Judicial review of local government reorganisation

The decision by Shrewsbury & Atcham Borough Council to apply for judicial review against the Secretary of State, Ruth Kelly, over the bidding process for new unitary authorities shows that local government re-organisation continues to be a controversial subject.

The Secretary of State may have intended to minimise the likelihood of challenge when she imposed a very tight timescale for the submission of proposals for new unitary authorities. The invitation was published on 26 October 2006, along with the White Paper, and local authorities were required to submit their proposals to the Department for Communities and Local Government (DCLG) by 25 January 2007. This meant that it would have been difficult for local authorities to apply unless they had already made progress on this, since they were required to show that they had local support for their proposals.

The Government also seems to have taken action to preempt any challenge over the power to consult on the proposed re-organisation by including clause 21 in the Local Government and Public Involvement in Health Bill which is currently going through Parliament. This provides that if, before the commencement of the Act, the Secretary of State invites or directs proposals for a single tier of local government or issues guidance on this or a proposal is made in response to the Secretary of State’s invitation, it is immaterial that this was done before the commencement of the Act.

Neither of these approaches has deterred Shrewsbury & Atcham Borough Council from making a challenge. Having previously issued a letter before claim, the Council has applied for judicial review and has published on its website the statement of facts and grounds for review produced by Andrew Arden QC and Jonathan Manning. The Council says that is supported by 11 councils and 19 Members of Parliament.

The grounds of the Council’s challenge are:

- There is no legal power for the Secretary of State to undertake the review in the way proposed.
• The proposals for change in Shropshire did not meet the criteria set down by the Secretary of State and no reasonable Secretary of State could have concluded that the criteria were met.
• The Secretary of State’s conduct on this stage of the process is unfair, partial and unbalanced.

Currently, the power to invite proposals for changes to the structure of local government is found in s.13 of the Local Government Act 1992. This allows the Secretary of State to request the Electoral Commission to recommend whether a structural change should be made. The Electoral Commission may direct the Boundary Committee for England to conduct a review and recommend whether a structural change should be made. The Secretary of State may then make an order to implement the recommendations made by the Electoral Commission for structural change.

Shrewsbury & Atcham Borough Council alleges that the current consultation is unrelated to the powers contained in the Local Government Act 1992. The Local Government and Public Involvement in Health Bill contains proposals which would enable the Secretary of State to carry out such a consultation in the future but they would not apply to the current consultation process.

The grounds of challenge go on to point out that even clause 21 could not authorise activity carried out prior to the passing of the Act, although it could authorise activity carried out between the passing of the Act and commencement of the relevant provisions of the Act. Therefore, the Council says that the Secretary of State lacks the power to conduct the consultation process which she has initiated and local authorities lack the power to respond to the consultation exercise.

When the Secretary of State issued an invitation to apply for unitary status, she set out criteria to which proposals were required to conform. These required that the proposals must: be affordable; be supported by a broad cross section of partners and stakeholders; provide strong, effective and accountable leadership; deliver genuine opportunities for neighbourhood flexibility and empowerment, and deliver value for money and equity on public services.

In Shropshire, a joint proposal, called One Council, was made by Shropshire County Council, Oswestry Borough Council and South Shropshire District Council but not by Shrewsbury & Atcham, Bridgnorth or North Shropshire. If this proposal were to be implemented it would result in the abolition of all the current councils in Shropshire and their replacement by one unitary authority.

The grounds of challenge report that in December 2006, Shrewsbury & Atcham Borough Council commissioned two independent reviews of the One Council proposal and it submitted these reviews to the Secretary of State. The Council says that both reviews showed that the criteria for the proposal to be taken forward had not been met. The Council also commissioned an independent poll of the electorate in order to assess the level of public support. It says that 67.2 of those responding favoured continued two-tier local government and similar polls elsewhere in Shropshire showed a lack of support for the proposal.
The Secretary of State announced on 27 March 2007 which proposals were being taken forward for consultation. The successful proposals included the Shropshire One Council proposal. On 28 March 2007, Shrewsbury & Atcham Borough Council wrote to the Secretary of State, seeking confirmation that the Secretary of State was satisfied that the proposal met the criteria specified in the invitation and requesting the suspension of the consultation process if legal proceedings were commenced. The Secretary of State confirmed that the Government’s opinion was that the Shropshire proposal met the criteria set out in the invitation.

Shrewsbury & Atcham Borough Council argues that no reasonable Secretary of State could have concluded that the criteria had been met.

The Council’s third ground is that the consultation process is unfair, partial and unbalanced. This is because it is based on the DCLG website which links to the proposal. The proposal only puts the case in favour of structural change, without providing any information on alternative or opposing points of view or even acknowledging that there are opposing points of view.

The consultation process has already begun and is due to close on 22 June 2007. Shrewsbury & Atcham Borough Council is seeking to have the reorganisation process stayed until the challenge is concluded.

The questions of whether the Secretary of State has attempted to use statutory powers before the passing of the Act in which they are contained and whether she is legally able to do so are likely to be of widespread interest. We await the outcome of this challenge with interest.