Planning High Court challenges: Practice and Procedure update 2017

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Introduction

- The Administrative Court Judicial Review Guide July 2017 edition - key changes
- Presenting a claim – some judicial warnings
- Aarhus Costs
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- Other issues

The Administrative Court Judicial Review Guide 2017 – key changes (1)

- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/647052/Admin_Court_JRG_2017_180917.pdf (July 2017)
- Note the tone: *"In recent years, the Administrative Court has become one of the busiest specialist Courts within the High Court. It is imperative that Court resources (including the time of the judges who sit in the Administrative Court) are used efficiently. That has not uniformly been the case in the past where the Court has experienced problems in relation to applications claiming unnecessary urgency, over-long written arguments, and bundles of documents, authorities and skeleton arguments being led very late (to name just a few problems). These and other bad practices will not be tolerated. This Guide therefore sets out in clear terms what is expected. Sanctions may be applied if parties fail to comply."*
- What is its status? Not a PD, but very like one …
- ***Bovale Ltd v Secretary of State for Communities and Local Government*** [2009] 1 W.L.R. 2274

The Administrative Court Judicial Review Guide 2017 – key changes (2)

Amendments to claim between issue and permission (6.10)

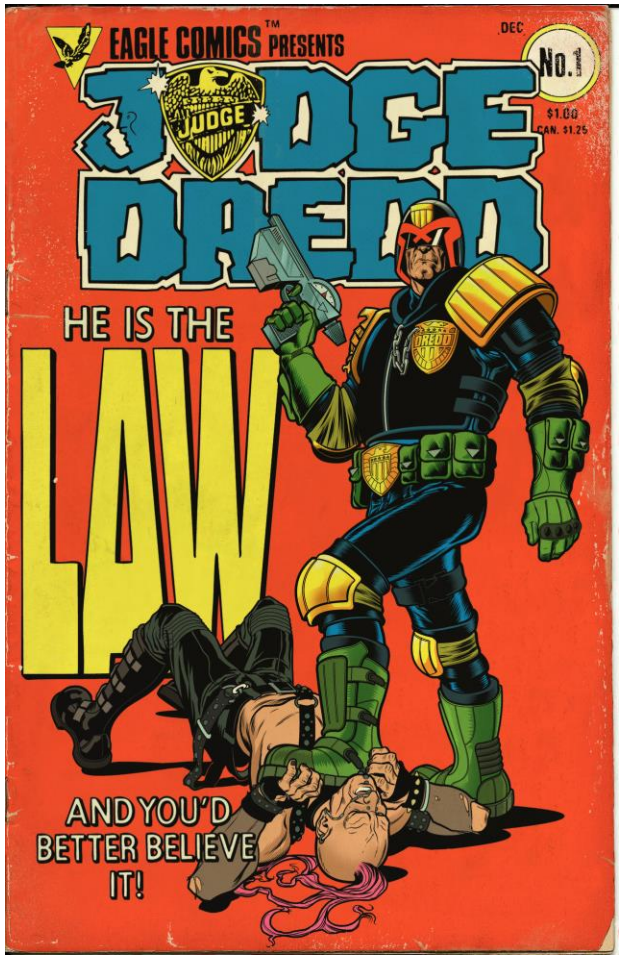
- If the claimant wishes to file further evidence, amend or substitute their claim form or claim bundle, or rely on further grounds after they have been filed with the court but before permission has been granted then the claimant must apply for an order allowing them to do so.
- The Court retains a discretion as to whether to permit amendments and will often be guided by the prejudice that would be caused to the other parties or to good administration.
- Where a defendant has agreed to re-take a decision then the claimant is likely to have to amend or end its claim. The court will only continue to entertain a challenge to the original decision if:
  - The case raises a point of general public importance; and
  - The point which was at issue in relation to the original decision remains an important issue in relation to the subsequent decision.

The Administrative Court Judicial Review Guide 2017 – key changes (3)

Case management

- Further powers have been delegated to Admin Court Office Lawyers, including the power to dismiss a claim / application where a party has failed to comply with any order, rule or Practice Direction, and the power to deal with applications for relief from sanctions, stays and adjournments (12.4.4).
- Urgent applications are to be made to the Duty Admin Court Judge rather than in Court 37 unless this would cause irreversible prejudice (16.2.7)
- Parties are encouraged to serve skeleton arguments by email. Attachments should be in word rather than pdf format (17.4.1)
- In relation to costs: where a Court has already decided costs of the application for permission, the parties should not invite the Court to vary that costs order following a settlement (23.5.2)
- The updated guidance also reflects recent case law in relation to Aarhus costs and appeals (see below)

Presenting a claim (1) *or how to make a Judge angry …*



Presenting a claim (2)

- ***R (Network Rail) v Secretary of State for the Environment*** [2017] EWHC 2259 (Admin)
- Holgate J issues a strong reminder to claimants of the need to present concise and focused arguments/material
- *"I regret the need to have to make some observations on the inappropriate manner in which the claim was put before the court"*
- Claimant succeeded on one simple point, but had submitted over 2,000 pages of material to the court and a lengthy skeleton argument, without proper cross-referencing, and in which the key ground *"had merely been alluded to in paragraph 76 and the first two lines of paragraph 77"* and "*the point was buried within the discussion of Ground 3 of the claim, a part of the Claimant's argument to which it does not belong".*
- *"The Claimant's skeleton argument was long, diffuse and often confused … The skeleton gave little help to the court"*

Presenting a claim (3)

- Holgate J stated that core bundle of 250 pages will generally be sufficient for the parties' legal arguments to be made
- "*Prolix or diffuse "grounds" and skeletons, along with excessively long bundles, impede the efficient handling of business in the Planning Court and are therefore contrary to the rationale for its establishment … Whichever party is at fault, such practices are likely to result in more time needing to be spent by the judge in pre-reading material so as to penetrate or decode the arguments being presented, the hearing may take longer, and the time needed to prepare a judgment may become extended. Consequently, a disproportionate amount of the Court's finite resources may have to be given to a case prepared in this way and diverted from other litigants waiting for their matters to be dealt with. Such practices do not comply with the overriding objective and the duties of the parties ... They are unacceptable*".
- He warned that in the face of such *'unacceptable'* conduct, the court has a range of case management powers at its disposal, including the power to refuse to accept excessively long skeletons or bundles and to impose costs penalties.

Presenting a claim (4)

- Last week was the JR of the Written Ministerial Statement on Neighbourhood Planning: ***Richborough Estates & Others v SSCLG***
- Dove J asked all counsel involved to circulate a warning to the planners in their chambers about the length of skeleton arguments in the Planning Court.
- The claimants' counsel produced a 70 page skeleton and 15 page supplementary skeleton in contrast to the defendant's 18 pages.
- The clear message from Dove J was that:
  - (i) the length of the claimants' documents was positively unhelpful
  - (ii) the Court of Appeal's 25 page limit is a reasonable guide and that in future counsel can expect to be asked to justify a skeleton argument longer than that (NB Administrative Court guide says 20 pages!)
  - (iii) some Judges (guess who?) may have refused to accept the claimants' skeleton argument or imposed costs sanctions
  - (iv) if counsel do not stop filing excessively long skeleton arguments, it is highly likely that page limits and sanctions will be introduced.

Aarhus Costs (1)

- Changes made by Civil Procedure (Amendment) Rules 2017
- Applies to all claims brought on or after 28 February 2017
- Wholesale replacement of CPR Part 45 Section VII (‘*Costs Limits in Aarhus Convention Claims*’)
- PD45 paras 5.2-5.3 repealed
- The new Aarhus Costs Rules (“ACR”)
- Amendments to PD25 (re. cross-undertakings) and PD52A (re. appeal costs)

Aarhus Costs (2) - CPR Part 45

- New rules apply to JR and statutory review BUT NB only where within the scope of Articles 9(1)-(2); only JR where Article 9(3) (non EIR/EIA cases) ….
- Available to *"members of the public"* as defined by the Convention (previously available to all claimants: see ***R (Hillingdon LBC) v. SST*** [2015] PTSR 1025)
- Claimants are now required to include, with their claim, a schedule of financial means verified by a statement of truth (r 45.42(1)(b))
- Caps remain at £5k (individual) / £10k (business/other legal person) & £35k reciprocal BUT
  - Separate costs caps for multiple claimants (not in N.I.); and
  - The caps can be varied or removed altogether (r. 45.44)

Aarhus Costs (3) - CPR Part 45

- Variation against the claimant only permissible if it would not make costs prohibitively expensive for them
- Variation in favour of the claimant only permissible if without the variation the costs would be prohibitively expensive for them
- CPR r 45.44(3)-(4) – proceedings are prohibitively expensive if they:
  - "*exceed the financial resources of the claimant*" having regard to 3rd party funding; or
  - are objectively unreasonable having regard to:
    - the situation of the parties
    - whether the claimant has a reasonable prospect of success
    - the importance of what is at stake for the claimant
    - the importance of what is at stake for the environment
    - the complexity of the relevant law and procedure
    - whether the claim is frivolous

Aarhus Costs (4) – appeal costs/ interim relief

Appeal costs:

- CPR 52.9A previously gave CoA a general discretion to limit appeal costs.
- New CPR r 52.19A provides that in an appeal against a decision made in claim to which the ACR apply, the court must consider whether the costs would be *"prohibitively expensive"* and if so limit the costs to the extent necessary to prevent this.
- Same principles apply as under CPR r 45.44 (see above)

Interim relief:

- PD25A already required "*particular regard*" to be had to the *"need*" to avoid making continuing with the claim prohibitively expensive.
- PD52A para 5.3(3) now applies the new CPR r 45.44 principles re. what constitutes prohibitive expense

Aarhus Costs (5) - RSPB

R (RSPB & others) v. SSJ [2017] EWHC 2309 (Dove J.) – challenge to two aspects of the ACR having a *"chilling effect":*

- **Ground 1** – variability of caps *"a claimant may be unwilling to commence a claim in circumstances where the court rules provide the opportunity for the costs liability in the event of failure to be varied upwards following an application under CPR 45.44 which can be made at any stage of the proceedings*".
- **Ground 2** - the requirement to provide financial information from the claimant and any 3rd party funder and this potentially being made public.

The claimants also sought a declaration that a claimant's own costs needed to be taken into account in assessing prohibitive expense.

Aarhus Costs (6) - RSPB

1) The ACR provisions re. variability of costs caps held to be consistent with the AC & EU law requirement of "*reasonable predictability*" (not "*certainty*")

- Based upon acceptance on behalf of the defendants that (by virtue of both CPR PD 23A para 2.7 and EU law), a defendant's application to vary would have to be made in the AOS (and determined by the judge considering permission on the papers; or where no permission is required then "*at the earliest possible stage*")
- Except where it subsequently transpired that:
  - (i) claimant had provided false/misleading financial information; or
  - (ii) claimants' circumstances had changed

Aarhus Costs (7) - RSPB

2) The financial information provided by a claimant needed to be considered in private

- Under CPR r 5.4C(1)(a) the financial schedule would not be a public document
- CPR r 39.2 conferred a power but no obligation for any hearing on the issue to be in private
- Defendant had made a w/o prejudice offer to promote amendment to CPR so that hearings would be automatically private, but disputed the necessity of this
- Dove J. held it was necessary due to the chilling effect that public disclosure could have not just on claimants but also 3rd party funders

Aarhus Costs (8) - RSPB

3) Claimant's own costs are relevant to assessing whether proceedings are '*prohibitively expensive*'

- This was agreed by the defendants
- Dove J. unpersuaded that a declaration was necessary given that the judgment recorded the consensus between the parties on this issue.

Aarhus Costs (9) - RSPB

- Dove J. considered issue of what the financial schedule should contain:
- CPR say *"a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide"*
- No further definition of what required
- D offered to amend CPR to provide that the schedule of the claimant's financial resources should be provided in the form specified in CPR 46 PD 10.1:
  - This requires information on "*the applicant's significant assets, liabilities, income and expenditure" and "in relation to any financial support which any person has provided or is likely to provide to the applicant, the aggregate amount - (i) which has been provided; and (ii) which is likely to be provided*."
  - This does not require that you identify 3rd P funders
- "*I am not satisfied that the form specified in CPR 46 PD 10.1 is fit for purpose given the clear intention of CPR 45.44(4) to enable a defendant to argue that given the nature and source of third party funding it is likely that in truth more finances are likely to be made available to the claimant."*

Aarhus Costs (9) - RSPB

- (1) Consequential matters (relief, costs, PTA) remain TBC…
- (2) Civil Procedure Rules Committee considering rule changes.
- (3) Decision VI/8K of the MoP
  - 6th MOP held in Montenegro, 11-13.9.17 (before date of judgment in RSPB, 15.9.17) follow up ACCC findings vs UK on costs
  - The ACCC's report to the MoP dated 2.8.17 considered that *"rather than moving the Party concerned towards meeting the requirements of [Decision V/9n]… overall, the 2017 amendments appear to have moved the Party concerned further away from doing so".*
  - Concerns: (i) variability of caps; (ii) own side costs; (iii) chilling effect of disclosing resources; (iv) separate costs caps multiple claimants; (v) lack of prescription of appeal costs.
  - The findings of the ACCC in this report were adopted by the MoP in Decision VI/8K.
- (4) 13.9.17 regret motion in Parliament on ACR.

Appealing the refusal of permission

- ***Glencore v Revenue and Customs Practitioners*** [2017] EWHC 1587 (Admin)
- Court considers relationship between CPR r 52.3 and 52.8, in particular, whether a claimant who has been refused permission to apply for judicial review at an oral hearing can apply to the same court for permission to appeal to the Court of Appeal
- Court finds that CPR r 52.8 displaces r 52.3 for judicial review cases and that r 52.8 implicitly provides that the High Court has no power to grant permission to appeal
- Accordingly, any party appealing the refusal of permission to apply for judicial review following an oral renewal must apply directly to the Court of Appeal

Time limits (1)

- ***Irving v Mid Sussex DC*** [2017] EWHC 1818 (Admin)
- Don't delay, even with a strong case!
- Claimant sought to challenge a grant of planning permission dated 18 December 2013.
- Since this time, the court had found, in a separate decision, that a materially identical grant of permission by same LPA was unlawful, accordingly the grant of PP in issue was accepted to be unlawful, and so the claimant had a strong case.
- March 2017 LPA resolved not to revoke the PP.
- The claimant claimed that her reason for delaying was that she had been led to believe that the council was not going to develop the land itself and that a reserved matters application by a developer would have to be made at a later stage, which could be challenged. It was only recently that she discovered this was not the case.
- The court refused to grant an extension of time. Cranston J held that *'in the planning context, promptness, when seeking to challenge a planning permission, has a particular force and runs as a thread through the case law'*
- Although the unlawfulness in the decision was *'patent'* it was not on the level of serious wrongdoing that the authorities suggested had to be present for a delay to be granted.
- The council's indication that it would not develop the land itself was not binding and was not a good enough reason for delay.

Time limits (2)

- ***R (Hillingdon LBC v Secretary of State for Transport*** [2017] EWHC 121(Admin)
- A legal challenge to a national policy statement must be brought within the 6 week period **after** the statement was designated or published
- October 2016 the Secretary of State announced the Government's decision that the preferred option for delivering additional runway capacity in south east England was the proposed construction of a third runway at Heathrow Airport, indicated that a draft national policy statement ("NPS") would be published reflecting that decision
- S/S applies to strike out the claim
- Case centred on interpretation of s13 of the Planning Act 2008
  - *"A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if— (a) the proceedings are brought by a claim for judicial review, and (b) the claim form is filed before the end of the period of six weeks beginning with the day after— (i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or (ii) (if later) the day on which the statement is published."*

Time limits (3)

- Cranston J held:
- *'In my view the meaning of the words of section 13, when understood in their context, is that proceedings can only be brought in the six-week period once the NPS is designated or published. Judicial review challenges both before and after that six-week period are prohibited.'*
- Also considered meaning of words "*anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement"*
- October 2016 statement was part "*of the process leading to the adoption of an NPS. It confirmed the Government's preferred site to deliver the new runway, a matter which the Secretary of State is permitted to include in an NPS by section 5(5)(d) . The Government's decision on 25 October 2016, and the announcement of that to the House of Commons and on the Department of Transport website, were without doubt acts in the course of preparing the draft NPS and ultimately any NPS*".
- Left open if earlier acts were also caught.

Alternative Remedies

- ***R (Piffs Elm) v Tewkesbury* [2016] EWHC 3248 (Admin)**
- Allegations of bias did not give rise to the exceptional circumstances which would be required for the court to hear a JR, where an alternative statutory right of appeal existed
- The Claimant's application for planning permission had been refused following a close vote of the Defendant's planning committee
- The Claimants alleged that the Defendant's decision was tainted by apparent bias because the planning officer which had recommended refusal was married to a planning officer who worked for a developer with an option to purchase land adjacent to the Claimant's site.
- The court held that the Claimant had an arguable claim on the basis of apparent bias, but that (according to previous case law) exceptional circumstances would have to be present to grant permission for a JR when a statutory right of appeal existed –
- This case did not amount to exceptional circumstances, not least because the Claimant was still within the time limit for making a statutory appeal

Relief from sanctions (1)

- ***R (Nelson) v Parole Board*** [2017] EWHC 728 - If a claimant appears to have given up on his claim, it may be struck out.
- ***Manjit Kaur v Secretary of State for the Home Department*** [2017] EWCA Civ 821 - Appellants risk being struck out if they do not keep the court informed about potential delays in obtaining a transcript.
- ***R (Director of Public Prosecutions) v Stratford Magistrates' Court*** [2017 unreported] - Failure to pay a court fee, even by a public authority, may not be fatal to a claim where there are good reasons to grant relief.

Relief from sanctions (2)

- ***Coates v Secretary of State for Communities and Local Government*** [2017] EWCA Civ. 940
- Try to get the claim right first time!
- The court of appeal upheld a judgment of the lower court to reject the Claimant's application to set aside a judgment striking out his claim
- The Defendant local authority claimed that Claimant's original statements of case disclosed no reasonable grounds for bringing the claim and a hearing was listed with several weeks' notice to consider the Defendant's strike out application
- The Claimant appeared at the hearing to request an adjournment to draft amended grounds. The adjournment was refused and the claim struck out
- The Court of Appeal held that the claimant had time before the hearing to consider amending his grounds and had not done so. The lower court acted within its discretion in refusing the adjournment and striking out the claim.

Interim injunctions (1)

- ***Basildon Borough Council v Tidd*** [2017] EWHC 1849 (QB)
- The court must consider an applicant's personal circumstances when considering an application to vary an injunction
- The court considered an application to vary an injunction preventing the placing of caravans on a site
- The Defendants moved to the site after making the injunction and applied to vary it to take into account their personal circumstances
- The court upheld previous case law to the effect that personal circumstances can only be considered on an application to vary not on the proposed joinder of a defendant in breach of a junction previously made against persons unknown
- Since this was an application to vary, the court was required to balance the need for compliance with court orders and planning law against the personal circumstances of the applicant
- In this case the applicants has sought to cooperate with the court by providing their names, instructing a planning agent, applying for retrospective planning permission and had been willing to engage in JR proceedings. The applicants also had young children
- Accordingly, the court allowed their application to vary the injunction

Interim injunctions (2)

- ***Wealdon DC v Mitchell*** [2017] EWHC 2328 (QB)
- Application of *American Cyanamid* test leads to house being demolished
- The Defendant had erected a house in a forested area in breach of planning control
- The Claimant council issued an enforcement notice in March 2015 but the claimant did not comply
- The Claimant applied for an interim mandatory injunction requiring the Defendant to demolish his house
- The court considered that there was a strong public interest in the enforcement of planning control and that the Claimant had a strong case
- The Claimant could not be adequately compensated in damages, whereas the Defendant could
- In considering the balance of convenience, the court noted considered the following the to count in the Claimant's favour:
  - The Defendant had failed to acknowledge service of the claim
  - The council pursued had the case in a reasonable manner, giving at least 2.5 years before applying for the injunction
  - The property was no longer the Defendant's only or principal home

Interim injunctions (3)

- ***Wokingham BC v Scott*** [2017] EWHC 294 (QB)
- <u>You cannot challenge an enforcement notice via injunction proceedings and policy can often trump popularity</u>
- The Defendants operated a mixed retail/horticultural business in the greenbelt which was popular with the local community
- The Defendant had carried out operational development in breach of planning control and the Claimant council issued an enforcement notice.
- The Defendants failed to comply with the EN and, rather than appealing it, sought a CLEUD.
- The Claimant applied for an injunction and in the course of these proceedings the Defendant sought to dispute the validity of the EN
- The court confirmed that a challenge to an EN could not be pursued outwith the provisions of s. 172 TCPA 1990.
- Further, the court concluded that the undoubted widespread support for the Defendants' business did not overcome the general public interest in enforcing planning control in the green belt

Other issues (1)

- Statement of truth
- ***Kingsley Edward v Greenwich Royal LBC*** [2017] EWHC 1112 (Admin)
- The Claimant brought an application to commit the Defendant for contempt of court for making a false statement of truth on its summary grounds of defence
- The court held that pleadings (such as SGs) were of a different character to witness statements since they contained legal submissions supported by statements of fact.
- Thus, the statement of truth applied to the statements of fact, not the legal submissions and the Claimant had failed to show that these statements were false or deliberately misleading
- The court found that the claim was meritless

Other issues (2)

- Amendments
- ***R (Tanvir Hussain) v Secretary of State for Justice*** [2016] EWCA Civ 1111
- High security prisoner brought a JR of his prison categorisation
- Before the application had been heard a further categorisation decision was taken by the Defendant
- The Claimant applied to amend his grounds to challenge the new decision. The High Court refused. NB this subject of amends in Administrative Court Guide (above).
- The Court of Appeal found this to be an *'over-rigid approach'*
- In this category of case Sales LJ stated that *'a neutral starting point is to be preferred with a fact-specific focus on practicality and case management'*

Other issues (3)

- S. 31(2A) Senior Courts Act 1981
- ***Anna Hoare v Vale of White Horse District Council*** [2017] EWHC 1711
- The Defendant had wrongly concluded that the one of the policies in a local neighbourhood plan was in conformity with the local plan
- However, the court held that, even in these circumstances, it was highly likely that the examiner and district council would have concluded that the NP was in general conformity with the local plan and that was the relevant test
- Accordingly, relief was denied
- In addition, the court noted that it was unable to consider the now adopted 2031 Local Plan because this had not been adopted at the time of the decision.

Other issues (4)

- Standing
- ***Wylde v Waverley BC*** [2017] EWHC 466 (Admin)
- Council tax payers and members of local authorities and civic societies did not have standing in a claim for judicial review of a local authority's decision to vary a condition precedent in a development agreement with another party, entered into after a competitive tendering process.
- This public procurement regime is tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts falling within the scope of the Regulations.
- Alleged failures in compliance with any procurement requirement has no direct impact on concerned local residents or members of the local authority

Other issues (5)

- Fraud
- ***Chalfont St Peter v Holy Cross*** [2017] EWHC 777 (QB)
- The Defendant (a convent school) had previously obtained a planning permission and the Claimant parish council had brought an unsuccessful judicial review against this decision.
- The Claimant then brought a part 7 claim against the Defendant alleging that it had procured the planning permission by fraud
- The Defendant applied to strike out the case on the basis that the matter had already been litigated in the JR
- The court found that the fraud claim had not been, and in any event could not have been, raised at the JR, because it would have required the court to make findings of fact, which is not generally appropriate in that forum
- Further, whilst there was precedent for the review by the Administrative Court of decisions vitiated by the fraud of the decision-maker, there was no authority to support the proposition that there was a legitimate ground of review where the decision-maker had acted properly, but the applicant had procured the decision by fraud

Other issues (6)

- Disclosure
- ***Richborough Estates v SSCLG*** [2017] case again - disclosure issues – which came before Gilbart J. *Unreported*
- The Claimant claimed that to have had a legitimate expectation of consultation on the statement. It also claimed that the statement was irrational.
- The High Court had to deal with issues of disclosure. It considered the test set out in ***Tweed v Parades Commission*** [2006] UKHL 53: that disclosure had to be necessary for fairly disposing of the case and carefully limited to the issues which required it in the interests of justice.
- It ruled that, as the grounds concerned whether the statement was irrational, it was necessary to disclose the matters that had been put before the minister.
- However, the court refused to order disclosure of any advice surrounding whether the minister had a duty to consult or any other legal advice received.

Questions?

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