ClientEarth

Re clause 37(8) of the Environment Bill

ADVICE

A. INTRODUCTION

1. We are instructed by ClientEarth, an environmental legal NGO and registered charity, to advise in respect of the Environment Bill ("the Bill"). ClientEarth has an ongoing programme of advocacy and campaigning work related to the impact of the UK's exit from the EU on domestic environmental law, its implementation and enforcement. In particular, ClientEarth has been actively engaged in scrutinising the Bill.[1]

2. On 30 January 2020, the Bill was re-introduced into Parliament. It is an updated version of the Bill initially published in October 2019, which was withdrawn subsequently due to the 2019 general election.

3. The Bill has completed the Committee stage in the House of Commons, following 22 sittings of the Public Bill Committee held between 10 March 2020 and 26 November 2020.[2] The Bill is now due to have its report stage and third reading on a date to be announced. Following which, the Bill will have its first reading in the House of Lords. Amendments can be made to the Bill at Report Stage in the House of Commons, and then in the House of Lords.

4. We are asked to advise in relation to a specific issue: the availability of remedies following an environmental review, and the effect of clause 37(8) of the Bill.

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[1] ClientEarth, along with a number of other non-governmental organizations, is part of Greener UK. Greener UK has submitted a briefing for the Commons Committee (dated November 2020). It responded to a number of amendments which were proposed in respect of the Office for Environmental Protection, that raised a number of general concerns which are not repeated here (available online: https://greeneruk.org/sites/default/files/download/2020-11/Greener_UK_and_Link_briefing_Environment_Bill_Committee_govt_amendments_on_the_OEP.pdf).

[2] A compilation of all twenty-two sittings is available online here: https://publications.parliament.uk/pa/cm5801/cmpublic/Environment/PBC009_Environment%20Bill_1st-22nd_Combined_26_11_2020.pdf.

B. THE ENVIRONMENT BILL CLAUSES

The role of the Office for Environmental Protection

5. Chapter 2 of Part 1 of the Bill establishes the Office for Environmental Protection ("the OEP"), a new, statutory and independent environmental watchdog. It is intended that the OEP should hold government to account on environmental law and its environmental improvement plans (required by the Bill) once the UK leaves the EU.[3]

6. The OEP's principal objective as set out in the Bill, in exercising its functions, is to contribute to environmental protection and the improvement of the natural environment. The OEP must act objectively and impartially.[4]

7. The Bill subdivides the OEP's proposed functions into two categories: (i) scrutiny and advice functions, and (ii) enforcement functions. The OEP must prepare a strategy that sets out how it intends to exercise its functions, including a specific enforcement policy.[5]

8. By way of background, the scrutiny and advice functions include:
    a. monitoring and reporting on environmental improvement plans and targets;[6]
    b. monitoring the implementation of environmental law broadly, save for a matter that is already within the remit of the Committee on Climate change pursuant to the Climate Change Act 2008, and;[7]
    c. giving advice to a Minister as to (a) any proposed change to environmental law, or (b) any other matter relating to the natural environment, on which the Minister requires it to give advice.[8]

9. A crucial aspect of its role involves the enforcement of environmental law. Its enforcement functions include:

[3] Explanatory Notes, Bill 9 (30 January 2020), p 10, and para 20.
[4] Clause 22(1)-(2).
[5] Clause 22(3)-(7).
[6] Clause 27.
[7] Clause 28.
[8] Clause 29.

a. Complaints: receiving complaints regarding alleged failures by public authorities to comply with environmental law, and;[9]
b. Investigations: carry out an investigation as to whether a public authority has failed to comply with environmental law, if it has received a complaint, or otherwise has information, that in its view, indicates that there may have been a serious failure to comply with environmental law.[10]

10. The OEP may issue two different kinds of notices: (i) information notice, and (ii) decision notice. The former is to facilitate an investigation, and the latter provides a means for the OEP to describe a failure to comply with environmental law, and set out recommended steps that the public authority should take to address it.

11. First, it may issue an information notice if it has (a) reasonable grounds for suspecting that the relevant authority has failed to comply with environmental law, and (b) it considers that the failure, if it occurred, would be serious. An information notice would require that the authority provide such information relating to the allegation as specified in the notice, in writing, so far as is reasonably practicable, within a specified period of time (being 2 months, unless the OEP has afforded the authority a later date for compliance.)[11]

12. Secondly, the OEP may give a decision notice to a public authority if: (a) the OEP is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and (b) it considers that the failure is serious. A decision notice must set out the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence of the failure). The OEP may not give a decision notice to a public authority unless it has first given at least one information notice relating to the failure of the authority to comply with environmental law that is described in the decision notice.[12]

[9] Clause 31; see also Explanatory Notes, para 255.
[10] Clause 32.
[11] Clause 34.
[12] Clause 35.

13. The Bill also makes provision for 'linked' notices. If the OEP gives an information notice or a decision notice to more than one public authority in respect of the same or similar conduct, it may determine that those notices are linked. A Minister of the Crown may request that the OEP determine that information notices or decision notices are linked and the OEP must have regard to that request. The OEP must provide the recipient of an information notice or a decision notice (a "principal notice") with a copy of every information notice or decision notice which is linked to it.[13]

14. The OEP may apply for a judicial review, or a statutory review, if:
    a. Seriousness threshold: the OEP considers that the conduct constitutes a serious failure to comply with environmental law;
    b. Urgency: making an application is necessary to prevent, or mitigate, serious damage to the natural environment or to human health.[14]

15. Section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 ("the SCA") (High Court to refuse to grant leave or relief where the outcome for the applicant not substantially different) does not apply to an application for judicial review made under subsection (1) in England and Wales.[15]

16. The OEP may also apply to intervene in judicial review or statutory review proceedings, if the proceedings relate to an alleged failure by a public authority to comply with environmental law, and the failure, if it occurred, would be serious (regardless of its own views as to the veracity of the allegation).[16]

Environmental review

17. The Environment Bill establishes a process that enables the OEP to bring legal proceedings against a public authority, for the court to review alleged conduct of an authority that is described in a decision notice as constituting a failure to comply with environmental law. The court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application

[13] Clause 36.
[14] Clause 38.
[15] Clause 38(3).
[16] Clause 38.

for judicial review. These new proceedings are called 'environmental review'.[17]

Process

18. Where the OEP has given a decision notice to a public authority it may apply to the court for an environmental review, but only if: (a) it is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and (b) it considers that the failure is serious. It is important to note that the environmental review process will only be employed where the OEP considers the failure is *serious*. There is therefore an inbuilt threshold, which reserves the environmental review process for serious matters only.

19. An application for an environmental review may not be made:
    a. before the earlier of the end of the period within which the authority must respond to the decision notice, and the date on which the OEP receives the authority's response to that notice, or;
    b. before the expiry of any time limit which applies to the commencement of judicial review or other similar legal proceedings for questioning the alleged conduct.

Remedy for non-compliance with environmental law

20. If the court finds that the authority has failed to comply with environmental law, it must make a statement to that effect (a "statement of non-compliance"). A statement of non-compliance does not affect the validity of the conduct in respect of which it is given.[18]

21. The statement of non-compliance is akin to the jurisdiction of the High Court to grant declaratory relief, i.e. simply to declare what the law is, and that the authority acted unlawfully. Declaratory relief is not the norm in judicial review where a decision is successfully challenged. As explained further below, the starting point is generally that the unlawful decision will be quashed (i.e. deprived of all legal effect[19]).

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[17] Clause 37.
[18] Clause 37(6)-(7).
[19] See, for example, *Grafton Group (UK) Plc v Secretary of State for Transport* [2016] EWCA Civ 561, para 18: *'…the effect of an order to quash, certiorari in the old language, was to render the instrument in question as if it had never been.'*

22. Clause 37(8) of the Bill provides that:

> *Where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages, but only if satisfied that granting the remedy would not –*
> *(a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or*
> *(b) be detrimental to good administration.*

23. Clause 37(9) states that:

> *In deciding whether to grant a remedy the court must (subject to subsection (8)) apply the principles applicable on an application for judicial review.*

24. The Explanatory Notes to the Bill state (at paras 316-318):

> *316. Subsection (8) provides that, if the [Court][20] makes a statement of non-compliance, it will have the full suite of remedies, other than damages, available to it as on a judicial review, but only if it is satisfied that granting such a remedy would have neither of the effects described in paragraphs (a) and (b). These remedies include a declaration, quashing, prohibiting and mandatory orders, and injunctions. Damages are not available in environmental reviews because the OEP, as the only applicant, would have no cause to seek compensation for damages personally suffered where the claimant in a traditional judicial review might. As such, this remedy is unnecessary.*
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> *317 <u>The provision that the [Court] may only grant a remedy if it is satisfied that neither of the effects described in paragraphs (a) or (b) would occur as a result, recognises the fact that the environmental review will take place after the expiry of judicial review time limits and that prejudice may result from quashing the decision at this later date. This provision allows third parties reliant on decisions involving the application of environmental law to have confidence that those decisions will not be quashed or other judicial review relief granted outside the normal judicial review time limits, if substantial prejudice, substantial hardship or detriment to good administration would be likely to result. If these effects are likely to result from the granting of the proposed</u>*

[20] In the version of the Bill as it was introduced, these proceedings were to be heard in the Upper Tribunal. Pursuant to amendments tabled by the government and passed during Committee stage, the current position is that environmental reviews will be determined by the High Court.

remedy, the [Court] may not grant the remedy.

318 Paragraph (a) of subsection (8) requires the [Court] to be satisfied that a remedy would not be likely to substantially prejudice or cause substantial hardship to a third party (a person other than the public authority defendant) before granting it. Expenditure already spent in reliance of the decision in question may be relevant to the question of substantial prejudice or hardship, along with potentially the recoverability of the sums and the financial means of the third party.

319 Paragraph (b) of subsection (8) requires that the [Court] also be satisfied that a remedy it grants would not be detrimental to good administration. This provision recognises the need to protect the orderly implementation of properly-reached decisions, and recognises that finality in decision-making is important for both public authorities and the public. (emphasis added)

C. EFFECT OF CLAUSE 37(8) OF THE BILL

Remedies in judicial review generally

25. It is well settled that '*the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary*' (Lord Roskill in *Inland Revenue Commissioners v National Federation of Self- Employed and Small Businesses Ltd* [1982] AC 617, 656.)

26. However, the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it (*R. (on the application of Edwards) v Environment Agency (No.2)* [2008] UKHL 22, para 63). This is referred to as the presumption in favour of relief.

27. A quashing order is the primary and most appropriate remedy for achieving the nullification of a public law decision. In *Cocks v Thanet DC* [1983] 2 A.C. 286, the House of Lords held (at p 295, per Lord Bridge):

> *Even though nullification of a public law decision can, if necessary, be achieved by declaration as an alternative to an order of certiorari, certiorari to quash remains the primary and most appropriate remedy.*

28. Where the court quashes a decision, it can remit the matter to the decision-maker to reconsider and reach a decision that is in accordance with the judgment of the court (pursuant to CPR 54.19). In some limited circumstances, the court may substitute its own decision for the decision to which the claim relates (insofar as permitted by section 31(5A) of the SCA[21]). A quashing order may be coupled with a declaration.

29. The key point is that the court has discretion, in determining what it is fair and just to do in a particular case. For example, the court may grant a declaration instead of a quashing order[22] (as well as a mandatory or prohibiting order or injunction which may have been sought by the claimant to require the defendant authority to do, or not to do, something). The discretion of the court in deciding whether to grant any remedy is '*a wide one*' (*Credit Suisse v Allerdale BC* [1997] Q.B. 306, at 355 per Hobhouse LJ). Equally, a court may decide to grant relief in respect of one aspect of the impugned decision, but not others.

30. There are a number of other factors which may influence the exercise of the court's discretion:
    a. The unlawful action of the public authority was established only on procedural, rather than substantive, grounds (see *Walton v Scottish Ministers* [2012] UKSC 44, paras 111-112).
    b. If the Claimant does not have a sufficient interest, then the Court may be more hesitant to grant a mandatory order or an injunction, as compared to a declaration (*R. v Felixstowe Justices Ex p. Leigh* [1987] Q.B. 582).
    c. The remedy would serve no practical purpose. For example, an activity under challenge may have already ceased before a remedy has been granted (*Williams v Home Office (No.2)* [1981] 1 All E.R. 1211 and [1982] 2 All E.R. 564).
    d. In addition, where rights under the European Convention on Human Rights are in issue, the Court must consider whether any remedy for a breach of a

[21] I.e. where: (a) the decision in question was made by a court or tribunal, (b) the decision is quashed on the ground that there has been an error of law, and (c) without the error, there would have been only one decision which the court or tribunal could have reached.
[22] See, for example, *Great North Eastern Railway Ltd v Office of Rail Regulation* [2006] EWHC 1942 (Admin).

right is effective.[23]

31. There have been a number of key statutory interventions which delimit the court's discretion:

    a. Substantial difference test: The High Court and Upper Tribunal must refuse to grant relief on an application for judicial review, and may not make any award of damages, if "*it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*". However, the Court can still exercise its discretion to award a remedy even if the "no difference" test is satisfied, if it considers that it is appropriate to do so for reasons of exceptional public interest. (SCA, s 31(2A)-(2C); (3C)-(3F), as introduced by the Criminal Justice and Courts Act 2015, s 84[24]). Notably:

        i. It has been held that if the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must not cast itself in the role of the decision-maker, but must nonetheless necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law (*R (Goring on Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] I WLR 5161, para 55).

        ii. The Court of Appeal recently considered section 31(2A), and observed that: *'[t]he provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process*

[23] *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 A.C. 291 at para 61 (Lord Nicholls of Birkenhead). In *R. (on the application of K) v Camden and Islington Health Authority* [2001] EWCA Civ 240; [2002] Q.B. 198 at para 54, Sedley LJ described art.13 as reflecting "*the longstanding principle of our law that where there is a right there should be a remedy*".

[24] The introduction of this provision was highly controversial.

remains flexible and realistic' (*Gathercole v Suffolk CC* [2020] EWCA Civ 1179, para 38, per Coulson LJ).

b. Delay: Under section 31(6) of the Senior Courts Act 1981, the court may withhold a remedy if there has been undue delay, and in addition, it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantial prejudice to the rights of, any person or would be detrimental to good administration. This is considered in further detail below.

Consequences of implementing clause 37(8)

32. Clause 37(8) would have the unprecedented effect of precluding the High Court from granting any remedy (such as an order quashing a decision or an order requiring or preventing certain action) pursuant to a finding of unlawfulness, unless the court is satisfied that granting the remedy would not: (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or (b) be detrimental to good administration. This is especially concerning because, as explained above, the environmental review process only applies to *serious* breaches of environmental law.

33. In short, the effect of clause 37(8):
    a. makes the issues of hardship or prejudice to the rights of a third party relevant in every case, not just where there had been undue delay.
    b. imposes a new fetter on the exercise of discretion;
    c. reverses the normal approach, in that the court must satisfy itself that there will not be hardship, prejudice or detriment, and;
    d. removes from the equation the issue of how serious the breach of environmental law is, and how serious its consequences.

34. There are therefore a number of serious conceptual problems with the clause.

35. First, the court's discretion would be fettered in mandatory terms, so as to prevent any remedy being granted, regardless of the seriousness of an established breach of environmental law, where a remedy would cause substantial hardship, or prejudice the rights of, any third party. The Explanatory Notes state (at para 318) that

expenditure already spent in reliance of the decision in question may be relevant to the question of substantial prejudice or hardship, along with potentially the recoverability of the sums and the financial means of the third party.

36. In the context of environmental breaches, there is significant scope for substantial hardship or prejudice to be caused to, in particular, parties with the benefit of planning or environmental permits, or indeed, polluters generally. The nature of such hardship would involve, typically, unrecoverable sums spent on a particular infrastructure or other development project, for example.

37. Indeed, it is obvious that any quashing of a decision such as a planning permission or environmental permit is likely to cause harm to the person who will lose the benefit of the permission or permit. Yet there are innumerable cases where such permissions and permits are quashed (and some examples are considered below). This is particularly concerning where, as set out above, quashing is usually the primary remedy in judicial review.

38. By contrast, it may well be the case that *not* quashing a decision could result in serious hardship to other parties, such as persons seriously adversely affected by an unlawful consent to a particular development, but clause 37(8) effectively excludes consideration of such hardship or prejudice from the exercise of the discretion.

39. Secondly, and relatedly, clause 37(8) imposes a potentially perverse inverse relationship between the seriousness of the damage to the environment caused by the unlawfulness, and the likelihood of the grant of a remedy. Large scale, or nationally significant, infrastructure projects (such as the construction of HS2, or Hinkley Point C nuclear power station for example) will involve, among other things, huge expenditure. The larger the project (in terms of physical scale), the greater expenditure.

40. Equally, the larger a project's physical scale, there is uncontroversially, a generally and broadly speaking, proportionally higher likelihood of environmental impacts. As such, clause 37(8) inadvertently may be likely to shield unlawful decisions concerning higher cost, and larger scale, infrastructure projects, as quashing such decisions inevitably are more likely to result in higher expenditure possibly being wasted,

despite the greater potential for environmental harm.

41. Thirdly, landowners and developers, for example, are now able to prevent being deprived of what she or he should never have had, the benefit of an unlawful decision. This is so even if the decision was egregiously taken in flagrant breach of environmental law. The nature of the unlawfulness committed by the decision-maker becomes wholly divorced from the remedy.

42. Fourthly, the notion of avoiding detriment to good administration is vexed by a lack of certainty, and predictability of outcome. The courts have tended to avoid formulating any precise description of what constitutes detriment to good administration, but courts are unwilling to excuse a breach of administrative law merely because the decision-maker would be caused inconvenience: "*even if chaos should result, still the law must be obeyed*": *Bradbury v Enfield LBC [1967] 1 W.L.R. 1311* at 1324 (Lord Denning MR).

43. Therefore, clause 37(8) would mean that a non-compliant action or omission could continue or a non-compliant decision could still have effect, undermining the rule of environmental law and potentially perpetuating irreversible environmental damage. Despite the OEP's stated objective, it is fundamentally inhibited from being able to hold public authorities to account for breaches of environmental law, regardless of how egregious and harmful those breaches may be.

44. Indicative examples can be readily contemplated:
    a. if a permit for a new mine was issued, with a failure to consider the impacts on air quality, such that operation would cause serious pollution and adverse health impacts to the public for many years. The permit could not be quashed unless the court was satisfied that quashing would not cause serious hardship to the operator of the mine or substantial prejudice to their rights to operate the mine. Patently it could have those effects and therefore the court would not be able to quash. The operator would be free to operate the mine notwithstanding the impacts.
    b. if a consent to build a road was granted which would destroy an internationally significant habitat, even if there was an egregious error of law

underlying the decision to grant development consent, again it probably could not be quashed as it would likely cause prejudice or substantial hardship to the developer. As a result of applying clause 37(8), the habitat would be destroyed.

Conclusion: efficacy of the environmental review process

45. The environmental review process, overall, is therefore rendered largely ineffective. This is particularly disturbing given that the inclusion of clause 37(8) is not strictly necessary to achieve its objective. It therefore is redundant, even on the basis of its stated justification. As such, the entire environmental review process need not be so severely undermined. This because the factors identified in clause 37(8) would naturally influence the court's exercise of its discretion, in any event, but would not *mandate* a particular outcome. In other words, the risk of substantial hardship and prejudice, for example, would be factors that the court would take into account in the exercise of its inherent discretion, in determining what is fair and just to do in the particular case in any event.

46. Indeed, clause 37(9) requires the court, in deciding whether to grant a remedy, (subject to subsection (8)) to apply the principles applicable on an application for judicial review. The interests of third parties, and the protection of good administration, would be achieved by: (i) the removal of clause 37(8), and (ii) the deletion of the reference to subsection (8) in clause 37(9). Clause 37(9) should be capable of providing the protection required to third parties.

47. Moreover, the finality of, and confidence in relying on, decisions relating to environmental matters would necessarily be affected by the implementation of a review process which sought to prevent or remedy environmental harms. The consequences of the environmental review process on decision-making will be taken into account by parties relying on such decisions, and reliance would necessarily need to be qualified.

48. The prospect of the review process resulting in the decision being quashed would incentivise decision-makers: (a) to ensure that the decision is lawfully taken in the first place, but also (b) to seek to resolve disputes ultimately without court intervention. For example, a public authority may decide simply to re-consider and re-take a

decision which it considers may be deemed to have acted in non-compliance with environmental law as opposed to fighting the case and relying on clause 37(8) if it loses. It is also easy to see how clause 37(8) may encourage a third party claiming hardship to participate and fight the case, even if the relevant authority acknowledged the unlawfulness of the decision.

49. Finally, it is notable that the Impact Assessment concludes that, among other things, one of the benefits of the environmental governance measures in the Bill is projected to be a '*reduction in third-party Judicial Review resulting in cost savings on legal proceedings by public authorities*.'[25]

50. However, if the environmental review process is largely ineffective then it is highly unlikely to make any meaningful impact on the numbers of judicial review claims being brought in respect of environmental matters. Potential complainants may simply opt to continue to rely upon the judicial review procedure, rather than pursuing the OEP route, potentially leaving the environmental review process underused. Even on its own terms, therefore, the Bill would not achieve one of the 'benefits' it purports to.

D. COMPARATIVE ANALYSIS

The Senior Courts Act 1981, section 31(6)

51. The closest analogous existing statutory provision to clause 37(8) of the Bill is section 31(6) of the SCA, which (as set out above) provides that remedy may be refused where there has been undue delay in making an application for judicial review, and the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

52. Permission to bring an application for judicial review will not usually be granted if there has been a delay in the first place. Under CPR 54.5, the judicial review claim form must be filed promptly, and in any event, not later than 3 months after the grounds to

[25] Impact Assessment (3 December 2019), p 16 (available online here: https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Environment%20Bill%20Impact%20Assessment.pdf).

make the claim first arose (or six weeks in the context of a decision made under the planning acts). This time limit cannot be extended by agreement between the parties. Insofar as relevant, the test is promptness and a claim will not necessarily be made promptly simply because it has been made within the three month, or six week, period.[26] As such, if brought late, a claim will be refused permission, thereby falling at the first hurdle. Delayed claims rarely get to the stage of relief. As such, section 31(6) is employed sparingly.

Historical development

53. Section 31(6) of the SCA has its roots in the recommendation of the Law Commission, the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review, and to recommend reforms. In 1976, the Law Commission published a report entitled '*Remedies in Administrative Law*'.[27] As part of its review, the Law Commission reviewed the time limits in respect of judicial review applications which were, at that time, six months if a quashing order was sought (then a writ of certiorari).

54. Given that what was at stake in judicial review claims was the vindication of an individual person's right, but also the assertion of the rule of law in the public sphere, the Law Commission did not consider that delay should of itself be the deciding consideration as to the circumstances in which the discretion to afford relief should be refused.

55. The Law Commission adopted a formula prescribed in legislation in Ontario, Canada,[28] in which in an application for judicial review the Court may extend time for bringing a claim where it is satisfied there are prima facie grounds for relief, and that no substantial prejudice or hardship will result to any person affected by reason of the delay. The Law Commission considered this could be strengthened further by recommending that relief may also be refused where to grant it would be detrimental to good administration. It therefore put forward a draft clause, which became section

[26] See, for example: *R. (Sustainable Development Capital LLP) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin). See also, in the context of the application of EU Directives: *Uniplex (UK) (Law relating to undertakings)* [2010] EUECJ C-406/08 (28 January 2010).
[27] Law Com. No. 73.
[28] Judicial Review Procedure Act 1971 (Ontario).

31(6) of the SCA.[29]

56. It is important to note that the overarching aim, however, was to prevent delay (in and of itself) from being the sole cause of the refusal of relief where it ought otherwise to be granted.

57. Indeed, the Law Commission referred to *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 W.L.R. 226 as being an example of a case where the Claimant did not bring a claim within the relevant time period, and was refused relief, but that may, pursuant to its recommendation, have been decided differently, if the claimant could satisfy the court that the quashing of the decision would not cause substantial prejudice or hardship to any person or be detrimental to good administration. The recommendation to implement what became section 31(6) of the SCA was therefore made to improve the availability of relief, and not to restrict it.[30]

58. In 1992-1994, the Law Commission revisited the issue in a further report titled '*Administrative Law, Judicial Review and Statutory Appeals*'.[31] One of the issues which the Law Commission considered was the length of the time limit, and its consistency as between different remedies. The Law Commission advised that:
    a. the time limit for a judicial review claim should be three months, and that if the application was not prompt, then it should be refused if the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration, and;
    b. an application may be made after the end of the period of three months if the court is satisfied that there is a good reason for the application not to have been made within that period, and that if the relief sought was granted, on an application made at this stage, it would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration. This is not the position under the current law, but is also reflective of the underlying rationale of avoiding delay being a

[29] Law Com. No. 73, pp 42-43.
[30] Law Com. No. 73, para 50. Notably, the Administration of Justice Bill 1985 contained a clause 43 which would have repealed section 31(6) of the SCA, but that clause was abandoned.
[31] Law Com. No 226.

sole reason for the refusal of an application for judicial review, or the relief sought.

Application of section 31(6) by the courts

59. The principles governing the application of section 31(6) were recently summarised by the Court of Appeal in *R. (on the application of Thornton Hall Hotel Ltd) v Thornton Holdings Ltd* [2019] EWCA Civ 737 (at para 21(6)-(8)):

    a. First: *'Once the court has decided that an extension of time for issuing a claim is justified and has granted it, the question cannot be re-opened when the claim itself is heard. Section 31(6)(a) of the 1981 Act does not apply at that stage, because permission to apply for judicial review has already been granted (see Lord Slynn in R. v Criminal Injuries Compensation Board., ex p. A [1999] 2 A.C. 330, at p.341A-G); and Sedley L.J. in R. (on the application of Lichfield Securities Ltd.) v Lichfield District Council [2001] EWCA Civ 304 , at paragraph 34; and CPR r.54.13).'*

    b. Secondly: *'The court's discretion under section 31(6)(b) requires an assessment of all relevant considerations, including the extent of hardship or prejudice likely to be suffered by the landowner or developer if relief is granted, compared with the hardship or prejudice to the claimant if relief is refused, and the extent of detriment to good administration if relief is granted, compared with the detriment to good administration resulting from letting a public wrong go unremedied if relief is refused (see, generally, Lord Goff of Chieveley in R. v Dairy Produce Quota Tribunal, ex p. Caswell [1990] 2 A.C. 738 ; and Sales L.J. in Gerber , at paragraphs 59 and 60, and 64 to 69). The concept of detriment to good administration is not tightly defined, but will generally embrace the length of the delay in bringing the challenge, the effect of the impugned decision before the claim was issued, and the likely consequences of its being re-opened (see Sales L.J. in Gerber , at paragraph 62). Each case will turn on its own particular facts and an evaluation of all the relevant circumstances (see Schiemann L.J. in Corbett , at paragraphs 24 and 25; and Hobhouse L.J. in ex p. Oxby , at pp.298, 299, 302 and 303).'*

    c. Thirdly: *'It being a matter of judicial discretion, this court will not interfere with the first instance judge's decision unless it is flawed by a misdirection in law or by a failure to have regard to relevant considerations or the taking into account of considerations that are irrelevant, or the judge's conclusion is clearly wrong and beyond the scope of legitimate judgment (see Sales L.J. in Gerber, at paragraphs 61 and 62). It may often be difficult to separate the exercise of discretion on remedy under section 31(6) from the considerations bearing on the discretion to extend time under, for example, CPR*

r.3.1(2)(a) (see Sales L.J. in Gerber, at paragraph 62). Care must be taken to distinguish in the authorities between cases where the court has exercised its discretion under section 31(6) and those where it has exercised its general discretion on remedy in a claim for judicial review (see, for example, Carnwath L.J. in Tata Steel UK Ltd. v Newport City Council [2010] EWCA Civ 1626, at paragraphs 7, 8, 15 and 16; and Sales L.J. in Gerber , at paragraph 64).'

60. Section 31(6) had previously been considered in two key decisions of the House of Lords.

61. First, in *R. v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell* [1990] 2 A.C. 738, the claimants were refused relief under section 31(6) of the SCA. Having failed to qualify for a wholesale quota in respect of milk production, they claimed relief under the exceptional hardship provisions set out in the Dairy Produce Quotas Regulations 1984. In February 1985, the Dairy Produce Quota Tribunal, on their construction of the Regulations, dismissed the claim. Initially unaware of a remedy, the claimants took no step to challenge the tribunal's decision until 1987 when they applied for and obtained permission for judicial review.

62. The claimants were refused relief because, given the lapse of time, it would be detrimental to do so given that the decision involved the allocated part of a finite amount of quota, and with circumstances in which a re-opening of the decision would lead to other applications to re-open similar decisions which, if successful, would lead to re-opening the allocation of quota over a number of years.

63. The House of Lords explained the following in respect to the concept of detriment to good administration (at p 748):

> *I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. This is because applications for judicial review may occur in many different situations, and the need for finality may be greater in one context than in another. But it is of importance to observe that section 31(6) recognises that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter*

which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these. In the present context, that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened.

64. Secondly, in *R. v Criminal Injuries Compensation Board Ex p. A* [1999] 2 A.C. 330, the House of Lords summarised the overall position:

> *There is undue delay for the purposes of section 31(6) if the application for leave is not made promptly or within three months of the relevant date. But even if it considers that there is good reason for extending the period, the court may refuse leave or may refuse the relief sought if in its opinion to grant relief would be likely to cause hardship or prejudice or would be detrimental to good administration.*

65. Section 31(6) has been described as *'distracting and unhelpful'* by Sedley LJ in *R. (on the application of Parkyn) v Restormel BC* [2001] EWCA Civ 330; [2001] 1 P.L.R. 108. Sedley LJ lamented that it (at para 32):

> *…selects one element – time – of the many which may affect the grant of relief and builds upon it some of the many other possible factors which can – as the present case shows – be relevant. It also includes, delphically, detriment to good administration. How, one wonders, is good administration ever assisted by upholding an unlawful decision? If there are reasons for not interfering with an unlawful decision, as there are here, they operate not in the interests of good administration but in defiance of it.*

66. In *R (on the application of Burkett) v Hammersmith & Fulham London Borough Council* [2001] 3 PLR 1 Sedley LJ also observed, (at p 13):

> *Administration beyond law is bad administration. The courts exist to protect the former as jealously as to stop the latter, but they cannot know which they are dealing with unless they hear out, and decide, viable challenges through the legality of administrative acts.*

67. It is important to note that the discretion in section 31(6) of the SCA does not apply to claims seeking to enforce directly effective rights derived from EU law meaning courts cannot rely on this provision in refusing to grant relief in such cases (*R (Berky) v Newport City Council* [2012] BLGR 592 at [50]–[52] (per Moore-Bick LJ, at paras 50-52)).

Comparison of section 31(6) and clause 37(8)

68. Clause 37(8) is, despite superficial similarities in wording, fundamentally different to section 31(6) of the SCA.

69. First, clause 37(8) seeks to impose a mandatory fetter on the exercise of judicial discretion, which would oblige a court (without exception) to refuse relief in circumstances where, as a matter of fact, the conditions of substantial hardship or prejudice, or detriment to good administration are satisfied (which, as considered above, may well be likely to be often).

70. By contrast, section 31(6) merely guides the court's discretion, and focuses its attention to a consideration of the factors identified by the provision, rather than requiring the court to make a particular decision in particular circumstances. Clause 37(8) is dogmatic. Even if the face of exceptional circumstances, or overwhelming public interest, the courts' hands would be bound to refuse a remedy if either of the two conditions are met.[32]

71. This undermines the effectiveness of the environmental review process generally, but the mandatory fetter on judicial discretion it imposes coerces courts into focusing on the substantial hardship or prejudice, or detriment to good administration, rather than the public authority's unlawful act, or the consequences for the environment. This also, of course, obliges the courts to ignore the wider implications of the environmental harms to the public generally.

72. The mandatory nature of the fettering of discretion also equips the authority with a readily available basis on which to appeal the granting of relief. It is well established

[32] See paras 72-77 below.

that judges are afforded latitude to make decisions within the scope of their discretion, and such fact-sensitive decisions should not be overturned on appeal,[33] but a failure to comply with a mandatory obligation will, in general, be easily argued on an appeal. This thereby introduces unnecessary additional uncertainty, and the real risk of gratuitous delay.

73. Secondly, the application of section 31(6) is conditional on there having been undue delay on the part of the claimant. In other words, the claimant has not brought the claim promptly, or outside of the three month (or six week) time limit. It is therefore focussed on the consequences of the time taken by the claimant to bring a claim. As explained above, its underlying policy rationale was to avoid the delay being the sole reason for the refusal of relief, in and of itself. The two conditions (substantial hardship or prejudice, and detriment to good administration) were not deemed a cogent basis for the denial of relief, by themselves.

74. The restriction in clause 37(8) of the Environment Bill is not so limited. The High Court must clear the clause 37(8) hurdle before it can grant a remedy in every single matter in which it has determined that a public authority has not complied with environmental law. Whilst the timetable for environmental review is slower than that for judicial review, the prescribed process for review in the Bill cannot be fairly characterised as being analogous to 'undue delay'.

75. In the planning context, for example, a decision of a local authority to grant or refuse planning permission may be subject to review pursuant to a statutory appeals process, that commonly involves a lengthy inquiry conducted by the planning inspectorate.[34] It is therefore not remotely unusual for decisions relating to the use of land, and the impact of such decisions on the environment, to be subject to time consuming scrutiny, which could lead to the initial decision being overturned (and indeed, that decision itself also being challenged and overturned). Third parties, such as developers, ought to be well equipped to adapt to the implementation of a (broadly) analogous process to an inquiry (for example), which may inevitably take a longer period of time to determine than a judicial review.

[33] See, for example: *Broughal v Walsh Brothers Builders Ltd* [2018] EWCA Civ 1610, para 11.
[34] Town and Country Planning Act 1990, ss 78 and 319A.

76. In our view, therefore, the necessary time prescribed for the process of an environmental review cannot justify the imposition of clause 37(8).

Examples of successful challenges involving: (a) a significant lapse of time, and (b) substantial hardship or prejudice to a third party

(a) Successful delayed claims

77. As noted above, the courts apply the judicial review time limits, prescribed under CPR 54.5, stringently. As such, there are very few instances of claims succeeding where a claimant has significantly delayed in issuing their claim.

78. *R. (on the application of Thornton Hall Hotel Ltd) v Thornton Holdings Ltd* [2019] EWCA Civ 737 is one such example (referred to above). The appellant appealed against the quashing of planning permission granted by the local authority for the erection of three marquees on its land. The land was in the green belt and was the site of a listed building and historic gardens.

79. The planning permission had been granted more than five years before the issue of the claim. However, the planning permission had erroneously omitted conditions specified by the planning committee, including a five-year time limit on the permission, and the claimant had issued the claim with reasonable speed on becoming aware of the mistake.

80. The Court of Appeal held (at paras 48-50):

> *48. Normally, in a case where such a long delay has occurred in a complaint of unlawfulness in a planning decision being brought before the court in a claim for judicial review, the court would not grant relief. Nothing we say in this judgment should be taken as suggesting the contrary. Equally however, we are in no doubt that, in the extremely unusual circumstances of this case, the judge was right not to withhold a remedy despite the very considerable delay in proceedings being begun.*
>
> *49. There are three considerations in this case that tell strongly in favour of that conclusion. First, the council's mistake in issuing a decision notice that did not reflect its own lawful decision was and remains – as it concedes – an indisputable error. The*

decision notice mispresents the council's decision. If the planning permission were not quashed, this manifest unlawfulness would persist. Secondly, this is not the normal case where a landowner or developer is entitled to rely upon a permanent planning permission not promptly challenged before the court. In this case the very delay in issuing the proceedings, far from prejudicing the commercial interests of Thornton Holdings, had the effect of enabling them to enjoy to the full, and beyond, the fruits of the temporary planning permission the council had in fact decided to grant. Thirdly, given that the council's committee resolved to grant no more than a five-year temporary permission, if the decision had been properly translated into the decision notice, the marquees would not have had the benefit of planning permission after 20 December 2016 and a further grant of planning permission would have been required for their retention. The effect of the quashing order, therefore, would not be to deprive Thornton Holdings of the value of the planning permission the council actually decided to grant. It would merely be to restore the position as it was when the decision itself was lawfully made.

50. We have considered whether, in view of the very lengthy delay, there are grounds for interfering with the judge's decision not to exercise his discretion to refuse relief in the form of a quashing order. We think not. We have in mind the observation of Carnwath L.J. in Tata Steel (at paragraph 16) that he "would need some persuasion that there is very much difference in practical terms between a declaration that a grant of planning permission is unlawful and the quashing of the permission". In this case our view is the same…[the] situation is, in our view, inimical to the public interest in a fair, efficient and transparent planning system, in which all participants in the process, including objectors, and also the public, are able to rely on the local planning authority to issue a true notice of the decision it makes. Despite the lengthy delay, the judge's decision not to withhold relief was, we think, amply justified. The effect of that decision was both to undo an injustice and to sustain the public interest.

81. The Court of Appeal emphasised the highly exceptional nature of the case, as relief was granted some five years after the unlawful decision occurred (described as *'wholly extraordinary'*, see para 51). However, this highly exceptional case would have been decided differently under clause 37(8) because, unlike section 31(6), the court would have no discretion to grant relief, even based on the exceptionality of the circumstances, or the demands of public interest.

82. Accordingly, the absolutist and mandatory nature of clause 37(8), with its absence of any room for residual discretion in any circumstances is highly unusual.

83. By way of two further, and less exceptional examples, in *R. v Bassetlaw DC Ex p. Oxby* [1997] 12 WLUK 213; [1998] P.L.C.R. 283, the Court of Appeal considered, in the context of a delayed challenge, whether the beneficiaries of unlawful planning consents would be prejudiced by their quashing. In particular:
    a. The Court of Appeal recognised that '*at present they have valuable development rights; if the consents are quashed they lose those rights subject to the possibility of applying afresh for new planning consents.*'
    b. However, it held that '*it is not just that the [beneficiaries of the consent] should enjoy this benefit if they should not have received it in the first place. They have no legitimate grievance on being deprived of what they should never have had.*'

84. As such, the mere loss of an unlawfully granted planning permission was given little weight, because a landowner had no legitimate grievance on being deprived of what she or he should never have had.[35]

85. Secondly, in *R. (on the application of Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin), Ouseley J quashed a planning permission for the relocation of an existing camp site, despite the Claimant's undue delay in bringing the challenge. As to the approach to be taken to section 31(6), he observed (at paras 132-133, and 144):

> *132. So, the question is whether the claimants, and the public interest more generally, should suffer the consequences of the unlawful decision with the undoubted impact which its lawful exploitation has and would continue to have, or whether the Thomases should suffer the detriment and prejudice which its quashing would bring. Relevant factors include the length of delay, who was responsible for its length and in particular whether the NPA or the Thomases were responsible, the degree to which it is the quashing or the delay which causes the prejudice, and whether the court granting the extension was misled in any way by the claimants.*
>
> *133. I accept Mr Porten's general point that a number of cases have stressed the need for challenges to planning permissions to be brought promptly, within the three-month*

[35] See *Thomas v Albutt* [2015] EWHC 2187 (Ch), para 390.

period. Three and a half years delay is a very long delay, in view of the claimants' almost immediate knowledge of the grant of the permission they challenge and of the contentious nature of the process as it neared completion. Even were a very substantial allowance in time made for the claimants to find out what was happening on the ground as the permission was exploited in May 2006, there has been undue delay of the order of two-and-a-half years. But much of the sting of Mr Porten's point in principle seems to me to have been removed by the extension of time and grant of permission to bring this application for judicial review. It now has to be measured very much against the established invalidity of permission and the prejudice and detriment to the Thomases which quashing the permission would cause.

…

144. It is the delay which causes much of the prejudice asserted from a quashing, rather than the simple fact of quashing because of the expenditure which the Thomases incurred after the grant. In my view, the claimants' delay is a weighty factor in the balance against them.

86. The landowner complained that he had suffered financial prejudice as a result of expenditure incurred in implementing the permission. However, Ouseley J ultimately concluded that, despite the undue delay and potential prejudice, the permission should be quashed (at para 161):

> *What is decisive to my mind therefore is that the permission is invalid and should in principle be quashed in the absence of strong contrary reasons. These do not exist. Mr Thomas can start again seeking planning permission without wasting his past expenditure; but the public interest could not be protected, unless the use were discontinued. There is no adequate justification for making the public pay compensation if there is a strong case for quashing an unlawful decision. There are so many serious and basic errors in the procedure whereby the application was considered and consulted upon, that it would be seriously detrimental to public confidence in the proper operation of the planning system to let it stand.*

87. Accordingly, notwithstanding that the landowner had the benefit of a planning permission for some three and a half years, the court nonetheless quashed the unlawful decision to grant it.

(b) Successful claims which caused substantial hardship or prejudice

88. Invariably, successful challenges to grants of development consent, or environmental permits (for example) will sometimes cause substantial hardship or prejudice to the rights of third parties. The common result of such challenges is the quashing of a planning permission.[36] Even if a decision is later retaken in favour of re-granting development consent, there will often be hardship and prejudice to the beneficiary of such consent. The general public interest in lawful administration is (rightly) deemed to outweigh such individual detriment (see, *Usk Valley Conservation Group* referred to above).

89. However, it should be noted that courts do decline to grant relief due to impacts on third parties of quashing a planning consent where appropriate, even where a claim is not delayed (see for example: *R (on the application of Guiney) v London Borough of Greenwich* [2008] EWHC 2012; *R (on the application of Gavin) v Haringey LBC* [2003] EWHC 2591), or other breaches of environmental law (see *R. (on the application of Waste Recycling Group Ltd) v Cumbria CC* [2011] EWHC 288 (Admin), in which a late, but arguable, claim was dismissed, as the arguable breach of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 in issue had not led to any harm to the public interest). The ability of the court to respond to such considerations is inherent in the flexible nature of its broad discretion.

90. In *R. (on the application of Corus UK Ltd (t/a Orb Eletrical Steels)) v Newport City Council* [2010] EWCA Civ 1626, the Court of Appeal held that a judge had incorrectly treated a dispute over the lawfulness of planning permission as if it were a private law matter that could be resolved by balancing the prejudice of one party against that of another. The claim had been brought late.

91. The first instance judge had been impressed by the prejudice to third parties which, it was said, would result from the quashing of the permission ([2010] EWCA Civ 1626, at paras 9-11).

[36] By way of indicative examples only, see: *Gare, R (On the Application Of) v Babergh District Council* [2019] EWHC 2041; *Watt, R (on the application of) v London Borough of Hackney & Anor* [2016] EWHC 1978 (Admin).

92. However, the Court of Appeal held that the judge's approach had been wrong in principle, observing that (at paras 140-14):

> *Whenever a planning permission is quashed, inevitably, if people have acted upon it, it affects their interest and uncertainty is created, but I am not aware that this has ever been regarded in itself as a reason for refusing to quash…*
>
> *[the judge's approach] ignores the very important consideration, which is that a planning permission is a public act and if it is found to be unlawful the normal result is it should be quashed and the matter should be regularised. That is not simply a matter of concern to [the parties]. It is a matter of public concern. That is why there are plenty of authorities which say that a normal rule is that unlawful permission should be quashed.* (emphasis added)

93. In *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603, the appellant appealed against a refusal to quash a planning permission relating to the redevelopment of a football stadium for a premier league football club. She argued that the permission had been granted without consideration of the need for an environmental impact assessment. Plainly, the steps taken to obtain planning consent for a football stadium would involve significant expenditure, and the quashing of such a consent would inflict hardship and prejudice to the developer (in this case, the football club itself). Nonetheless, the failure to undertake an environmental impact assessment meant that the permission should be quashed.

94. It is therefore very common for successful claims to cause substantial hardship or prejudice, but with the court's broad discretion, such concerns are taken into account and may, in appropriate circumstances, result in the refusal to grant a quashing order when balanced with all other factors. The courts approach is therefore already well calibrated to address the anxieties at which clause 37(8) is directed at assuaging.

Other existing provisions limiting the grant of a remedy

95. As noted above, the 'substantial difference' test, set out in section 31(2A), is a further example of a statutory provision which limits the grant of relief.

96. It poses a high threshold (see *R. (on the application of B) v Office of the Independent Adjudicator* [2018] EWHC 1971 (Admin), [2019] P.T.S.R. 769, [2018] 7 WLUK 696, paras

69-70; *AW v St George's, University of London)* [2020] EWHC 1647 (Admin), para 105; *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] P.T.S.R. 1446, [2020] 2 WLUK 372; *R. (on the application of Driver) v Rhondda Cynon Taf CBC* [2020] EWHC 2071 (Admin)[37], paras 158-168).

97. Section 31(2B), however, expressly provides a public interest exception:

> *The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.*

98. Section 31(2A) can be clearly distinguished from clause 37(8) on several counts.
    a. First, there is a rational purpose underlying section 31(2A). In the absence of the unlawfulness, there would not be a different outcome, and so the court does not change the outcome in response to the presence of the unlawfulness. Unlawful decisions will not be overturned simply because they are unlawful. There must be some effect to the decision arising from it (subject to the exceptional public interest exception provided in section 31(2B)). There is a clear relationship between section 31(2A), and its aim. By contrast, clause 37(8) cannot be so rationally justified. It instead would prevent a different outcome being achieved (through the application of relief) even in circumstances where, if it was not for the unlawful breach, there would have certainly been a different outcome.
    b. Secondly, although mandatory, there is clear scope for disapplying the rule prescribed by section 31(2A). The courts retain a residual discretion, pursuant to section 31(2B).

99. Cases where relief has been refused based on these provisions are relatively limited. By way of a recent example, in *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179, Coulson LJ held that a failure to have due regard to the public sector equality duty, under section 149 of the Equality Act 2010, would have made *'absolutely no difference to the planning decision that was taken'* (at para 39). Rather, the planning decision would actually result in improvements, in equality terms, reducing disadvantages (para 43). It would therefore be a *'waste of time and public money'*; to

[37] Appeal outstanding.

quash the decision because, even when adjustment was made for the error, it is highly likely that the same decision would be reached (para 38).

100. The common thread of cases in which relief is refused is that the defects in the public decision-making did not have a real-world impact, but were essentially formal errors that were clearly and squarely within the scope of the 'substantial difference' test.

101. For the sake of completeness, we have not been able to identify any other existing provisions which have a similar or comparable effect to clause 37(8). There are, by contrast, statutory procedures which require the applicant, challenging the decision, to show they have suffered substantial prejudice as a standing threshold (such as section 288 of the Town and Country Planning Act 1990).

E. CONCLUSION

102. In summary, clause 37(8) in our opinion unnecessarily imposes a dogmatic mandatory fetter on judicial discretion which has no parallel in existing law. This undermines the efficacy of the environmental review process, and undermines the OEP's ability to achieve its stated objectives.

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