

## **“Never On The Cards”: Fighting Single-Tier Local Government**

*Introductory Note by Francis Bennion* This should be read in conjunction with 2009.005 and 2009.009

On 17 January 2009 I drafted the following Note opposing a prospective appeal by the East Devon District Council (EDDC) against the decision of Cranston J. in a judicial review case brought by the EDDC. On the same day I emailed the Note to one of my local Budleigh Salterton councillors, who promised to pass it to the Chief Executive of the Council the next day, Monday 19 January. On that day the EDDC put on its website a notice (misleadingly dated 15 January) headed “Council takes unitary fight to Appeal Court”. This notice, which was not on the EDDC website when I drafted my Note, makes clear what had not been clear to me before, namely that the EDDC regards the case as a “unitary fight”, that is a fight against unitary government for East Devon (which would involve the abolition of the EDDC). As appears from my Note below (see in particular paragraphs 11-14) I think there is little chance of that fight succeeding.

As the EDDC notice referred to above is relevant to my Note I set it out here:

“East Devon District Council’s Executive Board last night (Wednesday) agreed to sanction an appeal against a High Court judgement dealing with the Council’s challenge to the Boundary Committee, which may shortly recommend massive changes to local government in Devon. The Local Government Review could recommend the scrapping of all eight district councils in Devon and the County Council, to be replaced by a giant unitary authority responsible for delivering all council services across Devon, with the exception of Torbay and Plymouth.

Yesterday’s meeting of EDDC’s top councillors voted for the appeal after receiving a report from the Chief Executive on the outcome of the Judicial Review hearing at the High Court shortly before Christmas. When the decision of Mr Justice Cranston was announced last week, EDDC’s Leader, Councillor Sara Randall Johnson, said she was “mystified” by the judgement, which was critical of the Boundary Committee on a number of fronts, but stopped short of outright censure. She said on Thursday morning:

‘We feel it is only right and proper that we should proceed to the Court of Appeal against the High Court decision, because of the importance of this issue to public interest and democracy. Reading between the lines of the judgement, it is clear that the Judge has some serious reservations about the way the Boundary Committee has carried out the tasks it was set by the Secretary of State. “If local government in Devon is to be tinkered with, we want to be sure that the process is both transparent and foolproof. At the moment, we are not confident on either count. Allowing our challenge to be heard by three Appeal Court Judges will ensure that the interests of Devon’s residents and of democracy will have been seen to be served.’

Breckland District Council in Norfolk is mounting a similar appeal against a High Court Judgement handed down in December, concerning a local government review in East Anglia. Both cases are expected to be fast-tracked for hearing by the Appeal Court in February.”

I am writing an article on this matter for *Criminal Law & Justice Weekly*. It is due to be published on 31 January and will be placed on this website.

On the 20 January 2009 the following resolution was passed unanimously:

Exmouth Residents' Association calls upon East Devon District Council to abandon its plans to appeal against the Judicial Review Judgment {[2009] EWHC 4 (Admin)}. Francis Bennion, a local resident and the leading authority on Statutory Interpretation, whose text book on the subject was cited in the High Court Judgment, has written a Note explaining that an appeal would have little chance of success. An appeal could be expensive and would be a further waste of council taxpayers' money with no benefits for the people of East Devon.

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## **EDDC should not Appeal the Cranston Judgment**

Note by Francis Bennion MA (Oxon.), Barrister.

### **Introductory**

1. I am a resident of Budleigh Salterton, which is within the area of the East Devon District Council (EDDC). I am a former Government legislative draftsman (Parliamentary Counsel) and the author of *Bennion on Statutory Interpretation* (LexisNexis, 5<sup>th</sup> edition 2008), which is referred to in paragraph 35 of the judgment of Cranston J. dated 8 January 2009 in the case with which this Note is concerned, *East Devon District Council v Electoral Commission (The Boundary Committee for England)* [2009] EWHC 4 (Admin). I shall refer to this as “the Devon Boundary Case”.<sup>1</sup>

2. On 8 January 2009 EDDC issued the following press release:

The Leader of East Devon District Council says she is “mystified” by the ruling of a High Court Judge who conducted a Judicial Review into EDDC’s challenge to a single Unitary Devon council. Councillor Sara Randall Johnson said the judgement sent out “mixed messages” and hinted that the Council would consider an appeal.

In a ruling handed down today (Thursday 8 January), Mr Justice Cranston:

Found the Boundary Committee had “misdirected itself” at the very start of the review process.

Felt it did not consult properly on alternatives to its single unitary proposal.

Believed it could also have done better when consulting on affordability.

Agreed that EDDC concerns about democratic remoteness were valid.

Advised that accountants must spend more time on the overall financial impact of any change.

Accepted that this might mean a further period of consultation was necessary.

But the judge also stated that EDDC’s challenge was “premature” – suggesting that the Council should have waited longer before challenging the Boundary Committee’s actions.

Reacting to the judgement, Miss Randall Johnson said: “I take a lot of comfort from much of what the Judge has said. It is clear that the Boundary Committee got quite a lot wrong. This vindicates our decision to challenge the process they followed. The Judge has stopped short of censuring them and his view that our challenge was premature is, frankly, mystifying. If we had waited until the final report had been sent to the Secretary of State, we could well have been deemed to have left our challenge too late. At least this way our concerns have been registered and the Judge has advised the Boundary Committee where he believes they have erred in law”.

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<sup>1</sup> It can be accessed at <http://www.bailii.org/ew/cases/EWHC/Admin/2009/4.html>.

Miss Randall Johnson was referring to parts of the Judgement where Mr Justice Cranston said the Boundary Committee had “misdirected itself as to what it could publish, consult on and propose to the Secretary of State” and “should consider with care whether it would be right to make further alternative proposals for Devon. He added that, if such a course of action were considered appropriate, the Boundary Committee would need to comply with the statutory requirements – in other words it should carry out further consultation”. She also took heart from the Judge’s comment on affordability consultation that “for the future the Boundary Committee may well modify its approach in the light of lessons learnt from the current exercise”.

Miss Randall Johnson added: “It saddens me that it has taken a challenge from this Council to uncover the fact that the Boundary Committee got it wrong from the start. I can only hope that with those comments ringing in their ears the Boundary Committee will do a proper job in future for the benefit of the whole of Devon. The ball is now firmly back in the Boundary Committee’s court. They must comply with the wishes of the Court, and they must also follow the latest directives from the Secretary of State regarding looking at matters ‘in aggregate’. Either way, they may end up having to consider options other than a single Unitary Devon. If that happens, there could be further delays which might frustrate the Government’s wish to rush ahead and implement the changes before the next General Election”.

She confirmed that the Council had been given leave to appeal against the judgement and that she and her colleagues were considering this course of action. They have 14 days to submit such an appeal.

### **Grounds for Appeal?**

3. As a resident and council tax payer I am opposed to the bringing by the EDDC of an appeal against the decision of Cranston J. in the Devon Boundary Case, and request that they do not do so. In my professional opinion the appeal would not achieve any worthwhile result for the Appellant and could well result in the Appellant’s having to pay substantial legal costs. My reasons for this opinion are given below.

4. I am surprised that the EDDC is considering an appeal because the press release set out above gives no indication regarding what it is in the judgment of Cranston J to which the appeal would be directed, that is what in the judgment the EDDC find objectionable and which it would be appropriate to appeal against. The press release seems to indicate that the EDDC are broadly satisfied with what would be the next steps by the Boundary Committee and others following the judgment.

5. I have not seen the pleadings in the judicial review case brought by EDDC, so I do not know precisely what was asked for. I thought, though the above press release does not mention it, that one of the EDDC’s main concerns was to secure the preservation of the two-tier system so that the EDDC would remain in being. In the consultation I opted for this course myself, having not at that stage investigated the matter fully. I return to this point below.

6. The passages in the judgment which appear adverse to the EDDC are the following.

“The grounds of challenge track, to a considerable extent, those in the *Breckland* case<sup>2</sup>, consultation and affordability . . . As well as consultation and affordability, there is a focus absent in the *Breckland* case on any required comparison with the original proposal for unitary government in Exeter, which triggered the present review. Moreover, East Devon contends that the Boundary Committee has committed errors in wrongly believing that it is permitted to propose only one new structure of local government for Devon, and in

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<sup>2</sup> *Breckland District Council & Ors v The Boundary Committee & Anor* [2008] EWHC 2929, <http://www.bailii.org/ew/cases/EWHC/Admin/2008/2929.html>

misunderstanding an aspect of how it was intended to conduct its review, namely, what was meant by conformity of a proposal with the criteria ‘in aggregate’.”<sup>3</sup>

“... the Boundary Committee have, in my judgment, met their statutory obligation to consult on affordability. I reach that conclusion applying the test of enhanced scrutiny expressed in the *Breckland* decision: paragraph 39 . . . In my judgment the Boundary Committee has fulfilled its statutory duty to afford those interested the necessary information to make meaningful representations on affordability. For the future the Boundary Committee may well modify its approach in the light of lessons learnt from the current exercise, but that is no basis for judicial review in the present case.”<sup>4</sup>

“Since I have held that there has been consultation on affordability which meets the statutory mandate, I see no basis for a challenge on rationality grounds. In my view the rationality argument is, in effect, the challenge mounted on staging and consultation, and already considered, in a different guise. If consultation on affordability accords with the statutory language, then in my view there is no basis for a rationality challenge.”<sup>5</sup>

“In *Breckland* I held that the issue of status quo was irrelevant to the Boundary Committee’s consideration under the 2007 Act [Local Government and Public Involvement in Health Act 2007]: paragraphs [60]-[64]. In the East Devon submissions, this is said to be incorrect since statute entrusts the Boundary Committee with power to act in specific circumstances. It is not entitled to commit itself in advance to making an alternative proposal if it can identify one which would meet the Secretary of State’s criteria and which could be, for example, the retention of the status quo as a better option. Whatever the Request and Guidance might say, they cannot dictate the range and construction of the Boundary Committee’s statutory powers . . .”<sup>6</sup>

“In light of the East Devon submissions I have accepted that my consideration of consultation in the *Breckland* case needs refinement. However, that has no impact on remedy in the present case. As far as the issues of affordability and status quo are concerned, I see no reason to disavow the approach adopted in the *Breckland* case. An important point not developed in argument in *Breckland* concerns the power of the Boundary Committee to advance more than one draft proposal. In my judgment, the Boundary Committee is authorised by statute to do that, and has been under a misapprehension as to its statutory power in that regard. It needs to reconsider whether it wishes to advance more than one alternative proposal in relation to Devon. If it decides to do that, it must address its obligation of public consultation in that regard. In doing so it will, within its discretion, carefully consider what has already happened. If it decides to advance more than one draft pattern of unitary local government for Devon, and one of these is along the lines of what it invited consultees to have in mind (the Exeter/Exmouth and the rest of Devon patterns) it will then need to consider whether this meets the criteria “in aggregate”. It will do that in line with the meaning of that concept as set out in the new December guidance. In my view, however, any challenge on these grounds is premature. The Secretary of State has extended the deadline for the provision of advice until mid February, and this may enable the Boundary Committee to comply with its statutory duties. There is no reason for me to reconsider the view I adopted in *Breckland* that this is not one of the exceptional cases where prematurity does not preclude remedy.”<sup>7</sup>

### **Preserving the Status Quo? “never on the cards”**

7. I referred above to the question of preserving the status quo. The judgment of Cranston J. ends as follows:

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<sup>3</sup> Para. 2.

<sup>4</sup> Para. 26.

<sup>5</sup> Para. 28.

<sup>6</sup> Paras. 29-30.

<sup>7</sup> Para. 45.

“In a letter of 25th September 2008, setting out East Devon’s formal response to the July Report, Councillor Randall Johnson, the leader of East Devon council, ventilated the various objections which her council had. I have referred to some of these earlier. However, she also highlighted what she described as the short term nature of legislative and policy approaches to local government. The current fashion, as I understand her to say, is for unitary patterns, but that may not last, just as other initiatives for local government have had a relatively short shelf life. She also identified the redundancies which may occur if the alternative proposal were implemented, which could be concentrated in the more disadvantaged rural areas of Devon. In a significant passage Councillor Randall Johnson wrote:

‘[Leadership] brings with it an understanding or acceptance that concerns are shared and understood and that the leaders are not so far removed from those that they govern that a sense of alienation and disempowerment or irrelevance is experienced. On this basis it is my genuine belief that a unitary County Council would be too big and too remote to provide effective leadership . . .’

In my view all these matters deserve the closest attention of both the Boundary Committee and the Secretary of State. For East Devon, Councillor Randall Johnson is in a sense the most important consultee, elected by her constituents, and then by her colleagues to be leader of the council. I hasten to add that there is no reason for me to think that her response will not attract that attention. But I make these remarks because of what I said at the beginning: this is an area where legal sensitivity to meaningful consultation is heightened – the future of local, representative assemblies is at stake.”<sup>8</sup>

8. The EDDC letter of 25 September 2008 to the Boundary Committee contains the following passage:

“. . . we actually consider that the existing local government structure in Devon better delivers the Secretary of State’s unitary criteria in aggregate than your draft proposal. It is due to the short, medium and long term dangers inherent in the draft proposal that we consider the current structure and system of local government in Devon is better placed to achieve the 5 criteria.”<sup>9</sup>

9. Later the letter says:

“. . . On this basis it is my genuine belief that a unitary County Council would be too big and too remote to provide effective leadership (albeit one would inevitably accept it would have the ability to ‘do strategy’).”<sup>10</sup>

10. The letter concludes on this point:

“It is the districts who are the first port of call for resolving queries or concerns. We may not be able to resolve all matters ourselves but actually we are a more certain and secure means of citizen and community empowerment than the untried and untested (and unknown) concept that your draft proposal seeks to favour.”<sup>11</sup>

11. In the quotations from Cranston J’s judgments there is included the statement “In *Breckland* I held that the issue of status quo was irrelevant to the Boundary Committee’s consideration under the 2007 Act: paragraphs [60]-[64]”<sup>12</sup>. Paragraph 64, there referred to, says “As far as the claimants’ contention on consultation on this issue is concerned, a comparison with the existing two-tier structure was never on the cards”. From my knowledge of statutory interpretation principles, I can add to this dismissive statement in a way not mentioned in either judgment.

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<sup>8</sup> Para. 46.

<sup>9</sup> Page 1.

<sup>10</sup> Page 3.

<sup>11</sup> Page 4.

<sup>12</sup> Paras. 29-30.

12. The purpose of Part 1 of the 2007 Act was, as its heading says, to facilitate “Change from two tiers to single tier of local government”. The official Explanatory Notes to the Act say:

“Part 1 of the Act provides for the process of making structural and boundary change to local government areas in England. It provides for a means by which an area where there are two-tiers of local government can be reorganised so that there is a single tier of local government”.

13. The leading principle in modern statutory interpretation is what is called purposive construction, which is fully explained in my book. Put shortly, it means that an Act must be so interpreted as to further its purpose.

14. Although, as said above, I am personally in favour of the two-tier structure and wish to see the EDDC preserved, I see absolutely no chance of that being achieved through an appeal from Cranston J.’s decision. Speaking frankly, it would be folly for a public body financed largely by council tax payers to launch such an appeal.

### **Conclusion**

15. I am somewhat in the dark in writing this Note because I am unaware of the pleadings in the judicial review action and the grounds on which the EDDC are thinking of appealing. However, I have given the reasons why I think that there is no chance of an appeal succeeding on the status quo ground, and explained why in my submission there is no point in incurring the expense of appealing on any other ground. The latter argument is strengthened by the fact that the Boundary Committee now have considerably more work to do in this matter along the lines indicated in Cranston J.’s judgment. There will ultimately be a definitive submission by the Boundary Committee to the Secretary of State (which so far there has not been). At that point there will be an opportunity for the EDDC, if it thinks fit, to institute further judicial review proceedings against the definitive submission. An appeal now might put that opportunity in jeopardy, since the East Devon council tax payers are likely to become impatient of yet further legal proceedings.

*Francis Bennion*

17 January 2009.