

Appendix 5 – Update report re. Judicial Review of Public Enquiry

Introduction

1. I have been asked as Monitoring Officer to provide an update on the possibility of a Judicial Review (“JR”) for a Public Inquiry the decision by Rt Hon Rebecca Pow MP Parliamentary Under Secretary of State (Minister for Nature), refusing to undertake a public enquiry into the failure of the EA to regulate the site and protect surrounding environment, and my thoughts are as follows;

The JR process

2. JR is a challenge to the *way in which a decision has been made*. It is not really concerned with the conclusions of that process and whether those were ‘right’, as long as the law has been correctly applied and the right procedures have been followed.
3. The Secretary of State (HM Govt) qualifies as a public decision- maker whose decisions are capable of being subject to JR.
4. If a JR is successful, the court will not substitute what it thinks is the 'correct' decision. This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way. Appeal, complaint, or ombudsman processes may, in certain circumstances provide alternative routes to remedy.
5. The court’s view is that litigation should be a last resort. If alternative procedures are available, offer more or less the same solution and have not been used, a judge can refuse to hear a judicial review or refuse to grant a remedy.
6. In relation to the Walleys Quarry matter redress via complaint, and ombudsman have both been sought by the Council without success. JR’s raised by members of the community have also been unsuccessful.

The Application Procedure

7. A JR claim form must be filed promptly and in any event not later than three months after the grounds upon which the claim is based first arose (CPR 54.1 (1)). The process around progressing a JR involves three stages:

Step 1 - The letter before claim – This is an opportunity to persuade the public body, at a no-cost-risk stage, to consider the grievance and put the matter right rather than face having its decision or action judicially reviewed.

Step 2 – The permission stage - This allows the court to filter cases by deciding which should be allowed to go to a full hearing. The permission stage is decided on the basis of a written claim and will involve a fairly brief look at the case to decide whether there is an arguable case; and the case has been brought promptly or if any delay can be justified.

Step 3 - The full judicial review hearing. If permission to proceed is granted, when all parties are ready, and when the court has time available, the case is listed for a full hearing at which argument by both sides is heard by the court.

8. Judicial review looks at the lawfulness of actions and decisions. These can be challenged on a number of grounds as follows:

- i. *Illegality* - Public bodies must correctly understand and apply the law that regulates their decision making powers. An action or decision may be unlawful if the decision maker had no power to make it or exceeded the powers given to him/her. Four kinds of illegal activity may be identified:
 - *Refusing to act* in a certain way in a mistaken belief that the law does not allow the body to act in that way;
 - *Misuse of discretion* - e.g. using a discretionary power for the wrong purpose or in the wrong circumstances, or putting unlawful limits on the exercise of discretion (often called *fettering of discretion* and typically applying a local policy rigidly);
 - *Taking irrelevant factors into account* or failing to take account of all relevant factors; and,
 - *Failing to take account of the Human Rights Act 1998.*
- ii. *Irrationality* - The court can reverse a decision if it is so unreasonable as to be “perverse” or “irrational”. Arguing that a decision is irrational is extremely difficult and such claims are usually linked to challenges based on *illegality* and/or *unfairness*, if this is possible.
- iii. *Unfairness* - This deals with the process for reaching a decision and includes *the right to a fair hearing* (which includes the rule against bias). Also the courts have recently extended the idea of fairness to prevent abuses of power where public bodies have sought to go back, without sufficient justification, on promises made (called '*legitimate expectations*').

9. If an application for judicial review is successful, the court can grant a *remedy* by making of one of six orders:

- i. *Quashing order*: the most commonly requested remedy. It *overturns* an invalid decision that has already been made. The public body must then take the decision again applying the proper legal test or following a fair procedure.

- ii. *Prohibiting order*: prevents a public body from taking an unlawful decision or action – for instance, to prevent the Home Office from deporting someone whom it has wrongly decided is an illegal immigrant.
- iii. *Mandatory order*: requires the performance of a duty, either an action the body has a duty to perform or the duty to reach a discretionary decision. For instance the court may order the public body to consider an application for a benefit when it has failed to do so (though the court *cannot* require that a specific decision is made, such as ordering that benefit be paid).
- iv. *Declarations*: The court may simply declare what the law is, or declare the respective rights of the parties, without making any other order.
- v. *Injunctions*: prevent an illegal act or enforce the performance of a duty. Since a *prohibiting* and *mandatory orders* serve similar purposes, injunctions are relatively rare. However, they are sometimes granted at the permission stage of the proceedings as a temporary order made before the court considers the case fully at the final hearing. For example, an injunction can be sought at an early stage to require a local authority to continue to provide community care services in a case disputing the lawfulness of withdrawal of those services.
- vi. *Damages*: Before the Human Rights Act came into force, damages were rarely awarded in judicial review and were not available to compensate people who had unlawful decisions made against them. Damages may now be awarded where a public body has unlawfully interfered with your human rights.

The Application Procedure

10. The claim form must be filed promptly and in any event not later than three months after the grounds upon which the claim is based first arose (CPR 54.1 (1) or the shorter time limits specified by *CPR 54.5(5)* and *54.5(6)* for certain planning judicial reviews (within six weeks) or certain procurement decisions (within 30 days).
11. The Sec of State Rebecca Pow refused our request for a public enquiry in her correspondence dated 6th November. In our letter dated 21 December to The Prime Minister Rishi Sunak MP, copied to Steven Barclay MP, Secretary of State for Environment, Food & Rural Affairs we asked HM Govt. “..to request you to reconsider your decision and commence a public inquiry into this matter”. It is not possible to agree an extension of time for lodging the application with the defendant. If an extension of time is needed for the lodging of the application, the claim form must:
 - include such an application; and
 - set out the grounds in support of the application.
12. A judge will usually consider the application for permission to proceed with the claim for judicial review on the papers. The judge’s decision granting or refusing permission and the reasons for the decision will be served on the claimant, defendant and any interested party. If permission is refused, the claimant may request the decision is reconsidered at a renewal hearing.
13. If permission is granted to the claimant, there is no right of appeal from the grant

of permission for the defendant.

Costs

14. It is well known that the costs of a contested JR can be considerable although every case is different and it is difficult to give a precise estimate in this regard. However it is worth bearing in mind that I am advised that the council spent almost £1m in costs in order to secure the Abatement Notice on Walleys Quarry. The extent of these costs is obviously a reflection of a number of factors e.g. the length of time this issue has been ongoing, the volume of evidence/data that has accumulated during this time, the complexity of the legal issues etc. I would add that I understand that the above figure does not include the cost of senior officers time expended on the matter which should not be underestimated.
15. In all the circumstances I would currently suggest that we would need to make a provision in the region of at least £1M **for a single JR**, bearing in mind that if we are unsuccessful we would be liable to pay the other side's considerable legal costs.

Conclusion

16. It is worth bearing in mind that the ultimate decision of whether or not a JR should be pursued should be based upon specialist professional legal advice taking into account the risk to public funds of doing so (whether such an application is successful or not) and it should be borne in mind that if/when leave for JR is granted the court process is not quick and can take in the region of 12mths to be concluded.
17. The end result of a JR may not ultimately "ease the suffering" of the community in relation to Walley's Quarry as JR can often merely result in the decision making body being directed to go back and reflect on its decision-making process and result in it reaching the same decision in a different way which may make it procedurally "fair" whilst the practical effects may remain substantively the same i.e. the Sec of State's decision not to agree to hold a Public Enquiry into Walley's Quarry.
18. Finally, our KC has been instructed to advise on this matter although we are currently awaiting Counsel's final advice on the merits/prospects of success of pursuing a JR, which it is envisaged shall be available at April's full Council meeting, when the final substantive advice requested by full council will be supplied.

Anthony Harold

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