

# The future of planning High Court challenges: JR reform, the Planning White Paper, the Environment Act 2021, levelling up and beyond



**James Maurici QC**

## Introduction

- *“It is difficult to make predictions, especially about the future”*
- Look at the future of Planning High Court challenges, consider:
  - (i) The Judicial Review and Courts Bill;
  - (ii) The Planning White Paper;
  - (iii) The Environment Act 2021 (excluding the OEP);
  - (iv) The levelling up agenda;
  - (v) Other recent and likely to continue trends in the cases.

## The Judicial Review and Courts Bill

- Pattern of Government since c. 2012:
  - (i) Incremental changes to judicial review aimed at limiting it;
  - (ii) Issuing consultation papers etc proposing numerous & radical changes and then doing something much less
- The Judicial Review and Courts Bill follows this pattern ...
- But we can expect more changes ...

## Judicial Review and Courts Bill

- Only one of two clauses at all relevant to Planning High Court challenges;
- S. 1 provides

*“A quashing order may include provision—*

*(a) for the quashing not to take effect until a date specified in the order,  
or*

*(b) removing or limiting any retrospective effect of the quashing”*

## Judicial Review and Courts Bill

Court to consider:

- (a) the nature and circumstances of the relevant defect;
- (b) any detriment to good administration that would result from exercising or failing to exercise the power;
- (c) the interests or expectations of persons who would benefit from the quashing of the impugned act;
- (d) the interests or expectations of persons who have relied on the impugned act;
- (e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
- (f) any other matter that appears to the court to be relevant. the nature and circumstances of the relevant defect.

## The Planning White Paper (1)

- Speech on the economy on 30 June 2020, the Prime Minister, Boris Johnson, argued that “*newt-counting delays*” slowed down house building. He said that, in the recovery from the Covid-19 pandemic, we would “*build better and build greener but we will also build faster*”.
- August 2020 The long-awaited Planning for the Future white paper was launched on 6 August 2020
- Consultation closed October 2020
- Since then yet another new S/S, and no real idea where this is heading ...
- So more recently PM conference speech pledges no homes on green field sites:
  - Knocked off course several Local Plans
  - Is this policy? No. See:
    - ***R. (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government*** [2011] 1 P. & C.R. 22;
    - ***R. (Friends of the Earth Ltd) v Heathrow Airport Ltd*** [2021] 2 All E.R. 967

## The Planning White Paper (2)

- Gove's statements Delphic ...
- *"It is only fair to say that the planning white paper was mischaracterised by many."*
- *"There is so much that is good in it, but it is important that we listen to concerns that were expressed in order to ensure that an already powerful and compelling suite of proposals is even more effective."*
- Gove had earlier said he was currently considering all the responses to the White Paper and will make announcements *"on the next steps in due course."*
- Prediction: much quietly shelved ... reform but limited ...

## The Planning White Paper (3)

- (1) Unlikely we will see “zoning” now?
  - But if we do legal issues?
  - (i) SEA vs EIA of Plans;
    - NB, clear more needed for EIA than SEA, given higher level: see *R. (Plan B Earth) v Secretary of State for Transport* [2020] P.T.S.R. 1446
    - Same issues for habitats: see *R. (Buckinghamshire CC) v SST* [2013] EWHC 481 (Admin) citing *Commission v UK* Case C-6/04 [2005] ECR I-9017 adverse effects on sites to be considered to the extent possible at each successive stage, where the level of detail in the plan or project permitted more specific assessments.
  - (ii) Speeding up Plan making vs increased work and importance of plans ...
  - (iii) Legal challenges to Plans.
- (2) Infrastructure Levy, still struggling with legal issues from CIL ... see e.g. recent controversy over *Stonewater v Wealden DC* [2021] EWHC 2750 (Admin).
- (3) Replacement of s. 106? Really?

## Environment Act (1)

- Section 17(1) requires the Secretary of State to prepare a policy statement on environmental principles (“EPPS”).
- This is defined in section 17(2) as “*a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy*”
- Section 17(4) of the Environment Act requires the Secretary of State to be satisfied that the EPPS will contribute to the improvement of environmental protection and sustainable development.
- Section 19(1) provides that a Minister of the Crown must, when making policy, have due regard to the EPPS currently in effect.

## Environment Act (2)

- The principles are set out in section 17(5) as follows:
  - *“(a) the principle that environmental protection should be integrated into the making of policies,*
  - *(b) the principle of preventative action to avert environmental damage,*
  - *(c) the precautionary principle, so far as relating to the environment,*
  - *(d) the principle that environmental damage should as a priority be rectified at source, and*
  - *(e) the polluter pays principle.”*
- Section 19(2) clarifies that the statement does not require a Minister to do or refrain from doing anything that would *“have no significant environmental benefit”* or *“would be in any other way disproportionate to the environmental benefit”* (emphasis added).
- The Government consulted on the draft EPPS between 10 March 2021 to 2 June 2021.

## Environment Act (3)

- In the draft EPPS - lots on proportionality: *“This policy statement will contribute to the improvement of environmental protection by setting out how the principles should be interpreted and proportionately applied by Ministers so that they are used effectively and embedded in policy to protect the environment.”* Is this a concern?
- Draft EPPS contains further definitions of the principles and guidance on their application, and their interaction. Definitions still quite limited ...
- Draft EPPS gives examples of possible actions that could be taken as a result of having considered the principles may include: (1) Amending policy options or including an additional policy option in the initial design of a policy, which reflects consideration of the environmental principles. (2) Reframing the policy to accommodate the principles. (3) Embedding a principle in law or guidance. (4) Postponing a policy.
- Interim OEP gave advice on draft EPPS.

## Environment Act (4)

*“The legal duty to have due regard to this policy statement applies to Ministers when making policy. Policy can be broadly understood as an intended course of action adopted to achieve an objective. Making policy means making a new policy or making a substantial change to an existing policy.*

*Examples of policy include the process of making, developing, revising<sup>4</sup> or repealing:*

- proposals or activities that lead to legislation;*
- national policy statements, strategies and frameworks;*
- Ministerial statements marking substantial changes in policy;*
- policies, strategies and frameworks prepared by public bodies that Ministers are required by statute to approve;*
- any other document that sets out a substantial change in approach to an established policy position.*

*Policy vs individual decisions*

*The duty is not designed to capture individual regulatory, planning or licensing decisions made by Ministers or authorities acting on their behalf”*

## Environment Act (5)

- **WHY DO WE NEED ALL OF THIS?** These principles are derived from EU Treaties not retained EU law.
- **SCOPE**: NB but EPPS only applies to Ministers of the Crown making policy.
- NB on Precautionary Principle (“PP”) – how else relevant:
- (i) PP embedded in some EU legislation, e.g. Habitats Directive, which was transposed into UK law and is now retained EU law;
- (ii) Some CJEU cases suggest the PP is a general principles of EU law, and these are retained EU law;
- (iii) Article 393 of the Trade and Co-operation Agreement.
  - Parties commits to respecting the internationally recognised environmental principles to which it has committed, such as in the Rio Declaration in particular: (a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments; (b) the principle of preventative action to avert environmental damage; (c) the precautionary approach referred to in Article 356(2);
  - EU (Future Relationship) Act 2020, s. 29 gives effect to Agreement.

## Environment Act (6)

- (iv) Is the PP part of domestic law more generally?
  - ***R v Secretary of State for Trade and Industry ex p Duddridge*** [1995] 3 CMLR 231 says no;
  - Some other domestic cases seems to have proceeded on basis it was: e.g. CA in Preston ***New Road Action Group v Secretary of State for Communities and Local Government*** [2018] Env LR 18 and ***R (Plan B Earth) v Secretary of State for Transport*** but decision reversed in SC.
- (v) Is it part of common law as customary international law?
  - See O McIntyre and T Mosedale, “The precautionary principle as a norm of customary international law” (1997) 9 Journal of Environmental Law 221;
  - A Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002)
  - customary international law is presumptively part of the common law: ***R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*** [2016] AC 1355 (SC), paras. 144-151 (Lord Mance)

## Environment Act (7)

- Other principles find outlet beyond situations where EPPS applies?
- See ***Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment*** [2017] UKPC 37 per Lord Carnwath
 

*“The Polluter Pays Principle (“PPP” or “the Principle”) is now firmly established as a basic principle of international and domestic environmental laws. It is designed to achieve the “internalization of environmental costs”, by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large (see eg OECD Council 1972 Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies; Rio Declaration 1992 Principle 16).”*
- Refers to multiple sources of international law for principle ...
- Common law?
- Not much basis for other principles in our case-law.

## Levelling up

- THE NEXT BIG THING?
- Importance underlined by renaming of Department.
- Good Law Project JR of the Levelling Up Fund
- See [Pork Barrel Politics \(crowdjustice.com\)](https://www.crowdjustice.com) “*The huge £4.8bn fund pretends to be the centrepiece of a levelling up agenda – but we think it’s just a way to funnel money into constituencies of political benefit to the Conservative Party.*”
- Granted permission.
- Grounds relate to Equality Act and lack of transparency.
- Subsidy control (what was State aid) issues?

## Other trends (1)

- It has been quite a year for legal challenges to DCOs under the 2008 Act, with the first four successful challenges having taken place:
  - (1) Manston Airport DCO: consent to judgment.
  - (2) Norfolk Vanguard windfarm DCO: *R (Pearce) v SSBEIS* [2021] EWHC 326 (Admin).
  - (3) The A38 Derby Junctions DCO: consent to judgment
  - (4) The A303 Stonehenge DCO: *R (SAVE) v SST* [2021] EWHC 2161 (Admin)

See this trend likely to continue ...

I predicted this back in 2009, see Judicial review under the Planning Act 2008  
J.P.L. 2009, 4, 446-451

Taken a while for this prediction to come true ...

## Other trends (2)

- Plus seen rise of first substantive JRs to:
  - (i) adoption of NPSs (see the Heathrow/ANPS litigation, 6 JRs); and
  - (ii) refusals to review NPSs, see:
    - ***R (Vince & Others) v SSBEIS*** (CO/1832/2020) JR claim against unlawful failure by SoS to review the Energy NPSs, settled when review announced;
    - JRs threatened of SST decision of 6 September 2021 not to review ANPS - see e.g. <https://goodlawproject.org/update/government-legal-commitment/> ... not launched
- Rise of these NPS challenges seem to me driven by cases like ***R (Thames Blue Green Economy Ltd) v Secretary of State for Communities and Local Government*** [2016] JPL 157 and ***R (Scarisbrick) v Secretary of State for Communities and Local Government*** [2017] EWCA Civ 787 and limits of what can be challenged in DCO process where NPS in place. See also ***R (Spurrier) v SST*** [2020] PTSR 240 at paras. 97 – 112.

## Other trends (3)

- Review of NPSs built into Planning Act, s. 6;
- Where SoS decides not to review or to review and not change or to review and change, judicial review provided for under s. 13 of the 2008 Act;
- S. 6 provides *“[i]n deciding when to review a national policy statement the Secretary of State must consider whether—*
  - *(a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,*
  - *(b) the change was not anticipated at that time, and*
  - *(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.”*
- See <https://www.gov.uk/guidance/planning-act-2008-guidance-on-the-process-for-carrying-out-a-review-of-existing-national-policy-statements>
- In my view this unlikely to stem the tide ...

# Thank you for listening

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## London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

## Birmingham

Cornwall Buildings  
45 Newhall Street  
Birmingham, B3 3QR  
+44 (0)121 752 0800

## Contact

✉ [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
🌐 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

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