

## **Observer Comments on UK Aarhus Compliance January 2015**

I have kept my comments in layman's terms, as I am an ordinary member of the public. I am one of many people who have suffered due to the rapid destruction of the UK's planning system – which has seen the undermining of long established planning policies and environmental protections. Legislative reforms have also removed the rights of any ordinary citizens or local authorities to uphold environmental and planning standards through the courts. The UK's environmental planning system used to be a beacon of good practice for other countries, but has proved very fragile and easily dismantled.

The UK government's response regarding its compliance with the Aarhus Convention, and particularly Article 9, has missed out a number of important facts.

### **National planning decisions in the UK are now entirely excluded from access to justice or independent review mechanisms**

A whole category of environmental planning cases now sits outside any affordable independent review mechanism, or access to justice, in the UK. This is the case even when human rights have been infringed, and environmental impacts are irrefutable. The reason for this is that section 288 or Statutory Reviews are the only available route to challenge Planning Inspectorate or Secretary of State decisions on planning permits or permissions. These are the same as judicial reviews in every aspect but name. The Planning Inspectorate now controls almost all environmental planning decisions in the UK, directly or indirectly. Judicial Reviews are only applicable to local level challenges of planning permission, and the power over planning no longer sits at the local level in this country.

The Planning Inspectorate and Secretary of State have been given many new powers within the UK planning system over recent years, and are able to overturn local planning permission refusals, on all sites small and large, and to veto or approve local planning policies after public consultation periods have ended.

Historically, the UK's planning system was established so that local planning policies and frameworks were developed and decided on at a local level, with careful checks and balances to prevent corruption, and with full public participation. But in recent years, the Secretary of State and his executive body, the Planning Inspectorate, have expanded their powers to 'call-in' and 'overturn on appeal' perfectly rational and legal decisions by local authorities to refuse planning permission. They can do this even when developments have proven environmental and human health impacts and go against local planning policies. The Planning Inspectorate and Secretary of State are currently overturning local refusals of planning permission at extraordinarily high rates (over a third of all appeals against local refusals of planning permission are overturned). There are no costs or disincentives for the developer to appeal to the Planning Inspectorate, and this route is only open to the developer. There is no route for third parties or residents to appeal, even if their fundamental human rights or health are affected by a development, or local planning policies have been contravened.

Unlike national and regional planning review procedures common across the rest of Europe, the Planning Inspectorate do not need to prove any error in the decision of the local authority before

overturning it. They do not even need to prove their national decision was better than the local authority's decision. They can exercise 'planning judgement' in the widest sense, and reverse any local authority refusal of planning permission, without needing to justify or explain their reasons adequately. Decisions are influenced through a secretive 'reading room' within the Inspectorate, with close ties to the Secretary of State. The Planning Inspectorate Reading Room's comments and decision making frameworks are claimed by the UK government to sit outside Freedom of Information or Environmental Data regulations, and are not available to the public. It is also very difficult for the public to access the information submitted by the developer to the Inspectorate, as they are required to travel to the Inspectorate's offices in Bristol, and pay considerable sums to obtain copies. As a result, developers are submitting environmental information and plans which differ from those submitted at local level, knowing the public has no easy way to access these.

There is no recourse to any affordable review of Planning Inspectorate decisions. They have been intentionally excluded from the cost regimes which apply to judicial reviews of local authority decisions. They sit within a special legal category, meaning they can only be challenged through 'statutory reviews' or section 288 of the Town and Country Planning Act. The costs of statutory reviews are very high – usually over £80,000 for legal costs on both sides, even for a simple or small case. There is no longer any legal aid for these cases, no affordable insurance schemes, and (as my recent case in the Court of Appeal confirmed) neither Cornerhouse rules or Aarhus cost limits apply to this category of challenge, so there is no way to obtain Protective Cost Orders. As a consequence, the majority of UK citizens are now unable to uphold the established local planning and environmental policies which used to protect them. Consequently there are almost no legal firms left in the UK able to help third parties or residents with planning cases, as they are generally required to work pro-bono, or under a risky Conditional Fee Agreement. Because Aarhus rules in the UK do not apply to Planning Inspectorate challenges, even applying for a Protective Cost Order is prohibitively expensive. And unless a very clear link with a pollution prevention or environmental impact assessment directive can be proved (and size thresholds for the latter have been increased in the UK so as to exempt most planning cases), there is no way for the courts to award a Protective Cost Order – as their judicial discretion has been so limited.

The consequences of this are plain to see. Press and media records show extreme public dissatisfaction with the state of our planning system. Court records clearly demonstrate that no ordinary resident, no-one of average income, and almost no local authorities, have been successful in challenging poor decisions of the national Planning Inspectorate in the last four years. Most have stopped trying. The costs are prohibitively expensive even for local authorities – so legal challenges from citizens and public bodies have dwindled to a tiny few, almost all of which are unsuccessful. And yet it is the public that must suffer the consequences of this 'chaos agent' role played by the Planning Inspectorate, and its escalating powers to rewrite and undermine local environmental policies.

The UK is also unique in European planning systems in that each decision of the Planning Inspectorate is allowed to set a legal precedent, altering the framework for future development consent at local level, and altering the powers of local authorities to interpret local environmental planning policies as originally intended. Local Authorities may still nominally write their planning policies in consultation with local people, but they are judged incapable of interpreting them. As a consequence, most UK citizens have stopped participating in consultations on local planning policy,

knowing these cannot be upheld at national level, and have effectively become meaningless, and not worth the paper they are written on.

Each centralised decision by the Planning Inspectorate or Minister creates ripples of impact on future decisions by the local authority – limiting their powers to negotiate with developers and reduce environmental damage or human health impacts. To make matters worse, this government have introduced fines or ‘cost awards’ against local authorities when they refuse permission for any development which is later ‘allowed’ by the Planning Inspectorate on appeal. This government have also introduced new rules, meaning local authority planning departments lose all their planning powers if a very low threshold of decisions are overturned at national level by the Inspectorate. They have also cut public funding for local authority planning staff, and made their jobs dependent on a system of bonuses which reward local authorities for each development they grant planning permission for. This creates a culture of bias and fear within local planning authorities, leading officers to grant planning permission for developments they would previously have refused – due to the costs and career risks associated with any refusals. Quasi-judicial local Planning Committees made up of elected representative used to be responsible for approving or refusing planning decisions, providing checks and balances, consistency, accountability and reducing the risk of corruption. However, Committee powers have been reduced, the risk of costs at Appeal stage have had a chilling effect on their ability to refuse applications, and Committee decisions are now increasingly delegated to single officers.

Many attempts to judicially review poor decisions by local authorities in the UK have only arisen because local authorities have lost their powers to say ‘no’ to environmentally damaging development. The cause lies at the national level, and the undermining of localism in our planning system.

The Planning Inspectorate is not an independent body, and is subject to no external scrutiny or public accountability. To make matters worse, there is no quality control framework or environmental data or analysis made available to the public about its decision making. There is a widely recognised ‘randomness’, bias and inconsistency to Planning Inspectorate and Secretary of State decisions, yet no way to challenge these decisions. There is no publicly available reporting or environmental data about trends in the Planning Inspectorate’s decision making, or its alignment with Local Planning Policy (which is meant to set the legal framework for development consent in the UK). Individual cases repeatedly demonstrate how far the Inspectorate can stray from previously well-established environmental standards, with virtual impunity. It has no published policies of its own, and has admitted to me it has no quality control frameworks.

Finally, the length of time which planning appeals and Statutory and Judicial Review court proceedings take in the UK (4 years or more is common, as in my case), and the inability of the courts to reverse decisions (they have to pass them back to the Inspectorate to re-determine, which takes even longer), creates intolerable uncertainty and disruption to citizens’ lives. In addition, the courts seldom grant injunctive relief, and there are unaffordable cost risks associated with even asking for this. So those affected by poor decisions face the horror of being unable to stop developments, even while they are attempting to challenge them.

This is not how other European planning systems work, and it is setting us on a course to environmental degradation and serious human health impacts. The power of local authorities to

interpret and uphold their own planning policies, and to make speedy authoritative decisions to refuse development which is environmentally damaging, must be restored in the UK.