

ClientEarth Comments on UK Aarhus Compliance January 2015

1 Introduction

1. The UK has long been in noncompliance with its obligations under the Aarhus Convention. These comments cover some of the current failures to comply which are of particular moment.
2. In its own remarks the UK omits that in recent cases its own judges have been noting the UK's noncompliance.
3. New legislation, the Criminal Justice and Courts bill, working its way through the Parliament, would increase the UK's noncompliance.
4. The present comments will cover key aspects of the UK's noncompliance, point to recent cases of note regarding this noncompliance, and sketch the further noncompliance the UK is seeking to enshrine in its law.

2 History and summary of access to justice in environmental cases in the UK

2.1 The Aarhus Convention

5. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention") was adopted on 25 June 1998 in the Danish city of Aarhus.
6. The UK ratified the Aarhus Convention on 24 February 2005. In line with the Convention's procedures the UK became a full Party to the Convention 90 days later, in May 2005.
7. The Aarhus Convention is built on three pillars:
 - a. access to environmental information (Article 5)
 - b. public participation in environmental decision-making (Articles 6-8)
 - c. access to justice in environmental matters (Article 9).
8. It is the third pillar - access to justice in environmental matters - that is relevant to these comments.
9. Access to justice is governed by Article 9 of the Aarhus Convention. Article 9 requires access to justice to be provided in three specific areas:
 - a. Article 9.1 requires access to justice in relation to Article 5 rights (access to environmental information):

- b. Article 9.2 requires access to justice in relation to Article 6-8 rights (public participation in environmental decision-making)
- c. Article 9.3 requires access to justice in a third additional category of cases:

*"3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any laid down in its national law, members of the public have access to administrative or judicial procedures to **challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.**"*

10. Articles 9.4 and 9.5 go on to provide that

*"4. In addition ..., the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be **fair, equitable, timely and not prohibitively expensive.** Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.*

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

11. Accordingly, amongst many other things, the Aarhus Convention requires the UK to ensure that:

- a. members of the public, who
- b. meet the criteria laid down in UK law, have
- c. access to administrative or judicial procedures, to
- d. challenge acts and omissions, by
- e. private individuals and public authorities, which
- f. contravene provisions of UK nation law relating to the environment, and
- g. those procedures must be fair, equitable and not prohibitively expensive.

12. Several complaints have been made to the Aarhus Compliance Committee complaining that the UK's costs rules are in breach of the Aarhus Convention.

13. These include the following complaints that are central to these remarks:

2.1.1 Complaint ACCC/C/2008/33 (ClientEarth, MCS & Latimer)

14. In ACCC/C/2008/33¹ (joint complaint by ClientEarth, the Marine Conservation Society and Mr Robert Latimer), the communicants raised a number of different complaints in relation to the UK's compliance with the Aarhus Convention. These included the following two points which are central to these remarks²:

(1) The "costs follow the event" rule

15. The communicants complained that the application of the rule generally applied in the English courts that "costs follow the event" (i.e. the losing party will generally be required to pay both its own costs and those of the winning party) to environmental cases makes access to justice in cases falling with Article 9 of the Convention, prohibitively expensive and is a financial barrier to justice, in breach of Article 9.4 and 9.5.

16. The UK argued that the rule did not make proceedings "prohibitively expensive" because it was mitigated by the availability of the following:

- a. Legal aid
- b. Conditional fee agreements
- c. Protective costs orders (PCOs)
- d. Judicial discretion.

17. The Committee disagreed with the UK and concluded that³: "*despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention ... the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial [...] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.*"

The Committee's findings on the specific mitigating factors relied upon by the UK were:

- a. Legal aid: The Compliance Committee did not comment specifically on legal aid in its findings in this case.

¹ <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>

² There were other complaints raised and other findings of non-compliance by the Compliance Committee in this case, for example, that the requirement to bring judicial review proceedings "promptly is too uncertain. However, those additional points are not the focus of these remarks.

³ At paragraphs 135 - 136

b. PCOs:

- i. The principles for granting a PCO under English law are the Corner House principles, set out by the Court of Appeal in *R (on the application of Corner House Research) v Secretary of State for Trade & Industry* [2005] 1 WLR 2600 and subsequent case law, namely "that the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances"⁴ and that:

"1. A protective costs order may be made at any stage of the proceedings, on such conditions the court thinks fit, provided it is satisfied that:

i) the issues raised are of general public importance;

ii) the public interest requires that those issues should be resolved;

iii) the applicant has no private interest in the outcome of the case;

vi) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order;

v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

*3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above."*⁵

The Compliance Committee considered that the "general public importance", "no private interest" and "in exceptional circumstances" criteria were all problematic in terms of ensuring that access to justice in Article 9 cases is not prohibitively expensive.⁶

- ii. The Compliance Committee also considered that the costs of the application for a PCO (i.e. the risk of losing the application and having to pay both parties' costs of the application) were in themselves limiting access to justice.

⁴ Para 72

⁵ Para 74

⁶ It is also worth noting (although this was not raised before the Compliance Committee) that there is considerable uncertainty as to whether a PCO under the Corner House principles can ever be granted in a private law (as opposed to public law) action. See the conflicting dicta of the *Court of Appeal in Morgan v Hinton Organics (Wessex) Ltd* [2009] Env. L R 30 at 36-40, *Ewieda v British Airways Plc* [2010] C.P.Rep. 6 at 22 & 38 and *Austin v Miller Argent (South Wales) Ltd* [2001] Env.L.R 32 at 11 & 64

iii. Further, the Compliance Committee considered that the practice of courts in applying a reciprocal PCO in favour of the defendant when granting a PCO to a claimant might also inhibit access to justice as it might prevent a claimant from being able to afford its own legal representation.

c. Judicial discretion: The Committee considered that considerable discretion of the courts in deciding the costs, without any clear legally binding direction from the legislative or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty.

18. The Committee recommended that the UK review its system for allocating costs in cases within the scope of the Aarhus Convention and undertake practical and legislative measures to overcome the problems identified.

(2) Cross-undertakings in damages for interim injunctive relief

19. The communicants also argued that the general requirement that claimant must give a cross-undertaking in damages before being granted interim injunctive relief (i.e. the making of an order during the course of the proceedings temporarily requiring the defendant to do or refrain from doing something pending the outcome of the proceedings) means that interim relief may not be available in environmental cases without risking prohibitive expense.

20. This means that environmentally damaging activities which are the subject matter of proceedings are likely to be allowed to continue during the course of the proceedings instead of being stopped pending the outcome of the trial. As proceedings can take a year or more to be resolved, a considerable amount of irreversible environmental damage might be done whilst the court process is ongoing. Interim injunctions are therefore an important protection in environmental cases.

21. The Compliance Committee found⁷ that:

"... this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4."

2.1.2 Complaint ACCC/C/2008/23 (individuals represented by Richard Buxton Environmental & Public Law) - private law actions

22. In ACCC/C/2008/23, the communicants (two individuals represented by Richard Buxton Environmental & Public Law) had been ordered to pay the costs of the defendant (the operator of a waste composting site near the communicants' hold) following the discharge of an interim injunction.

⁷ At paragraph 133

23. The proceedings were private nuisance proceedings in respect of odours emanating from the defendant's site. The interim injunction was initially granted but subsequently discharged because the parties and court were unable to settle on workable wording for the order.
24. The Compliance Committee found that private nuisance proceedings fell within Article 9.3 of the Convention:

"45. Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that other's use of land or interference with the enjoyment of land or of some right connected with the land. The Committee finds that in the context of the present case, the law of private nuisance is part of the relating to the environment of the Party concerned, and therefore within the scope of article 9, paragraph 3, of the Convention.

46. The Committee, having found that article 9, paragraph 3, of the Convention is applicable to the law of private nuisance in the context of the present case, also finds that article 9, paragraph 4, requiring that the procedures referred to in paragraph 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive, is thereby also applicable.

47. The Committee notes that the Party concerned acknowledges that private nuisance proceedings in the context of the present case are within the scope of article 9, paragraph 4, of the Convention."

25. The Committee went on to find on the facts that the costs order was "unfair" due the particular circumstances in which the interim injunction came to be discharged. However, the more central importance of this case is that the Committee found (and the UK appeared to concede) that the private law nuisance proceedings in this case were within the scope of Article 9.3.

2.2 Changes in UK rules since those findings

2.2.1 Introduction of costs caps in CPR Part 45 for environmental judicial review cases

26. Following the above findings of the Compliance Committee, the Ministry of Justice published a consultation paper "Costs Protection for Litigants in Environmental Judicial Review Claims: Outline proposals for a costs capping scheme for cases which fall within the Aarhus Convention".
27. This led to introduction of new cost capping rules which apply to some environmental cases. In particular, the 2013 Jackson reforms introduced new fixed costs rules into Part 45, Section VII of the Civil Procedure Rules (CPR) dealing with "Aarhus Convention claims".
28. "Aarhus Convention claims" is defined in CPR r.45.41(2) as:

"a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998,

including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

29. Accordingly, these provisions only apply to claims for judicial review and have no application to private law or statutory review actions relating to the environment.
30. CPR r. 45.43 then provides that "*a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45*".
31. Practice Direction 45 caps the costs recoverable against the claimant to:
 - a. £5,000 where the claimant is claiming as an individual and not as or on behalf of a business or other legal person
 - b. £10,000 in all other cases.
32. The Practice Direction also provides that where a *defendant* is ordered to pay costs, the amount specified for the purpose of rule 45.43 is £35,000 (i.e. there is a cross-cap on the amount of costs a claimant can recover if it wins).
33. There are opt-out provisions in r.45.42 if a claimant does not want the rules to apply.
34. Under r.45.44 a defendant can challenge whether a claim is in fact an Aarhus Convention claim within the meaning of r. 45.41(2). The court will determine this question at "*the earliest opportunity*"⁸. If, following such a challenge by the defendant, the court determines that the claim is not an Aarhus Convention claim, the court will "*normally*" "*make no order for costs*"⁹. If, on the other hand, the court finds that the claim is an Aarhus Convention Claim, the court will "*normally*" order the defendant to pay the claimant's costs of that determination on the indemnity basis¹⁰.

2.2.2 New provision in relation to cross-undertakings in damages for interim injunctions in judicial review cases

35. A change has also been introduced to CPR Practice Direction 25A in relation to cross-undertakings in damages for interim relief. The new Practice Direction 25A 5.1B now provides:

"(1)If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking

⁸ r.45.44(2)

⁹ r.45.44(3)(a)

¹⁰ r.45.44(3)(b)

(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and

(b) make such directions as are necessary to ensure that the case is heard promptly.

(2) Aarhus Convention claim" has the same meaning as in rule 45.41(2)."

36. Again, because the definition of Aarhus Convention claim here is the same as in CPR r.45.41(2), this new provision only applies to judicial review cases and does not apply to private law claims or statutory review.

2.2.3 Changes made in the Legal Aid, Sentencing and Punishment of Offenders Act 2012

37. The UK has, however, also made a number of changes which have a detrimental effect on access to justice in environmental cases.

38. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPOA") made a number of highly controversial changes to the legal aid and other court funding rules in the UK. These have had the effect of eroding access to justice in environmental cases rather than improving it.

39. The provisions pertinent to these remarks are:

(1) Reductions in scope of legal aid

40. LASPOA drastically reduced the scope of legal aid available in the UK. Whilst legal aid is now available in some environmental cases, the means test is a very stringent one.

41. LASPOA does, however, contain a number of "exceptional case" carve-outs¹¹, whereby civil legal aid can be made available, despite the legal aid cuts, where the Director of Legal Aid Casework makes an "exceptional case determination".

42. Section 10(3)¹² provides that an exceptional case determination is a determination:

"(a) that it is necessary to make the services available ... under this part because failure to do so would be a breach of -

(i) ... Convention rights (within the meaning of the Human Rights Act 1998(, or

(ii) any rights ... to the provisions of legal services that are enforceable EU rights, or

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach."

¹¹ In s.10 (for individuals) and Schedule 3 paragraph 2 (for legal persons)

¹² The corresponding provision for legal persons is in Schedule 3 paragraph 2 of LASPOA 2012

43. Accordingly, whilst exceptional case determinations are able in cases where the provision of legal aid is required to ensure compliance with the European Convention on Human Rights ("ECHR") and in cases where a failure to provide legal aid would be a breach of EU laws, no exceptional case determination is available in Aarhus Convention Claims. This means that the safety net that exists to protect the rights of individuals to access to justice under the ECHR and EU laws does not extend to Aarhus Convention rights, leaving a gap where claimants may be unable to afford to bring proceedings in environmental cases and also not entitled to legal aid, making the proceedings prohibitively expensive in breach of the Aarhus Convention.

(2) Conditional fee agreement success fees not recoverable

44. Section 44 of LASPOA 2012 amended s58A of the Courts and Legal Services Act 1990 such that "A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by the other party under a conditional fee agreement".

45. This means that a winning claimant can no longer recover the amount of a success fee (i.e. the additional sum the claimant agrees to pay its lawyers in the event they win the case, in return for the lawyer agreeing to take the case on a "no win, no fee" basis) due to the claimant's lawyers under a conditional fee agreement from the defendant. The idea behind the change is to encourage parties to move away from using *conditional* fee agreements and towards using *contingency* fee agreements.

46. Under a *contingency* fee agreement the claimant's lawyer receives a proportion of the damages received by the claimant if the claimant wins the case. Contingency fee agreements are not well suited to many environmental cases as often the claimant is not seeking damages but rather a declaration and/or injunction. There are therefore no damages from which to take the supplemental fee.

47. Accordingly, abolition of recovery of success fees due under conditional fee agreements is likely to make it significantly more difficult for claimants to obtain legal representation on a "no win, no fee" basis in environmental cases.

(3) ATE insurance premiums not recoverable

48. Section 46 of LASPOA 2012 amended the Courts and Legal Services Act 1990 by inserting a new section 58C(1) which prevents claimants from recovering the premium paid for after-the-event ("ATE") insurance as part of the claimants' costs, even if the claimant wins the case.

49. ATE insurance premiums can be very substantial. This rule against recovery of ATE insurance premiums means that a claimant might be substantially out of pocket even if it wins its case and otherwise recovers its costs. This puts the claimant in an environmental case in the very difficult position of having to choose between taking out ATE insurance but having to bear the costs of the premium even if they lose, or not taking out the insurance and risking liability for the defendants' costs if they lose.

50. That choice is likely to make access to justice in many environmental cases prohibitively expensive.

2.3 Further complaints to the Aarhus Compliance Committee arising out of those changes

51. As a result of those changes in the law, two further complaints against the UK have been submitted to the Compliance Committee.
- a. in September 2012, the Environmental Law Foundation (represented by Hugh James Solicitors) made a complaint (ACCC/C/2013/85) that the removal of the entitlement to recover the premium paid for an ATE policy in s.58C(1) of the Courts and Legal Services Act 1990¹³ meant that private nuisance cases were "prohibitively expensive".
 - b. in February 2013, Richard Buxton Environmental & Public Law made a further complaint (ACCC/C/2013/86) to the Compliance Committee that the UK government was failing to ensure that members of the public have access to judicial procedures to challenge the acts and omissions of *private* parties under Article 9.3 because private law claims were excluded from the definition of "Aarhus Convention claims" in CPR r.45.41(1).
52. The UK provided a joint response to those two complaints on 20 December 2013¹⁴. The gist of the UK's response is that environmental private law nuisance claims do not fall within Article 9.3 of the Aarhus Convention.
53. The Aarhus Compliance Committee has not yet issued its findings in relation to those two complaints. However, in light of (i) the Committee's findings in ACCC/C/2008/23 that environmental private law cases do fall within Article 9.3 (see above), and (ii) the content of a report issued by the Compliance Committee in May 2014 (see below), it is likely that the Committee will disagree with the UK's argument that private nuisance claims are not within Article 9.3 and require the UK to take further steps to improve access to justice in private law environmental cases.

2.4 The Aarhus Compliance Committee's recent report on the UK's compliance – May 2014

54. Following a finding of non-compliance, the Compliance Committee monitors the steps taken by the relevant Party to correct the non-compliance and issues reports on its findings from time to time.
55. In May 2014, the Compliance Committee produced a report on the UK's compliance following the Committee's findings of non-compliance in cases ACCC/C/2008/33, /27 and /23.

¹³ Amended by s.46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012

¹⁴http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-85/Correspondence_Party_concerned/UK_response_85_86.pdf

56. In the report, the Compliance Committee expresses the view that, despite the introduction of the new cost caps into CPR Part 45, the UK is still not in compliance with its obligations under the Aarhus Convention.

57. This is for several reasons, including the following which are pertinent to these remarks¹⁵:

2.4.1 The new costs caps in Part 45 are limited to judicial review cases and do not apply to private law or statutory review cases

58. The Compliance Committee notes in the report that the new costs caps in CPR Part 45 are limited to judicial review cases and do not apply to private law cases (or statutory review) and finds that the UK had therefore taken insufficient measures to fully meet the requirements of Article 9.4 of the Aarhus Convention.

59. The Committee concludes that:

*"In England and Wales, the new cost protection provisions apply to claims for "judicial review of a decision, act or omission all or part of which is subject to the Aarhus Convention", but do not address statutory review or private law claims. ... Bearing in mind that the requirement in article 9, paragraph 4 for procedures to be not prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of that article, the Committee finds that the Party concerned has taken insufficient measures to fully meet the requirements of article 9, paragraph 4 in this regard."*¹⁶

60. The amendments to legal aid and the abolition of recovery of ATE premiums and success fees in LASPOA 2012 all compound this problem, by taking away some of the key safety nets that previously applied in private law cases.

61. Further, because the same definition of Aarhus Convention claim is used in Practice Direction 25, the same reasoning applies equally to the existing rules on cross-undertakings in damages for interim relief.

2.4.2 Protection for claimants who cannot afford the costs caps

62. The Committee expresses concern in the report that there may be some claimants for whom even £5,000 or £10,000 is "prohibitively expensive", particular when viewed collectively with the £35,000 cross-cap on the costs recoverable by the claimant itself, which can leave claimants substantially out of pocket even if they win the case.

63. The UK had suggested that those claimants are likely to be entitled to legal aid (plus corresponding protection from adverse costs orders that is afforded to legally aided claimants). However, the Compliance Committee expresses the view that it is problematic to rely on legal aid to cover this

¹⁵ Again, there are further findings of non-compliance by the Compliance Committee in this report, for example, a finding that the UK has failed to amend the time limit for bringing judicial review proceedings.

¹⁶ Paragraph 44. See also paragraph 35

category for several reasons. The short timeframes for bringing a judicial review claim may mean that by the time the claimant has had its legal aid application approved it may be too late to bring a claim. Further, the means test threshold to qualify for legal aid is very low, which means that most people will earn too much to qualify. Further, legal aid can be difficult to obtain in public interest cases and may not be available for all types of environmental claims.

64. The amendments to legal aid and recovery of ATE premiums and success fees in LASPOA all compound this problem by taking away the safety nets that might have been used to ensure access to justice for claimants for whom even the Part 45 costs caps are prohibitively expensive.

2.5 *Commission v UK (Case C-530/11) – February 2014*

65. In addition to the Compliance Committee finding the UK to be in breach of the Aarhus Convention, the European Court of Justice (“ECJ”) has also recently made a similar finding.
66. The European Union has enshrined parts of the Aarhus Convention into European directives, in particular rights relating to public participation in environmental decision-making and access to justice in those cases¹⁷.
67. Where those directives apply (environmental impact assessments of certain projects and integrated pollution prevention and control), member states are required to provide access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of the relevant decision, act or omission, and that procedure “*shall be fair equitable, timely and not prohibitively expensive*”¹⁸.
68. The ECJ found that the UK costs rules¹⁹ were inadequate to ensure that proceedings falling within those directives were not prohibitively expensive. The ECJ was critical of the Corner House principles and UK’s system of requiring cross-undertakings in damages for interim relief.
69. Whilst the new cost capping provisions in CPR Part 45 (which came into effect during the course of the proceedings in *Commission v UK*) go some way to rectifying the problems identified by the Commissions and the ECJ, they do not, for the reasons set out in the preceding sections, go far enough.

¹⁷ Article 3(7) and 4(4) of Directive 2003/35 insert, respectively, Article 10a in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p.40) and Article 15a in Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p.26), which has been codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p.8).

¹⁸ Article 10a of Directive 85/337 and Article 15a of Directive 96/61

¹⁹ The judgment makes no reference to the new provisions for cost capping in judicial review cases in CPR Part 45, presumably because the case was argued before those provisions came into effect.

3 The Criminal Justice and Courts Bill

70. New legislation, the Criminal Justice and Courts bill, is currently working its way through the Parliament, would increase the UK's noncompliance. The Bill contains a number of proposals that will make access to judicial review proceedings more difficult. There is no carve-out in the Bill for Aarhus Convention claims so environmental judicial review claims will also be adversely affected by the proposals.

4 Recent Cases

Judges in recent UK cases have made important observations about the noncompliance of the UK with the Convention. The UK fails in its remarks to draw the attention of the Committee to these cases.

In *The Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539, the Court of Appeal found that the UK's cost protection is not compliant with the Aarhus Convention.

The Claimant, Ms Venn, applied to quash a planning inspector's decision to allow the owner of the land next door to her London property to build another dwelling in his garden. Her challenge was by way of statutory appeal under s.288 of the Town and Country Planning Act 1990. Mrs Justice Lang in the court below granted a Protective Costs Order (PCO) of £3,500. The Secretary of State appealed.

The first question was whether the Claimant's s.288 application fell within Article 9(3) of the Aarhus Convention, which states that members of the public should have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The Court of Appeal agreed with the previous judge's conclusion that it did, rejecting an argument by the Secretary of State that the Claimant was not challenging a public authority's contravention of a provision of national law relating to the environment because this case involved a policy. Article 9(3) would be deprived of much of its effect in the UK if such a distinction between law and policy was drawn.

The second, more difficult, question concerned the principles upon which the Court should exercise its discretion to grant a PCO in an Aarhus case in which directly enforceable EU environmental Directives are not engaged. Under Article 9(4) of the Convention, the procedures for bringing a challenge under Article 9(3) are to be adequate and effective and "not prohibitively expensive". On this basis, when someone brings a judicial review "all or part of which is subject to the provisions" of the Aarhus Convention, they may not be ordered to pay costs exceeding £5,000 for individuals and £10,000 for others (CPR 45.41, 45.44 and Practice Direction 45). Ms

Venn conceded that statutory appeals are not subject to these provisions but said the court should exercise its inherent jurisdiction to make a PCO on the basis that the case involved an environmental challenge within Article 9(3) Aarhus. Mrs Justice Lang recognised the CPR 45.41 provisions did not apply but granted a PCO on the basis that “the *Corner House* criteria [which set out the guidelines for making a PCO] should be relaxed to give effect to the requirements of the Aarhus Convention.”

Lord Justice Sullivan in the Court of Appeal was persuaded that the Secretary of State’s appeal must succeed, finding that once it is accepted that the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but a deliberate expression of legislative intent, it would be inappropriate to exercise a judicial discretion to give cost protection.

Exercising such discretion would also give effect to an international Convention which was not made directly effective by the EU and which has not been incorporated into UK domestic law.

However, the Court of Appeal was reluctant to reach its conclusion, recognising that confining CPR 45.41 to judicial review means that it is not Aarhus compliant. The court stated that “[a] costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systematically flawed in terms of Aarhus compliance”.

It follows from the Venn case that the UK is still failing to comply both with international and EU law with regard to access to justice under Article 9(3) and 9(4) of the Aarhus Convention. In the case itself, the court was told that the UK government is currently looking at the costs regime for environmental cases. According to Lord Justice Sullivan, the government will now be able to take the Court of Appeal’s own conclusions on this appeal “into account in the formulation of a costs regime that is Aarhus compliant”.

In *Austin v Argent Miller [2014] EWCA Civ 1012*, the Court of Appeal found that private nuisance claims can fall within Article 9.3 of the Aarhus Convention, which the Committee has instructed the UK, but which it fails follow.

In a joint judgment, Lord Justices Elias and Pitchford wrote:

“17. ... in our judgment it would be wrong to exclude all claims of private nuisance from the scope of Article 9.3 [of the Aarhus Convention], irrespective of the potentially significant public interest in the wider environmental benefits which they may bring if successful. ...

18. It seems to us unrealistic to believe that the powers conferred upon public authorities will suffice to achieve the Convention’s objectives. Public bodies are often under staffed and under resourced and do not have the same direct concerns to uphold environmental standards as do members of the public. ... action by individuals will be a valuable additional method of ensuring that high environmental standards are maintained. We do not see why in an appropriate case a private nuisance claim should not be treated as one of the judicial procedures referred to in Article 9.3.”

It is clear that private actions can fall within the scope of Article 9.3. Until the UK acts accordingly it is systematically depriving its citizens of access to justice in contravention of the Convention.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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