IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
[2022] EWHC 3425 (Admin)

Nos. CO/2622/2022
CO/2412/2022

Royal Courts of Justice

Friday, 2 December 2022

Before:

MR JUSTICE EYRE

B E T W E E N :

THE KING
on the application of
SHAHID IBRAR

Claimant

- and -

(1) DACORUM BOROUGH COUNCIL
(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendants

AND

B E T W E E N:

THE KING
on the application of
SUADAD SUMAIDIAE

- and -

Defendants

(1) LONDON BOROUGH OF EALING
(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

J U D G M E N T

A P P E A R A N C E S

Ben Fullbrook (instructed by **Russell Evans Rahaman)** for **Shahid Ibrar**

Clive Wolman (instructed by way of **direct access**) for **Suadad Sumaidiae**.

Horatio Waller (instructed by the **Government Legal Department**) for the **Secretary of State for Levelling Up, Housing and Communities**

Giles Atkinson (instructed by **Legal Services, Decorum Borough Council**) for **Dacorum Borough Council**.

The **London Borough of Ealing** did not attend the hearing.

MR JUSTICE EYRE:

1 Two separate cases "the Sumaidiae case" and "the Ibrar case") are being heard pursuant to the directions of Holgate J. In each case the Claimant has made an application for judicial review arising out of the relevant Inspector's dismissal of the Claimant's appeal against an enforcement notice issued by the relevant local planning authority. In each case the judicial review claim was issued after the expiry of the 28 day period for appealing under s.289 of the Town and Country Planning Act 1990 ("the Act.") and in each Holgate J made an order on 8th August of this year.

2 Holgate J ordered that the matters were heard together and in each case he adjourned the applications for permission to seek judicial review to this hearing, ordering in these terms at [4] I quote from the order in the Sumaidiae case with paragraph 4 of the order in the Ibrar case being in materially the same terms). Holgate J said this:

> "At the hearing the court will consider *inter alia* whether this claim should have been brought under s.289 having regard to ss.285 and 289 TCPA 1990 Act, and if so the application for leave will be determined under that provision. If the matter is to be dealt with under s.289, and on that basis the Claimant needs an extension of time, he must make any application to extend time with all grounds relied upon to justify that extension not less than 10 days before the hearing and pay the appropriate court fee for that application."

3 I have structured this judgment slightly differently from the format which might be thought to follow from paragraph 4 of Holgate J's order but it is to the same effect.

The Legislative Framework.

4 The legislative framework can be summarised shortly.

5 Section 174 of the Act provides for an appeal to be made against an enforcement notice on the grounds set out in that section.

6 Section 284 provides that the validity of sundry development plans, orders, decisions and directions shall not be questioned in any legal proceedings whatsoever except as provided by that part of the Act: the relevant passage being in subsection (1) and the relevant orders being referred to in subsection (2).

7 Section 285, under the heading "Validity of enforcement notices and similar notices", provides at subsection (1):

> "The validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."

8 I need refer to s.288 only in passing. That provides for a process for statutory review of sundry orders, decisions and directions. Such a review is triggered by an application for leave which in respect of applications relating to orders must be made within the period of six weeks beginning the day after the order takes effect or is confirmed.

9 Section 289 provides as follows in subsection (1):

> "Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court."

Subsection (6) provides:

> "No proceedings in the High Court shall be brought by virtue of this section except with the leave of that Court …".

The Relevant Time Limits.

10 The matters I have to determine have to be considered against the background of various time limits.

11 CPR 54.5(5) provides a six week limit for judicial review of decisions of the Secretary of State or of a local planning authority under the Planning Acts, the six weeks running from when the grounds first arose.

12 Practice Direction 54, para.4.2, provides that a judicial review claim must include or be accompanied by a statement of facts and a statement of grounds but those can be contained in the same document.

13 Practice Direction 54D, para.6.1, considers applications for permission under s.289, and provides that such an application must be made not more than 28 days after notice of the relevant decision is given to the applicant.

14 CPR 45.4(2) provides that an assertion that a claim is a claim within the scope of the Aarhus Convention is to be made in the judicial review claim form and that a relevant schedule of financial resources is to be served with the claim form in such a case.

15 It is relevant to note in each of the two cases before me: the history of the proceedings; the basis on which the judicial review claim is brought; and the applications currently being made.

The Sumaidiae Case

16 The history of the Sumaidiae case is as follows. On 30th September 2020 Ealing Borough Council served an enforcement notice on the Claimant in respect of 76 Horsenden Lane South, Perivale. The notice related to an alleged change of use of that property from a single dwelling to ten self-contained flats. On 17th November 2020 the Claimant commenced an appeal under s.174 saying in summary that the use had existed for more than four years and was therefore immune from enforcement. The decision letter in that appeal was dated 25th May 2022. The 28 day period for s.289 appeal accordingly expired on 22nd June 2022. The Claimant issued a judicial review claim form on 5th July 2022; that is some 41 days after the decision.

17 Holgate J's order was on 8th August of this year and on 18th November 2022 the Claimant made an application in the alternative to the judicial review claim for an extension of time for the s.289 appeal.

18 The judicial review claim was made both against the Secretary of State and against the local planning authority, Ealing Borough Council. The following judicial review grounds were advanced. First, procedural unfairness in that the Inspector is said to have failed to consider the first limb of the Claimant's appeal ground D, namely that the ten flats had been in situ for more than four years. Second, it was said that the Inspector's conclusion that there was no substantive evidence to support occupation of the flats for more than four years was irrational because it failed to give proper weight to the evidence of Mr Mayer Cohen. Third, it was said that the Inspector's conclusion that the property was being used as a hotel was not properly open to the Inspector on the evidence. The fourth and fifth grounds were supplemental: the fourth being a reservation of position as to the arguments to be advanced if the matter was remitted back to the Inspector, and the fifth being a challenge to the Inspector's costs order.

19 It will immediately be seen that the grounds all relate to the Inspector's decision and that is, indeed, the decision referred to in the judicial review claim form. That is the position even though the local planning authority was made a party as a Defendant.

20 The applications in that action now are for permission for judicial review; for an extension of time if the matter is treated as an appeal under s.289; and in that event for permission under s.289.

21 The explanation that is given for the route that has been taken and the time taken is, in part, that there was a deliberate decision to proceed by judicial review but also because it was believed that the relevant period was one of six weeks. However, that explanation is advanced in the context of the Claimant having received notice of the dismissal of a s.174 appeal some little time after the appeal was launched, albeit in the context of the difficulties caused by the Covid-19 pandemic,. More particularly it is said that the notice was received very shortly before the Claimant was leaving the United Kingdom for an extended business trip abroad and in circumstances where he had difficulties in making contact with the United Kingdom.

The Ibrar Case.

22 The history of the Ibrar case is as follows. The local planning authority, Dacorum Borough Council, confirmed the relevant Article 4 direction on 6th May 2020. That removed in part the general development rights attaching to the relevant land, which is land off Church Road, Little Gaddesden. In July 2021 part at least of the land was bought by the Claimant and he then commenced the installation of fencing and the construction of a shed or sheds. On 2nd August 2021 there was a site visit by a council officer and the issue of a temporary stop notice. On 3rd August 2021 the council emailed Mr Ibrar attaching a copy of the Article 4 direction. Two enforcement notices were served: the first on 12th August 2021 and the second on 25th August 2021. On 27th August 2021 an interim injunction was granted to the local planning authority restraining, in summary, the potential works of development and other related works. That injunction was continued on 3rd September 2021 and, indeed, it has been continued until 5th December of this year.

23 On 6th September 2021, Mr Ibrar launched his appeal under s.174 against the enforcement notices. The Inspector's decision dismissing the appeals came on 8th June 2022. It follows that the 28 day period for making a s.289 appeal expired on 6th July 2022. The judicial review claim form was issued on 20th July 2022, that being the last but one day of the six week period under CPR 54.5(5). It will be readily seen also that was eleven and a half months after the Claimant had knowledge of the Article 4 direction. The statement of facts

and grounds did not accompany the judicial review claim form but was served on 29th July of this year.

24 Holgate J's order in that claim was also made on 8th August of this year.

25 The Claimant applied on 17th November 2022 for permission to convert the claim to a s.289 appeal with a consequent extension of time if the matter was not to proceed by way of judicial review. He also applied for an order that the matter be regarded as falling within the Aarhus Convention with the appropriate costs cap applied and for an extension of time for making that application and providing a statement of resources.

26 Mr Ibrar advances two grounds of review of the Inspector's decision. The first is that the Inspector erred on the facts in the review of the Article 4 direction. It was accepted that the s.174 appeal did not raise in express terms a challenge to the Article 4 direction. It is instead said that such a challenge was implicit in the reference in the appeal where it is said that "the enforcement notice which was served on the land is not correct and not legally for the point of law and facts"(sic). The notice then proceeded to set out grounds relating to the particular breaches. It was said that those words should have alerted the Inspector to the need for the legality of the enforcement notice to be proved and that should, in turn, have caused the Inspector to investigate the lawfulness of the Article 4 direction. Next, it is said that there were errors of law on the part of the Inspector leading to an irrational decision. In very short terms, those errors are said to have taken the form of a failure to consider the relevant evidence and/or the taking account of irrelevant evidence.

27 Three grounds are advanced by way of the judicial review challenge to the Article 4 direction. It is said that it was made in a procedurally unfair manner. The pleadings next advanced an allegation of a breach of legitimate expectation but that is no longer pursued. Finally, it is said that the Article 4 direction was *ultra vires* in the sense of being made in excess of lawful authority.

28 It follows that the applications now made on Mr Ibrar's behalf are: an application for permission for judicial review; an application to extend time for the claim form to 29th July 2022 – that is necessary because the statement of facts and grounds did not accompany the claim form; an application to substitute an appellant's notice under s.289 for the claim form as an alternative route if the court concludes that the judicial review claim is not apt; and applications for appropriate extensions of time in respect of s.289 and, as I have already indicated, the Aarhus Convention matter.

29 By way of explanation for the delay and for the route taken (that is the failure to bring the claim within 28 days and bringing it as a judicial review claim) the Claimant is frank in contending that he did so because he believed, and believes, that judicial review is the appropriate course. As to the delay in filing the statement of facts and grounds, he says that because of lateness in receiving the full bundle of papers the statement of facts and grounds could not be prepared timeously. The Claimant does not, however, give any detailed explanation of why that bundle was prepared or obtained late. As to the lateness of the Aarhus application, the Claimant is again frank in saying that the position was that at the time of commencement of proceedings he did not believe that the claim fell within the scope of that Convention but that having reviewed the matter a different view has been taken.

The Common Issues.

30 It will immediately be seen that, although each claim is to be considered separately and on its separate merits, there are a number of common issues. That, of course, is why Holgate J

directed for them to be heard together. The common issues are in essence: the need to consider the effect of s.285 of the Act on the scope for judicial review; the circumstances (if any) in which judicial review can be sought in respect of a decision which could be the subject of an appeal under s.289; and if judicial review is not appropriate, whether the relevant claim should be permitted to continue as a s.289 appeal with such extension of time as is necessary.

31 I will set out my assessment of those common issues and then turn to apply my conclusions to the particular cases. I explain now that when I undertake that latter exercise I will bear in mind throughout that the test is one of reasonable arguability and that I must consider, certainly in terms of permission, whether it be permission for judicial review or under s.289, the requirements of reasonable arguability.

The Interrelation between s.289 Appeals and Judicial Review Claims.

32 I have already recited the relevant statutory provisions. It was rightly common ground before me that s.285 does not preclude an application for judicial review of an Inspector's decision made on a s.174 appeal. That position can be seen to follow from the judgment of Lord Phillips MR, in *Sivasubramaniam v Wandsworth County Court* [2002] EWCA Civ 1738, where at the beginning of [36] Lord Phillips said:

> "There is a long and strong line of judicial authority that has held ineffective statutory provisions purporting to oust judicial review where the challenge is to the jurisdiction and this has extended to judicial review of decisions of the County Court. …"

I need not read the balance of that paragraph. Similarly, in [44], having reviewed a number of authorities, his Lordship said this:

> "… The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory *implication*…."(original emphasis).

33 To the same effect Sullivan J in the case of *R (Cheltenham Builders Limited) v South Gloucestershire DC* [2003] 4 PLR 95, [2003] EWHC 2803 (Admin), summarised the position thus at [53]:

> "…Where Parliament wishes to oust judicial review because of the availability of a statutory appeal, it has to do so in the clearest possible terms. There can be no ouster by implication..."

34 It is arguable that judicial review of an Inspector's decision is not, in fact, considering the validity of an enforcement notice and so is not, on any view, caught by s.285 but is rather concerned with a public law error in the Inspector's conclusions and approach. However, that is an artificial approach and I certainly do not approach matters on that footing.

35 I have been referred to the decision in the Divisional Court in the case of *Zafar v Stoke-on-Trent City Council* [2020] EWHC 3249 (Admin). That does not, in my judgement, lead to any different conclusion. The position in that case was of an appeal by way of case stated in circumstances where a criminal prosecution had been brought for a failure to comply with an enforcement notice. The defence was that the underlying Article 4 direction was not properly made and so the enforcement notice was not valid. The Divisional Court held that that line of argument was not open to the Defendant. The effect of the judgment of Julian

Knowles J, in which Macur LJ concurred, is that the argument that an Article 4 direction is not valid and that, therefore, a consequent enforcement notice is not valid, was an argument which could be raised in a s.174 appeal. In those circumstances, it was not open to a Defendant to criminal proceedings where there had been no such appeal to raise that argument in defence of the criminal proceedings. At [55] Julian Knowles J said this:

> "Drawing the strands together, in my judgment these authorities make clear that it was not open to the Appellant to argue by way of defence to a criminal charge contrary to s 179 that he had not breached the Enforcement Notice because the Council could not prove the existence of an Article 4 Direction for the conservation area in question. That was, in substance, an argument that the work which the Appellant had carried out was not a breach of planning control. For the reasons I have explained, that was matter which could only be challenged by way of an appeal to the Secretary of State under Part VII of the 1990 Act, a step which the Appellant did not take."

The Divisional Court was not, however, saying that s.285 precludes judicial review of an Inspector's decision. It was simply not addressing that issue.

The Circumstances in which a Judicial Review Claim can be brought when an Appeal under s.289 is potentially available.

36 This issue requires consideration of the question of where permission for a grant of judicial review would be appropriate.

37 The starting point is that the court will not normally grant judicial review where an applicant has an adequate alternative remedy but can do so in exceptional circumstances. Those matters were referred to and addressed, again by Lord Phillips in the *Sivasubramaniam* case at [43] and at [46-48]. At [47] Lord Phillips referred to what he described as "an abundance of authority" and said:

> "What these authorities show is that judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review. Usually, however, the alternative procedure is more convenient and judicial review is refused."

38 The same test was expressed, in slightly different words, by the then Master of the Rolls, Sir John Dyson, in *Watch Tower Bible & Tract Society of Britain & Ors v The Charity Commission* [2016] EWCA Civ 154, where he said at [19], under the heading of "General principles concerning alternative remedies to judicial review":

> "These principles are not in dispute and can be summarised briefly. If other means of redress are "conveniently and effectively" available to a party, they ought ordinarily to be used before resort to judicial review [quoting Lord Bingham in *Kay v Lambeth*]. It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom

> decisions are made and actions taken to refer the matter to a specialist tribunal … To allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision risks undermining the will of Parliament..."

39 The rationale for that approach is that the courts must at all times be conscious of the importance of the right of providing a redress through the courts to the aggrieved subject. However, account must also be taken of the potential adverse consequences of using the judicial review procedure when there is an adequate alternative remedy. If judicial review is used in those circumstances the time and resources of the court will be taken up with matters for which there is an adequate alternative remedy and will be taken up with those matters at the expense of time and resources which could be used to provide redress to those for whom there is not an adequate alternative remedy.

40 In addition, the alternative route will often have been designed with particular reference to the particular category of case and particular context. There may be a specialist tribunal and there may be special time rules or other rules enabling the redress to be better focused than by way of the instrument, potentially the blunter instrument, of judicial review.

41 In my judgement the principle that judicial review will not normally be granted where there is an adequate alternative remedy is not confined to cases where the person seeking judicial review is seeking whether deliberately or otherwise to subvert the whole statutory appeal process. Mr Wolman of counsel, appearing for Mr Sumaidiae, sought to draw a distinction between the case of a person who simply comes straight to judicial review and does not take any of the steps laid down in a statutory appeal process and a person who has used that process to some extent but, rather than taking a second appeal or an equivalent step in the statutory process, then proceeds by way of judicial review. I accept that a person who has used a statutory process to some extent is not subverting the rules in the same way, or to the same extent, as a person who has not used that process at all. That does not, however, alter the principle that judicial review should not be used when there is an adequate alternative remedy nor does it mean that the principle is not applicable in such circumstances. That principle is not confined to the case of someone who is totally ignoring the relevant statutory procedure.

42 The existence of an alternative remedy and its adequacy are to be determined at the time of the decision under challenge. A person challenging a decision must take the appropriate course at that stage. If a statutory appeal is an appropriate alternative remedy at that time then that brings into play the principle that judicial review will not be granted when there is an adequate alternative remedy. The person seeking judicial review cannot say that the alternative statutory route has subsequently become unavailable or inappropriate if it was originally available and appropriate. That is particularly relevant if there is a time limit on the alternative route. A person who fails to take in time what would be an appropriate course cannot say that it is no longer an appropriate alternative remedy because of his or her failure to make an application within time.

43 There are cases in which the court will grant judicial review even if there is an alternative remedy and the *Cheltenham Builders* case, to which I have already referred, shows an instance where that might arise. That was a case where judicial review was sought rather than an application being made under s.14 of the Commons Registration Act 1965. However, as Sullivan J pointed out at [53] and [54], what had happened there was that the applicant for judicial review had taken what was, in fact, a more onerous course. That was because under s.14 there was no need to seek permission and no need to make the application promptly or within any timescale at all. That meant that by seeking judicial

review the applicant there had chosen to go through more hoops than would otherwise have been necessary. In those circumstances, the court did not decline judicial review on the footing that there was an adequate alternative remedy.

44 The question, therefore, becomes one of whether an appeal under s.289, will always be an adequate alternative remedy and whether there are circumstances in which the court may give judicial review even if an appeal under s.289 is available as a remedy.

45 The conclusion I have reached is that normally s.289 will be an adequate alternative to a judicial review challenge to a decision of an Inspector and normally it will not be appropriate to grant judicial review to a party who could have appealed under s.289. I am prepared to accept that there may be cases where an appeal under s.289 will not be an adequate remedy but those will be vanishingly rare. In addition, there may be cases where it is appropriate to grant judicial review even if a s.289 appeal is available as an alternative remedy but, again, those will be vanishingly rare. In any given case the court will need to consider whether s.289 is an adequate alternative remedy and whether to give permission for judicial review even if it is available as an alternative remedy. It will only be in the most exceptional of cases that the court will be able to say that s.289 is not an adequate alternative remedy or to conclude that judicial review is nonetheless appropriate.

46 The reasons for that conclusion are as follows. The first is the context of s.289. That section provides a route to the court. It provides a route of redress to what is patently an appropriate tribunal. Indeed, the very same judges as would be dealing with judicial review of a Planning Inspector's decision will be the judges of the Planning Court who will be dealing with a s.289 appeal. This does mean that this is not a circumstance where there is an alternative specialist tribunal but it also means that a party seeking judicial review in these circumstances cannot say that he or she will not receive an equivalent level of judicial input under the s.289 procedure.

47 Next, an appeal under s.289 is on a point of law, and I will consider the effect of that in a little while.

48 Then the context being that of an enforcement notice is also significant. Such a notice flows from a decision by a local planning authority. Section 174 provides for redress initially by way of an appeal to the Secretary of State. Section 289 then provides scope for a further appeal to the High Court. It follows that there is a structured route of redress provided to a person subject to an enforcement notice.

49 In addition although, as I have already indicated, s.285 does not preclude judicial review of an Inspector's decision the existence and terms of s285 are relevant as part of the context and as an indication of the tenor and interpretation which is to be adopted.

50 It is significant that there are special rules governing s.289 appeals. Those are rules which derive from the Rules of Court and which are there because of the context of the need for expeditious resolution of these matters. In particular, there is a need for expedition where there is an enforcement notice requiring compliance on pain of criminal sanctions. Thus, PD 54D, para.6.1, provides a time limit of 28 days. Similarly, the application for permission is to be determined at a hearing. There is no equivalent of the paper consideration followed by an opportunity to renew which would apply to judicial review. That is a reflection of the need for expedition and also of the importance of the matter. Paragraph 6.5 of the Practice Direction provides that the permission hearing is to be heard within 21 days of the filing of the appeal unless the court orders otherwise: again an indication of the expedition with

which matters are to be addressed. Paragraph 6.14 of the Practice Direction provides as follows:

> "Where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court."

There is, accordingly, a marked difference between the scope of the remedy available under section 289 and judicial review.

51 I come to those conclusions through consideration of the wording of the Act and of the Rules and the principles which flow from them. That is the conclusion which also flows from authority. Reference has been made to the decision of Nolan J in the case of *R v Secretary of State for the Environment, ex parte Davidson* (1990) 59 P&CR 480. That was a case where an enforcement notice had been issued and where the matter came before Nolan J at a judicial review hearing under the former Ord. 53 procedure. The Claimants sought to invoke that decision as an example of a case showing that judicial review could be granted even though the predecessor of s.289 was available. However, in my judgement, the case shows that the normal approach is for there to be appeal by way of s.289 and not judicial review. I cannot improve on the summary given by Holgate J in the reasons for his decision in Sumaidiae. Referring to the *Davidson* case, he said this:

> "Nolan J made it plain that the matter should <u>*not*</u> have been dealt with by judicial review the natural justice ground could and should have been dealt with under s.289. The only reason why the judge went on to deal with the grounds was that they had been fully argued."

That appears from the passage at 481 to 482, where Nolan J summarised the contentions that there ought to have been an appeal under the predecessor of s.289. He noted that the counter-contention was that because there was an allegation of a denial of natural justice that should proceed by way of judicial review. He said at the foot of 481:

> "I am bound to add that I can see no reason why a denial of natural justice could not perfectly properly be raised as an error of law in a s 246 appeal. Justice is one of the pertinent grounds of seeking judicial review so it is one of the most obvious examples of an error of law if the rules of natural justice are not observed."

Before making that assessment Nolan J had set out the arguments which had been advanced by reference to the special structure and the restrictions under what was then a 246 appeal. He concluded by saying:

> "There are, therefore, as it seems to me, genuine reasons why this application should not be allowed under Ord 53. If the Ord 53 jurisdiction were made available in this instance it would wholly defeat the very strict time limit laid down by s.246 and Ord 55."

Nolan J went on to say this:

> "I would, however, think it wrong to dispose of the matter on that basis. A denial of natural justice has been asserted. The matter has been fully

> argued and whatever the procedural position may be I propose to deal with the argument on the merits."

It is to be noted that Nolan J was dealing with matters at a time before the permission stage was introduced to the former Ord.53 procedure. That meant that the matter had come before him effectively for a hearing and had been prepared and fully argued for a hearing. In those circumstances it is entirely understandable that he chose to deal with the substance of the matter. That is very different from the current proceedings and from the current regime where there is a permission stage in judicial review.

52 Section 289 provides for an appeal on a point of law. Judicial review provides scope for a review when there is a public law ground of challenge. I accept that there may theoretically be a distinction between those two categories and there may be some cases which fall in the latter category, namely of a public law ground of challenge, but not in the former though those will be rare in the extreme. As I have already just noted, Nolan J was perfectly happy to approach the matters on the footing that a failure to abide by the rules of natural justice is an error of law.

53 Typical public law grounds of challenge are procedural unfairness; breaches of natural justice; failures to consider a particular line of claim or defence; and irrational conclusions, in the sense of irrationality flowing from a failure to consider relevant matters or a consideration of irrelevant matters or a conclusion so unreasonable that it could not be taken by any reasonable decision-maker properly addressing the issues. Those can all perfectly easily be seen also as errors of law.

54 A factual error which does not involve those or error of law will, of course, not be a point of law. A rational but flawed conclusion on the facts would not raise a point of law. But, similarly, and subject to the consideration of the case of the *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330 to which I will turn to shortly, it would not be a basis for a judicial review claim.

55 In the case of *London Parachuting Ltd v Secretary of State for Environment and South Cambridgeshire District Council*, noted in the General Planning Law for 1986 at p.70, Mann J was dealing with a case where there was an appeal under what was then s.246. There the first ground of appeal was that the appellants had been prevented from calling evidence on their behalf. It was said that their witness had been dissuaded from giving evidence by one of the objectors who was a legal officer for the second respondent. The note of the case says that Mann J said that that argument was a point which could not be raised under s.246. It was a point which might have been raised by application for judicial review on which, albeit exceptionally, questions of fact can be explored, but it was in the circumstances there too late. So Mann J was adverting, it seems, to cases which could not proceed through the statutory appeal route but which could proceed by way of judicial review.

56 However, it will immediately be seen that the circumstances there were particularly exceptional and I note that in the case of *Clarke v Secretary of State for the Environment* [1993] 65 P&CR 85, Glidewell LJ at p.90 at least seems to have envisaged evidence being advanced on a statutory appeal, at least to the extent of being advanced to establish that an Inspector had not properly summarised or had disregarded material evidence, albeit that that was not the circumstance in that case.

57 Mr Wolman, for Mr Sumaidiae, referred to the *Criminal Injuries Compensation Board* case and sought to say that that was a case supporting the proposition that a material error of fact

could be a basis for a judicial review albeit it would not be a basis for an appeal on a point of law. The matter was dealt with by Lord Slynn at p.334 letter G:

> "Your Lordships have been asked to say that there is jurisdiction to quash the Board's decision because that decision was reached on a material error of fact."

Lord Slynn then referred to passages from **Wade and Forsyth** and from **de Smith**, and said this:

> "For my part, I would accept that there is jurisdiction to quash on that ground in this case, but I prefer to decide the matter on the alternative basis argued, namely that what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness."

So that is the most tentative of terms, and that is reinforced when one sees Lord Hobhouse's speech at 348 when he said that he agreed with Lord Slynn, just below letter D:

> "I also agree with the reasons which he gives for arriving at that conclusion. There was an inadequate observance of the principles of natural justice. As Lord Slynn has pointed out, it is not necessary for the determination of the present appeal to enter upon the question whether error of fact can without more be relied upon as a ground for judicial review. I will therefore on this occasion express no opinion about the problems to which the acceptance of such a ground would give rise nor discuss the soundness of the views expressed in the passages he has cited from the leading textbooks. Such consideration will have to await a case which requires their decision."

58 So at its highest, the *Criminal Injuries Compensation Board* case amounts to saying that there could be judicial review about an error of fact which is not a point of law but it is important to note the highly tentative basis in which that proposition was expressed.

59 A further question, which I need not consider here but which may be relevant in future, is whether even if there is a limited category of mistake of fact which could not be the basis for a s.289 appeal but which could be the basis for a judicial review, whether even in those circumstances permission for judicial review should be granted. That question will have to be considered in the light of the structure of the 1990 Act and the restriction of appeal under s.289 to a point of law. There will be considerable force in the argument, it appears to me, that even if judicial review is available in those circumstances, the court should not grant relief because to do so would be to circumvent and subvert the will of Parliament as expressed in setting out the limitations on an appeal from a s.174 decision.

60 So I will need to consider in the two cases before me whether a s.289 appeal provided an adequate alternative remedy to judicial review and, if so, whether I should nonetheless allow the matter to proceed down the judicial review route. Before I do so, I turn to the other matter of general application which is the approach to be taken where judicial review is not appropriate and where the issue is whether a party who has commenced proceedings via judicial review should be allowed to proceed through a s.289 procedure out of time.

The Applicable Approach in Cases where a Party is seeking to convert a Judicial Review Claim into a s.289Appeal.

61 This issue involves consideration of whether a party should be allowed to substitute a s.289 appeal where an extension of time is needed to do so. Indeed, there is only really a potential difficulty where an extension of time is needed or where a party seeks to persist with the judicial review claim. Where a judicial review claim was filed within the s.289 period of 28 days and where the party is content to proceed by way of s.289 and to convert to that there is likely to be no difficulty. In those circumstances there would be no prejudice, absent special circumstances, in allowing the judicial review grounds to stand as a s.289 appeal.

62 It was agreed before me that the question of an extension of time is to be considered by reference to the *Denton v White* test namely considering in the light of the overriding objective the seriousness of the relevant breach; the explanation that is proffered; and then looking at all the circumstances of the case to consider whether justice requires relief to be granted or refused.

63 Bringing a s.289 claim out of time will always be a serious matter even if the period in question is only a short one. That is because of the nature of the proceedings which raise the issue of the continuance in force of an enforcement notice and because of the provisions which emphasise the need for speed and expedition. The strength or otherwise of any particular explanation will depend on the particular circumstances of the case in question. Those circumstances will vary. However, there are some general considerations which are likely to be relevant more widely and which, to some extent, also relate to the potential explanations. The court must be astute to prevent the bringing of a judicial review claim and its subsequent conversion to a s.289 appeal or the substitution of the latter to the former to be used as a device for subverting the s.289 time limit. There is scope for that to be done as a deliberate ploy but even when it is not a deliberate ploy it has the capacity to circumvent the structure set out by the Act and the Rules.

64 The timing of the judicial review claim and the stance taken by the applicant will both be of significance. At one extreme would be an application issued by way of judicial review but brought within the s.289 28 day limit and where the party accepts that there should be substitution as soon as the matter is raised by the court or the other side or, indeed, of its own motion. In those circumstances, absent special circumstances, there would be no prejudice to the other party; no subversion of the structure laid down by statute; and minimal use of court time. It is likely that in such a case permission would be given and that the relevant matter would proceed under s.289.

65 Moving a little further on the spectrum: one can envisage a judicial review claim issued within the judicial review six week period but outside the 28 day period but where the applicant of his or her own motion, or immediately when the point is pointed out, accepts there should be substitution. Whether that would be permitted and whether an extension would be granted will depend on the circumstances and the effect of the delay but, again, there would be limited impact on the court's resources in those circumstances.

66 At the other extreme there is a judicial review claim issued at the end of the six week period where a party persists in seeking to proceed as a judicial review. That will have an effect on the time taken to deal with the matter both in terms of when it is resolved but also in terms of the court time and resources involved and the costs borne by the parties on both sides. As has happened here there would need to be a hearing, judicial pre-reading, argument and consideration. In addition the taking up of court time is by no means irrelevant. It means that the time of the court is taken up addressing the particular case and cannot be spent on

the needs of other litigants. This is not a matter of the court's *amour propre* or of the court taking offence at having its time taken up nor is it a matter of a party being penalised for advancing an argument nor yet would it be a case of election in a strict sense. However, application of the overriding objective does mean that a party who chooses to use a procedure which the court finds to be inappropriate; who persists in doing so; and who only turns away from that course in the face of an adverse ruling is putting him or herself in a position where then to allow a substitution of a s.289 appeal and an extension of time, would be giving that party something of a free hit at the expense of other litigants. That will be a potent factor against the giving of an extension of time.

67 The contrasting position can be seen in the case of *R (on the application of Wandsworth LBC) v Secretary of State for Transport* [2003] EWHC 622 (Admin), [2004] 1 P&CR 32, where Sullivan J gave permission for what had been launched as a s.288 review to proceed as a s.289 appeal. That is a result very much at the first end of the spectrum to which I adverted. It is significant that there the application was initially made by way of a s.288 review application rather than a judicial review claim and certainly what was happening there was a pragmatic approach to particular circumstances not the setting out of any general principle of user substitution.

68 In considering what the overriding objective requires it will be appropriate to look to the merits but only at a very high level of generality. The question will not be that of whether it would be appropriate for permission to be granted if one were looking at the position after the extension has been granted that would be simply replicating the permission test. The merits are to be looked at in a different way. If there is a claim which as a s.289 appeal is not only reasonably arguable but can readily be seen to be compelling then that would clearly be a factor in favour of granting an extension of time. Conversely, if the grounds can be seen to be only just across the reasonable arguability barrier then that is potentially a factor against the grant of an extension of time. I emphasise that those are matters of limited weight and the court will not when considering whether to grant an extension of time look at the merits in great detail.

The Application of the Approach here.

69 I turn, after that preamble, to look at the particular cases considering in each instance whether the s.289 route is an adequate alternative remedy and, if so, whether I should nonetheless allow the matter to proceed by way of judicial review and whether, if not, I should grant an extension of time for the s.289 application and s.289 permission.

70 Dealing first with the Sumaidiae case. The attractive arguments advanced by Mr Wolman involved an attempt to portray the challenge as a matter of fact apt for judicial review but not for s.289. However, the reality is that the challenges being advanced are raising matters of law. The contention is that the Inspector reached conclusions not properly open to her as a matter of law on the material before her: either as a result of applying an incorrect approach or by way of reaching an irrational conclusion. Those are all matters which could perfectly adequately form the basis of a s.289 appeal.

71 There are no exceptional circumstances such as to warrant allowing the matter to proceed by way of judicial review where there is an adequate alternative remedy. Therefore, permission to proceed by way of judicial review is refused.

72 Should I extend time for the s.289 appeal? The history I have set out shows that the judicial review claim was issued right at the end of the six week period. There was a deliberate decision to proceed by way of judicial review although, as I note, that was in the context of

the Claimant being out of the country for at least part of the relevant time. However, a significant factor here is that the Claimant persisted in seeking to have the matter characterised as judicial review. That led to the incurring of costs and the use of court resources. The position might have been different if the Claimant had applied in July of this year referring to his absence from the country and seeking at that stage to convert the judicial review claim into a s.289 appeal, and seeking at that stage an extension of time. I do not say that such an application would necessarily have been granted but it would have had considerably more force than the application made in the events as they have transpired where the s.289 extension of time is sought only as an alternative to the contention which has been advanced in argument and which has taken up court time that judicial review is appropriate. IIt is not appropriate, in my judgement, to grant that extension of time.

73 I am influenced by the fact that, even if time had been extended, I would not have granted permission under s.289 on the material before me. The matters advanced are really issues as to the Inspector's interpretation of the evidence and there is no basis for saying that there was an error of law in the approach taken by the Inspector.

74 Ealing Borough Council was joined as a Defendant, indeed, as the first Defendant to the claim. No decision of Ealing was in issue. That authority should have been identified as an interested party not as a Defendant. Therefore, as against Ealing I simply refuse permission for a judicial review.

75 It follows that the sundry applications made by the Claimant in that action are refused or dismissed and, subject to any argument to the contrary, it appears to follow that the Claimant must pay the Defendant's costs.

76 Turning then to the Ibrar case.

77 The claim against Dacorum Borough Council is a matter which is potentially apt for judicial review. It is a claim saying that the Article 4 direction was flawed on public law grounds. It is, however, very much out of time. Leaving aside the fact that the Article 4 direction was made before Mr Ibrar became an owner of the land and that there is a person who had an interest in making a claim at that stage, but leaving that aside, the claim was made eleven and a half months from the time that Mr Ibrar had knowledge of the Article 4 direction. The argument that Mr Fullbrook sought to advance on Mr Ibrar's behalf that it was appropriate to await the outcome of the s.174 appeal is imply untenable. A party can seek judicial review of an Article 4 direction outside the statutory appeal process. Mr Ibrar could have done that before he received the enforcement notice, albeit time for doing that was very short, or he could have done that instead of appealing the enforcement notice. More significant is the point that it is simply not realistic to say that the challenge to the Article 4 direction was being put on hold pending the s.174 appeal. Matters might have been different if the challenge to the Article 4 direction had been stated expressly and put front and centre in that appeal and if that had been made clear to the local authority. In truth, however, the s.174 appeal was not proceeding by way of a challenge to the Article 4 direction. As I have already said, it is accepted that point was not raised expressly. What is said is that the Inspector should have realised that there was a question as to the legality and should have gone exploring as to the lawfulness of the making of the Article 4 direction. In those circumstances, it seems to me it is not tenable to say that Mr Ibrar was awaiting the outcome of the s.174 appeal while holding in reserve the judicial review claim. The reality must be that the decision to even contemplate a judicial review claim came at a rather later stage.

78 In those circumstances, the Claimant cannot now seek an extension of time for judicial review, certainly not of the length that would be necessary, because a new argument has

been thought up. So I decline to extend time for the judicial review claim against the local authority and refuse permission on the footing that it is out of time.

79 I turn to the judicial review of the Inspector's decision. In that regard, s.289 clearly provides an adequate alternative remedy. The challenge is one of law. It is said that there is an error of fact but the error of fact in respect of Article 4 is, in reality, an error of law. That is because what is said is that the Inspector should have investigated the position and should have come to a conclusion that, as a matter of law, the Article 4 direction was not validly made. That is a matter perfectly capable of being dealt with under a point of law appeal under s.289.

80 So I refuse the judicial review permission there. There is simply no prospect of judicial review being given in respect of the Inspector's decision when there was an adequate alternative remedy.

81 I turn to the question of the extension of time for s.289. The application is substantially out of time. The proceedings were commenced out of time even for the judicial review proceedings. There was a deliberate decision to proceed by way of judicial review rather than statutory appeal, and again of significance is the fact that the Claimant has persisted in that stance and that has necessitated the expenditure of funds and the taking up of court time in addressing that argument. It is not appropriate, now that that argument is rejected, that conversion to s.289 and an extension of time should be granted.

82 Again, I would have refused permission in any event even if I had given that extension of time. The Article 4 argument is a new point and so must be viewed with caution. A party is not absolutely barred from advancing a new point in a s.289 appeal but, as Holgate J explained, in *Barker Mills Estate (Trustees of) v Test Valley Borough Council* [2017] PTSR 408 at [77], the courts will be wary about permitting a new argument to be advanced in a s.289 appeal, indeed in any subsequent challenge to a planning decision. Even if one were to permit the point to be raised it simply cannot be credibly said that the Inspector erred in law in failing to investigate of his own volition the validity of the making of the Article 4 direction where the validity of that direction was not an argument advanced before him.

83 The other grounds could not be dismissed quite so straightforwardly but they would not, in my judgement, be of sufficient strength to justify an extension of time in the circumstances I have already set out where the extension is not otherwise justified.

84 The application for Aarhus costs protection was also very late in the day and it is not appropriate to grant the extension sought. What has happened here is that the Claimant in terms said that the Convention did not apply and then, at the eleventh hour, has sought to invoke the Convention. The rules provide for notification of a claim to invoke the Convention protection and for early provision of information about a party's financial resources. That is so all concerned can know at an early stage what the costs exposure or costs limitation potentially is. It is not appropriate to allow that to be done at the eleventh hour in the absence of good reason and a change of understanding does not amount to such a good reason.

85 It is also of note that it cannot be suggested that the risk of costs liability dissuaded Mr Ibrar from bringing his claim. He brought the claim at a time when he believed that he was not within the costs protection. The rationale of the Convention is to encourage the bringing of claims and to avoid people who would otherwise be dissuaded from bringing claims from being so dissuaded. The facts amply demonstrate that such dissuasion did not operate in Mr Ibrar's case.

86 It follows that I dismiss that application together with the other applications made by Mr Ibrar and again, absent special circumstances, the costs of the opposing parties will have to be borne.

CERTIFICATE

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