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Do you know your section 288 from your section 289?

Procedural disparities will crop up when planning appeal challenges in the High Court, says Meyric Lewis

There are many perplexing differences in the procedures for challenging the secretary of state’s decisions in planning appeals, which are different from judicial review challenges to local authority decisions to grant planning permission.

Planning appeals under section 78 of the Town and Country Planning Act 1990 against refusals of planning permission by local authorities can only be challenged under section 288 of the Act and appeals against enforcement notices served by authorities must be appealed under section 289. That is, section 288 ‘applications’ are for planning appeals and section 289 ‘appeals’ are for enforcement notice appeals.

**Wednesbury unreasonableness**

The basic legal arguments are likely to be similar; both proceedings are a ‘point of law’ challenge to the validity of the secretary of state’s decision, i.e. alleging Wednesbury unreasonableness, failure to take material considerations into account (or taking immaterial considerations into account), inadequacy of reasoning, etc.

The section 288 application is a part 8 claim and the section 289 appeal is a part 52 civil appeal. The court’s leave will be required for both under section 288, assuming clause 57 of the Criminal Justice and Courts Bill becomes law and under section 289, by under existing section 289.(6).

For the time being, though, section 288 does not require leave or permission. Detailed requirements are set out in the practice directions (PD 8A and PD 52A, respectively).

**Time limits**

Section 288(3) specifies a non-extendable time limit of six weeks from the date of the decision. The claim must be filed at the Administrative Court and served within the deadline, but because the requirement for service is laid down in the rules, the deadline for service can be extended if appropriate.

The time limit for appealing under section 289 is 28 days from the date of receipt of the decision. This time limit is under the rules so can be extended if appropriate.

Under section 288, the part 8 claim form must state the remedy sought and the legal basis for claiming that remedy; compare the Administrative Court guidance on section 288 applications that “the [claim] form may be rejected if it does not contain any grounds of law…”

The section 289 appeal application must be in writing and set out the reasons why permission should be granted and, if the time limit has expired, the reasons for any delay. It is worth noting that there are further detailed requirements for what must be included with the application.

The section 288 application/part 8 claim must be served on the secretary of state and the local planning authority. The rules are slightly different where the local authority is the challenger.

The section 289 application for leave or permission to appeal must be served on the secretary of state, the local planning authority and the local authority that served the notice, respectively.

Note that everyone must be served before filing in the Administrative Court. This must be verified by witness statement(s) or affidavit(s) and any failure of service explained.

Evidence for a section 288 application must be filed and served on the other parties within 14 days after service of the claim. Evidence in support of a section 289 appeal must be filed at court at the same time as making the appeal application. By now, you should be prepared to launch an application under section 288 or an appeal under section 289.

TCPA CHALLENGES: A READY ROUND-UP

- Challenge to a planning appeal decision under section 288 is called an application.
- The deadline is six weeks.
- Use CPR part 8.
- The six-week time limit cannot be extended.
- Challenge to an enforcement notice appeal decision under section 289 is an appeal and proceeds by way of part 52.
- The deadline is 28 days.
- Use CPR part 52.
- All evidence, etc, must accompany permission application, which must be served before filing.
- But, if planning permission is refused on an enforcement notice decision, challenge is under section 288, not section 289.