

Response to Ministry of Justice Call for Evidence: Judicial Review and Nationally Significant Infrastructure Projects

9 January 2025

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to make the justice system fairer for all. Our vision is of fair, accessible, and efficient legal processes in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.
2. JUSTICE has, throughout its existence, been concerned with administrative justice and the importance of access to judicial review. Judicial review plays a critical constitutional role in upholding the rule of law, allowing ordinary individuals to ensure that executive action is lawful through accessing our independent courts and judiciary.
3. In recent years, JUSTICE has provided written responses to public debates on judicial review reform; including submissions to the Independent Review of Administrative Law ('IRAL') (October 2020), the previous Government's response to the review (April 2021), and extensive briefings on the Judicial Review and Courts Bill (2021 – 2022).¹ We had concerns about proposals, particularly in the latter, which we felt would limit access to justice and impinge on the rule of law.

General Comments: Review methodology and findings (question 1)

4. We note that this consultation is largely in relation to the recommendations of Lord Banner KC's Review ('the Review') into Legal Challenges to Nationally Significant Infrastructure Projects ('NSIPs'). However, the consultation raises some wider constitutional and access to justice issues relating to access to judicial review more generally, and it is on this which we have focused our submissions.
5. We also note that the Review's statistical evidence base was limited. This is not a criticism of Lord Banner KC and his team; Lord Banner KC acknowledges that he has '*not carried out an expert statistical analysis*' and that there are '*gaps in the data*'.² The reality is that the Review found only 30 challenges to the Secretary of State's grant of a DCO since the 2008 Act came into effect. Of those 30 challenges, three were

¹ JUSTICE, '[Response to Call for Evidence – IRAL](#)' (October 2020); JUSTICE, '[Judicial Review Reform: Consultation Call for Evidence – Response](#)' (April 2021); and <https://justice.org.uk/judicial-review-and-courts-bill/>.

² Lord Banner KC, '[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)' (28 October 2024), paras 8 and 9

awaiting permission at the date of the publication of the Review. We are concerned that reforms with potential wider impact on judicial review more generally could be made based on a very limited dataset.

The importance of judicial review and access to justice

6. We fully agree and welcome the Government's statement that *'judicial review is a constitutionally important mechanism which allows an individual or organisation affected by a decision taken by a public body to challenge the lawfulness of that decision in court'*.³ We also agree with the Government, and the Review itself, that *"inappropriate' legal challenge is an unhelpful and misleading concept'*.⁴ It is a core component of the rule of law that all government decision-making should be open to legal challenge, and it is the role of the independent judiciary to filter out claims which are unmeritorious.

7. As JUSTICE set out in our response to IRAL,

'Judicial review is a crucial check on the abuse of power, ensuring that the Government and other public authorities act in accordance with the rule of law. Access to judicial review is a key element of our unwritten constitutional arrangements for the protection of the rule of law'.⁵

8. We also welcome the Government's statement that it is committed to *'ensuring that access to justice is maintained in line with its domestic and international legal obligations'*.⁶ The ability to challenge the legality of actions of public authorities is fundamental to the rule of law and changes to the rules regulating who can bring such challenges has the potential to undermine the maintenance of the rule of law.⁷

9. In light of this, we agree with the Government, and the Review itself, that cost cap rules should not be amended in light of the UK's obligations under the Aarhus Convention.⁸ We also agree with the Review and the Government that the standing test should not be restricted. As IRAL said, in the context of a proposal to restrict the right to judicial review to only those 'directly affected' by government action, *'such a course would have significant constitutional implications and we do not recommend it...the temptation to legislate should be resisted'*.⁹

Reducing the number of permission attempts (questions 3, 4, 5 and 20)

³ Ministry of Justice, ['Judicial Review and Nationally Significant Infrastructure Projects: A call for evidence on the recommendations of the independent review by Lord Banner KC'](#) (28 October 2024), p8

⁴ Ibid., p9

⁵ JUSTICE, ['Response to Call for Evidence – IRAL'](#) (October 2020), p5

⁶ Ministry of Justice, ['Judicial Review and Nationally Significant Infrastructure Projects: A call for evidence on the recommendations of the independent review by Lord Banner KC'](#) (28 October 2024), p10

⁷ JUSTICE, ['Response to Call for Evidence – IRAL'](#) (October 2020), p24

⁸ Ministry of Justice, ['Judicial Review and Nationally Significant Infrastructure Projects: A call for evidence on the recommendations of the independent review by Lord Banner KC'](#) (28 October 2024), p13

⁹ ['The Independent Review of Administrative Law'](#) (March 2021), p94

10. The permission stage across judicial review generally works well. It allows the courts to filter out weak or vexatious claims¹⁰ whilst retaining sufficient flexibility to allow arguable claims to proceed. We note that the consultation explicitly acknowledges the potential for any changes to the permission stage for DCO judicial reviews to also be made to other types of judicial review claims – both other types of planning judicial reviews as well as ‘*in wider judicial review claims*’.¹¹ The case for reforming the permission stage, down to two stages or a single stage, is not well-made and the proposals should not proceed. We are particularly concerned that changes to the permission stage for judicial review generally could be made based on a very limited data set as set out above.
11. The proposals to reduce the permission stages to either two or one stage would both involve the removal of the paper permission stage in the High Court. We oppose this on access to justice and cost-efficiency grounds. The paper permission stage is a cost-effective way for the courts to approve permission where a claim is clearly arguable, provide clear reasons for refusing permission or certify the claim as totally without merit (which means its request for permission cannot be renewed at an oral hearing). This not only reduces costs for the court by avoiding the need for a much more resource intensive oral hearing in many cases, it also reduces costs for potential claimants (and public authorities), a key factor in ensuring proper access to justice. If there was no paper permission stage, one third of the DCO permission decisions which were dealt with entirely on the papers would have had an unnecessary oral hearing:

- (a) seven of the 27 claims were granted permission on the papers.
- (b) in another two claims permission was refused on the papers and the claimants did not renew.¹²

This would have been a further waste of time and resources for the court, claimant and defendant.

12. Removing the paper decision would also undermine the use of rolled-up hearings, where a paper decision determines that the permission and substantive decision can be determined together at one oral hearing. The Review highlighted seven claims which went to a rolled-up hearing (six of which were ordered to proceed to a rolled up hearing at the paper stage), with two subsequently granted permission.¹³ If both these claims had gone straight to an oral permission hearing, they would have required a further substantive judicial review hearing.
13. We are also strongly opposed to removing the ability to renew a permission decision to the Court of Appeal. This is predominantly a paper-based decision, since changes to the CPR in October 2016.¹⁴ There is no evidence this stage is being abused, to justify its abolition. In fact, the review highlights that the ability to apply to the Court of Appeal is an essential safeguard in a small but significant number of cases - of the 9 cases identified where permission was appealed to the Court of Appeal, five had permission

¹⁰ As Lord Diplock said in *R v Inland Revenue Commissioners ex p National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 at 643, it is also designed: “to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

¹¹ Ministry of Justice, ‘[Judicial Review and Nationally Significant Infrastructure Projects: A call for evidence on the recommendations of the independent review by Lord Banner KC](#)’ (28 October 2024), p8

¹² Lord Banner KC, ‘[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)’ (28 October 2024), para 33

¹³ *Ibid.*, para 33

¹⁴ Civil Procedure Rules, [Part 52.5](#)

subsequently granted.¹⁵ In respect of other types of judicial review, there are no publicly available Court of Appeal permission application statistics,¹⁶ something which the Ministry of Justice should look to rectify in future Civil Justice Statistics publications.

14. We also stress that, whilst there are particular circumstances in DCO judicial review claims and NSIP projects, reforming the permission stage in relation to one form of judicial review risks opening the door for future tightening of the permission stages for other judicial review claims. This is noted by the Government in its consultation document, which also talks about potentially widening it to planning decisions more generally. Government statistics make clear that, in the past ten years, between 13% and 21% of judicial reviews lodged are granted permission on the papers. It is not in the interests of the claimant, defendant or the High Court that such claims are required to have a more costly, time-consuming oral permission hearing.¹⁷
15. We strongly urge the Government to not reduce the number of permission attempts for judicial review of DCO decisions, planning decisions or judicial review more generally. The Review did not identify sufficient evidence to justify such a change, there could be unintended consequences which lead to an inefficient use of court resources and it would reduce access to judicial review.

Raising the permission threshold (questions 6, 7, 8 and 20)

16. The Review stated that there ‘*may*’ be a case for raising the permission threshold for judicial review, through amendments to the CPR, to claims which are ‘likely to succeed’ (in line with the *Mass Energy* decision in the Court of Appeal). We completely disagree.
17. The Review cites the *Mass Energy* decision in the Court of Appeal¹⁸, but notes it has ‘*not been widely taken up*’ as ‘*subsequent case-law has sought to characterise the Court of Appeal’s reasoning as being principally based upon the fact that the permission hearing had involved considerably more detailed analysis of the case than is usual at the permission stage*’.¹⁹ As the Court of Appeal note in *R (on the application of Plan B Earth)*, the *Mass Energy* decision was before the practice of ordering rolled-up hearings had developed in both the Administrative Court and Court of Appeal.²⁰ A rolled-up hearing can be a more effective way of preventing significant delay in an individual case.
18. The Review further states that ‘*there is no right either under UK constitutional principles or international law, for an arguable but weak or mediocre claim to proceed to a full hearing rather than being weeded*

¹⁵ Lord Banner KC, ‘[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)’ (28 October 2024), para 34

¹⁶ ‘It should be noted that no data was available to show the numbers and outcomes of appeals made to the Court of Appeal against refusals of permission (where such appeals are available)’ [The Independent Review of Administrative Law](#)’ (March 2021), p84

¹⁷ Ministry of Justice, ‘[Civil Justice statistics quarterly: July to September 2024](#)’ (5 December 2024)

¹⁸ *Mass Energy Ltd. v Birmingham City Council* [1994] Env. L.R 298

¹⁹ Lord Banner KC, ‘[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)’ (28 October 2024), para 16

²⁰ We note the Supreme Court subsequently overturned this Court of Appeal decision on whether the grounds were ultimately arguable. However, the Court of Appeal’s point about the *Mass Energy* threshold was not discussed or argued. [R \(on the application of Plan B Earth\) v Secretary of State for Transport](#) [2020] EWCA Civ 214, para 264.

out tomorrow'.²¹ We disagree with this analysis, as it conflates arguable with weak claims and suggests that at present a significant number of weak claims proceed to a full hearing.

19. The threshold for the grant of permission is that the Court is satisfied that there is an arguable ground for judicial review having a realistic prospect of success.²² It is unclear how a 'weak or mediocre claim', as described in the Review, would meet this test. IRAL concluded that the permission stage already '*operates as a significant filter for claims that should not proceed*'.²³ This is backed up by Ministry of Justice statistics – in 2023 only 18% of judicial review claims lodged were granted permission. This has not been higher than 25% of judicial review claims in the past ten years.²⁴
20. More fundamentally, it is an important part of our constitutional settlement that meritorious claims of potential government illegality are permitted to proceed, even if they are not ultimately successful. The Government are right to highlight UNISON in their consultation and the clear statement that '*the right of access to justice...is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication*'.²⁵
21. First, access to judicial review and effective government are mutually reinforcing. The ability of individuals to hold public authorities accountable through judicial review improves the quality of public decision-making. UNISON made clear that, in order for the courts to ensure government complies with the law, '*people must in principle have unimpeded access to them*'.²⁶ Raising the threshold for permission will reduce the accountability of public bodies and in turn the quality of public bodies' decision making. The reduced likelihood of judicial review claims proceeding can affect the conduct of public bodies regardless of claims actually being brought – the possibility of legal action provides a crucial role in improving public body decision making.
22. Second, at the permission stage, there is an inequality of arms between the claimant and the defendant, who holds more information sought about the decision challenged. Given pre-permission disclosure is often limited, the full strength of a judicial review claim may only become properly apparent after the grant of permission, with full disclosure by the defendant.
23. This is notwithstanding the more practical arguments which Lord Banner KC acknowledges in his review, such as that the court would likely need to spend at least half a day on each permission application and that '*applications for pre-permission disclosure may also proliferate if the permission stage becomes more*

²¹ Lord Banner KC, '[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)' (28 October 2024), para 77

²² HMCTS, '[The Administrative Court Guide Judicial Review Guide 2024](#)' (October 2024), p63

²³ [The Independent Review of Administrative Law](#)' (March 2021), p84

²⁴ Ministry of Justice, '[Civil Justice statistics quarterly: July to September 2024](#)' (5 December 2024)

²⁵ [R \(on the application of UNISON\) v Lord Chancellor](#) [2017] UKSC 51, para 29

²⁶ *Ibid.*, para 68

granular'.²⁷ Whilst the Review states it has anecdotal evidence that present permission applications take longer than the default 30 minutes²⁸, this would still be a significant increase in court resources.

24. We therefore agree with the Government's misgivings about amending the permission test for DCO judicial reviews and urge them not to proceed with any changes to the permission threshold. We are particularly concerned that a move to allowing only the very strongest claims to proceed in relation to these types of judicial reviews would open the door for this approach to be taken in other types of judicial review (and indeed other types of cases too) with serious consequences for access to justice and the rule of law.

Conclusion

25. In light of the above, JUSTICE would urge the Government to not reduce the number of permission attempts or the permission threshold in judicial review claims of DCOs or planning more generally. This would set a dangerous precedent for the future of judicial review, undermining the Government's stated commitment to access for justice and the rule of law.

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JUSTICE | 9 January 2025

²⁷ Lord Banner KC, '[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)' (28 October 2024, para 80

²⁸ Lord Banner KC, '[Independent review into legal challenges against Nationally Significant Infrastructure Projects](#)' (28 October 2024, para 81