Landmark CHAMBERS

CHALLENGING DEVELOPMENT CONSENT ORDERS IN THE HIGH COURT

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METHOD OF CHALLENGE: SECTION 118 OF THE 2008 ACT

- All challenges to the grant or refusal of a DCO, or any procedural step along the way to such a decision, must be brought by JUDICIAL REVIEW pursuant to section 118 of the 2008 Act.

- Section 118 modifies the time limit that would otherwise apply, but does not otherwise alter the ordinary JR rules.

JUDICIAL REVIEW PROCEDURE

Procedure for DCO challenges is ordinary judicial review (planning court) procedure:

- CPR 54 applies
- As now with statutory challenges, there is a permission stage and Defendants / IPs can file Summary Grounds and seek to have permission refused.
- Claimants have a right to renew application for permission to oral hearing, may be dismissed.
- Court is not involved with merits, claimant must show error of law or that one of the grounds for judicial review is made out.

PLANNING COURT

- All DCO cases will be allocated to the Planning Court (CPR54.21(i)).
- Very likely to be "significant" within meaning of CPR PD 54E, para 3.2:

  3.2 Significant Planning Court claims include claims which—

  a) relate to commercial, residential, or other developments which have significant economic impact either at a local level or beyond their immediate locality;

  b) raise important points of law;

  c) generate significant public interest; or

  d) by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

- Brings in time limits in CPR PD 54E, para 3.4:
  - Paper permission decision within 3 weeks of AOS;
  - Oral renewal hearing within 1 month of renewal application.
  - Substantive JR hearing within 10 weeks of time for Detailed Grounds

TIME LIMITS (1): Calculation of time

- Unlike ordinary judicial review claims, 6 WEEK TIME LIMIT IN ALL CASES, calculated from either (a) publication or (b) notice / notification of an event.
- FOR CLAIMS BROUGHT PRIOR TO 13 APRIL 2015, TIME RUNS FROM THE DATE IN QUESTION:
  - Example: DCO published on 12 September 2014, time expires on 23 October 2014 – see *R (Blue Green London Plan) v SSEFRA* [2015] EWHC 495 (Admin).
- FOR CLAIMS BROUGHT ON OR AFTER 13 APRIL 2015, TIME RUNS FROM DAY AFTER DATE IN QUESTION:
  - Example: DCO published on 12 September 2015, time expires on 24 October 2014.
  - This brings approach in line with CPR (see *Berky* [2012] 2 CMLR 44)

TIME LIMITS (2): What can be challenged?

- Section 118 permits challenge to the following:
  - Grant of Development Consent Order (DCO): Subsection (1). Time runs from publication of DCO or, if later, statement of reasons.
  - Refusal of DCO: Subsection (2). Time runs from publication of statement of reasons for refusal.
  - Rejection of application: Subsection (3). Time runs from notice of that rejection to applicant.
  - Decisions to correct, alter, revoke DCOs: There are various powers to alter etc DCOs and decision documents in Schedules 4 and 6 to the 2008 Act. In all cases time runs from the giving of the required notice in accordance with the Schedule.
  - "Anything else done" by the Secretary of State "in relation to" a DCO application: Catch all, time runs from "relevant date".

TIME LIMITS (3): Publication / notification

- Publication What is the date on which a DCO or reasons are "published"?
  - Method of publication not prescribed in 2008 Act.
  - Per Lindblom J in *R (Williams) v SSECC* [2015] EWHC 1202 (Admin), date of publication is date that document "put into the public domain".
  - In *Williams,* placing of documents on PINS website was sufficient to constitute publication, at least together with email notification on same day to persons involved.
  - NB Claim dismissed as out of time despite fact that point only taken after substantive argument heard on merits.
- Notification Relevant notice must be "given" to applicant or other person under subsection 118(4), (5) or (6) (and similar wording in subsection (3).

TIME LIMITS (4): Procedural challenges

- Default position in section 118(7) catch-all:

  (7) A court may entertain proceedings for questioning anything else done, or omitted to be done, by the Secretary of State or the Commission in relation to an application for an order granting development consent only if—

  … (b) the claim form is filed during the period of 6 weeks beginning with the relevant day.

  (8) "The relevant day" … means the day on which—

  (a) the application is withdrawn, (b) the order granting development consent is published or (if later) the statement of reasons for making the order is published, or (c) the statement of reasons for the refusal of development consent is published.

- This rules out any argument that it a claimant should be required to raise a challenge to a procedural step prior to publication of the DCO. (NB *Contra* Maurici "Judicial Review under the Planning Act 2008", (2009) JPL 446)

- Arguably, also has the effect that such a challenge cannot or at least generally should not be brought at an earlier stage.

TIME LIMITS (5): Particular cases

- CHALLENGE TO ACCEPTANCE OF DCO: Claimant may argue that Secretary of State wrong to *accept* DCO application, for example because project falls below NSIP thresholds.
  - Section 118(7) makes clear that he can (and must?) bring that challenge *only* after DCO granted.
- ENVIRONMENTAL IMPACT ASSESSMENT / SCREENING:
  - Held in *R (Catt) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593 that claimant can challenge LPA planning permission on basis of error in EIA screening opinion, even if conducted years before grant.
  - Recently doubted by Lord Carnwath in *R (Champion) v N Norfolk DC* [2015] 1 WLR 3710
  - But in DCO context, section 118(7) appears to make clear that (since a screening decision will be "in relation to a DCO application"), challenge can be made within 6 weeks of grant of DCO.

GROUNDS OF CHALLENGE

- Usual judicial review grounds; illegality, irrationality, procedural unfairness;
- Supervisory jurisdiction, not an opportunity to re-argue the merits of a particular project;
- In practice, many claims are likely to turn on:
  - Correct interpretation of policy;
  - The environmental assessment/effects of projects;
  - Procedural fairness of the examination process;
- Challenges to a decision to make a DCO are difficult. No successful challenge to date.

AN EXAMPLE CHALLENGE

- *Halite Energy Group Ltd v SoS for Energy and Climate Change* [2014] EWHC 17 (Admin).
  - Successful challenge to a refusal to make a DCO for an underground gas storage facility;
  - Court found an unfair procedure had been followed. ExA fundamentally departed from agreed position in the SOCG without warning the parties;
  - Patterson J confirmed:
    - examination process is "inquisitorial, iterative and learning"
    - Critical that the process "is undertaken in a way that achieves the objective of the ExA but is fair to all parties throughout"
    - "As a rule there is no cross-examination at the hearings or on the written documents submitted in response to the Panel's questions. The onus is, therefore, on the ExA to ensure that material matters of concern, which may or may not, have been raised by others who have made representations on the planning application are raised with all parties in a fair and transparent way."

UNRESOLVED ISSUES

- *R (Williams) v SSECC* [2015] EWHC 1202 (Admin): issue left unresolved of whether, for appropriate assessment under Habitats Directive, windfarm project should be taken as including the connection to the grid;
- *Considered in EIA context by Court of Appeal in R (Larkfleet Ltd) v South Kesteven District Council* [2015] EWCA Civ 887. Court held:
  - What is in substance a single project cannot be "salami-sliced" into a series of smaller projects, each of which falls below the relevant threshold criteria;
  - However, just because two sets of proposed works may have a cumulative effect on the environment, this does not make them a single "project" for the purposes of the Directive:
  - Directive contemplates that they might constitute two potential "projects" but with cumulative effects which need to be assessed at each stage;
  - Declined to decide whether question of law or reviewable question of judgment.

AARHUS COSTS

- CPR was amended (1 April 2013) to provide new costs rules for judicial reviews which fall within the Aarhus Convention.
- CPR 43.43 provides standard costs caps for cases which
  a) fall within CPR 45.41 as an “Aarhus Convention” claim; and
  b) State on claim form that they are an Aarhus Convention claim (so claimant can “opt out” by not seeking Aarhus protection or expressly stating he does not want it).
- The standard caps are found at paragraph 5 of the Practice Direction to CPR 45 and limit the claimant’s costs at £5,000 (for an individual) or £10,000 (for any other claimant) and the Defendant’s costs to £35,000. At present, no provision to vary cap.

SCOPE (1): Law relating to the Environment

The Aarhus Convention, Art 9, requires states to ensure access to justice in cases involving "law relating to the environment".

- In *Venn v SSCLG* [2013] EWHC 354, Lang J held that the law relating to the environment should be given a wide meaning, in accordance with definition of "environmental information in implementation guide.
- Approach largely upheld by Court of Appeal: [2014] EWCA Civ EWCA Civ 1539, [2015] 1 WLR 2328. CA rejected argument that planning policy was not part of law relating to the environment.
- Precise boundaries unclear, but clear that many planning cases will come within Aarhus. All but impossible to conceive of a DCO case that will not be an environmental case.

SCOPE (2): JUDICIAL AND STATUTORY REVIEW

- In the Court of Appeal in *Venn,* it was decided that "judicial review" did not include "statutory review" such as claims / applications / appeals under section 288 or 289 TCPA 1990, or similar statutory challenges.
- Court was critical of fact that rules did not confer protection in such cases.
- Debate almost certainly irrelevant to DCO challenges:
  - Most importantly, as we have seen, DCO challenges are brought by "judicial review", albeit with modified time limits.
  - For completeness, very likely to involve Environmental Impact Assessment issues – in context of EIA, EU law makes Aarhus Convention directly effective: *Garner [*2010] EWCA Civ 1006, *Edwards* [2014] 1 WLR 55, approach may be indistinguishable in practice.

SCOPE (3): PUBLIC BODIES

- Issue arose in *R (HS2 Action Alliance Ltd) v SST [2015] PTSR 1025* as to whether public bodies could rely on Aarhus CPR Fixed Costs regime.
- Court of Appeal held that they could: rules as drafted made no distinction between public bodies and other claimants, because irrelevant to whether claim was an Aarhus Convention claim with CPR 45.41. Meaning of Aarhus Convention claim relates *solely* to whether claim relates to the environment.
- Accordingly, CA decision not affected by subsequent decision of Aarhus Compliance Committee that public bodies do not require to be given protection under the Convention, which protects "members of the public".

AARHUS COSTS: FUTURE CHANGES

- Government has consulted on further changes to the CPR regime: "Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges", 17 September 2015
- Notable proposals
  - Extend protection to cover statutory challenges
  - Permit "subjective element" in assessment of cap, to allow regard to be had to financial resources of claimant. Follows judgments in *Edwards* (CJEU: 2013] 1 WLR 2914, SC [2014] 1 WLR 55).
  - Permits any party to apply to vary level of cap or reciprocal cap, including by reducing it to zero or removing it altogether.
  - Make clear that public bodies will not be able to benefit from Aarhus regime as claimants.
  - Remove rule that unsuccessful challenge to imposition of cap will lead to indemnity costs.

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