# PEBA The Planning & Environment Bar Association

Judicial Review Reform
Ministry of Justice
102 Petty France
London
SW1H 9AJ
By email to: judicialreview@justice.gov.uk

29 April 2021

Dear Ministry of Justice:

**RE: Judicial Review: Proposals for Reform Consultation**

I write in response to the above Consultation launched on 18 March 2021 on behalf of the Planning and Environment Bar Association (PEBA), which represents barristers specialising in planning, environment and local government law.

**Summary of the People we Represent**

As its name suggests, PEBA is an organisation whose members are barristers specialising in planning and environmental law. In that capacity, a significant part of PEBA members' work is in acting for claimants, defendants and interested parties in judicial review claims, in addition to analogous statutory reviews and appeals which proceed outside CPR 54. Many PEBA members have wider public law practices. Many are also members of the Attorney General's Panel of Civil Counsel and act frequently to defend decisions taken by the UK Government in their specialist fields. Collectively, we have considerable experience of the operation of judicial review and analogous procedures.

As the Ministry will be aware, planning litigation has undergone substantial reforms over the last decade, which has had considerable success in speeding-up the adjudication of judicial review claims. These measures include:

- From 1 July 2013, CPR 54.5 was amended so as to require claims for judicial review under the Planning Acts (and Public Contracts Regulations) to be brought within six weeks (instead of the usual 3 months).

- From 6 April 2014, claims relating to decisions under planning legislation (as defined at CPR 54.21) must be issued in the Planning Court. The Planning Court



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is a specialist list within the Queen's Bench Division, led by the Planning Liaison Judge (presently Mr Justice Holgate) whose role is to allocate cases to judges with appropriate expertise.

- From 13 April 2015, by amendments to s.31 Senior Courts Act 1981, the Court must now refuse relief or leave, if it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. These legislative changes have been accompanied by development in the case law to restrain the circumstances in which the court will quash a planning or environmental decision. In ***Walton v Scottish Ministers*** [2013] PTSR 51 and subsequently in ***R(Champion) v North Norfolk District Council*** [2015] 1 WLR 3710, the Supreme Court held that the Court retains a discretion not to quash a decision, even if a breach of an EU law derived provision is made out. This has had a restraining effect on claims.

- In 2019 a set of core and frequently cited authorities were collated into a single paperback volume, in collaboration between PEBA and the Judiciary, known as *Leading Planning Cases*. From 1 January 2020, the Planning Court expects practitioners to not reproduce authorities within the book within authority bundles. This has streamlined the preparation for hearings.

These measures have been actively supported (and, in some cases, promoted) by PEBA, whose members fully recognise the need to ensure that the judicial review process is not abused, that claims are brought and determined promptly, that hopeless cases are discouraged or (where brought) weeded out at the earliest opportunity.

**PEBA's Response to the Consultation Questions**

***Q1. Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?***

No. PEBA does not consider the introduction of suspended quashing orders to be appropriate in the planning and environment field.

That is because, in the majority of cases which are the subject of challenge in our fields, the defendant public authority does not have the power to take the decision again because it is *functus officio.* It follows that in such cases, if the Court identified an error of law which would warrant the quashing of the decision, there would be no utility suspending the effect of the order for further steps to be taken because the



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public authority would not have the power to do so. The effect of the suspended quashing order would therefore simply be delay.

Perhaps as a consequence of public authorities in planning and environmental decisions generally being *functus officio* once a decision is made, we understand anecdotally from Scottish planning and environment practitioners that s.102(2)(b) Scotland Act 1998 is not routinely used in planning and environmental cases or indeed in administrative law cases generally.

***Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?***

If, nevertheless, the Government wished to introduce a provision for the Court to suspend the effect of a quashing order, PEBA considers it would be best to leave it to the Court to develop the circumstances in which it would be appropriate to exercise that power.

That is because where a decision has been vitiated by an error of law **and** it cannot be said it would be "highly likely" the outcome for the claimant would be the same but for that error (s.31(2A) Senior Courts Act 1981), it is probably in the public interest that such a decision should not stand, save for the most exceptional of circumstances. Those circumstances by their nature are likely to be highly fact-specific and exhaustive legislative criteria are likely to constrain the Court delivering the appropriate outcome.

PEBA does not wish to comment on *Cart* judicial reviews.

***Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?***

PEBA represents members who practise in England and Wales only and therefore does not wish to comment on the implications for devolved jurisdictions.

***Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?***

No. For the reasons set out in answer to Question 1, PEBA does not consider that a prospective only remedy is a practical remedy in the majority of planning or environmental claims.

Moreover, there is a risk that prospective only remedies could give rise to injustice as those affected by a decision prior to it being declared unlawful would be debarred



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from achieving a remedy. Such an outcome would appear to cut against the stated aims of the reforms which are to "protect the rights of individuals against an overbearing state …" (Foreword by the Lord Chancellor, para.1).

It is worth acknowledging that the Court already has the discretion not to quash an administrative decision, which may take account of the factors outlined at para.64.

Should the Government wish to promote legislation to introduce prospective only remedies, we consider it best to leave to the Courts the development of the circumstances in which such orders should be made.

***Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?***

Yes, the proposals in (a) and (b) would likely make the use of Statutory Instruments more certain. PEBA prefers a presumptive approach over a mandatory approach however, PEBA considers the power to suspend the quashing of an SI would be better given to the Courts without a presumption or mandate.

***Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?***

No. As set out under question 1, the majority of claims in the planning and environment fields are against decisions where the public authority has no power to re-take or re-issue. It follows that a suspended quashing order would not be helpful in the majority of cases. Accordingly, if such a power were to be introduced PEBA would favour a presumption over a mandatory approach but would prefer the power to be introduced without a presumption or mandate at all.

***Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?***

Yes however, as explained under question 1, suspending the quashing of decision to grant a planning permission which has been found to have been made as a result of the wrongful exercise of administrative power (as distinct from a lack of power at all) is unlikely to be helpful. It would likely simply result in delay as the public authority would have no power to correct the defect. PEBA therefore consider the distinction between a valid power exercised wrongfully and a decision issued without a power at all, is unlikely to be significant in most cases in our fields.



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***Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?***

PEBA strongly supports the proposition that the rule of law requires the courts to decide the extent to which an ouster clause, which purports to prevent a citizen from accessing the courts, is effective. As you say, "an effective Government is one which protects and upholds the rights of citizens, including the right of access to justice" (para.35).

In our fields, the courts have developed a large body of case law which holds that matters of planning judgment will not be subject to judicial consideration. Accordingly, the court has already established that, in general, acts of executive power in our fields are to be held to account by means otherwise than a legal claim. However, where claims are well founded on established legal principles it is, PEBA suggests, vital that those citizens are not debarred from accessing the court by an ouster clause. It is important to recall that applications for judicial review may be sought not only by third party objectors but also by local planning authorities and developers. Providing an effective remedy to challenge the wrongful use of power is therefore vital to uphold confidence in planning and environmental decisions.

***Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.***

Yes. We agree that it is rare that permission is refused for a claim brought within 3 months.

Moreover, the promptness requirement was removed for most planning judicial reviews from 6 April 2014, when the shorter 6-week time limit was introduced to CPR 54.5 for decisions made under the "Planning Acts". This has added welcome certainty to claims for judicial review in the planning sphere.

***Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?***

No. As recognised by the shortened timescale for most planning judicial reviews, decisions in our field are often relied upon very quickly. It follows that there is a compelling case to ensure the validity of such decisions are determined promptly. For that reason, coupled with the fact decision makers are often unable to remedy the decision once issued, we do not consider extending the time limit would be sensible as pre-action resolution is unlikely.



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***Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?***

No. As detailed above, there is a compelling public interest in the validity of planning decisions being promptly determined. However, the Court's ability to extend time in appropriate cases is well understood and should remain.

***Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?***

The Planning Court already operates "significant Planning Court claims" PD54E, para.3.1. Such claims are subject to an accelerated timetable at para.3.4. The criteria for significant claims are as follows:

- Significant economic impact at a local or beyond their immediate locality.
- Raise important points of law.
- Generate significant public interest.
- By virtue of the volume or nature of the technical material.

Beyond this existing arrangement, PEBA does not consider that a tracking system would increase the efficiency of the Administrative Court business. The procedure for determining judicial review claims is simple, considerably simpler (and consequentially quicker) than most civil claims. The early opportunity for case management at the permission stage enables the judge to tailor the directions for the case to best prepare it for trial. We consider a rigid tracking system would undermine this already effective system.

***Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?***

No. There is already a requirement to serve interested parties, adding a requirement to serve organisations which may have an interest in the litigation would increase the cost burden for parties for little return. The ability for other parties to seek to intervene in litigation is well established and well known by most interest groups.

***Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?***

Yes. This was a suggestion of PEBA and we are pleased to see it has been taken-up by the IRAL and the Government. We support this proposal.



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***Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?***

Yes. In theory, Summary Grounds of Resistance are intended simply to identify a "knock-out blow" which would justify refusal of permission. In practice, most defendants lodge Summary Grounds which are more detailed than this, because they wish to maximise their chances of knocking a claim out at the permission stage. As a consequence, if permission is granted, there is often little to add at the detailed stage, and it is not unusual for defendants simply to ask that their Summary Grounds stand as their Detailed Grounds.

PEBA consider there to be merit in providing a defendant with the option of not duplicating its pre-action protocol response in order to resist a claim. However, in all but the most straightforward of cases, we consider it likely that defendants will still choose to submit summary grounds. In such cases, PEBA would not wish there to be a departure from the general practice that defendants which file summary grounds are entitled to recover their costs in the event permission is refused.

***Question 16: As set out in para 105(b) above, is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?***

No, PEBA would not be in favour of extending the time limit for a defendant to file detailed grounds from 35 days to 56 days after the order giving permission. That would be likely to hamper the timetable for significant Planning Court claims, as well as the determination of Planning Court business generally.

***Questions 17-19***

PEBA has nothing further to add in response to Questions 17 to 19.

**Conclusion**

We are grateful for the opportunity to have participated in the consultation exercise and wish the Government well in its review.

Yours faithfully,

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For and on behalf of PEBA



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