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NEW REMEDIES IN JUDICIAL REVIEW CASES: IMPLICATIONS FOR PLANNING

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The Judicial Review and Courts Bill ("the Bill"), first announced in the Queen's Speech in May to introduce reforms to judicial review, had its first reading just before Parliament's summer recess. It follows the Government commissioned Independent Review of Administrative Law ("IRAL") in 2020 that examined and consulted on whether wide ranging reform to judicial review was necessary.

The Bill introduces only some of the IRAL's recommendations and, to the relief of many, none of the more radical proposals that were considered as part of the IRAL's review.

The main elements of the Bill (that relate to judicial review) introduce new variations to quashing orders. These are relatively limited changes to the process of judicial review, but they will (somewhat paradoxically) effectively increase judicial powers by conferring a new discretion to limit the consequences of ultra vires decisions and acts.

In this blog we examine what the new remedial measures mean for Planning judicial reviews.

New Variations to Quashing Orders

Quashing orders are one of the remedies available to judges where a claim for judicial review succeeds. They revoke the original action or decision on the basis that it is invalid so that it never had any legal effect.

They are the remedy most commonly applied by the courts in successful Planning judicial reviews and result in the quashing of planning decisions (usually a planning permission). However, the courts also sometimes refuse relief even in successful cases if the legal errors are technical, where it is highly likely the outcome for the applicant would not have been substantially different had the error not occurred[1].

The Bill introduces new variations to quashing orders to give courts the opportunity to offer more flexible remedies to allow public authorities time to rectify identified errors through Suspended Quashing Orders, or by removing or limiting any retrospective effect of the quashing[2] through Prospective Quashing Orders.

There is an expectation[3] that Prospective Quashing Orders will not be frequently applied, but we expect that Suspended Quashing Orders may be applied in successful Planning judicial reviews in certain situations.

Suspended Quashing Orders

A Suspended Quashing Order could be suspended for any length of time under the draft legislation, subject to the satisfaction of conditions to be determined by the court. During the time of suspension, the 'impugned' decision would be treated as valid and if the conditions are not satisfied in the specified timeframe and the errors not rectified, the quashing order would become effective. In the planning context, this means that judges would have discretion to suspend the quashing of a planning permission (or other decision), allowing a planning permission to stand whilst the legal errors are rectified by the planning authority.

When deciding whether to use the new remedial powers, the courts must consider a prescribed non-exhaustive list of factors (which includes the nature of the defect and the interests of those who relied and benefitted from the decision). However, the Bill also introduces a general presumption to use these new remedies in certain circumstances if they afford 'adequate redress' unless there is a good reason not to do so.

Implication for Planning Judicial Reviews

Although the new remedial measures are not targeted specifically at the planning process, rather they are aimed at providing more flexibility in cases that raise constitutional questions, or where quashing a decision would pose significant risks to national security or the public interest, it is likely that there will be opportunities for their use in Planning cases, which are often of public interest.

Indeed, when introduced in the Queen's Speech in May, one of the main benefits of the Bill highlighted, was that they would help ensure that large infrastructure projects are not delayed because an impact assessment had not been properly done.

Suspended Quashing Orders could potentially be used to enable errors that are more than merely technical to be remedied without the original permission being quashed. For example to enable an impact assessment to be retrospectively carried out. If these powers were already available, this remedy may have been applied by the court in the recent successful judicial review of the Development Consent Order (DCO) for the Stonehenge bypass[4]. As it was, the DCO was quashed on grounds that the heritage impacts and alternative routes had not been adequately considered by the Secretary of State. However, a Suspended Quashing Order may have avoided the quashing of this DCO and the need (and expense) for the whole DCO examination process to be re-started.

Courts will need to be cautious in their application of Suspended Quashing Orders in Planning cases and careful in their drafting of conditions to ensure that planning applications are fully re-

decided by the appropriate planning authority if the requisite error, once remedied, generates new considerations or evidence. Further guidance in this respect would be helpful.

A claimant's objective in a Planning judicial review is usually for a planning permission to be quashed. However, potential claimants may be concerned that these new remedies introduce a risk that, even if successful in their claim, they could walk away 'empty handed'. This risk will need to be considered by potential claimants when deciding whether to commence a claim for judicial review.

In Practice

In practice, courts will need to justify their use of these new remedies. Clear evidence or proposals from respondents as to how the legal error could be remedied and within what timescales will need to be presented to the court post-judgement. Courts will want to avoid unlawful acts being left in place for an uncertain period and without any remedy. If this is a risk, it is unlikely a Suspended Quashing Order would be found to offer 'adequate redress' and be made.

If the Bill is passed, it does not necessarily mean the new remedies will be regularly applied or used in ways that are controversial or unjustified. The courts have a widely acknowledged history of restraint in the use of their powers and we expect this to continue. However, these new measures will open the door to the possibility of their use in Planning judicial reviews and in a way that may be of concern to potential claimants.

The second reading of the Bill is expected in September.

1. Introduced via an amendment to the Senior Courts Act 1981 by the Criminal Justice and Courts Act 2015

2. Clause 1 of the Bill would introduce a new section 29A of the Senior Courts Act 1981

3. Set out in the Explanatory Notes to the Bill

4. R (On the Application Of) Save Stonehenge World Heritage Site Ltd v Secretary Of State For Transport [2021] EWHC 2161

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