Case No. CO/ 4943/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:

BLUE GREEN LONDON PLAN

Claimant

-and-

THE SECRETARY OF STATE FOR THE DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT

-and-

THE SECRETARY OF STATE FOR THE DEPARTMENT OF ENVIRONMENT FOOD AND RURAL AFFAIRS

Defendants

-and-

THAMES WATER UTILITIES LIMITED

Interested party

REQUEST FOR AN OUT OF TIME DECISION AND PERMISSION REFUSAL FOR JUDICIAL REVIEW TO BE RECONSIDERED AT AN ORAL HEARING UNDER CPR 54.12(3)

Summary Grounds for Reconsideration

1. Grounds for reconsideration of the Judges Order refusing: 1. to extend time, and 2. consider permission to apply for judicial review, will argue that:

Under the Direct Effect of the European Directive, the High Court has jurisdiction to accept circumstances of the public's conception of time for an 'Aarhus' application to judicially review the Secretaries of State's (**SsoS's**) refusal to comply with the Environmental Impact Assessment Directive and 'shut his ears' to evidence of the new water industry. Notwithstanding there is no statutory provision for an extension of time in the new regime of the Planning Act 2008.

Ground 1.

2. To oust the court's power in such an excessive manner destabilises the constitutional balance. Lord Woolf LCJ warned of 'elective dictatorship' saying "It's dangerous to go down the line of telling the judges what they have to do". Dictatorships refuse reasoning in the Rule of Law, imposing rigid rules.

3. The SsoS could operate a policy so long as he was prepared to 'listen to a substantial argument reasonably presented urging a change in policy' or 'be willing to listen to someone with something new to say'. Public bodies must take into account relevant considerations, they may not fetter their discretion by applying the policy unduly rigidly. *British Oxygen co v Minister of Technology [1971] A.c. 610.*

4. In refusing to listen to the EU Environment Commissioner, multiple requests and expert evidence presented on the website bluegreenuk.com , the SsoS had 'shut their ears'.

5. "the remedy by certiorari is never to be taken away by any statute except by the most clear and precise words." Denning LJ R v Medical Appeal tribunal, ex p Gilmore [1957] 1 QB 574, 583. "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." R (Sivasubramaniam) v Wandsworth County Council [2003] 1 WLR 475.*

6. Instructions were published for public participation in the planning process for the Nationally Significant Infrastructure Project (**NSIP**) under the Aarhus Convention transposed into the Planning Act 2008 in 'Guidance on the pre-application process for major infrastructure projects, published on 10 January 2013' which SsoS 'must have regard'.

7. The first; 'Nationally Significant Infrastructure: how to get involved in the planning process' advice note 8.1 How the process works,- The process in a snapshot,- key stages.- The application in a snapshot,- The application process- six key steps, included a chart with the words 'Post decision - there is the opportunity for legal challenge'

8. The Decision letter of 12 September 2014 to the Applicant TWUL granting development consent (included in the application for permission) had the words; 'A claim for judicial review must be made to the high court during the period of six weeks from the date when the Order is published or if later..statement of reasons.. same date ... as this letter on the Planning Inspectorate (**PINS)** website... Any person... challenging..PINS or SsoS...advised to seek legal advice..contact Administrative Court Office at the Royal Courts of Justice '. The claimant is unaware of any published notice stating 'by 4.30, Thursday 23 October', or any mention of similar words to that effect during several meetings with other concerned citizens,

including several groups attending one meeting in chambers, courtesy of a generous QC.

9. It is contended that publishing 'by 4.30, Thursday 23 October 2014' in the SsoS's DCO letter of 12 September 2014, is no more difficult than 'during the period of six weeks from the date when the Order is published'. Further that the SsoS, in not doing so, were in breach of the Aarhus Convention and the purpose and intention of the Planning Act 2008 Guidance on the pre-application process for major infrastructure projects, published on 10 January 2013. The SsoS in exercising their discretion cannot do so in manner which will frustrate Parliament's intention. *Padfield v MAFF [1968] AC 997*

Ground 2: European Union law

10. The public perception of time distinguishes the purpose of the Aarhus Convention as argued in the Order refusing to extend time or consider argument for Judicial Review under EU law in *Barker v Hambleton District Council[2012] EWCA Civ 610.*

11. The Claimant cannot afford legal advice, as is the case with the majority under Aarhus. He took these 2 instructions to mean 6 weeks from Friday 12 September is Friday 24 September, as in 'Friday week', the public perception of time.

12. As *Barker* argues: 'The substantive provisions upon which the submission on EU law is based originate with the Aarhus Convention on *Access to Information, Public Participation in Decision –Making and Access to Justice in Environmental Matters* (25 June 1998). Article 9.3 of the Convention obliges state parties to ensure access to justice. Article 9.4 requires the provision of "adequate and effective remedies" which are "fair, equitable, timely and not prohibitively expensive". Although the Aarhus Convention is not an instrument of EU law, the United Kingdom is a state party and the Convention has been approved by the EU (Decision 2005/370). Its provisions do not have direct effect but, in cases concerning matters covered by EU law, a national court is required to interpret domestic procedural rules in accordance with the objectives of Article 9 and the doctrine of effective judicial protection of rights conferred by EU law.' The present context concerns a matter covered by EU Direct Effect law of the EIA Directive on which the claim is based.

13. The court must have jurisdiction in order to ensure the full and effective protection of directly effective rights derived from European Community law. 'The authority referred on this issue is *Lesoochranarske Zoskupenie v Slovakia* [2011] Env LR 28, a decision of the Grand Chamber. The judgment includes the following passages:

47. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the (Environmental Impact Assessment Directive), since the Member States are responsible for ensuring that those rights are effectively protected in each case …
48. On that basis, … the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).
49. Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that art. 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.
50. It follows that … it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of the Aarhus Convention."

14. By reference to those paragraphs, it is incumbent on the Court to read into the order wording which would permit an application to be made later than six weeks starting with the date of adoption if it is within the ordinary meaning of the words 'six weeks time', in line with the public perception of time. Because, if we do not do so, we shall fall foul of the principle of effectiveness. The principle required that the application was within 6 weeks of Friday 12 September 2014.

15. The principle of effectiveness requires the court to accept the application as it would have been excessively difficult and practically impossible for a claimant who is not a lawyer and has no legal representation as a Litigant in Person, to make the implication from 'within 6 weeks' that there was a special legal formula, different from the public perception of time within the statutory time limit. It is a clear and reasonable time limit. The fact that the SsoS chose not to put it in the 'most clear and precise words' of 'by 4.30, Thursday 23 October 2014' releases the LIP applicant from the obligation of implying it. 'Within 6 weeks' cannot have the effect of implying a specially formulated jurisdictional rule. Advice to seek legal advice does not overcome the infraction of EU law. The advice notice 8.1 and the SsoS's advice was badly designed so as not to comply with the intention of Parliament that citizens participate in the decision-making process.

Ground 3. ECHR

16. Under Article 6 of the ECHR the very essence of the right of access to a court is impaired. The particular circumstances of public perception of time distinguish *Barker* and follows *Majski v Croatia* (No 2) [2011] ECHR 16924/08

17. The court is bound to treat the application as duly made within '6 weeks' under the public perception of time. Refusing to accept the application as out of time amounted to a breach of the right to a fair trial under Article 6(1), which provides:

"In the determination of his civil rights and obligations … everyone is entitled to a … hearing within a reasonable time …"
The submission is that he was denied a hearing as a result of the SsoS not using the 'most clear and precise words' in stating the time limit.

18. 'The question in relation to Article 6 is whether the claimant was denied "the very essence" of his right of access to a court. In *Majski v Croatia* (No 2) [2011] ECHR 16924/08 the applicant wished to challenge his failure to secure an appointment in the Attorney's Office. He was wrongly informed by the State Attorney's Council that his remedy was an application to the Administrative Court under section 23 of the Administrative Disputes Act whereas in fact it was only under a different section of the same Act which involved a different procedure, but the same 30 day time limit. He claimed that by holding his application to be inadmissible the Administrative Court had breached his Article 6 rights. The European Court of Human Rights, having observed that the right of access to a court is not absolute but may be subject to limitations, stated (at paragraph 66):

"However, these limitations must not restrict or reduce the access left to an individual in such a way or to such an extent that the very essence of the right is impaired."

19. Its decision that that "very essence" had been impaired was plainly conditioned by its conclusion that there was a lack of clarity in the statutory provisions which had only recently been the subject of judicial consideration. It did not consider that the applicant "should have been aware of it" because it "normally takes six months for such a development of the case law to acquire a sufficient degree of legal certainty before the public may be considered to be effectively aware of the domestic decision" (paragraph 70). It continued (at paragraph 71):

"<u>In these particular circumstances</u>, the applicant might have reasonably expected … the Administrative Court [to give him the correct information]. Instead, the

Administrative Court declared his application inadmissible outright. As a result … he was prevented, through no fault of his own, from having the impugned decision … examined on its merits."

20. That passage, including the words I have emphasised, demonstrates the fact-sensitive nature of the inquiry into whether or not "the very essence" of the right of access to a court has been impaired.

21. In my judgment, the present case is significantly different. The statutory provision was clear that the six week time limit started with "the relevant date" which was the date when the plan was adopted by the local planning authority. That 21 December was the date of adoption was abundantly clear – a fact that was reiterated in the Adoption Statement and the Notice of Adoption. Mr Barker and his specialist legal representatives should have been aware of all that. In effect, they allowed themselves to assume that there had been an indulgence which, as it went to jurisdiction, the Council was not competent to grant, even if its intentions were benevolent. In these particular circumstances, I do not consider that it can be said that there had been an impairment of "the very essence" of the right of access to the court.'

22. *Barker* is distinguished in this case by the claimant having no 'specialist legal representatives', no 'most clear and precise words' being used to state the very essence of the right of access to the court; namely the precise time for making an application. Paragraph 19 above is repeated; 'the applicant might have reasonably expected … the SsoS [to give him the correct information, precisely]. Instead, the Administrative Court declared his application inadmissible outright. As a result … he was prevented, through no fault of his own, from having the impugned decision … examined on its merits."

23. It cannot be argued that the applicant's previous experience with the courts is a reason for him knowing how time was to be calculated in this case. He is not a lawyer and does not practice law or give legal advice as a lawyer. Further, no lawyer mentioned the precise date.

24. The Judge in *Barker's* final remarks indicate how the public may see the intention of the SsoS's in not being precise on the date for submission;
'There is another aspect of the case which seems to me to be significant. Important planning decisions are not simply of bilateral significance. They affect many interests. In a case such as the present other interested parties were entitled to assume, without the need to engage in litigation, that if no valid application was made within the statutory time limit, the ADPD would be beyond challenge.'

Ground 4. Developments since the start of the Claim

25. For such a globally important Decision for the UK, developments are continually reinforcing the claim. 2 of the most important are included here and sent to the Court.

1. The Secretary of State for Energy and Climate Change, Edward Davey MP reported results of the UN meeting on Climate Change in Lima, Peru, securing agreement between 194 countries; " I am proud the UK has been leading the way, by our laws on low carbon energy and climate, by successfully championing ambitious targets to cut emissions in Europe and with our central role here in Lima."

2. Lord Berkeley and Prof Chris Binnie issued a report, ministerial letter and press release of the evidence that the Thames Tideway is now already compliant with the UWWTD. This is further and conclusive evidence that there is therefore no need for the Thames Tideway Tunnel.

26. Only a Blue Green London Plan remains necessary to integrate air, water and energy infrastructure into a NSIP to fulfill London and the UK's UWWTD and contribute significantly to our climate change 40% EU carbon reduction obligation and 80% by 2050 under the Climate Change Act.

27. Before the Hearing, the Claimant has the option, therefore, to issue a claim for Interim Relief to give effect to European Union law under CPR 54.3.7, as the court must have jurisdiction to grant interim relief in order to ensure the full and effective protection of directly effective rights derived from European Community law, by following the procedure held by the House of Lords in *R v Secretary of State for Transport Ex Parte Factortame (No.2) [1991] 1 A.C. 603*. The Court may then consider an interim injunction for the wider public interest in having a Blue Green London Plan implemented as a remedy.

28. The Claimant has informed the court that he has invited other Interested Parties to join his Application to balance the playing field under the Overriding Objective. Discussions have been held with Lord Deben, Lord Krebs and others of the Climate Change Committee. There is general agreement that adaption of regulation, in particular Planning law, is a vital part of mitigation and adaption in climate change to enable targets set under the Act.

29. The fact that these arguments have had to be made by application to a court of law is further evidence of the inadequacy of the applicants public consultations and lack of a timely Environmental Impact Assessment.

Conclusion

30. For the reasons set out above, the original claim is not out of time as submitted by a Litigant in Person within 6 weeks under the applicant's Aarhus Convention rights and ECHR right to a fair hearing.

31. The applicant thanks the court for reminding the SsoS the costs limit is £5000, and leaving arguments to follow the submission of a detailed cost claim.

32. As always, in recognition of the extreme and exceptional circumstances of climate change affected by the SsoS's Decision, it is submitted a case to answer has been made out for permission to be granted for a Judicial Review of that Decision. The Court is humbly requested to hold it worthy of reconsideration.

Graham Stevens IP

16 December 2014