Landmark CHAMBERS

PRACTICE AND PROCEDURE UPDATE FOR HIGH COURT PLANNING CHALLENGES

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Outline of presentation

SECTION A – RECENT CHANGES

1. Aarhus Costs (in force since 1 April 2013)
2. Timing (in force since 1 July 2013)
3. Totally without merit (in force since 1 July 2013)

SECTION B – PROPOSED CHANGES

1. Specialist chamber of the Upper Tribunal
2. Permission filter for s.288 challenges
3. Restriction of LPA right of challenge to infrastructure projects under s.118 Planning Act 2008
4. Removal of legal aid from s.288/289 challenges
5. Standing
6. Other proposals.

1) Aarhus costs rules since CPR 45.41-44

i. CPR rules
ii. Issue about the scope of the rules
iii. The decision in *Venn v Secretary of State [2013] EWHC 354*
iv. Other points

i) The CPR rules

- Following consultation, the CPR was amended with effect from 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 45.41 and which
  b) are not disapplied by 45.42 on the basis that they do not state on the claim form that they are an "Aarhus Convention Claim" (at Section 6 of form N461), or state that they do not wish the rules to apply.
- 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.

CPR 45.41: Scope

"(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, ''Aarhus Convention claim'' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

Challenging the application of CPR 45.43

- Under CPR 45.44 Defendants are given strong incentives not to dispute that a claim is an "Aarhus Convention claim". Under the rules:
  - Any question of whether the claim is an Aarhus Convention claim will be determined at the earliest opportunity;
  - If the court decides that the claim is an Aarhus Convention claim then it will normally make an order against the defendant on the indemnity basis;
  - If the court decides that the claim is not an Aarhus Convention claim then it will normally make no order for costs.

- The rules therefore constitute a major improvement in the position of claimants who wish to review decisions which they believe fall within the Aarhus Convention.

(ii) Issues about scope

The definition of scope under CPR 45.41 gives rise to some fundamental questions:

- What features will bring claims within the scope Aarhus Convention?
- What is the meaning of "judicial review" in CPR 45.41 (Art 9(3) of the Convention refers to "judicial procedures to challenge acts and omissions by private persons and public authorities")? In particular, does the term extend to statutory challenges under TCPA 1990 or to private nuisance.
- What will be the effect of a claim falling within the Aarhus Convention but outside of CPR 45.41 because it is not "judicial review"?

These questions have now been addressed by Lang J in Venn v SSCLG [2013] EWHC 3546 (Admin). An appeal may still be brought.

What does the Aarhus convention say?

The Aarhus Convention requires states to ensure access to justice in environmental matters under Article 9.

Art 9(4) requires that

> *"the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible*."

- Art 9(3) requires that:

  > *"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

- ‘Environment’ is not defined by the Convention, but its *Implementation Guide* (2013) indicates that guidance can be found in the definition of “environmental matters” at Art 2(3) and that in interpreting the scope regard should be had to the drafters’ intention that it should “be as broad in scope as possible”.
- Art 2(3):

  “Environmental information” means any information in written, visual, aural, electronic or any other material form on:

  (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 subparagraph (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, the factors, activities or measures referred to in subparagraph (b) above;”

(iii) Venn v SSCLG [2013] EWHC 354

- The judgment of Lang J on 15 November gave clarification on the application of CPR 45.41, and on the application of Aarhus cost principles to cases which fall with the Convention but without 45.41.

Key facts:

- Ms Venn sought to challenge the Inspector's grant of permission for the construction of a new house in the garden of a Victorian terrace in south-east London under s.288 TCPA 1990. She lived next door to the property and was concerned by the loss of green space and the impact of the development on the enjoyment of her home.
- The court heard that she had about £180,000 of equity in her property, a loan of £60,000 from her parents, but that as her only income was £71.70 through the Job Seekers Allowance she would be unlikely to obtain a substantial loan against her collateral. Her counsel was acting pro bono via Direct Access.
- Her grounds of challenge focused on the application by the Inspector of the Local Plan policy relating to residential development on garden land; Lang J considered that her grounds were arguable.

Venn: Findings

- Lang J's principle findings were:
  a) No application of CPR 45.41 to s.288 challenges. (§§27-32)

  b) This challenge (*inter alia* failure to correctly apply open-space policy) fell within the Convention. (§24)

  c) Although the Convention did not have direct effect (i.e. through EU implementation) UK law should be interpreted and applied in harmony with its provisions where possible (*Walton* [2012] UKSC 44 at [100] applied); in this case that meant the adoption of the approach in *R(Garner) v Elmbridge BC* [2010] EWCA Civ 107 (modifying the *Cornerhouse* criteria). (§36)

  – Accordingly she made an order that the Claimant's costs be limited to £3,500.

a) No application of CPR 45.41 to s.288 challenges (or other statutory challenges)

- The judge found that "judicial review" referred only to cases brought under s.31 of the Senior Courts Act 1981 and CPR 54, and not to applications under s.288 of TCPA 1990. This was on the basis that:

  - the MoJ did not intend statutory challenges to be covered by 45.41;
  - LASPOA 2012 draws a distinction between an "application for judicial review" and a "decision applying the principles that are applied by the court on an application for judicial review";
  - no purposive reading was appropriate in this case (applying the principles in *Marleasing* [1990] ECR 1-4135) on the basis that there was no alleged infringement of a directive incorporating the Convention.

  It is worth noting that that judge did not consider what the outcome would have been had the Convention been directly effective.

b) Challenge within Aarhus Convention

- Despite finding that CPR 45.41 did not apply, Lang J held that the claim fell within the Aarhus Convention, contrary to the SoS's submission that the claim was a small-scale planning challenge.
- Her reasoning was as follows:
  - The Convention does not define 'environment' but
    a) the definition of "environmental information in Art 2(3) and
    b) the guidance offered by the *Aarhus Convention: Implementation Guide* (2013)

  show that the Convention's application is intended to be broad and comprehensive.
- The evidence provided by a number of environmental charities (in particular the Royal Horticultural Society) showed that the impugned policy related to 'garden-grabbing', a practice which had considerable impacts on the environment in terms of drainage, climate change resilience, urban temperatures, air quality, habitats, and the quality of the human and social environment. (§ 17)
- The Claimant's contention was that a policy restricting garden-grabbing had not been properly applied, therefore her challenge was to an act or omission contravening national law relating to the environment and fell within Art 9(3).

c) Costs protection appropriate even where CPR 45.41 does not apply.

- Following the Supreme Court in *Walton v Scottish Ministers* [2012] UKSC 44 at [100] the Aarhus Convention is not part of UK domestic law, except where incorporate through European Directives.
- Nevertheless UK law should be interpreted and applied in harmony with its provisions where possible.
- The *Corner House* criteria should be relaxed to give effect to the Aarhus Convention and, adopting the approach in *R (Garner) v Elmbridge BC* [2010] EWCA Civ 1006, this means that the public importance and public interest criteria are met because the claim raised 'environmental matters'.

Appropriate costs caps should then be considered under *Edwards*.

- Having concluded that the claim fell under the Aarhus Convention but not within CPR 45.41 Lang J then went on to assess the claimant's needs under the principles in *Edwards v Environment Agency* [2013] 1 WLR 2914. Of note, and whilst there is no obvious clash, consideration will need to be given to whether this is consistent with *Edwards* in the Supreme Court, December 2014: [2014] 1 WLR 59.
- In making that assessment Lang J went into some detail as to the financial circumstances of the claimant (at paras 37-43) and was persuaded that although Ms Venn had considerable equity in her property she was unlikely to be able to acquire a loan due to her very low income.
- Lang J was concerned with the level of intrusion into Ms Venn's finances and did not think it appropriate to ask Ms Venn to give evidence orally. She also took note of the fact that Ms Venn was represented pro bono, which would mean that there was no need for a reciprocal cap.
- She concluded that the correct level for a costs cap was £3,500.

Edwards in the Supreme Court: December 2013

- The Supreme Court provides a useful summary of what the ECJ decided at para 23 of Lord Carnwath's judgment:

> 23 A number of significant points can be extracted from the Edwards judgment. (i) First, the test is not purely subjective. The cost of proceedings must not exceed the financial resources of the person concerned nor "appear to be objectively unreasonable", at least "in certain cases". (The meaning of the latter qualification is not immediately obvious, but it may be better expressed in the German version "in Einzelfällen", meaning simply "in individual cases".) The justification is related to the objective of the relevant European legislation (referred to in para 32 of the judgment), which is to ensure that the public "plays an active role" in protecting and improving the quality of the environment. (ii) The court did not give definitive guidance as to how to assess what is "objectively unreasonable". In particular it did not in terms adopt Sullivan LJ's suggested alternative of an "objective" assessment based on the ability of an "ordinary" member of the public to meet the potential liability for costs. While the court did not apparently reject that as a possible factor in the overall assessment, "exclusive" reliance on the resources of an "average applicant" was not appropriate, because it might have "little connection with the situation of the person concerned". (iii) The court could also take into account what might be called the "merits" *66 of the case: that is, in the words of the court, "whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages" (para 42). (iv) That the claimant has not in fact been deterred for carrying on the proceedings is not "in itself" determinative. (v) The same criteria are to be applied on appeal as at first instance.

Venn: Implications

1. The CPR Aarhus costs rules only apply to Part 54 Judicial Reviews.
2. “Provisions relating to the environment” can include the interpretation or application of policy where evidence suggests that the policy has as its goal the protection of some aspect of the environment, which should be interpreted broadly (in line with Art 2(3) and the Implementation Guide).
3. The Aarhus Convention should be used to interpret costs rules even where not implemented by EU directives.
4. Where a case falls outside of CPR 45.41 the result may be a lower cost cap than if it had fallen within.

Other practical points

1. Evidence of impact on the environment is crucial.
2. The judge will try to deal sensitively with the claimant, but will require details of the claimant's finances (cf proposal to require detailed financial statements from applicants for PCOs).

(iv) Application to onward appeals (continued)

CPR 45.41 does not apply to appeals. The relevant rule is CPR 52.9A, which is not specific to Aarhus Convention claims, and which provides for a general jurisdiction in the CA to make protective costs orders on the basis that there was limited costs recovery in the lower court:

Orders to limit the recoverable costs of an appeal

52.9A

(1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

(2) In making such an order the court will have regard to –

(a) the means of both parties;

(b) all the circumstances of the case; and

(c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

(iv) Application to onward appeals

There is a useful discussion of the application of this rule in general terms in *R (Manchester College) v Hazel* [2013] EWCA Civ 281, albeit that is not an environmental case.

It is clear from *Edwards* in the ECJ that this rule will have to be applied in accordance with the Aarhus Convention "principles", so as to avoid creating a situation where proceedings are prohibitively expensive.

In the Supreme Court, Lord Carnwath commented as follows on this requirement:

> *23. … (v) The same criteria are to be applied on appeal as at first instance.*
> *24 I do not understand the last point as intended to imply that the same order must be made at each stage of the proceedings, or that there should be a single global figure covering all potential stages, but rather that the same principles should be applied to the assessment at each stage, taking account of costs previously incurred.*

(v) Possible application to private nuisance claims?

- In *Austin v Miller Argent* [2013] EWHC 2622 (TCC) Milwyn Jarman QC heard an application for a PCO covering proposed nuisance proceedings. The alleged nuisance stemmed from the production of dust and noise at the Ffos y Fran opencast mine, which the applicant contended was produced as a result of the breach of planning conditions imposed following an EIA-compliant Environmental Statement.
- The application was made both on two grounds, (1) that the Aarhus Convention was directly effective as the case involved the efficacy of conditions imposed as part of the EIA process, (2) that the Aarhus Convention was engaged in any event and should be taken into account, necessitating the grant of a PCO.
- The judge rejected the application but granted permission to appeal, an appeal is scheduled for the spring.

2. Timing

As amended on 1 July 2013 CPR 54.5 now states:

> *"(5) Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose."*

This provision operates as an alternative to 54.5(1), accordingly there is now no promptness requirement in planning JRs.

- The JR Pre-Action Protocol has also been amended.

  "*This protocol may not be appropriate in cases where one of the shorter time limits in Rules 54.5(5) or (6) applies. In those cases, the parties should still attempt to comply with this protocol but the court will not apply normal cost sanctions where the court is satisfied that it has not been possible to comply because of the shorter time limits.*"

  Given that the new time frame for claimants is almost always going to be a tight, it is unlikely that failure to comply will result in sanctions in anything but the rarest cases.

Scope of the new time limit

- The new time limit applies to decisions made ‘under planning acts’. ‘Planning acts’ has the same meaning as s.336 TCPA 1990 (CPR 54.5(A1).
- s.336 lists TCPA 1990 as well as the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990.
- This would, on its face, extend to decisions made under regulations which were in turn made under powers derived from these acts.

3. Totally without merit

- From 1 July 2013 the CPR has been amended so that where a judge refuses permission for judicial review and records the application as being totally without merit in accordance with rule 23.12 the claimant cannot request that the decision be reconsidered at a hearing. (CPR 54.12(7))
- Where an appeal is sought against such a decision it will lie with the Court of Appeal, however, due to CPR 52.15(1A)(b), the Court of Appeal has no jurisdiction to consider such an application at an oral hearing. This was recently confirmed in (*R(RG - Albania) v Secretary of State for the Home Department* (C4/13/2419, judgment given on 4 October 2013).

- This will effectively mirror the power given to appellate judges by CPR 52.4A.
- However, in the Admin Court the judges will have more experience of the "clearly without merit" test for immigration related claims, where the effect of a finding that a claim is without merit is renewal does not operate as a stay on removal (CPR 54 PD 18.4). This has been applied rather more robustly by the Admin court than by the Court of Appeal.
- Risk of conflation or drift as between the "arguability" threshold and the "totally without merit" test.

SECTION B

CHANGES PROPOSED BY MOJ CONSULTATION PAPER

"JUDICIAL REVIEW – PROPOSALS FOR FURTHER REFORM"

Outline of proposals relating to planning

1. Create specialist ‘Land and Planning Chamber’;
2. Introduce permission filter for s.288 challenges;
3. Restrict ability of LPAs to challenge infrastructure projects under s.188 PA 2008;
4. Remove legal aid from s.288 and s.289 challenges (except where in breach of ECHR/EU law);
5. Adopt new standing test;
6. Other changes relating to JR more widely.

1. Creation of a specialist Land and Planning Chamber

- Intention is to speed up the process.
- Steps have already been taken to achieve this through the creation of the Planning Fast-Track. The Government anticipates that the results of those reforms should be clear by the end of the year.
- All planning judges and judicial reviews will be transferred to the Lands Chambers (which will be renamed).
- Intention is that this should enable better case-management and faster resolution of issues.
- ALBA supported the proposal, but were concerned that there should be frequent movement of judges between planning and environmental law and the Administrative Court.

2. Introduction of a permission filter for all statutory challenges under TCPA 1990

- It has been an obvious anomaly that s.288 has no permission stage but s.289 has.
- This proposal has been brought forward as a result of suggestions by the judiciary and has been supported by ALBA and others.
- It would presumably use the same standard of arguability used in Part 54 and s.289 appeals.
- Note that it does not address other related anomalies between section 288 and 289, and judicial review, as to whether onward appeal to Court of Appeal is a "second appeal" within CPR 52.13 and whether one can appeal against a refusal of permission (in JR you can, CPR 52.15, in section 289, and likely 288, you cannot (*Walsall MBC v SSCLG* [2013] EWCA Civ 270, [2013] JPL 1183).

3. Restriction of the ability of Local Authorities to challenge Infrastructure Projects under s.118 PA 2008

- This proposal may involve adopting a provision similar to s.1.4 of the Dutch Crisis and Recovery Act 2010 which restricts the right of local authorities to challenge decisions made by central government.
- The Government considers it important that under the Dutch legislation local authorities still have the chance to pursue remedies through the ordinary civil law. It is not clear whether this route would satisfy the UK's European obligations.
- The Government is also interested in extending the principles in favour of mediation and arbitration which already apply to governmental departments.

4. Removal of legal aid from all s.288 and 289 challenges where failure to fund would not breach ECHR or EU rights.

- It is unlikely that there would be circumstances in which Article 6 of the ECHR was engaged by the non-provision of legal aid. It may be possible to argue that a refusal of legal aid would give rise to a breach of EU law, either the Legal Aid Directive (2002/8/EC), or Article 47 of the EU Charter on Fundamental Rights, in cases where an underlying issue of EU law is in play (such as for example in relation to compliance with the EIA or SEIA directives). This remains untested terrritory.

5. Introduction of a tighter test for standing

- The Government is concerned that the standing rules have been relaxed too far.
- It wishes to consider whether there is a more appropriate test that could be applied and presents as possibilities:
  - "direct and individual concern" (test to bring challenge in CJEU). Although it points out that this is unlikely to be appropriate;
  - "victim" (test in HRA 1998 or ECHR). It is unclear what this would mean in planning context where individual rights are seldom at issue.
  - "a person aggrieved" (test in statutory challenges).
  - "potential to produce a benefit for the individual, a member of the individual's family or the environment" (test for civil public funding of judicial review). This is in practice likely to be even more restrictive than the "direct and individual concern" test so it is hard to see why it would be more appropriate.

Other proposals:

- Allow ‘no difference’ arguments to be made at the permission stage, or to a lower standard than the current ‘it is inevitable that the breach of legal duty would have made no difference to the decision reached’.
- Transfer the costs risk of the permission stage to the legal provider.
- Award costs of an oral hearing at the permission stage as a matter of course.
- Find an alternative mechanism for resolving Public Sector Equality Duty disputes.
- Extend the use of wasted costs orders.

- Mandate the provision of detailed financial statements by applicants for PCOS.
- Introduce a presumption in favour of cross-capping when PCOs are made.
- Restrict making of PCO where there is an individual or private interest (cf cumulative impact with proposed changes to standing requirements).
- Restrict making of PCOs in non-environmental cases.
- Restrict making of PCOs to “political” or “campaigning” claimants.
- Introduce a presumption that interveners should bear its own costs whatever the outcome of the case; and that interveners are liable for all additional costs created by their intervention.

- Extend the availability of ‘leapfrogging’ – enable more appeals to be transferred directly to the Supreme Court both by widening the criteria and the range of courts and tribunals from which a case can leap.
- Remove the requirement that all parties consent to an application for for ‘leapfrog’.