Question 2: If you think that a new Land and Planning Chamber is desirable, what procedural requirements might deliver the best approach and what other types of case (for example Linked environmental permits) might the new Chamber hear?

Should environmental cases be transferred to any new Chamber (and we would point out that a number of planning cases will be environmental cases), special procedures will need to be implemented in order to comply with the Aarhus Convention. These include that: (i) cases must be dealt with in a timely manner in accordance with Article 9(4) of the Convention; (ii) specific regimes in relation to standing, costs and injunctive relief must be implemented to ensure compliance with Articles 9(3) and (4) of the Convention; and (iii) the scope of review should be considered to ensure that compliance with Article 9(2) and (3) of the Convention is respected.

Local Authorities Challenging Infrastructure Projects

Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?

Despite the fact that no challenges have been brought by Local Planning Authorities (LPAs) to Nationally Significant Infrastructure Projects (NSIPs), the consultation paper invites views on whether there should be further restrictions on the extent to which LPAs can challenge decisions on NSIPs in England and Wales, unless they are the applicant for development consent.

As NSIPs are decided in view of National Policy Statements (NPSs) they could be approved in spite of the aims and objectives of the requisite local plan, even if they are reflected in the Local Impact Report (LIR) which is there to 'give details of the impact on the area'. If we see an LPA as having more democratic legitimacy, and if we support devolution of power to local government level[7], then taking away their ability to challenge decisions which are in effect imposed on them is of concern.

For example, an incinerator proposed by Covanta in Merthyr Tydfil in Wales (over 50 MW) would have required a third of Wales's waste and was contrary to the Welsh Government's waste plans. It was also situated in an area with an opencast coal mine on the one side and a landfill site on the other, and with very poor access. Is it correct that an LPA in that situation should be further limited in being able to bring a challenge?

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7 See The Coalition: our programme for government, chapter 4: "*We will promote the radical devolution of power and greater financial autonomy to local government and community groups*" available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf

Link also questions whether such proposals comply with the Localism Act 2011 and the LPA's responsibility to take account of the needs/wishes of the local community[8] and undertake their requisite role within NSIP Examinations. For example, LPAs are specifically required to submit LIRs and be involved in the planning obligations and conditions which may be attached to the permission.

It is also worth recalling that while no NSIPs decisions have yet been challenged by LPAs, there have been challenges in analogous situations in the past. For example, in the Dilly Lane Case[9], Hart District Council challenged the requirement for an Appropriate Assessment under the Habitats Regulations when effects and possible mitigation were already known.

Link is also concerned that this approach could be extended to other decisions made by the Secretary of State (SoS) including, for example: (i) appeals made to the SoS following determination by an LPA; (ii) applications that are called in; (iii) appeals against enforcement notices to the SoS under sections 288 and 289 of the TCPA 1990; (iv) development plans or policy (e.g. Gatwick and Heathrow cases); and (v) proposals such as HS2 which (but for its own parliamentary procedure) would have been a NSIP.

Challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

Question 8

Paragraph 63 of the consultation paper invites views on whether legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the TCPA 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights). Link supports the retention of legal aid in such cases – in our view there is no difference between such cases and planning Judicial Reviews.
In our view, the withdrawal of legal aid would only be permissible if there was a third party right of appeal that allowed citizens and groups an equal voice with the appellant on planning matters.

Standing – environmental cases

The consultation paper recognizes that the approach to standing in England and Wales is subject to the requirements of EU law which incorporates the Aarhus Convention. However, the paper holds that the current interpretation of "sufficient interest" as including those with a public interest provides a more generous approach than that required by Aarhus[10].

Link does not accept this view and in this respect we would refer the MoJ to the Aarhus Implementation Guide. The Guide[11] states that nothing in the Convention prevents the Parties from granting standing to any person without distinction. However, the Convention requires — as a minimum — that members of the "public concerned" either having a sufficient interest or maintaining

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8 Ibid, chapter 4: "*The Government believes that it is time for a fundamental shift of power from Westminster to people. We will promote decentralisation and democratic engagement, and we will end the era of top-down government by giving new powers to local councils, communities, neighbourhoods and individuals*".

9 *R on the application of Hart District Council v The Secretary of State for Communities and Local Government, Luckmore Limited, Barratt Homes Limited* [2008] EWHC 1204 (Admin)

10 E.g. Paragraph 73 of the consultation paper

11 The Aarhus Convention: An Implementation Guide (Second Edition, 2013). Available on the UNECE website at http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf

impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6. The public concerned is defined in article 2, paragraph 5, as "*the public affected or likely to be affected by, or having an interest in, the environmental decision-making*" (see the commentary to article 2, paragraph 5). For other members of the public concerned, including individuals, although the Convention allows sufficiency of interest and impairment of a right to be determined in accordance with requirements of national law, the Convention criteria of sufficient interest and impairment of a right should not be understood as inviting Parties to limit the scope of persons with standing.

While the Parties retain some discretion in defining the scope of the public with standing in these cases by using the two stated criteria, the Convention imposes two qualifications. Most importantly, the determination of what constitutes a sufficient interest and impairment of a right must be consistent "*with the objective of giving the public concerned wide access to justice within the scope of the Convention*", i.e. Parties may not use the discretion bestowed on them in order to narrow down the scope of persons with standing. Rather, they should interpret their national law requirements in the light of the general obligations of the Convention found in articles 1, 3 and 9.

Article 6 has provisions applying to the "public" as well as the "public concerned" (paragraphs 7 and 9). The Guide states that "*it is consistent with the objectives of the Convention to hold that actual participation in a decision-making procedure under article 6, paragraph 7, would indicate that the member of the public has the status of a member of the public concerned. Yet, it could well be too restrictive to require that only persons who participate in the decision-making procedure would be granted access under article 9, paragraph 2*".

Thus, compliance with the Convention requires that the objective of wide access to justice is upheld when determining the scope of persons — both natural and legal — with regard to standing.

Paragraph 73 of the consultation paper highlights that the courts have recognised that a public spirited citizen without any direct legal interest in the outcome of the case may, unlike a "*meddlesome busybody*", be allowed to seek JR in cases which present a serious issue of public importance[12]. Moreover, in *Dixon*[13], it was held that a local resident was "*perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment*".

While the Government accepts the requirements of EU law and the Aarhus Convention justify a different approach for environmental cases (essentially environmental NGOs are guaranteed rights of standing even if they are not directly affected), it is argued that this does not extend to individuals, unless they can demonstrate that they have both a genuine interest in the environmental matter at issue and that they have sufficient knowledge to be able act on behalf of the public interest[14]. It is worth recalling that the essence of public law is to ensure that the decisions taken by public bodies are legal. With that in mind, the particular skills or knowledge set of the person bringing the claim are largely irrelevant: sufficient safeguards already exist to ensure that 'busybodies' cannot bring claims.

Various approaches to limit standing for individuals are discussed in the consultation paper, all of which would result in a more restrictive approach than that currently applied by the courts. Some of these options, in light of Guidance on the Aarhus Convention cited above, would create a real risk that unlawful actions by a public authority would increasingly go unchallenged and put the UK in breach of the Convention in respect of "the public concerned".

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12 *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Lord Rees-Mogg* [1994] QB 552.

13 *R v Somerset County Council and ARC Southern Limited Ex p. Dixon* [1998] Env. L.R. 111

14 Paragraph 81 of the Consultation Paper

To summarise, Link does not believe the UK's current approach to standing extends beyond that required to comply with the Convention, and that any proposal to restrict standing at this stage could put the UK in breach of the Convention.

Standing – non-environmental cases

The consultation paper proposes that persons are to have a "direct and tangible" interest in the outcome of the proceedings. Three alternative tests have been proposed, all of which represent a tighter test than the "sufficient interest" test currently used by the courts. Judicial Review provides an opportunity for individuals and groups to challenge public decisions and the proposed change to the standing test could undermine the checks and balances that currently exist, limiting the persons or groups who can challenge a public decision. It could further mean that there will be some public decisions which no-one would have a direct and tangible interest in order to challenge. There is also the "catch 22" situation where a claimant may qualify to be able to bring a claim but have too much of a personal interest in order to get a PCO (see below).

Questions

Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? Do you have any examples?

No, such an approach is entirely consistent with the objective of the Aarhus Convention, which requires Parties to interpret standing "*with the objective of giving the public concerned wide access to justice within the scope of the Convention*".

In any event, we would argue that environmental cases require a broad approach. The whole point of public interest cases is that people are not taking a narrow view of what is in their interest and are recognising the wider importance to society of a particular issue.

Furthermore, paragraph 78 of the consultation paper acknowledges that Judicial Reviews brought by NGOs and charities "*tended to be relatively successful compared to other JR cases*". Thus, the 'problem' the government is attempting to address has not sufficiently been identified in the consultation paper and does not support the government's concerns "*about the use of unmeritorious JRs to cause delay, generate publicity..."* (paragraph 1 of the consultation).

Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis? Should the Government consider other options?

No. The strict approach of "direct and individual concern" implemented by the CJEU has already been found to be in breach of the Aarhus Convention by the Compliance Committee[15]. Similarly, the Aarhus Implementation Guide highlights that restricting standing to only those persons who have participated in the decision-making procedure under Article 9(2) may put Parties in breach of the Convention. Both NGOs *and* individuals must be able to enjoy broad access to the courts in environmental cases.

Question 11: Are there any other issues, such as the rules on interveners, the Government should consider in seeking to address the problem of Judicial Review being used as a campaigning tool?

Link does not agree with the premise on which any such rules should be introduced. Crucially, Judicial Review will only succeed if a public body has behaved unlawfully. That is the issue to be

[15] See the findings in Communication C32 available at http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html

examined by the court – the claimant's motivation (in the absence of unreasonable and/or improper conduct) is irrelevant.

As a general point, we would point out that the considerable time and cost implications associated with Judicial Review prevent NGOs from using it as a 'campaign tool'. Furthermore, the consultation paper provides no evidence that Judicial Review is used by NGOs in such a way - indeed the fact that NGOs have such a high success rate is surely cogent evidence that any campaigning purpose is ancillary to the fact that NGOs have a particularly good record in using JR to enforce the rule of law.

Procedural defects

Judicial Review is the core procedure allowing individuals or groups to challenge the *way* in which Ministers, Government Departments, local authorities and other public bodies make decisions. It is not concerned with the merits of a decision or whether the public body has made the 'right' decision. The only question before the court is whether the public body has acted unlawfully. In particular, it is not the task of the courts to substitute its judgment for that of the decision-maker.

The main grounds of review are that: (i) a decision maker has acted outside the scope of its statutory powers and/or duties; (ii) a decision was made using an unfair procedure; (iii) a decision was manifestly unreasonable or irrational (so-called '*Wednesbury* unreasonableness'); (iv) a decision taken is in breach of the Human Rights Act; or (v) in breach of European Community Law. It is widely recognized that the courts have consistently attached a very high threshold to *Wednesbury* unreasonableness[16] - to the extent that it is rarely used as a ground on its own.

The consultation paper confirms that the courts have applied a cautious approach to the use of the "no difference" principle – holding that a probability that the decision would have been the same is insufficient and that inevitability is required[17]. We believe this to be the correct approach.

Question 15: Are there alternative measures the Government could take to reduce the impact of Judicial Reviews brought solely on the grounds of procedural defects?

Link is concerned that the consultation appears to make a distinction between a procedural defect and substantive illegality – both constitute unlawful behaviour and to require there to have been some sort of substantive breach for a case to proceed is to misunderstand the limitations of the present scope of Judicial Review.

Notwithstanding the above, there are alternative measures the Government could contemplate, including:

- Introducing a third party right of appeal in planning cases. Allowing third parties an opportunity to have their concerns considered in detail both on the facts and law could remove the 'need' for many EIA type cases;

- Building ADR mechanisms such as mediation more explicitly into the system, particularly as the idea of the Pre-Action Protocol (PAP) was to help bring about settlement and/or narrow the issues under dispute. In planning cases, this would require: (i) the possibility of a mediation agreement that an LPA would seek the quashing of their own decision if that was the mediation's conclusion; and (ii) a change to (discretion on) time limits to either allow or

16 Macrory, R. and Day, C. (2012). Study on the Implementation of Articles 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: UK. Page 17. Available at http://ec.europa.eu/environment/aarhus/access_studies.htm

17 *R(Smith) v. North East Derbyshire PCT* 1 WLR 3315 per Lord Justice May at para 10

strongly require discretion to be exercised in favour of a late, non-contentious (or contentious if LPA did not follow mediation outcome) JR as a result of such a mediation.

Rebalancing Financial Incentives

Paragraph 112 of the consultation paper states that the Government "*expects that the combined effect of the new fee for an oral permission hearing and the removal, from 1 July 2013, of the right to an oral renewal hearing in cases certified as totally without merit will be fewer requests for oral permission hearings in the future".* In so doing, the Government is openly acknowledging that, at least in part, the imposition of a fee for an oral permission hearing will deter claimants from continuing with their case[18]. In light of the Aarhus Compliance Committee's findings in Communication C57 (Denmark[19]), to go ahead with the introduction of a fee would be a clear breach of Article 9(4) of the Aarhus Convention with regard to prohibitive expense.

Costs of Oral Permission Hearings

Question 21: Should the courts consider awarding the costs of an oral permission hearing as a matter of course rather than just in exceptional circumstances?

No, and the introduction of such measures in relation to Aarhus cases for which the stated intention is to reduce the potential number of cases as a result of the potential financial risk incurred by the claimant represents a clear breach of the Aarhus Convention (see comments above).

This same point applies to questions concerning wasted cost orders and costs arising from the involvement of third party interventions, where the stated intention of the proposals is to use financial incentives to deter claimants from pursuing environmental cases.

Protective Costs Orders – non-environmental cases

Link is concerned that the proposal to prevent PCOs being available where a claimant has an individual or private interest in the matter (regardless of whether there is a wider public interest) could reduce the availability of PCOs in non-environmental claims. Again, this change could adversely impact on NGOs or charities with limited funds.

Costs arising from the involvement of third party interveners and non-parties

Question 31: Should third parties who choose to intervene in Judicial Review claims be responsible in principle for their own legal costs of doing so, such that they should not, ordinarily, be able to claim those costs from either the claimant or the defendant?

Third party interveners play an important role in JR proceedings and the court are often grateful for their input on an issue. In our experience, interveners ordinarily cover their own costs and are not presently at risk of paying the costs of the other parties. We think this is the correct balance for the Court to strike.

However, if an intervener raises an issue which results in the other parties incurring legal costs, the government is proposing that the intervener should be liable for those costs. Link is concerned that this may adversely affect charities and NGOs with limited funds, in which case the Courts will no longer benefit from such interventions.

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18 See also paragraph 148 of the consultation paper

19 See paragraph 50 of the Committee's findings at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-38/ece_mp.pp_c.1_2012_7_e.pdf

Question 33: Should claimants be required to provide information on how litigation is funded? Should the courts be given greater powers to award costs against non-parties? Do you see any practical difficulties with this, and how those difficulties might be resolved?

We oppose this proposal if it is to be a general requirement on claimants in environmental cases. However, following the judgment of the CJEU in *Edwards*[20], Link believes that claimants in Aarhus cases are at liberty to submit information about their financial position to the Court in order to argue that the fixed adverse liability figures of £5,000 for individuals and £10,000 (other cases) should be reduced in order to ensure that costs are not prohibitively expensive on both an objective and a subjective basis.

Leapfrogging

Question 35: Do you think it is appropriate to add to the criteria for leapfrogging so that appeals which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people) can be expedited?

No, we do not consider this to be appropriate. If any of the above cases fall within existing Supreme Court criteria, they could be heard by it. The function of the Supreme Court is to hear matters of constitutional importance.

Leapfrogging

Question 36: Are there any other types of case which should be subject to leapfrogging arrangements?

Link would accept that a case with a very obvious EU point that may be suitable for a reference to the CJEU may qualify for this type of arrangement.

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[20] See Case C-260/11 - *R on the application of David Edwards, Lilian Pallikaropoulos v (i) Environment Agency, (ii) First Secretary of State, (iii) Secretary of State for Environment, Food and Rural Affairs*