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GOVERNMENT'S BOLD MOVE TO REDUCE LEGAL CHALLENGES TO NSIPS

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SUMMARY

The Government has confirmed it will introduce legislation to reduce the number of attempts claimants have to secure permission to legally challenge a DCO.

Legislation will be introduced, probably in the forthcoming Planning and Infrastructure Bill, that will remove the first stage in an attempt to secure permission for judicial review (JR) in which currently the arguability of the claim is decided by a High Court judge on papers. All applications for permission will instead be decided at an oral hearing. If a judge refuses permission at this stage and certifies the case 'totally without merit', claimants will no longer be able ask the Court of Appeal to reconsider. Thus the number of attempts to secure permission will be reduced from 3 to 2 in all cases, and from 3 to 1 in cases certified as 'totally without merit'.

This change should reduce the time it takes for most unsuccessful claims to be concluded and therefore help reduce delays to nationally significant infrastructure projects (NSIPs) caused by unsuccessful legal challenges.

RECOMMENDATIONS TO SPEED UP DELIVERY OF NATIONAL INFRASTRUCTURE

The announcement comes off the back of the Government's call for evidence at the end of last year on Lord Banner KC's recommendations to address delays arising from legal challenges against DCO decisions, but in advance of any formal response. However, in a Parliamentary Statement made alongside this confirmation, the Government also confirmed that a number of Banner's other recommendations to streamline the process for judicial review and reduce delays (of which there were several) will be taken forward. These include the introduction of non-mandatory case management conferences to NSIP JRs; the formal designation of NSIP JRs as significant planning court claims and a commitment to work with the judiciary to introduce target timescales for NSIP JRs in the Court of Appeal and the Supreme Court

In his report, Banner recommended the number of available attempts to seek permission for JR should be reduced either to two (one in the High Court and one in the Court of Appeal) or one (one in the High Court, with no right of appeal) and he addressed the counter-arguments in favour of maintaining a second opportunity to seek permission (being the adoption of a more precautionary approach to decision making with judges more likely to grant permission in marginal cases and the risk of mistakes with no opportunity to rectify them). The Government has interestingly opted to take forward the more radical option presented by confirming these changes.

However, where applications for permission for JR are refused and found to be unarguable but not 'totally without merit' it seems that a claimant's opportunity to appeal that decision in the Court of Appeal is intended to remain.

COMMENT

For a Government committed to the rule of law this was always going to be a difficult balance to strike, between (on the one hand) speeding up the infrastructure delivery process by limiting the scope for legal challenges and (on the other hand) not curtailing access to justice in merit-worthy cases. In focusing on the permission stage of challenges the Government has at least alighted upon an area where, on its face, the low success rate for challenges has back-up from data assembled by the Banner review. This, coupled with a selective quoting from previous judgments where claims of dubious merit have been called out, gives the Government some coverage against the inevitable complaints from the claimant community.

We will report further when the Government's response to the call for evidence is published which will set out how the measures announced to speed up the JR process for DCOs will be taken forward and will work in practice.

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