JUDICIAL REVIEW – PROPOSALS FOR FURTHER REFORM CM 8703

Submission by Professor Richard Macrory

1. I am Professor of Environmental Law at University College London and a barrister at Brick Court Chambers. In my professional capacity I have been involved in a number of Judicial Reviews, mainly involving environmental law, and acting both for NGOs and industry. I was a member of the Sullivan Committee on environmental Judicial Reviews in 2008. The views expressed in this submission are personal. Given my background, my submission will largely focus on environmental judicial reviews.

   Aarhus and Access to Justice

2. As noted several times in the Consultation Paper, Art 9 of the Aarhus Convention constrains the way in which Government can restrict the right of review by third parties in environmental cases. The Aarhus access to justice provisions are now reflected in two core EU environmental directives (environmental assessment and industrial emissions), and the European Court of Justice has recently gone further by stating that since the EU is party to Aarhus, *"According to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union."*[1]

3. Although the Paper acknowledges that many of the proposals, especially concerning standing, will not apply to Aarhus cases, many planning JRs (involving environmental assessment for example) will inevitably engage Aarhus - to treat planning and environmental JRs as distinct categories is not in reality sustainable. This is all the more so given that the UK chose to implement the environmental assessment directive within its existing town and country planning controls. The UK has traditionally adopted a fairly 'gold-plated' form of judicial review, and my personal view is that the vision of Aarhus for economical and speedy access to legal review for a broad section of the public, including NGOs, will require a more radical rethink of how we handle JRs, well beyond the capped costs regime introduced in April of this year.[2] Otherwise, there is a danger that the UK will face continuing challenges to the compatibility of current procedures with Aarhus, together with increasing uncertainty and delays. The need for a fresh approach could tie in

[1] Case C-240/09 '*Slovakian Bear*', 8 March 2011, para 30.
[2] Civil Procedure (Amendment) Rule 2013/262.

with some of the proposals in the Consultation Paper which I expand upon below. I also think it is worth exploring the recent reforms regarding how we handle environmental statutory appeals and what they might have to offer in this context.

4. The Aarhus provisions on access to justice do not require that such rights are exercised by judicial review before the courts – Art 9 permits review before a court of law or "*another independent and impartial body established by law*." Equally, as the Sullivan report noted, "*Aarhus does not entitle members of the public to bring frivolous or unwarranted claims."*[3] The 'costs in the cause' principle, with the potential risk of exposure to the other side's costs should the case be lost, has in the past no doubt acted as a surrogate filter on weak or unfounded cases, counterbalancing the liberal approach to standing developed by the judiciary over the last twenty five years or so. It is now accepted that costs in the cause is not compatible with Article 9 of Aarhus. But restricting standing cannot be used as an equivalent filter, since that can be equally incompatible with Aarhus. Cost capping as recently introduced for Aarhus cases may address the costs issue (though there remain doubts whether the lack of flexibility in the amounts specified are compatible with Aarhus) but potentially imposes significant costs on public bodies even where they win cases. Hence the need to rethink how we handle such cases and whether they could be dealt with more speedily and economically than through traditional JR procedures.

5. It is also important to note that it is not only NGOs who can make use of JR procedures either to raise legitimate concerns about legality and/or as a delaying tactic. Planning and environmental JRs are also brought by rival industries and businesses whose motives for doing so may also sometimes be questionable or driven by their own economic interests. Given the radical nature of some of the proposals, I would have found it helpful to have had a more detailed analysis of the Planning JRs brought in recent years (who were the claimants (developers, national NGOs, local individuals, etc.) parties involved, success rate, the extent to which Aarhus was engaged, etc.). The general figures in the Paper for all JRs do not indicate whether these are equally applicable to Planning JRs. Below, I give more details of the analysis of environmental JRs I conducted for DEFRA a few years ago which provide some useful insights.

[3] *Ensuring Access to Environmental Justice in England and Wales (The Sullivan Report),* para 7

First Tier Tribunal as a Regulatory Appeals Body

6. In 2003 the Department of Environment Food and Rural Affairs commissioned me to examine the case for a specialized environmental tribunal. My report [4] was focussed on providing a more coherent and efficient system for handling regulatory appeals in environmental regulation rather than judicial review as such, although it was clear there was a connection between the issues. In this context a regulatory appeal means the right of the applicant for a consent or licence or a person in receipt of some form of regulatory enforcement notice (such as a remediation notice) to appeal on merits to another body. The right of appeal against refusal of planning permission to the Secretary of State (and mainly handled by PINS) has been a long established feature of the town and country planning system. The 2003 report demonstrated that the system was far more confused in the field of environmental regulation, with appeals heard by a range of different bodies under different legislation, and sometimes with no right of appeal. The evidence suggested that an incoherent or incomplete system of regulatory appeals was likely to increase the pressure on judicial reviews. My proposal for a new specialist Tribunal to handle such appeals was generally well-received, but the Government at the time did not act upon it.

7. Under Part III of the Regulation Enforcement and Sanctions Act 2008, civil sanctions were introduced for a range of environmental regulations. As a result a specialized Environmental Tribunal was established in 2010 within the Regulatory Chamber of the First-Tier Tribunal. Although its jurisdiction was initially limited to appeals against sanctions imposed under Part III of RESA, no such appeals have yet been heard because enforceable undertakings (under which the regulator and the regulated business agree an appropriate response to the regulatory breach) have proved to date a more effective mechanism that the imposition of a sanction. In the two formal appeals to date (remediation notices imposed by the Marine Management Organization), the Tribunal through effective case-management has secured agreed settlements[5]. In 2010 the then Senior President of Tribunals commissioned me to re-examine, now that there existed an Environmental Tribunal, whether there was a case for the Tribunal handling a greater range of regulatory appeals in the environmental legislation. My report[6] concluded that if anything the

---

[4] MACRORY R with WOODS M (2003) *Modernizing Environmental Justice : Regulation and the Role of an Environmental Tribunal* Centre for Law and the Environment, University College, London

[5] The parties to the first appeal were represented by counsel from the same Chambers who have since written a joint and positive account of the procedure : http://www.39essex.com/resources/news.php?id=163

[6] MACRORY (2011) *Consistency and Effectiveness – Strengthening the New Environment Tribunal* Centre for Law and the Environment, UCL

system for regulatory appeals had become more confused since the 2003 study, and I recommended that environmental appeals should as a matter of principle be consolidated within the Tribunal. This would provide a more coherent and specialized body, and would be beneficial to both the regulated community and the wider public interest. The general analysis was accepted by Government, and over the past few years, a large number of existing environmental appeals have been transferred to the Environmental Tribunal, with more proposed[7]. Over four hundred Nitrate Zone Appeals were heard by the Tribunal this year.

Environmental Judicial Reviews

8. As part of the 2003 study, I was given access to Judicial Review files in the High Court, and examined cases involving environmental legislation over the past three years. Town and country planning cases, both JRs and statutory appeals, including those involving environmental assessment, were deliberately excluded, and inevitably some subjective judgment had to be made as to what was or was not an environmental case. Overall there were around 60-70 such Judicial Reviews over the three year period, and 55 files were examined in detail.

9. The figures indicated that the majority of cases (28) were brought by companies or industry, while some 22 were brought by individuals or environmental groups or similar associations. Decision makers being challenged included Government Departments in 27 cases, and the Environment Agency in 16 cases. The average time for cases to reach a full hearing in court was six months from the date of lodgement, and the average duration of the main hearing was 1.3 days.

10. Leave for judicial review was refused in 12 cases, indicating a higher rate of leave being granted than in the 2012 figures quoted in the Consultation document. 13 cases were withdrawn, and of the remainder only four were ultimately successful. The figures quoted in the Consultation document indicate a 40% success rate for the claimant in adjudicated decisions, though it is not clear whether this applies equally to planning cases. One reason for the lower success rate in environmental cases (7%) may be that often the decisions being challenged were those of specialized agencies who could be expected to ensure that the legal basis of their decision was sound, or whose expertise the courts will generally respect.

[7] see footnote 10 below for the current areas where appeals can now be made to the Environment Tribunal.

11. Equally, however, it was clear from an examination of the files and the actual decision of the courts that many of the cases were, in reality, merits driven disguised as judicial reviews, and ultimately did not succeed for that reason. The files indicated that about two thirds of the cases fell within this category where the claimant was essentially seeking a substantial rehearing of the facts. I have not been able to examine recent files, but on the assumption that there has not been a significant change in the overall picture, there seem to be two responses to this analysis. One is that this confirms a view that judicial review is being used inappropriately, and that stronger case-management and leave procedures might more effectively weed out earlier what are in effect merits appeals. The other is this in fact reflects a repressed need for some form of third party merits appeals which should be addressed rather than dismissed out of hand, or otherwise pressure on JR procedures will continue. The traditional view that it is the local authority or other public agency that is seen as representing the public thus avoiding the need for third party appeal rights may no longer hold true.

12. The right of third party merits appeals (other than by way of judicial review) in planning and other areas has never been a traditional feature of UK appeals procedure, and will not be attractive in the current climate. But one could envisage a system whereby third parties who had participated in a regulatory procedure (by objecting to a licence application, for example) could have the right of appeal to the First-Tier Environment Tribunal which is not a full merits appeal as such but restricted to challenging the "*substantive and procedural legality of the decision*" (reflecting the wording of the access to justice provisions of Aarhus). The First-Tier Tribunal with its combination of legal and technical expertise could be expected to handle such appeals with authority, speed, and economy, and involving mediation where appropriate. In itself, the right of such an appeal would not necessarily oust the availability of judicial review but the failure to exercise such a right would weigh heavily with the court - see. e.g. Lord Scarman *in R v Inland Revenue Commissioners ex parte Preston* [1985] AC 835 *"..a remedy by way of judicial review is not to be available where an alternative remedy exists."* Providing an appeal in this way to the First-Tier Tribunal would be more consistent with Aarhus aspirations than JR actions, and the channelling of such challenges through the First-Tier Tribunal would help to dampen unrealistic JR claims. As for frivolous or vexatious appeals the current Tribunal Procedure Rules give the Tribunal considerable powers to strike out claims including where it considers, *"there is no reasonable prospect of the appellant's case, or part of it, succeeding."*[8] Appeals on points of law from the First-Tier Tribunal would go to the Upper Tribunal.

[8] Tribunal Procedure (First-Tier Tribunal)(General Regulatory Chamber) Rules 2009/1976, rule 8)

Upper Tribunal handling Judicial Reviews

13. The Consultation Paper considers the possibility of establishing a Lands and Planning Chamber within the Upper Tribunal to handle planning JRs. I find considerable merit in the greater use of the Upper Tribunal to handle specialist JRs of this nature. The combination of members with specialist legal and other technical expertise appropriate to the case in hand is attractive.

14. The overall objectives of the Upper Tribunal rules (SI 2008/2698), including the express duty on parties to assist the Upper Tribunal in furthering these objectives, provide a compelling set of principles for a more proportionate and modern approach to Judicial Review procedures:

2.
(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c)ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d)using any special expertise of the Upper Tribunal effectively; and
(e)avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Upper Tribunal to further the overriding objective; and
(b) co-operate with the Upper Tribunal generally.

Compared to the High Court, the Upper Tribunal is likely to have more flexibility in the way it develops procedures appropriate to the type of case in hand. A specialist Chamber in the Upper Tribunal would provide an identifiable jurisdiction, and would have access to the appropriate professional expertise, both legal and non-legal, to handle both the legal issues and the complex factual questions often involved in these types of JRs. It is likely to have the ability to reach faster decisions which are both consistent and robust, reducing the likelihood of appeals against its decisions. The Upper Tribunal has the capability to encourage mediation and employ other interventionist techniques to assist parties in identifying and focussing on the real core issues

in dispute, and to reduce the current 'stand-off' periods (which can last many months) between the lodgement of JR papers and the actual hearing – in current practice, this is usually effectively dead time where everything is on hold. There may well also be a case for greater written submissions and a time limitation on oral argument (more akin to the Court of Justice of the European Union). Recently, the Upper Tribunal has indicated that in judicial review cases it will not feel obliged to follow cost-shifting principles applied in the High Court. [9] Above all, the attraction of using the Upper Tribunal (Lands Chamber) as the basis for the expansion of jurisdiction is that it is building upon an existing and well-established institution rather than involving the costs and upheaval of establishing a wholly new body.

15. If a decision is taken to establish a specialist Planning Chamber of the Upper Tribunal in the form of Land and Planning Chamber, I would suggest that the Chamber should also include an environmental jurisdiction. This should happen whether or not the proposal in para 12 above to introduce a limited right of third party appeal to the First-tier Tribunal is accepted. Defining in a transfer order what is or is not an environmental JR is less easy than defining a planning JR, but a sensible starting point would be JRs involving those areas of environmental law where there now exists a right of statutory appeal to the First Tier (Environment) Tribunal. Where an applicant for, say, an environmental permit[10] has appealed to the First Tier Tribunal, appeals on points of law are heard by the Upper Tribunal. It would make far more sense if any JR by a third party in the same area of law also went to the Upper Tribunal, rather than having two different courts potentially ruling on the same provisions. As further environmental appeals are transferred to the First Tier tribunal, transfer orders should operate in parallel in relation to JRs in those areas. As the Upper Tribunal develops expertise and profile in such cases, the High Court may be more willing use its discretionary power to transfer individual environmental JRs not falling within a transfer order to the Upper Tribunal where it considers it 'just and convenient' to do so.[11] The proposed new Chamber could be named the Land, Planning and Environmental Chamber to reflect its wider jurisdiction. The new body is likely to attract considerable confidence within the business community and the wider public.

---

[9] *R (LR) v FtT (HESC) and Hertfordshire County Council* [2013] UKUT 0294

[10] DEFRA have been consulting this year on transferring environmental permitting appeals to the First Tier (Environment) Tribunal with a transfer possibly taking place in October 2013. Other areas where the Tribunal currently has appeal jurisdiction include environmental civil sanctions, energy-using products, emissions trading, energy information, carrier-bags charges, marine licencing, nitrate vulnerable zones, flood and coastal zone management, waste regulations, green deal regulations, climate change agreements, energy efficiency schemes, reservoirs Act.

[11] s 31A Supreme Court Act 1981 inserted by s 19 Tribunal, Courts and Enforcement Act 2007. As far as I know, no order for such a transfer in an environmental JR has been made to date.

16. There will, of course, be an argument that it is premature to transfer planning JRs to the Upper Tribunal until the impact of the newly established Planning Fast-Track procedures in the Administrative Court in meeting current concerns is better understood. The Fast-Track procedures do not really address the potential benefits of a single specialist JR jurisdiction combining land, planning and the environment. But if a decision is taken to delay in the light of Planning Fast-Track, it would still be sensible in the meantime to establish a project to examine in more detail the practicalities and time-scales involved in establishing a Land, Planning and Environment Chamber within the Upper Tribunal, including any primary legislation that may be required.[12]

Standing Issues

17 The Consultation Paper raises issues concerning standing, and questions whether the judiciary has developed too liberal an approach in its interpretation of the 'sufficient interest ' test. As the Paper notes, however, in relation to environmental NGOs, the Aarhus Convention (and its implementation under EU law) constrains restrictions on standing in that "*non-governmental organizations promoting environmental protection and meeting any requirements under national law"* are deemed to have a sufficient interest to challenge substantive and procedural illegalities. In terms of requirements under national law, some other countries in Europe have developed more precise criteria in relation to standing such as a minimum size in terms of membership, or that the issue at stake must fall within the purpose of the organization.[13] However, any requirements under national law must not be contrary to the general goals of Aarhus. In 2009 [14] the Court of Justice held that a Swedish requirement that an NGO had to have 2000 members to have standing before the courts hindered effective judicial protection – the threshold has since been reduced to 100 members.[15]

18 Aarhus may expressly permit Member States some discretion to define standing for NGOs, but there must be doubts how far doing so will really meet the concerns expressed in the Consultation Paper. Under the existing

[12] Transferring planning s. 288 statutory appeals, including the possible introduction of leave procedures, is likely to requirement amendments to the Town and Country Planning Act and the Planning Act 2008.

[13] For a recent comparative analysis see Eliantonio et al (2013) *Standing up for Your Right(s) in Europe – A Comparative Study of Locus Standing (Locus Standi) before the EU and Member State' Courts,* Intersentia, Cambridge.

[14] Case C-263/08 *Djurgarden-Lilla Vartans Miljoskyddsforening v Stockholms kommun genom dess marknamnd* [2009] ECR-I-09967

[15] Eliantionio (2013) supra, p 73

principles of sufficient interest, courts will be reluctant to grant standing to an NGO whose purposes are unrelated to the issue at hand. Even if new standing rules excluded a particular NGO, it is often possible to find a surrogate individual with clear standing to bring the case. A good example is the 1983 anti-fluoridation case *McColl v Strathclyde Regional Council*[16], where the actual petitioner was an 'adental' elderly woman. But as the judge noted, "*others attended Court with great regularity and it would be naive to presume that the petitioner alone has an interest in the outcome of this action or indeed that her interest in the outcome is as great as that of others who have attended regularly."* In that case, she was legally aided, but since the abolition of champerty as a crime or tort under Criminal Law Act 1967, it is not illegal for an NGO to fund another person's legal action, though subject to court discretion, they could be exposed to a third party costs order. In certain cases, judges have welcomed the value of NGOs as a claimant in terms of expertise and efficiency. Otton J (as he then was) noted in *R v Her Majesty's Inspectorate of Pollution ex parte Greenpeace Ltd* (Queens Bench Division 29 September 1993) that a neighbour or employee of British Nuclear Fuels Ltd who clearly had individual standing would have been unlikely to command the expertise at the disposal of Greenpeace : *"Consequently a less-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties."*

Finally, when it comes to cases brought for 'political' purposes, courts are highly sensitive to this being a potential abuse of process, and will exercise a power to strike out if this is felt to be a significant motive. One of the first legal cases I was involved in as a young barrister was a tort action brought by families against oil companies producing leaded petrol. Evidence from newsletters produced by the families indicated that this was part of a political campaign, and that they hoped it would secure a great deal of publicity even if they did not win. Had it not been for the fact the actual plaintiffs were the children of the adults involved, the judge in the lower court indicated he would have struck out the claim as an abuse of process.[17] JRs of course sometimes involve issues of high political significance but, as illustrated, for example, in the Heathrow extension case.[18] British judges often emphasise that the courts are not the appropriate place to determine questions of policy, accepting the 'principle that Parliament and the elected Government are best placed to

[16] [1984] JPL 351

[17] *Budden v BP et al* (1980) 124 SJ 376. The Court of Appeal did in fact strike out the claim not as abuse but as disclosing no reasonable cause of action.

[18] *London Borough of Hillingdon and others v Secretary of State for Transport and another* [2010] EWHC 626.

determine what is in the public interest' (Consultation Paper para 80). Their concern, rightly so, is with questions of law that relate to such policy.

Answers to specific questions

Question I (Upper Tribunal)

There is clearly an argument that it would be premature to create a Land and Planning Chamber in the Upper Tribunal until more is known about the impact of the Planning Fast-Track. But the Upper Tribunal has advantages in its capacity for handling specialist JRs, with a membership with combined legal and other relevant professional expertise, and greater flexibility in developing its procedures in the light of the overall objectives stated in its Procedural Rules. If a decision is taken to delay any role for the Upper Tribunal in the light of Planning Fast-Track, it would still be sensible in the meantime to establish a project to examine in more detail the practicalities and time-scales involved in establishing a Land, Planning and Environment Chamber within the Upper Tribunal, including any primary legislation that may be required.

Question 2 (Upper Tribunal)

If a specialist Upper Tribunal Chamber were created to hear planning JRs, it would make sense to include a range of environmental JRs. These should initially be based on those areas of environmental law where statutory appeals are now heard by the First-Tier Tribunal (Environment). As further appeals are transferred to the First Tier Tribunal, JRs in the same area of law should be transferred to the specialist Chamber of the UT. It could then be entitled the Land, Planning and Environment Chamber.

Question 3

If there is a leave procedure for planning JRs, then there seems no reason in principle why there should not be an equivalent leave procedure for statutory TCPA challenges.

Question 9 – 11 (Standing)

As the Paper notes, the Aarhus Convention (and its implementation in EU Directives) grants standing rights to individuals and environmental NGOs to bring legal actions. It is unrealistic to think there is a clear separation between planning JRs and environmental JRs, and in many JRs involving planning issues, Aarhus will be engaged. The Convention gives parties to the Convention a certain leeway to define in their national law what environmental NGOs are entitled to bring such an action, provided conditions do not inhibit the principles of access to justice. But it is questionable whether any definitions will really go beyond the judicial discretion that already exists

in defining sufficient interest. Where a JR is primarily motivated for political purposes, courts should already have sufficient power to strike out such a claim. The British judiciary has generally shown itself very sensitive in distinguishing between policy issues appropriate for determination by Government or elected representatives rather than the judiciary, and those issues of law relating to public policy which under rule of law principles should ultimately be determined by the courts. It would be unwise to adopt proposals which would inhibit genuine issues of law relating to public policy being decided by the courts rather than the Executive.

Questions 12 – 16. (Procedural defects)

It would be sensible to explore whether one could introduce faster and economic interlocutory procedures to determine the legality of alleged procedural defects that arise during administrative decision-making. Often an issue may arise, but parties will continue until the result of the final decision, and then, if it is unfavourable to them, look to procedural defects that might vitiate it, with the result that any JR is not heard for months after the final decision.

A lay observer would consider this a strange practice, and potentially an immense waste of time and resources. A procedure that allowed for a rapid interlocutory ruling on the legality of a procedural defect (which could then be remedied during the original decision-making) would bring considerable advantages, and avoid the potentially unsatisfactory and difficult task of the judiciary having to second-guess at a later stage whether the defect in question would have made any difference to the final decision. A dispute, for example, about the legality of the scope of environmental assessment information could be resolved in this way rather than waiting for the final decision. The use of the Upper Tribunal in this context could be considered. The failure of any party to exercise such a right in respect of a procedural defect of which they were reasonably aware at the time could be a ground for refusing leave for a JR at a later stage.

About you

Please use this section to tell us about yourself **Full name RICHARD MACRORY**	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) **PROFESSOR OF ENVIRONMENTAL LAW (in personal capacity)**	
Date Oct 26 2013	
Company name/organisation (if applicable): **Faculty of Laws**	
Address University College London Bentham House Endsleigh Gardens	
Postcode London WC1 OEG	
If you would like us to acknowledge receipt of your response, please tick this box	(please tick box) ✔
Address to which the acknowledgement should be sent, if different from above	