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HIGH COURT CHALLENGES AND THE NSIP REGIME

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NUMBER OF CHALLENGES TO GRANT OF DCOs WHICH HAVE SO FAR SUCCEEDED IN THE HIGH COURT

THE ROLE OF THE HIGH COURT (PLANNING COURT)

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- All court challenges to the NSIP process and outcome will be in the Planning Court, via judicial review. Three different “forms” of judicial review:
  - Under section 13 of the Planning Act 2008, relating to National Policy Statements (NPSs)
  - Under section 118 of the 2008 Act, relating to grant or refusal of Development Consent Order (DCOs)
  - Residual role for non-statutory judicial review under CPR 54

TIME LIMITS (1): Calculation of time under section 13 and 118

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- 6 WEEK (42 DAY) 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)

- This brings matters into line with time limits in other planning related judicial review cases

TIME LIMITS (2): What can be challenged?

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- **Section 13 is used for challenges to National Policy Statement or anything done in the course of preparing such a statement**

- **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

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- **<u>Publication</u> 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.**

- **<u>Notification</u> 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

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- **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

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- **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.**

- **PROCEDURAL DECISIONS:** EG Do issues require cross-examination?

Exclusivity under section 13 and 118

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Section 13:

(1) 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 6 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.

- Used to say “during the period of 6 weeks beginning with” the relevant day.

Exclusivity under section 13 and 118 (2)

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- Became an issue in *R (Hillingdon LBC) v Secretary of State for Transport* [2017] 1 WLR 2166, Cranston J. Attempt to challenge Heathrow / Airports NPS at draft stage, before publication. Plainly a challenge to something done to prepare for an NPS, within section 13(1).

- Question was whether challenge could be brought only *within* the 6 week period, or at any time prior to the end of the period (and so before the period started).

- Cranston J held that challenge had to be brought within the 6 week period and was precluded in advance of the start of the period.

JUDICIAL REVIEW PROCEDURE

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Time limits aside, procedure for DCO challenge is ordinary judicial review (planning court) procedure:

- **CPR 54 applies**
- **In contrast 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.**

RESIDUAL ROLE FOR JUDICIAL REVIEW?

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- Effect of procedural exclusivity as described above is that all challenges once NPS or DCO process has been commenced must be brought by section 13 or section 118, and only at the end of the process.

- Ordinary judicial review may nevertheless be pursued to steps which are preliminary to the making of the application for a DCO
  - *R (Sefton Metropolitan Borough Council) v Highways England* [2018] EWHC 3059 (Admin)
  - Will probably only be relevant where, as for the Highways Agency, the DCO applicant is itself a public body

PLANNING COURT

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- **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**

COSTS PROTECTION FOR CLAIMANTS: THE AARHUS CONVENTION

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- Most “environmental” cases will come within Article 9(3) of the Aarhus Convention and hence will be “Aarhus Convention claims” as defined in CPR 45.41. See *Venn* [2015] 1 WLR 2328 for the breadth of what constitutes an environmental claim with Art 9(3)

- First consequence of this is that, under reg 2 of the Criminal Justice and Courts Act 2015 (Disapplication etc) Regs 2017, they are excluded from the CCO regime.

- Second consequence is that *claimants may be entitled* to the different and more generous form of costs protection given by CPR 54 Part VII, Fixed Costs in Aarhus Convention Claims

AARHUS FIXED COSTS REGIME, Part VII of CPR 45

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- The Fixed Costs regime of the Aarhus Convention applies to two kinds of claims, which are defined as Aarhus Convention Claims:
  - Judicial Review claims which come within Articles 9(1), (2) or (3) of the Aarhus Convention, which is very broad
  - Statutory reviews (e.g. section 288 TCPA 1990) which come within Articles 9(1) and 9(2) *only*
- Response to Court of Appeal ruling in *Venn* that previous version of rules only applied to *judicial reviews,* but that this breached the Aarhus Convention and was unlawful
- Government made a deliberate decision to remedy illegality *in part only,* so some forms of planning High Court challenge will not attract Aarhus costs protection
- BUT "judicial review" here will cover statutory judicial review under sections 13 and 118 as well as other judicial review, so Aarhus rules apply in full.
- In practice, therefore, Aarhus costs protection likely to be available in nearly any form of "claimant" challenge to DCOs.

AARHUS FIXED COSTS REGIME, Part VII of CPR 45

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- Standard Cap for individuals £5000, for legal persons £10000.
- Reciprocal Cap of £35000 for Respondents
- Anyone can apply to have either cap varied, up or down
- A claimant can engage the Cap by simply stating claim is an Aarhus claim – then for Defendant to challenge. No claimant costs liability of losing that argument.
- A party who wished to vary any cap must apply with evidence.

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