A Pillar of Justice II

The continuing impact of legislative reform on access to justice in England and Wales under the Aarhus Convention

Environmental Law Foundation

Friends of the Earth

RSPB

AUTHORS:

Carol Day
(Legal Consultant, The RSPB)

Hannah Von Minden
(University College London)

Tom Brenan and Emma Montlake
(Environmental Law Foundation)

Katie de Kauwe and Flora Hausammann
(Friends of the Earth England, Wales and Northern Ireland)

EDITED BY:

Stephen Tromans KC
(39 Essex Chambers)

The RSPB, The Lodge, Sandy, Bedfordshire SG19 2DL.
T: 01767 680551 | www.rspb.org.uk

The Royal Society for the Protection of Birds (RSPB) is a registered charity: England and Wales no. 207076, Scotland no. SC037654.

Environmental Law Foundation, The Barn, 36 High Street, Pershore, Worcestershire WR10 1DP.
E: info17@elflaw.org

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Friends of the Earth Limited, 1st Floor, The Printworks, 139 Clapham Road, SW9 0HP.
T: 020 7490 1555 | www.friendsoftheearth.uk

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1. EXECUTIVE SUMMARY

1.1 Introduction

The Ministry of Justice (MOJ) has yet to establish a transparent and consistent system for identifying the number of environmental Judicial Review (JR) claims issued every year and to evaluate whether costs rules established to make legal action affordable for civil society are operating effectively. The absence of an effective monitoring system has presented the authors with some challenges in producing this Report, but notwithstanding these limitations, we have attempted to provide an informed evaluation of the observed trends in environmental JRs on the basis of best available information. We welcome assurances from the MOJ that software to identify Aarhus Convention (AC) claims regardless of topic area will be introduced shortly.

The report has been compiled using data for environmental JRs provided by the MOJ covering the period 15 May 2019 to 31 July 2022, published MOJ statistics, and data from the Pillar of Justice I report (POJ I)[1]. The Conclusions and Recommendations arising from the data analysis are presented in section 7 of the Report and the four key findings of the Report and consequential recommendations are set out below.

1.2 The number of environmental JR applications

The number of Aarhus claims peaked in the period from December 2020 to October 2021 and then fell significantly in the period from October 2021 – July 2022. When combined with the data from POJ I, we see a continuing decline in the number of Aarhus Convention claims from 2013 to date. It is hoped that a review of the Environmental Costs Protection Regime (ECPR)[2] will assist in uncovering the reasons for the decline in the number of applications. However, in the interim, it would appear that legislative reforms intended to dissuade JR applications introduced over the last decade[3] are indeed having that effect on both environmental and other civil claims. This assumption is reinforced by the Environmental Law Foundation (ELF) case studies which, whilst not comprehensive, illustrate that cases with good prospects of success are not being brought, in some cases for fear of adverse costs. In order to address the continuing decline in the number of AC claims being issued, we recommend that ongoing and piecemeal attacks on JR and the Aarhus costs regime are reversed. This includes matters previously identified by the Aarhus Convention Compliance Committee as contributing to non-compliance with Article 9(4) of the Convention in a Report submitted to the seventh Meeting of the Parties in August 2021[4]. We include a summary of those matters below and they are discussed more fully in section 7 of the report:

- The inclusion of all environmental claims (civil and private) within the scope of the ECPR.
- The adoption of the Northern Ireland costs approach (in which default caps for Claimants can only be varied downwards and the reciprocal cap for Defendants can only be varied upwards).
- An amendment to CPR 45.44 to prevent variations of the cap by Interested Parties.
- An amendment to CPR Part 45 to confirm the default cap expressly covers the adverse costs of all proceedings with necessary amendments to CPR 52.19A and the Supreme Court Rules to reflect this position.
- An amendment to CPR 45.44 to remove the requirement on Claimants to provide a schedule of financial resources when making an application for JR.
- An amendment to CPR 45.43(4) to reinstate the original (2013) rule that there is one cap per claim, not one cap per Claimant.
- Appropriate amendments to section 87 of the Criminal Justice and Courts Act 2015 and CPR Part 45 in order to ensure that members of the public who join proceedings as interveners in support of the Claimant are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive.
- An amendment to the CPR to clarify that a Claimant is not liable for multiple sets of costs of the Acknowledgement of Service/Summary Grounds of Resistance at the permission stage in judicial and statutory review cases, and that such costs must in all the circumstances be reasonable and proportionate.
- An amendment to CPR 45.43 to remove the reciprocal cap on Aarhus Convention claims.[5]

1.3 The number of applications successfully challenged by Defendants as Aarhus Convention claims

Apart from a single case in dataset 1, no claims were successfully challenged by a Defendant as not being Aarhus Convention (AC) claims between May 2019 – July 2022. On the contrary, a significant number of cases (27 in total) were unsuccessfully challenged by the Defendant over the same period. When combined with data from the POJ I report, there would appear to be a continuing and consistent decrease in the number of successful challenges since the peak between February 2017 - May 2018. The MOJ has pointed out that due to different court forms in use, in some of these cases the Defendant in fact only applied to vary the amount of the cap, while agreeing that the case in question was an Aarhus case. This limitation makes it difficult to fully understand the extent to which Defendants are challenging the status of claims as AC claims but, on its face, it suggests that Defendants may be using this provision of the CPR disproportionately.

In light of the above, there appears to be a questionable basis for retaining a regime in which Defendants who unsuccessfully challenge the status of claims as AC claims are ordered to pay costs on a standard basis only. It would appear that while challenges continue to be brought (albeit at a reduced rate than previously[6]) they are not being upheld by the courts. This could be unfairly exacerbating the overall costs burden for Claimants, and creating satellite litigation on costs, which is precisely what the rules on cost protection were intended to prevent. We recommend an amendment to CPR 45.45(3)(b) to reinstate the pre-2017 indemnity costs regime in respect of unsuccessful challenges to the status of a claim as an Aarhus claim.

1.4 The number of cases in which permission was granted

The data shows no significant change in success rates at permission stage between the beginning of POJ I (April 2013) and the end of POJ II (July 2022). An analysis of the proportion of JR applications and environmental JR applications that are granted permission to proceed out of the total number of applications made indicates that environmental JRs are approximately twice as likely to be granted permission to proceed than JR applications overall. This shows that there are meritorious cases being brought by environmental claimants as they pass this key procedural hurdle of whether or not they are arguable (and so fit for further consideration at a substantive hearing, as opposed to hopeless, frivolous or vexatious) more frequently than the average from JR claims as a whole.

However, the data also reveals a decrease in the percentage of total environmental JRs being granted permission since 2020, while the percentage of general JRs being granted permission has been slowly increasing since 2019. This trend was detected (but not remarked upon) towards the latter time period in POJ I and the authors note that this timeframe fits with when the "no substantial difference in outcome" test was introduced. The decline in success rates for environmental JRs being granted permission to proceed since December 2020 – October 2021 has also been reported anecdotally. We recommend the imminent ECPR review specifically invites views on the apparent decline in success rates at the permission stage and what measures can be taken to address such concerns.

1.5 The number of cases ultimately successful for the Claimant

The POJ II data shows a modest increase in environmental JR success rates at first instance, fluctuating around 10%. Compared to the figures for total JR applications, where the success rate has remained consistently around 3% since 2019, it can be seen that AC applications perform comparatively well in terms of ultimate success. When combined, the POJ I and POJ II data shows a modest but overall increase in the success rate at first instance. At first blush, it would appear that while fewer cases are being brought, and fewer cases are being granted permission to proceed, those that get to a substantive hearing are more likely to be successful. One possibility is that Claimants are increasingly bringing cases for which they are advised they have high (or higher) prospects of success.

We recommend the imminent ECPR review invites views on this issue and that the new regime implemented by the MOJ monitors this (in addition to the parameters highlighted above).

1.6 Concluding remarks

The absence of a comprehensive monitoring mechanism to evaluate the extent to which the Aarhus costs regime provides compliance with Articles 9(4) and (5) of the Convention is indicative of the Government's wider failure to

grasp the importance of access to environmental justice. This is despite repeated calls on the part of environmental NGOs and, more latterly, the Compliance Committee itself to implement a programme of measures to remove barriers to compliance with provisions of the Convention on access to justice.

The findings of POJ I and POJ II reveal that environmental JR has a relatively good track record in highlighting unlawfulness when compared with JR generally and that current rules and some decisions of the courts (on varying caps and on permission stage costs) are having a predictably cumulative deterrent effect on prospective Claimants. If there is an active policy of trying to deter Aarhus claimants (which arguably is the case) that amounts to a serious systemic breach of the Convention and one that should be urgently reversed. There are in addition serious concerns about changes to the rules on remedies which would be a further significant deterrent.

The serious impacts of restricting access to justice, in particular on already disadvantaged individuals, was documented as long ago as 2009.[7] The obvious gaps highlighted by the Compliance Committee must now urgently be addressed. It is hoped the imminent ECPR review will identify persistent barriers to access to environmental justice and a route-map to compliance as soon as possible, and certainly before the 1 October 2024 deadline set by the Compliance Committee.

2. BACKGROUND

2.1 Purpose of the Report

The purpose of this report is to clarify, to the extent possible on available data, how the current legislative framework is enabling, hindering or even preventing the UK from meeting the access to justice requirements of the UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention")[8], with particular emphasis on the issue of prohibitive expense.

In the short-term, this analysis will inform our responses to a forthcoming review of the effectiveness of the ECPR, which currently forms the sole component of the UK's Action Plan to address the challenge of the prohibitively high cost of legal action.[9] In the longer-term, it will enable us to better understand the trends and long-term impact of the ECPR, alongside other legislative reforms and developing jurisprudence, on Judicial Review (JR) practice and other forms of litigation.

The MOJ has yet to establish a transparent and consistent system for identifying the number of environmental cases issued every year and to evaluate whether the costs rules established to make legal action affordable[10] for civil society are operating effectively. The absence of a monitoring system has presented the authors with some challenges. Nevertheless, our aim is to provide an informed evaluation, on the basis of the best available data, of the extent to which legislative changes and the apparent approach of the courts (on, for example, applying discretion) in England and Wales ensure that judicial processes are 'fair, equitable, timely and not prohibitively expensive' for claimants in proceedings falling within the ambit of the Aarhus Convention ("Claimants").

2.2 The Aarhus Convention and the UK

The Aarhus Convention was adopted in 1998, linking for the first time in binding international law, human rights and environmental protection.

The link between environmental concerns and human rights was formally made (in an international context) at the 1992 UN Conference on Environment and Development in Rio de Janeiro, when 178 countries adopted the Rio Declaration on Environment and Development (the "Rio Declaration").[11] Significantly, Principle 10 of the Rio Declaration called for environmental issues to be handled with the participation of all concerned citizens and introduced the rights to access to information, participation in decision-making and access to justice. The adoption of the Aarhus Convention brought the procedural rights and requirements of Principle 10 of the Rio Declaration into effect. Though primarily regional in scope,[12] the comprehensive framework for procedural environmental rights and obligations on public authorities has been used as a model for countries throughout the world. The UN records that there are currently 38 signatories and 47 Parties.[13]

The objective of the Convention, as stated in Article 1, is to guarantee the public rights of access to information, participation in decision-making and access to justice in environmental matters; in order to contribute to the protection of the right of every person (present and future) "to live in an environment adequate to his or her health and well-being".

The rights-based approach encompassed in these three 'pillars' established the Aarhus Convention as a new kind of environmental agreement linking substantive and procedural environmental rights, sustainable development and the involvement of the public concerned. It was the first international legal instrument to explicitly refer to a right to a healthy environment for 'present and future generations' and set up the rights introduced in the three pillars as a means for all members of the public to assert or achieve this.[14] As such, the Aarhus Convention brought to the forefront the space for public interaction with public authorities to contribute to environmental protection and government accountability within a democratic context.

One of the most important legal mechanisms for the public, and encompassing the dynamic of public participation, access to information and accountable governments, is JR. JR represents almost the sole mechanism for civil society to challenge the decisions, acts and inactions of public bodies affecting the environment in the courts, and as such, it is imperative that it operates effectively.[15] Box 1 (below) illustrates the importance of the JR process in exposing defective decisions and approaches, although even ostensibly unsuccessful cases have been shown to influence decisions and shape public policy and it can also take several unsuccessful cases before a point of law is successfully established. For example, in R (Wild Justice) v Water Services Regulation Authority,[16] the Claimant Wild Justice was refused permission to

challenge Ofwat's failure to systematically enforce s.94(1) Water Industry Act 1991. However, as of June 2022, Ofwat was progressing enforcement action against six water companies due to "heightened concerns about its environmental performance across a number of metrics.[17]

Box 1 – The importance of environmental JR

Net Zero Strategy JR

The Net Zero Strategy (NZS) was presented to Parliament in October 2021 by the Secretary of State for Business, Energy and Industrial Strategy (then the Rt Hon. Kwasi Kwarteng). The Climate Change Act 2008 (CCA) requires the Secretary of State to ensure that net emissions of UK Greenhouse Gases (GHG) are at least 100% lower in 2050 than they were in 1990 and under s.4 CCA they must set five-yearly carbon budgets as stepping-stones to meeting the 2050 target, and ensure that the UK does not exceed the budgets. Under ss. 13 and 14 CCA the Secretary of State must prepare and report on his proposals and policies for meeting the carbon budgets. He presented the NZS as part of that obligation.

Friends of the Earth England, Wales and Northern Ireland (Friends of the Earth), alongside ClientEarth and Good Law Project applied for a Judicial Review challenging the level of information that the Secretary of State had when he adopted the NZS, and the failure of the NZS to include the basic information required under the CCA to enable MPs to evaluate how the Government intended to achieve its carbon budgets. Crucially, the NZS did not show the carbon emissions reduction that each proposal or policy was expected to achieve, or even the total projections. To show how the UK would meet its climate targets, the NZS simply set out "an indicative delivery pathway", including power sector, fuel supply and hydrogen, industry, heat and buildings, transport, natural resources, waste and F-gases, and GHG removals, providing three 2050 net zero "scenarios". The document merely modelled the level of reduction it is theoretically feasible for each sector to achieve.

Friends of the Earth also challenged the Secretary of State's conclusion that the Public Sector Equality Duty (PSED) under section 149 of the Equality Act 2010 did not apply to his strategy for transitioning to high-efficiency low carbon buildings under the linked Heat and building strategy (HBS). As a result, the HBS did not consider the potential impact on people with protected characteristics, including older people, the young, disabled people, and people of colour. The Secretary of State ultimately conceded that he had acted unlawfully and committed to undertaking an Equality Impact Assessment.

Following a hearing in the Royal Courts of Justice, in which Friends of the Earth's case was heard alongside the legal challenges brought by ClientEarth, Good Law Project and environmental campaigner Jo Wheatley, the court ruled in July 2022 that the NZS breached the CCA.

The judge found that the NZS did not meet the Government's obligations under the CCA. The Secretary of State did not have legally sufficient information to enable him to adopt the NZS, and the NZS itself did not include sufficiently detailed climate policies showing how the UK's legally-binding carbon budgets would be met. Parliament and the public were effectively kept in the dark about a shortfall in meeting a key target to cut emissions, amounting to around 75 million tonnes of CO_2 equivalent.

The ruling highlights the significance of the CCA, as the legally binding national framework for reducing carbon emissions. It requires the Government to update its climate strategy to include a quantified account of how its policies will achieve climate targets, based on a realistic assessment of what it actually expects them to deliver. The updated strategy was presented to parliament for scrutiny by MPs in March 2023.

If the process of checking the abuse of power is weakened, the impacts are significant, disproportionate and discriminatory, for example it has been shown that deficits in access to justice have the most impact on the poorest and most vulnerable in society.[18]

Both the UK, and the EU as a Party in its own right, signed the Aarhus Convention in 1998 and ratified it in 2005. In preparation for ratification, the EU adopted two new Directives on access to environmental information[19] and public participation in environmental decision-making.[20] The UK duly amended its statutory regime to ensure compliance with these new requirements in relation to pillars one and two of the Convention.

In terms of compliance with the third pillar concerning access to environmental justice,[21] the UK government relied on the existing process of JR, alongside the statutory review process.[22] At that point, the Government assumed these processes were Aarhus compliant.[23]

2.3 Article 9(4) of the Convention and Prohibitive Expense

The matter of prohibitive expense has been a perennial issue for the UK in terms of its compliance with the Aarhus Convention. Article 9(4) of the Convention requires the provision for claimants of 'adequate and effective remedies, including injunctive relief as appropriate'. It also requires that those legal review mechanisms 'be fair, equitable, timely and not prohibitively expensive'. It is notable that this protection is not restricted under the Convention to cases or remedies against public authorities, yet environmental claims against private entities, such as nuisance claims, are currently not covered by the cost protection provisions introduced by the UK to implement the requirements of Article 9(4). Other types of private law proceedings, such as injunctive proceedings taken out to restrict environmental protest, are also not covered.

Since ratifying the Convention, a number of NGOs, charities and members of the public have raised concerns about the UK's ability to meet the requirements of Article 9(4) and continue to make submissions to the Aarhus Convention Compliance Committee on this point.[24]

In response to three particular Communications,[25] the Committee found that by failing to ensure that the costs for all court procedures subject to Article 9 are not prohibitively expensive (and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect) the UK fails to comply with Article 9(4) of the Convention. The Committee also found that the system as a whole is not such as "to remove or reduce financial [...] barriers to access to justice", as Article 9(5) of the Convention requires a Party to the Convention to consider. Finally, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement Article 9(4) of the Convention, the UK also fails to comply with Article 3(1) of the Convention. These findings were endorsed by the Meeting of the Parties to the Convention later in 2011 (Decision IV/9i[26]) and continuing non-compliance was confirmed by Meetings of the Parties in 2014 (Decision V/9n[27]), 2017 (Decision VI/8k[28]) and 2021 (Decision VII/8s[29]).

At the Seventh Meeting of the Parties in 2021, the UK was requested (along with eighteen other parties) to submit a phased plan of action to the Compliance Committee by 1 July 2022 demonstrating how it intended to bring itself back into compliance with Article 9(4) of the Convention. Decision VII/8s identified the scope and purpose of the Action Plan, being to address the implementation of recommendations concerning costs (among other matters) in paragraph 2 of the Decision, namely to:

(a) Ensure that the allocation of costs in all court procedures subject to article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive;

(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

(c) Further review its rules regarding the time-frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework; and

(d) Establish a clear, transparent and consistent framework to implement article 9 (4) of the Convention.

Decision VII/8s required the UK to submit a detailed progress report on the measures taken to achieve the Compliance Committee's recommendations by 1 October 2023, with a final deadline for compliance of 1 October 2024.

Environmental NGOs attempted to engage with the substantive development of the UK Action Plan. Relevant country contacts were identified to the UK Aarhus Focal Point on 16 December 2021 and both the main barriers and possible solutions were set out in detailed correspondence dated 24 March 2022.[30] Despite these persistent efforts, there was no substantive engagement with stakeholders, certainly in England, Wales and Northern Ireland, in the period leading up to the publication of the Action Plan on 1 July 2022.

The much-anticipated Action Plan contained no tangible proposals in relation to England, Wales and Northern Ireland. It simply stated: "The UK Government will consider whether it is appropriate to amend the Environmental Cost Protection Regime (ECPR) in the Civil Procedure Rules (CPR) or make other changes following the conclusion of the Call for Evidence" (own emphasis added). As such, the Action Plan did not even commit the UK to accepting reform in a particular way despite the very clear and careful findings of the Compliance Committee establishing breaches of the Convention. Moreover, the reference to a future review of the ECPR was not new - the MOJ had previously referred to the possibility of conducting a review in October 2018.[31]

The Action Plan also confirmed the UK has no current plans to extend costs protection to private law claims, despite the UK's continuing non-compliance with Article 9(3) of the Convention in this respect following the Compliance Committee's Findings in Communications ACCC/C/2013/85 and ACCC/C/2013/86 in 2015.[32]

On 3 December 2022, the Compliance Committee informed the UK that, having reviewed the Action Plan, it appeared to be only partially appropriate and invited the Aarhus Focal Point to attend an open session with the Committee at its seventy-seventh meeting in December 2022. During that Meeting, the Curator, former Advocate-General of the Court of Justice of the European Union Ms Eleanor Sharpston, highlighted the very long history leading up to Decision VII/8s (going back to 2011) which, aside from the introduction of the Aarhus costs regime in 2013, had since then been characterised by "little forward progress and much backsliding". In simple terms, she described the current UK Action Plan as "general and random" and confirmed that in order to meet the final deadline of 1 October 2024 it would need to get "sharper-edged and more specific".

The RSPB, Friends of the Earth and ClientEarth followed up the Compliance Committee meeting with an offer to meet and discuss the detailed measures that could form part of the Action Plan, but at the date of publication, a meeting and a review of the ECPR are still awaited.

2.4 Concerns about other Pillars of the Convention

In addition to concerns regarding costs, on-going Communications before the Compliance Committee raise further questions about the UK's compliance with the Convention.

A Communication submitted in 2017 by the RSPB, Friends of the Earth, Friends of the Earth Scotland and Leigh Day[33] alleges the UK is in breach of provisions of the Convention in respect of the requirement to provide a review of both procedural and substantive legality.[34] In essence, the point taken is that the threshold consistently applied by the courts for the substantive review of decisions in environmental JR is so high as to be effectively out of reach for Claimants, rendering the UK non-compliant with the Aarhus Convention in respect of Articles 3(1), 9(2), 9(3) and 9(4). A hearing took place at the UN in Geneva in November 2019 and at the time of publication draft Findings are awaited.

Concerns have also been raised that Article 8 of the Convention (public participation in the formulation of new laws which may have a significant impact on the environment in advance of them being laid before Parliament) has never been formally transposed into domestic law.[35] This failure has been raised in Communications submitted by Friends of the Earth in connection with the draft Brexit "Great Repeal Bill"[36] and WWF-UK concerning the negotiation of free trade agreements (FTAs).[37] Both Communications have been declared admissible and draft Findings are awaited for the Friends of the Earth Communication following a hearing in Geneva in September 2022.

3. LEGISLATIVE AND CASE-LAW DEVELOPMENTS 2019 – 2022

3.1 Independent Review of Administrative Law

The Independent Review of Administrative Law (IRAL) Panel was established following the Conservative Government's 2019 manifesto commitment to guarantee that JR is available to "protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays".[38]

As a result of a concerted campaign including representative legal bodies, NGOs and practising lawyers, the proposed statutory presumption requiring judges to award the new suspended and prospective quashing orders widely was removed from the Bill in April 2022.

In July 2020, the IRAL Secretariat issued a call for evidence to "all listed parties" to address the question of whether JR strikes the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government.[39] The Terms of Reference invited data and evidence concerning JR with a particular interest in any notable trends over the last thirty to forty years, how JR works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by JR. The Panel examined a range of data and evidence, including relevant caselaw and submitted its Report to Government in January 2021, following which the Independent Panel was disbanded.

The Government published the Panel's Report on 18 March 2021. The Report made two modest recommendations for change in the substantive law including legislating for the introduction of Suspended Quashing Orders (SQOs) and legislating to reverse the effect of the Supreme Court decision in *Cart* and re-affirm that decisions of the Upper Tribunal to refuse permission to appeal are not subject to the supervisory jurisdiction of the High Court.[40] The Panel also made various recommendations for changes in procedure to be taken forward by the Civil Procedure Rule Committee (CPRC) including removing the requirement for a claim to be issued "promptly" (but retaining the 3-month time limit), providing further guidance on intervenors and providing for an extra step in the procedure of a Reply, to be filed within seven days of receipt of the Acknowledgement of Service.

3.2 Government consultation 2021

On the same day the Government published the Panel's Report, it also published a consultation document, 'Judicial Review Reform - the Government Response to the Independent Review of Administrative Law'.[41] The consultation sought views on a range of reforms to JR including: legislating to clarify the effect of statutory ouster clauses; legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis; legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only; legislating for suspended quashing orders to be presumed or required; and legislating on the principles which lead to a decision being a nullity by operation of law.

The consultation period ran for six weeks, during the Easter period and over the pre-election period for the Scottish and Welsh elections. Despite acknowledging that "most respondents were broadly opposed to the proposals", the Government's response confirmed an intention to legislate to remove *Cart* Judicial Reviews and provide additional remedial powers to suspend, remove or limit the retrospective effect of quashing orders.[42]

3.3 The Judicial Review and Courts Act 2022

In July 2021, the Government introduced the Judicial Review and Courts Bill to the House of Commons. The Bill received robust criticism in the Lords, including from the group Peers for the Planet with whom a coalition of NGOs, including the authors of this Report, worked closely. As a result of a concerted campaign including representative legal bodies, NGOs and practising lawyers, the proposed statutory presumption requiring judges to award the new suspended and prospective quashing orders widely was removed from the Bill in April 2022. The Government's concession served to maintain judicial discretion as to which remedies are awarded and reduce the potential for negative impacts arising from the new remedies. The Bill received royal assent and became law on 28 April 2022.

The Judicial Review and Courts Act 2022 broadens the menu of remedies that the courts may choose to grant. Section 1 of the Act inserted s.29A into the Senior Courts Act 1981. Subsection (1) provides that "A quashing order may include provision (a) for the quashing not to take effect until a date specified in the order, or (b) removing or limiting any retrospective effect of the quashing." Further subsections allow a quashing order to be made subject to conditions.

Subsection 8 sets out factors the court 'must have regard to' when deciding whether to exercise the s.29A(1) power. These include:

(a) the nature and circumstances of the relevant defect;

(b) any detriment to good administration that would result from exercising or failing to exercise the power;

(c) the interests or expectations of persons who would benefit from the quashing of the impugned act;

(d) the interests or expectations of persons who have relied on the impugned act;

(e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;

(f) any other matter that appears to the court to be relevant.

The Act gives the court the option of suspending the quashing order, so that the public body is first given the opportunity to correct any failure that the court has identified. The court also has a discretion to limit the retrospective effects of the quashing order, so that things done by the public body before the quashing order was granted remain lawful. As with other remedies in JR, the choice of order is at the discretion of the judge hearing the case, taking account of each case's circumstances.

However, for Claimants, the Act raises the prospect of winning a JR but with only a limited remedy to show for it. Similarly, the Act gives the court the discretion to grant a full remedy to the Claimant, but limit the retrospective effects of the judgment for any other individual who had not issued a claim before the date of the judgment. These limitations are exacerbated by the fact that a Defendant can raise the applicability of these provisions at any stage in the proceedings – including circumstances in which a Claimant has won and a remedy is being considered.

Plainly, the new power has potential to be relied upon by the Defendant or Interested Party in numerous cases and could almost become the norm for it to be applied for. This would greatly prolong JR proceedings and add massively to the costs if a successful Claimant then has to fight that point. The uncertainty involved and the extra cost would seem to be to be a very serious chill factor for Claimants, especially if they may not know until after substantive argument if the power is going to be relied on.

There has been no reported case to date which has considered the use of this power. The White Book currently provides no commentary (other than setting out the factors). It is therefore too early to assess its impact. However, one of the authors is already aware of a case in which the Defendant has raised the prospect of a prospective only quashing order and it is of particular concern to Claimants that this possibility can be raised at any stage in the proceedings.[43]

3.4 Case law developments

Some recent cases raise issues in relation to Article 9(4) of the Aarhus Convention and may have negative implications for access to justice in England and Wales.

R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey[44]

The case concerned an Aarhus Convention claim that had been refused permission to proceed. Both the Defendant and the Interested Party successfully argued for an increase of the Aarhus cost cap for the Claimant, from £5,000 to £20,000. Before the High Court, the parties proceeded on the basis that the increase of the cost cap was made at the request of the Interested Party. Therefore, the jurisdictional issue the court had to decide on was whether an Interested Party had standing to apply for a variation of the Aarhus cap.

The High Court held that an Interested Party has standing to apply for a variation of the default cap. In this case specifically, the court maintained a modified default cap of £20,000 and ordered the Claimant to pay costs totalling £16,991 (of which £12,000 were to be paid to the Interested Party).

CPRE Kent v Secretary of State for Communities and Local Government

This case concerned a challenge by the Campaign to Protect Rural England (CPRE) to the government's National Planning Policy Framework, which it claimed failed to give sufficient weight to environmental considerations. The Claimant served the claim on the Secretary of State as the first defendant, the Council as the second defendant and Roxhill as an Interested Party. In awarding costs, the judge had acknowledged the claim was an Aarhus Convention claim and made cost orders in favour of the Defendants and the Interested Party up to the Aarhus cost cap of £10,000. The Court of Appeal dismissed an appeal by the Claimant challenging this cost decision.[45]

In its judgment, the Supreme Court clarified the costs position for unsuccessful Claimants in JRs and statutory reviews involving multiple Defendants. When permission is refused, a Claimant may now be liable to pay the costs of more than one Defendant and/or IP to prepare and file an Acknowledgement of Service (AoS) and Summary Grounds of Resistance (SGoR). It is not necessary to show 'exceptional' or 'special' circumstances apply, although costs must be reasonable and proportionate. The effect of this decision was immediate. In a subsequent case known to the authors, an Interested Party sought costs of just under £24,000 for simply preparing the AoS and SGoR, referring to the Supreme Court judgment. Permission was subsequently refused. The judge fixed the costs cap at £10,000, ordering the costs of preparing the Acknowledgement of Service be paid by the Claimant to the Defendant in the sum of £8,900.00 and by the Claimant to the IP in the sum of £1,100.00.

Both judgments have important implications for access to justice. The effect of the Supreme Court judgment in CPRE Kent is twofold: (i) Interested Parties could be motivated to submit inflated cost estimates at an early stage of the proceedings in the hope this will be a deterrent to Claimants; and (ii) the court will now routinely order costs in such cases up to the full level of the default Aarhus caps at the permission stage (and that's assuming that the default costs caps are not varied upwards). This position is exacerbated by the judgment in *Bertoncini* in that IPs can now not only request their costs at the permission stage, but they can also apply for the cap to be varied upwards to accommodate excessive cost estimates.

This is contrary to the objective of the Aarhus caps, which are intended to limit the level of adverse costs exposure throughout the duration of a case, in order to ensure the proceedings are not prohibitively expensive for the Claimant. The possibility that sums well in excess of the default Aarhus cap intended to apply to the entire duration of the case can be ordered at an early stage is likely to have a "chilling effect" on potential Claimants, thus further undermining the UK's ability to comply with Article 9(4) of the Convention. It is a particularly serious problem when combined with what may be a tendency for the permission stage not simply to be a threshold based on arguability but in some cases a full blown rehearsal for the substantive hearing.

R (oao Friends of the Earth Ltd) v Secretary of State for Transport & Others [2021] EWCA Civ 13 (13 January 2021)

When it comes to the recovery of costs, in England and Wales, the cost cap figures are inclusive of VAT, as held in *R (oao Friends of the Earth Ltd) v Secretary of State for Transport & Others* [2021] EWCA Civ 13 (13 January 2021). In the authors' view, this could feed into the overall issue that environmental cases can sometimes be, in practice "too expensive to win" (see the Recommendations section, below).

R (ClientEarth) v SSBEIS [2020] EWHC 1303 (Admin)

In this case, the Defendant successfully applied to increase the Claimant's cost cap, but the Claimant's application to increase the Defendant's cost cap was refused. The Defendant's cost cap remained at £35,000; the Claimant's was increased from £10,000 to £25,000. This is an example then, of where a Claimant's cost cap has been increased, and increased significantly but without any element of mutuality.

4. THE "CHILLING EFFECT" OF ADVERSE COSTS – A SELECTION OF ELF CASES

4.1 Introduction

Even prior to the cases noted at section 3.4 above, there is evidence of the 'chilling effect' of adverse costs in environmental cases. The Environmental Law Foundation (ELF) has supported UK communities for 30 years by empowering them to use their legal rights to challenge activities and decisions that threaten damage to their local environment and to get involved in environmental decision making. The Aarhus Convention requirements are woven through much of ELF's work.

ELF receives around 300 enquiries a year from communities and in the period of 15 May 2019 to 31 July 2022 covered by this report, 87 enquiries concerned the potential for judicial review of public authority decisions. As such, these would be classed as "Aarhus claims" for the purposes of the Court rules. From the data available, expert opinions were obtained in 34 of these cases, 16 of which were given a positive chance of success. Seven of these cases proceeded to take action and four were successful (57%). However, of the nine cases which didn't proceed, in seven of them (75%) costs were the primary reason for not proceeding. In other words nearly 44% of clients who were advised by experts to take further steps towards JR were unwilling or unable to take on the risk of an adverse costs order even with the potential benefit of an Aarhus costs cap.

This "chilling effect" is illustrated by the following cases which highlight that costs are still 'prohibitively expensive' for many communities seeking to bring environmental claims.

4.2 Cases from 2019

(1) Save Bixteth Park

Summary: The Save Bixteth Park group were looking to pursue a JR claim against Liverpool City Council (LCC) over failings in public consultation regarding development of a park. The application involved the loss of 0.83 hectare of public green open space (the only such in the central business district), the felling of 61 trees and loss of habitats for rabbits and nesting birds. LCC's Planning Committee had voted to approve an application for "reclamation works" at "Land at Pall Mall". Whilst both funding and the timescale were tight the community were keen to pursue a claim.

Outcome: Counsel was instructed pro-bono and gave a positive opinion on lack of proper consultation. ELF drafted a pre-action protocol letter which was served on LCC. The group was still keen to pursue, but was very concerned about the costs cap of £10k and felt unable to issue.

(2) Pine Martens

Summary: Permission was granted by Forestry England for a project to collect pine martens (PMs) from Scotland for release into the Forest of Dean in England, potentially into a Special Area of Conservation (SAC) for Greater and Lesser Horseshoe bats. There was secrecy over the location. There had been a shadow Habitats Assessment (HA) despite the possible impact on bats from the known predation from PMs.

Outcome: A pre-action protocol letter was sent to Forestry England who owned land where the releases were possible. They conceded and agreed to carry out a full HA. This concluded that there were possible significant impacts on the bats as they could not exclude PMs from bat hibernation sites. Even so, release went ahead. The enquirer decided not to challenge the HA as there were no funds available.

4.3 Cases from 2020

(1) Save Belle Vue Stadium

Summary: The Save Belle Vue Stadium action group had been set up to fight plans for 247 houses on what was an open space/stadium where leisure time and two sports (greyhound racing and stock car racing) currently took place. Not only was the stadium historic, being the original venue in the UK for racing after its arrival from North America in 1926, but it was also a vital open space located in what is a built up, industrial and residential area of Manchester. After a year of challenging the plans, the application was finally heard by Manchester City Council's Planning Committee in December 2019, and was 'Minded to Approve' in short time. The site was an Asset of Community Value, there were issues about whether local residents were fully and properly consulted on the process, and concerns over the Council not having given proper consideration to the loss of the open space due to an incorrect and weighted submission by Sport England.

Outcome: ELF had a positive opinion from Counsel. A pre-action protocol letter was sent but the enquirer decided not to go ahead because of costs and that even if they were successful, they may only temporarily delay the development.

(2) Loss of green space

Summary: The enquirer was a local person aiding their local community in their fight to save their small local park from a development of 12 houses and flats. The surrounding area, the Woodhall Estate, is ex-council estate and home to a community many of whom have lived there for decades. The park in question was built as part of the estate itself in the late 1940s. It was the only green space accessible to the local community within a short walking distance. The park is adjacent to a former Church Hall community centre that was closed and later demolished due to a lack of funding some years ago. This ground had been beautifully reclaimed by nature and was part of B-Lines (a Buglife project).

Outcome: Counsel identified a number of issues with the application and ELF sent a letter regarding concerns with any likely decision to approve. Planning permission was approved. Counsel offered to look into grounds and draft a pre-action protocol letter. However, the enquirer had concerns about funding a claim and did not respond despite Counsel offering to act pro-bono with ELF in place.

(3) Housing development in AONB

Summary: A development of 119 houses was permitted in an AONB (Area of Outstanding Natural Beauty) in East Sussex. The enquirer raised concerns about the impact on wildlife and loss of recreational space.

Outcome: ELF secured a positive opinion from Counsel who offered to act pro bono and a solicitors firm agreed to a Conditional Fee Agreement. The enquirer decided not to proceed with judicial review due to concerns over adverse costs.

4.4 Cases from 2021

(1) Hinkley Point C sediment

Summary: ELF was contacted on behalf of two campaigning groups regarding a Marine Management Organisation (MMO) decision to permit dredging and disposal of sediment from Hinkley Point C in the Bristol Channel. They had concerns that MMO had not addressed questions regarding baseline radiological data raised by the groups.

Outcome: Counsel gave a positive opinion on grounds to challenge the MMO decision and ELF drafted a pre-action protocol letter but the enquirer decided not to pursue due to costs.

(2) Intensive Poultry Unit

Summary: The enquirer was concerned about the grant of planning permission by Herefordshire Council to regularise an intensive poultry unit that had been built in breach of an earlier planning permission.

Outcome: Counsel indicated that there were arguable grounds to challenge the decision on the basis that the necessary procedures had not been correctly adhered to. A statement of facts and grounds was sent but the Council declined to respond within the time given. The enquirer decided not to pursue a judicial review due to the risk of exposure to costs.

(3) Local Plan

Summary: A local group was considering a judicial review challenge in the event of approval of Hambleton District Council (HDC) Local Plan. They were particularly concerned about the climate change implications of plan proposals regarding transport and use of 'best and most versatile' agricultural land for industrial development.

Outcome: Counsel advised that while there were no grounds for challenge on the group's main concerns, there may be an arguable ground in the adequacy of the Strategic Environmental Assessment. There was a discussion amongst the community on likely prospects of losing. The major factor was costs and chances of success. They considered that even if the JR was successful, HDC would be likely to appeal the decision, recognising that the Council's pockets were much deeper than those of the local community. The group decided not to proceed due to costs and the threat of a large bill.

4.5 Cases from 2022

(1) Woodcock Hill Town and Village Green

Summary: ELF has been assisting with this matter for over two years. It concerns opposition to the application by Taylor Wimpey for the de-registration of land in Borehamwood registered as a Town and Village Green (TVG) and a local wildlife site which had been under the careful stewardship of local people, in particular the Woodcock Hill Village Green Committee for many years.

Outcome: ELF supported and instructed Counsel for a two-week public inquiry in March 2022. Taylor Wimpey's application to de-register part of the TVG was permitted by the Inspector. The group sought to judicially review this decision but the Secretary of State argued that a TVG matter should not be permitted costs protection. However, this point was conceded and permission was granted. The case was lost at first instance and the group has applied for permission to appeal to the Court of Appeal. Tens of thousands of pounds had been raised by the group for the two-week public inquiry only to face further significant costs for funding a JR of the Inspector's decision. Without the support of Counsel acting pro bono this matter would not have been funded. ELF had previously assisted the group in 2007 with the TVG registration process when the land first came under threat.

(2) Social housing

Summary: Brent Council had a new policy on the development of brownfield spaces across the borough to address the housing crisis. Planning permission was granted to build two four-bedroom social homes on a small car park with green space in Wembley. Social rent was identified by the 2020 Brent Poverty Commission report as the only genuinely affordable housing which most families in housing need could afford and the rent level at which Brent Council should be aiming to provide its Council housing programme. The application for planning was made for social housing at affordable rent but the planning team made changes for it to be at London affordable rent (which is more expensive) and the planning committee approved this. Residents were greatly concerned over the loss of three mature trees and the loss of the only usable green communal area to five car parking spaces to compensate for loss of the car park, leaving them with nine fewer spaces. A previous refusal of development at the site had cited the loss of trees and parking. There is a disabled person living on the estate who would be severely impacted by the loss of local green space. Concerns about loss of habitat for hedgehogs and loss of privacy for residents had not been addressed by the planning committee.

Outcome: Counsel provided a positive opinion on a number of JR grounds including misinterpretation of planning policy, failure to give reasons regarding the loss of trees, failure to consult and breach of the Equality Act 2010 in regard to the needs of disabled people. ELF sent a pre-action protocol letter and a solicitors firm offered a Conditional Fee Agreement but the enquirer decided not to proceed because of the uncertainty around costs and a lack of time to seek funding.

(3) 5G mast

Summary: The community was concerned about planning permission granted for an 18m 5G mast in Lewes, East Sussex during the Summer holiday period.

Outcome: Counsel provided a positive opinion on JR grounds concerning consultation and compliance with the Lewes Neighbourhood Plan but the community was unwilling to accept the financial risks of judicial review and decided not to pursue. However, they then regretted that decision and sought advice on a late challenge but were advised this would not succeed.

(4) Artificial hockey pitch

Summary: Plans were approved on appeal to develop an artificial hockey pitch with high intensity lighting in Guildford which would impact on an Area of Outstanding Natural Beauty and a Local Nature Reserve. The enquirer sought urgent advice on a potential JR.

Outcome: ELF was able to secure a high level and brief opinion in an emergency which was positive regarding the failure to obtain relevant evidence or to address the issue of light pollution in the decision. Two ELF solicitors firms offered assistance but the community decided against going ahead owing to concerns over costs.

5. DATA AND ANALYSIS

5.1 Methodology

The purpose of this report is to assess the extent to which the regime of judicial and statutory review in England and Wales complies with the requirements of Article 9(4) of the Aarhus Convention. It follows on from a previous report on the subject, carried out by Friends of the Earth and the RSPB in 2019 (hereinafter referred to as POJ I).[46] Particular emphasis is placed on the impact of recent legislative changes and how any barriers that may become evident can be addressed.

This report has been compiled using data provided by the MOJ under the Environmental Information Regulations 2004, published MOJ statistics, and data from the POJ I report. In order to understand how well the Aarhus costs regimes are operating, these environmental statistics have been compared to total JR statistics (environmental and other) where possible and appropriate.

For transparency, and in case useful to other research, the correspondence with the MOJ can, in appropriate instances, be made available upon request to the authors.

5.2 Definitions

For the purpose of this report, 'success' is defined as cases where the 'claim was allowed at the substantive hearing'. This definition was confirmed as that used by the MOJ when responding to our data requests dated 10 July 2019 and again when responding to our request in 2022 so has been adopted by the authors throughout.[47] Hence, the success criterion is limited to the main legal outcome, which the authors recognise may exhibit itself in positive, but variable, real-world impacts.[48]

5.3 Information requests

The questions asked in the Environmental Information Requests (EIR) were:

1. The number of applications for JR in England and Wales identified on Form N461 as Aarhus Convention claims made between 15 May 2019 and 31 July 2022.

2. The number of applications in question (1) that were challenged, regardless of the outcome, by the Defendant as being Aarhus Convention claims.

3. The number of applications in question (1) that were successfully challenged by the Defendant as being Aarhus Convention claims.

4. The number of applications in question (1) in which permission to JR was granted (either on the papers or on oral renewal).

5. The number of applications in question (4) progressing to a substantive hearing.

6. The number of applications in question (5) that were ultimately successful for the Claimant.

Unfortunately, the authors cannot guarantee the completeness of the data received from the MOJ under the EIRs. In an email dated 7 September 2022, the MOJ explained that the software currently used to identify cases as AC claims only recognises certain topics as potential AC cases. This means that cases that do not fall within these specific topic areas cannot be recorded by staff members as AC claims in the computer system. In other words, the current system is not able to generate a report of all cases that the Claimant has marked as an AC claim. In order to collect data on as many unrecorded AC cases as possible, the authors contacted a number of law firms to collect cases which were filed by claimants as AC claims but were missing from the initial data provided by the MOJ. These cases were then analysed by the Administrative Court Officer and, if they fell within the scope of the EIRs, the data on these cases was added manually. Against this background, it is likely that the final data provided is incomplete. The authors regret the lack of an accurate and reliable system on such an important issue.

On a more positive note, the MOJ clarified in an email dated 22 February 2023, that the current software will be replaced "in the near future" (Summer/Autumn 2023) by another system that should be able to identify AC claims regardless of the topic area.

5.4 Standardising the data

The data received from the MOJ falls into four different years (2019 – 2022). However, as dataset 1 starts on 15 May 2019 and dataset 4 only contains data up to 31 July 2022, dividing the data into four years would have resulted in time periods of unequal length. In order to ensure that the data periods are comparable, the data have been standardised into four time periods of equal length using the following calculation:

38.5 (total number of months from 15 May 2019 to 31 July 2022) / 4 (because the data is spread over four

years) = 9.625. 0.625 x 30 (average length of a month) = 18.75. Each period is therefore 9 months and 18.75 days.

All open cases in the data between 15 May 2019 and 31 July 2022 (27 cases) were universally excluded from our data analysis and our conclusions.

Regarding the graphs that combine datasets from POJ I and POJ II, it is important to note that the respective datasets are not of equal length. Therefore, these graphs only show a general trajectory, but the accuracy of this is limited by the fact of the difference in data standardisation between the reports.

5.5 Final datasets

Following these adjustments, the datasets analysed below are as follows:

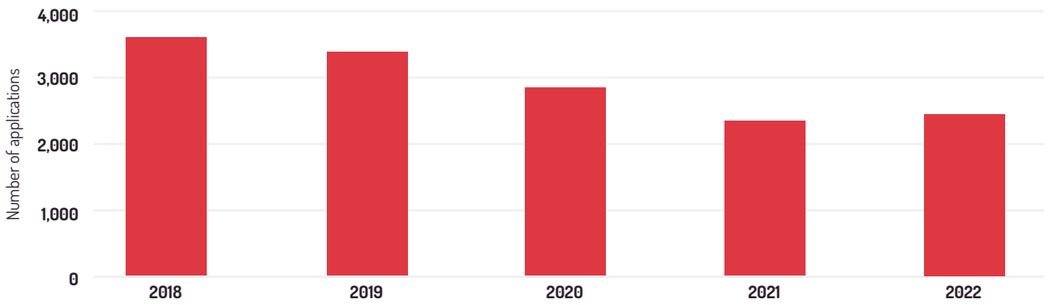
- Dataset 1: 15 May 2019 – 4 March 2020
- Dataset 2: 5 March 2020 – 23 December 2020
- Dataset 3: 24 December 2020 – 12 October 2021
- Dataset 4: 13 October 2021 – 31 July 2022

5.6 Total JR data

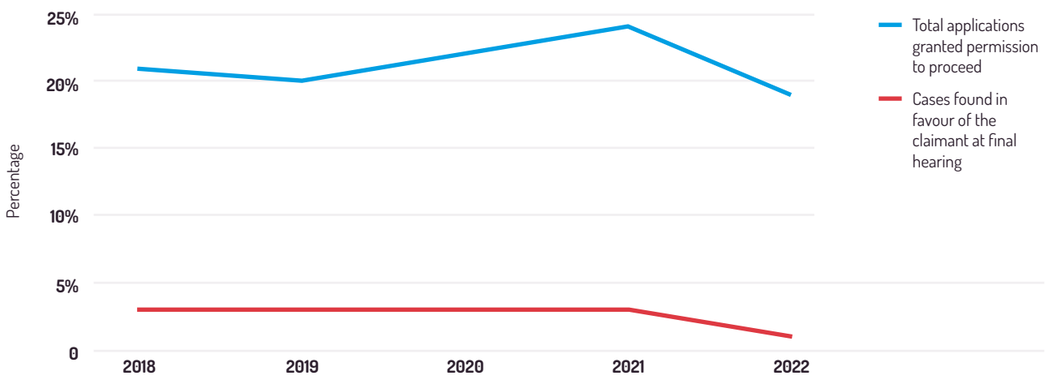
For the purpose of highlighting the impact of the Aarhus regime on access to justice, some of our collected data has been compared to data collected by the MOJ of total JR statistics. The statistics are published quarterly by the MOJ on the 'Civil Justice Statistics Quarterly' website[49], which we have plotted onto graphs below.

The MOJ has pointed out that the figures on case progression for more recent JR applications are unlikely to be final, as cases take time to move through the Administrative Court system.[50] Therefore, data on cases from 2022 in particular is likely to be subject to future changes.

Graph i: Total number of JR applications of all types 2018 - 2022



Graph ii: Percentage of total JR applications granted permission to proceed and found in favour of the claimant at final hearing



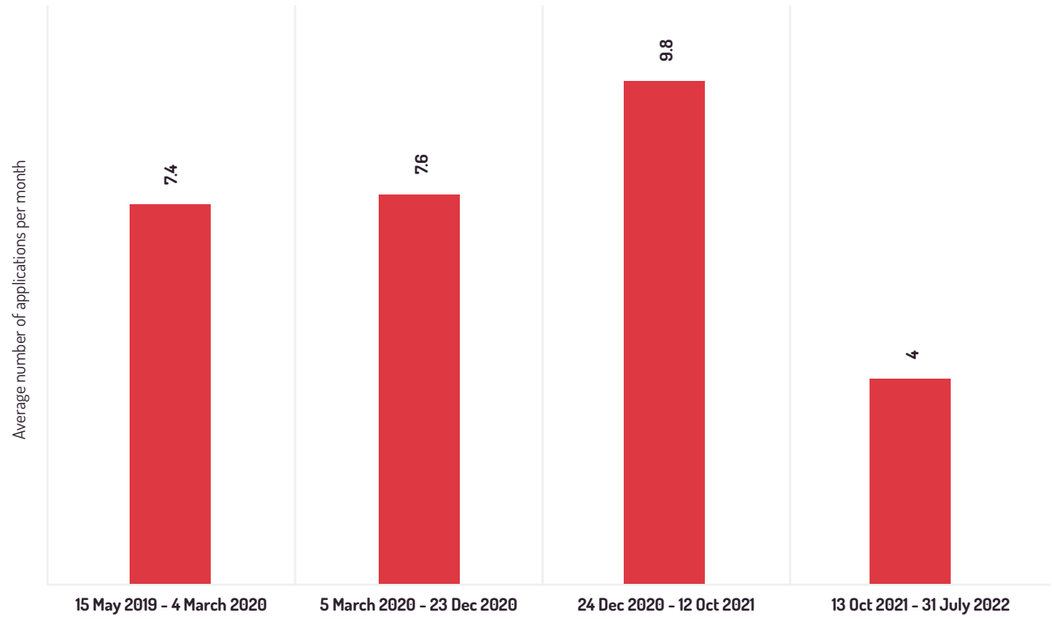
6. UNDERSTANDING THE DATA

6.1 Number of environmental Judicial Review applications between 15 May 2019 - 31 July 2022

The number of applications for JR identified on form N461 as Aarhus Convention (AC) claims peaked in the period from 24 December 2020 to 12 October 2021 (Dataset 3) and fell significantly in the period from 13 October 2021 – 31 July 2022 (Dataset 4).

Dataset	Dataset 1: 15 May 2019 – 4 Mar 2020	Dataset 2: 5 Mar 2020 – 23 Dec 2020	Dataset 3: 24 Dec 2020 – 12 Oct 2021	Dataset 4: 13 Oct 2021 – 31 Jul 2022
Total no. of applications for JR identified on Form N461 as AC claims	72	70	87	37

Graph 1A: Number of applications for JR identified as AC claims

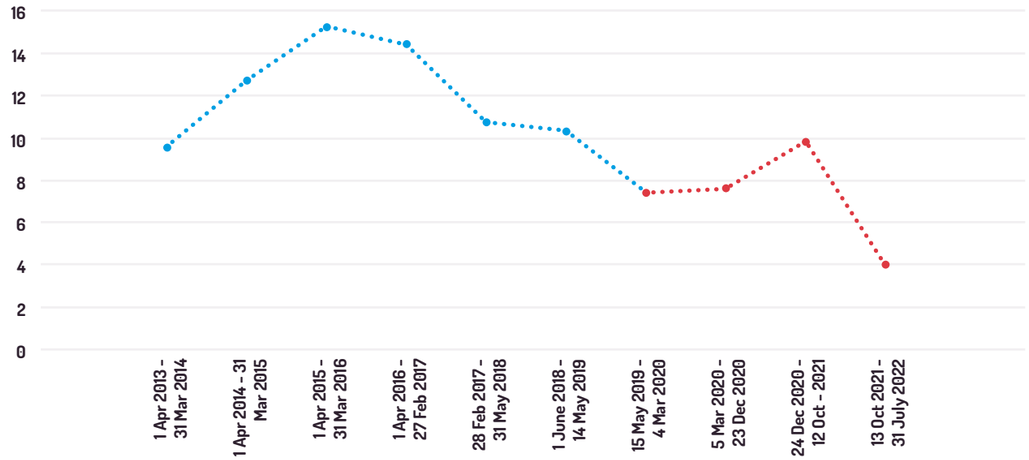


The average number of applications per month was calculated as follows: Total number of cases in each dataset / total number of months plus the partial months of each dataset.

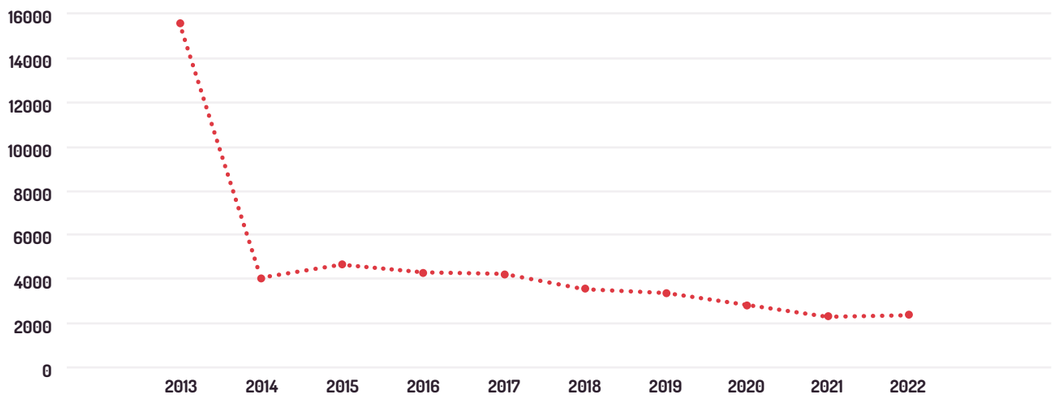
Ex. for Dataset 1: 72 (total number of cases) / (9 (total number of whole months) + 20/31 (partial months of May and March: 16 days in May + 4 days in March)) = 7.4 (rounded to one decimal place)

Graph 1B combines the datasets from the current report (red line) with the data from the POJ I report (blue line) on the number of JR applications identified as AC claims. As explained above under 5.4, the difference in data standardisation between POJ I and POJ II means that combined graphs only show a general trajectory. The graph shows a general trend of a decrease in JR applications identified as AC claims since the peak in the period from 1 April 2015 – 31 March 2016 to 13 October 2021 – 31 July 2022.

Graph 1B: Number of applications for JR identified as AC claims including POJ I datasets



Graph 1C: Number of total JR applications



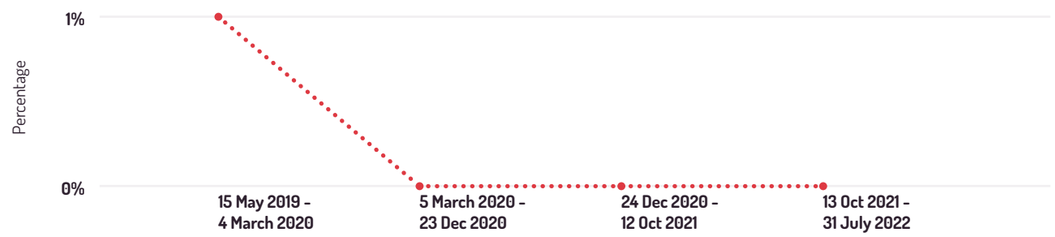
Graph 1C shows the number of total JR applications. It is worth noting that in 2013, out of the total 15,592 cases, 13,141 cases were asylum and immigration cases. When comparing this data with the JR applications identified as AC claims, a similar decreasing trend can be observed.

6.2 Number of applications successfully challenged by Defendants as Aarhus Convention claims

There has only been one successful challenge by Defendants to the status of claims as AC claims since May 2019.

Dataset	Dataset 1: 15 May 2019 – 4 Mar 2020	Dataset 2: 5 Mar 2020 – 23 Dec 2020	Dataset 3: 24 Dec 2020 – 12 Oct 2021	Dataset 4: 13 Oct 2021 – 31 Jul 2022	Grand total
Total no. of applications for JR identified on Form N461 as AC claims	72	70	87	37	266
No. of applications challenged by the Defendant	9	11	7	1	28
No. of applications successfully challenged by Defendant as AC claims	1	0	0	0	1
% of applications successfully challenged by Defendant out of total number of applications identified as AC claims	1%	0%	0%	0%	0.38%

Graph 2A: % of the total applications identified as AC claims that were successfully challenged by Defendant

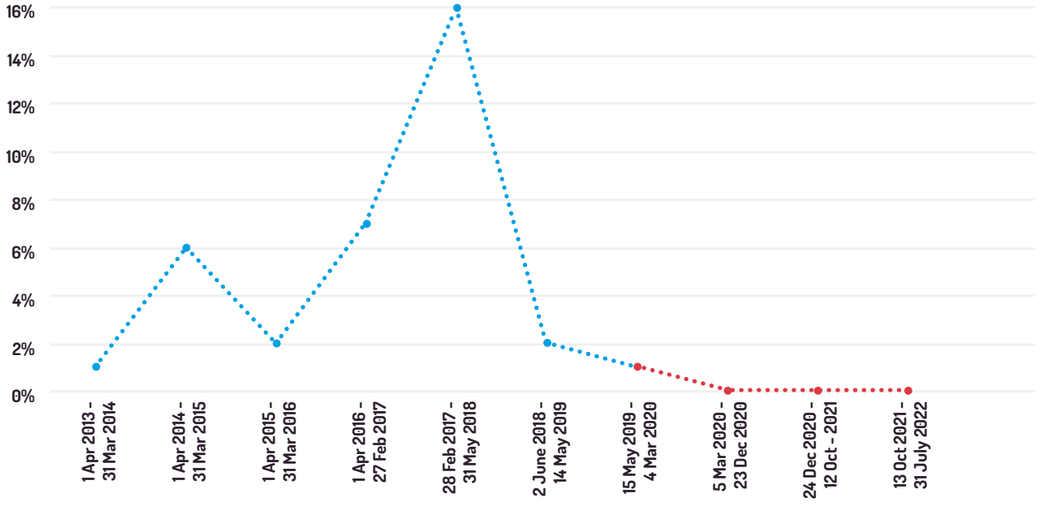


Graph 2A shows that, apart from one single case in dataset 1 (15 May 2019 – 4 March 2020), no claims were successfully challenged by the Defendant as not being AC claims. On the contrary, a significant number of cases were unsuccessfully challenged by the Defendant in the different time periods, 27 in total: 8 cases in dataset 1 (15 May 2019 to 4 March 2020), 11 cases in dataset 2 (5 March 2020 to 23 December), 7 cases in dataset 3 (24 December 2020 to 12 October 2021) and 1 case in dataset 4 (13 October 2021 to 31 July 2022). However, importantly, the MOJ has stated that in some of these cases the Defendant in fact only applied to vary the amount of the cost cap, while agreeing that the case in question was an Aarhus case.[51] This lack of precision in the court's records is apparently owing to the different court forms in use. This limitation makes it impossible to fully understand the extent to which Defendants are challenging the status of claims.

While the small number of successful challenges suggests a positive outcome from the Claimants' perspective, it also suggests Defendants may be using this provision of the CPR unfairly, an issue we discuss in section 7 of the Report (Conclusion and Recommendations).

Graph 2B combines the POJ I data (blue line) with the updated data from this report (red line). While the authors of the POJ I report were hesitant to draw conclusions from the sudden drop of a previously high success rate for challenging claims being AC claims,[52] the combined data clearly shows a consistent decrease of successful challenges since the peak between 28 February 2017 and 31 May 2018.

Graph 2B: % of total number of AC claims successfully challenged by Defendant, including POJ I data



6.3 Number of cases in which permission was granted

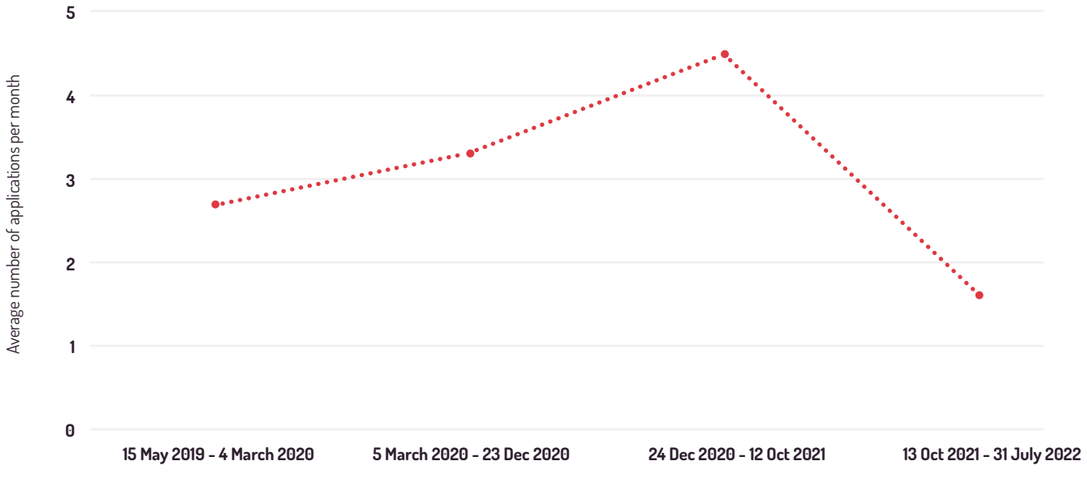
The number of Aarhus Convention cases granted permission to proceed was consistently increasing until October 2021, after which there was a significant fall. Importantly however, the actual percentage success rate of cases obtaining permission has remained relatively level.

Note: The following cases were removed from the total number of environmental JR applications because they were withdrawn before permission to proceed was granted or refused:

- Dataset 1: CO/2727/2019 (claim lodged 12 July 2019)
- Dataset 2: CO/1484/2020 (claim lodged 24 April 2020)
- Dataset 4: CO/3487/2021 (claim lodged 14 October 2021); CO/3756/2021 (claim lodged 4 November 2021); CO/1935/2022 (claim lodged 31 May 2022)

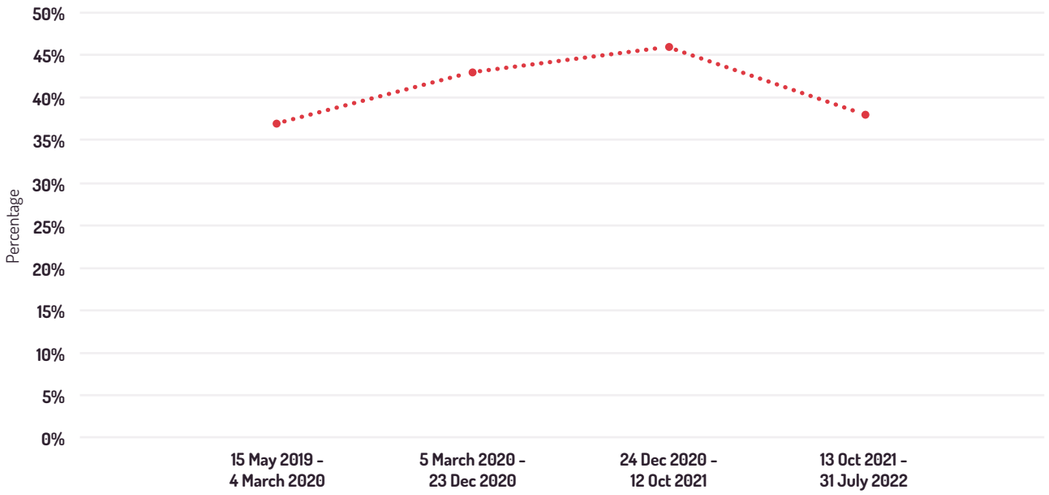
Dataset	Dataset 1: 15 May 2019 – 4 Mar 2020	Dataset 2: 5 Mar 2020 – 23 Dec 2020	Dataset 3: 24 Dec 2020 – 12 Oct 2021	Dataset 4: 13 Oct 2021 – 31 Jul 2022
Total no. of applications for JR identified on Form N461 as AC claims	71	69	87	34
No. of applications in which permission to proceed was granted	26	30	40	14
% of applications granted permission out of total number of applications identified as AC claims	37%	43%	46%	38%

Graph 3A: Average number of AC applications granted permission to proceed per month

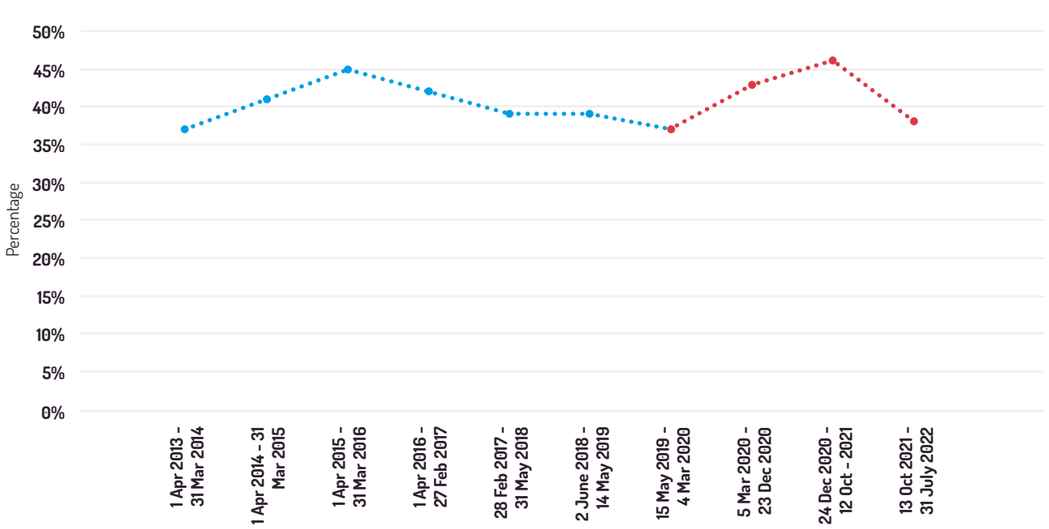


Graph 3A shows a significant decrease in the number of applications for which permission was granted per month after dataset 3 (24 December 2020 – 12 October 2021). Graph 3B below, which shows the percentage of total AC applications where permission to proceed was granted, follows a broadly similar trend.

Graph 3B: Percentage of AC cases where permission was granted



Graph 3C: Percentage of AC cases where permission was granted, including POJ I data



Graph 3C shows that, despite some fluctuations, the percentage of environmental JR applications where permission to proceed is granted has remained relatively stable in both the POJ I data (blue line) and the POJ II data (red line).

Graph 3D: % of total JR applications granted permission to proceed

Dataset	2019	2020	2021	2022
No. of total JR applications granted permission to proceed	680	610	564	453
% of total JR applications granted permission to proceed out of total number of JR applications	20%	22%	24%	19%

Graph 3D shows the percentage of overall JR applications that were granted permission to proceed between 2019 and 2022. Interestingly, while the current (POJ II) trend is a decrease in the percentage of total environmental JRs being granted permission since 2020 (see above graphs 3A and 3B), the percentage of general JRs being granted permission has been slowly increasing since 2019, with a decrease in 2022. Given that the numbers for 2022 may be updated as remaining cases pass through the court system, it is not possible to draw final conclusions at this stage. However, the success rate for permission still remains significantly lower than that for environmental JRs specifically.

Importantly, these trends reflect the findings of POJ I, which also found that environmental JRs were approximately twice as likely to be granted permission when compared to the total number of JRs. The decreasing success rates for permission for environmental cases, and the increasing success rates for permission for judicial review cases in general became evident from 2016 and has continued throughout the period of POJ II.

6.4 Number of cases ultimately successful for the Claimant

Success rates fluctuate between 8% and 11% throughout the datasets.

Note: The following cases were removed from the total number of environmental JR applications because they were withdrawn after permission to proceed was granted or refused:

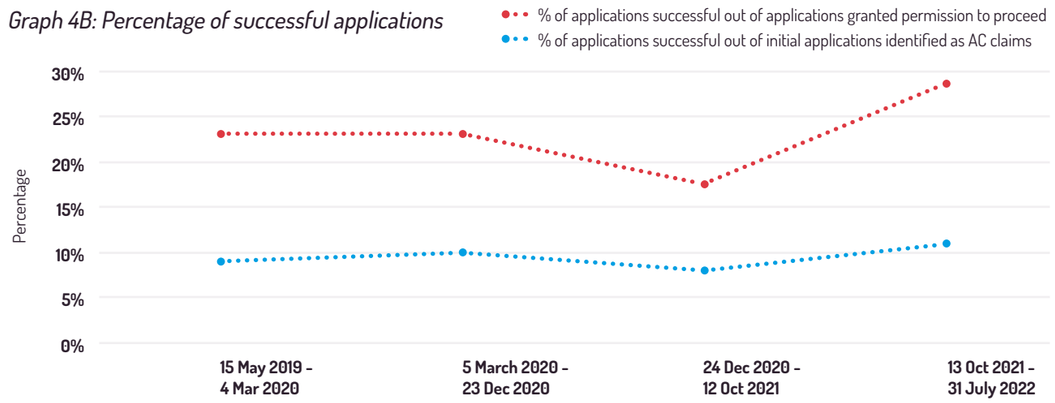
- Dataset 1: CO/4880/2019 (claim lodged 12 December 2019)
- Dataset 2: CO/3088/2020 (claim lodged 1 September 2020); CO/4575/2020 (claim lodged 8 December 2020)
- Dataset 3: CO/1457/2021 (claim lodged 22 April 2021); CO/1482/2021 (claim lodged 23 April 2021)

Dataset	Dataset 1: 15 May 2019 – 4 Mar 2020	Dataset 2: 5 Mar 2020 – 23 Dec 2020	Dataset 3: 24 Dec 2020 – 12 Oct 2021	Dataset 4: 13 Oct 2021 – 31 Jul 2022
Total no. of applications for JR identified on Form N461 as AC claims	70	67	85	37
No. of applications that were ultimately successful for the Claimant	6	7	7	4
% of applications successful out of total number of applications identified as AC claims	9%	10%	8%	11%

Graph 4A: Average number of AC applications that were ultimately successful for the Claimant

This data shows that between dataset 1 (15 May 2019 – 4 March 2020) and dataset 3 (24 December 2020 – 12 October 2021), the number of applications that were ultimately successful for the Claimant was slowly increasing. However, there was a reduction in the number of successful cases between dataset 3 and dataset 4 (13 October 2021 – 31 July 2022). Importantly however, the actual percentage success rate (as a proportion of the total number of cases brought in the time period) increased between these two datasets (see the Table above).

Graph 4B: Percentage of successful applications

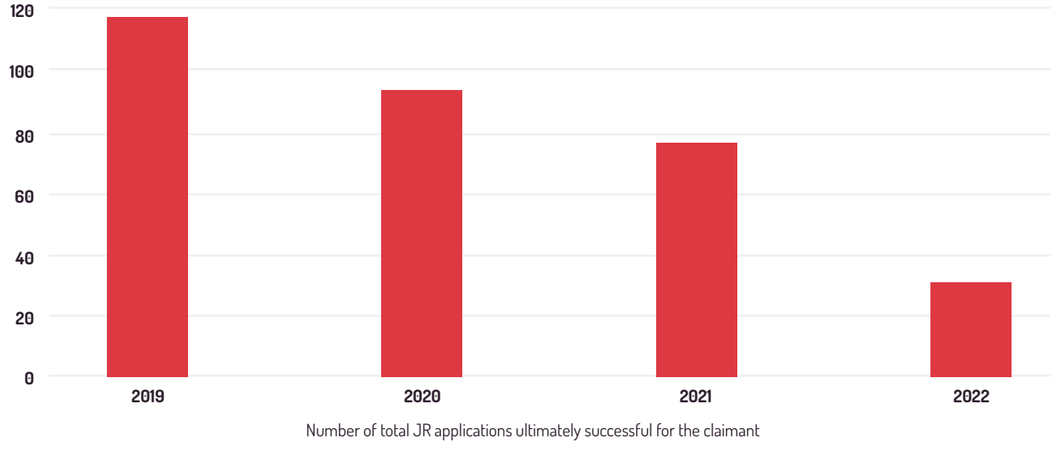


The two datasets in graph 4B show the percentage of applications that were ultimately successful, using two different reference points.

The blue line shows the success rate out of the total number of applications identified as AC claims. Across the datasets, the success rate remains relatively stable, fluctuating around 10%. Compared to the figures for total JR applications, where the success rate has remained consistently at 3% since 2019 (except in 2022) (see table under graph 4C below), AC applications continue to perform strongly.

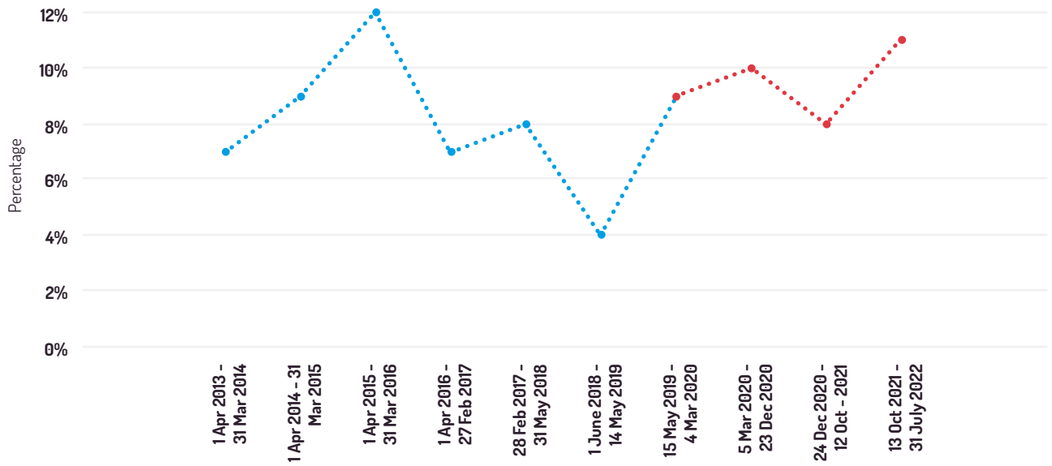
The red line visualises the success rate out of the applications that were granted permission to proceed to a substantive hearing.

Graph 4C: Number of total JR applications ultimately successful for the Claimant



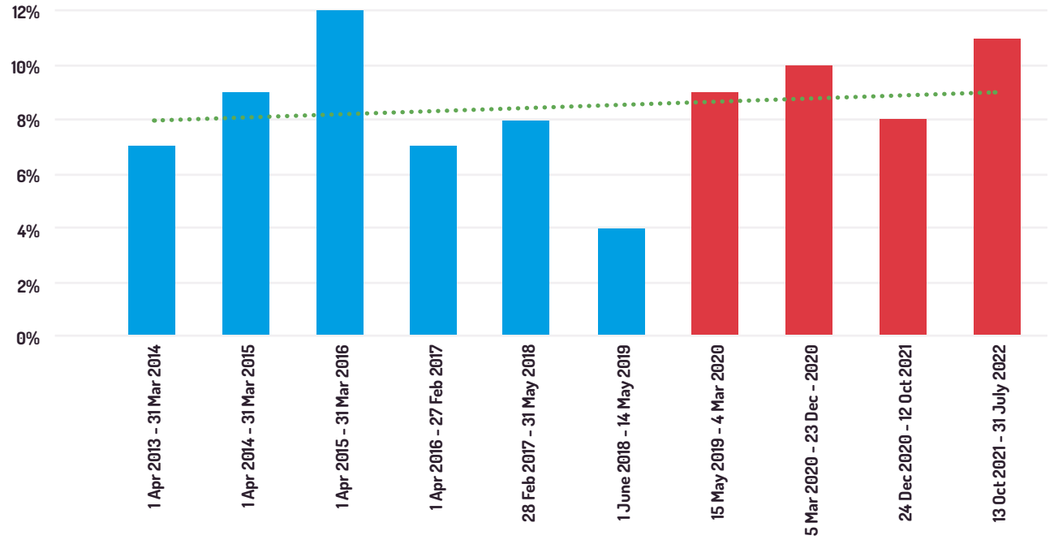
Dataset	2019	2020	2021	2022
No. of total JR applications ultimately successful for the Claimant	117	93	76	31
% of total JR applications ultimately successful for the Claimant out of total number of JR applications	3%	3%	3%	1%

Graph 4D: Percentage of successful AC applications, including POJ I data



Graph 4D shows both the POJ I data (blue line) and the POJ II data (red line) on the percentage of applications that were ultimately successful for the claimants. Since 1 June 2018 there has been a modest overall increase in the success rate.

Graph 4E: Percentage of successful AC applications including general trend



Graph 4E shows the main trajectory (green line) of successful AC judicial review applications since the POJ I datasets. Overall it can be observed that the success rate of environmental JRs has remained relatively stable, with a slight increasing trend. Again, this compares favourably with the success for JRs as a whole, which has remained level, at 3% (again, the 1% in 2022 is likely to be updated as remaining cases progress).

7. KEY CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The MOJ has yet to establish a transparent and consistent system for identifying the number of environmental JRs issued every year and to evaluate whether costs rules established to make legal action affordable for civil society are operating effectively. This is despite being asked to do so by the Aarhus Convention Compliance Committee and repeatedly by environmental NGOs.

The absence of an effective (or any) monitoring system has presented the authors with some challenges in producing this Report. For example, as pointed out in section five (methodology), the software currently used by the MOJ to identify cases as AC claims only recognises certain topics as potential AC cases. This means that cases that do not fall within these specific topic areas cannot be recorded by staff members as AC claims in the computer system. In other words, the current system is still at the time of writing not able to generate a report of all cases that the claimant has marked as an AC claim.

Secondly, the MOJ clarified that due to different court forms in use, in some of these cases in which it was recorded the Defendant challenged the status of a claim as an AC claim, the Defendant had in fact only applied to vary the amount of the cost cap. These challenges illustrate the need for a simple modification to the system to record cases in which the claim has been identified by the Claimant as an AC claim.

Notwithstanding these limitations, our aim is to provide an informed evaluation of the observed trends in environmental JRs on the basis of best available information. The authors welcome clarification from the MOJ in February 2023, that the current software will be replaced "in the near future" (Summer/Autumn 2023) by another system that should be able to identify AC claims regardless of the topic area. This will, we hope, inform a much clearer picture of basic information, such as the number of claims being issued annually, and will also provide the MOJ with an opportunity to implement a monitoring regime concerning not only the matters addressed in this Report, but other factors relevant to the UK's compliance with Article 9 of the Convention.

7.2 Number of environmental JR applications

7.2.1 Decline in number of Aarhus claims

The POJ II data shows the number of Aarhus claims peaking in the period from December 2020 to October 2021 and then falling significantly in the period from October 2021 – July 2022 (Graph 1A and associated Table).

Graph 1B combines the POJ I and POJ II data and shows a general trend of decrease in JR applications identified as AC claims between April 2013 and July 2022 (peaking at April 2015 - March 2016). For the first dataset in 2013, there were between 9-10 applications per month, but by the final dataset ending on 31 July 2022 there were four applications per month. This suggests that the number of environmental JR applications in 2022 is less than half the number that were being made in 2013. However, the final dataset is significantly lower than the first three, such that if an average were taken across all four of the POJ II datasets (a total of 66 cases) the decline would still be significant, but it would be less severe. An evaluation of the data post July 2022 is necessary to determine whether dataset 4 was an anomaly, or the start of a more substantial decline in applications.

Graph 1C shows the number of total JR applications. When comparing this data with the JR applications identified as AC claims, a similar decreasing trend is evident.

It is hoped that a forthcoming ECPR review will assist in uncovering the reasons for the decline in the number of AC applications. However, in the absence of the findings of a robust consultation exercise, it would appear that legislative reforms intended to dissuade JR applications introduced over the last decade are indeed having that effect on both environmental and other civil claims.

These legislative reforms included the passage of the Criminal Justice and Courts Act 2015 (CJCA 2015). The CJCA 2015 made several changes to the justice system concerning JR, including changes to the Senior Courts Act 1981, two of which have particular significance for environmental claims. Firstly, s.84 of the Act reduced the threshold at which the court can refuse permission for JR, or if the JR is successful, any relief/remedy. It imposed a new duty on the court to refuse permission or withhold a remedy if it is 'highly likely' (rather than inevitable) that the outcome for the applicant would not have been substantially different if the legal error challenged had not occurred. The court's discretion to waive that duty is preserved in cases only of "exceptional public interest". This section came into force on 13 April 2015 for any High Court proceedings started on or after this date.

Section 87 of the CJCA 2015 introduced new costs rules for interveners, with two key features. First, the Act clarified that interveners are unable to recover their own costs except in exceptional circumstances. Second, in any court lower than the Supreme Court, where an application for costs against an intervener has been made by another party to the proceedings, the Act imposed a new duty on the court to order costs against the intervener if any of the following four conditions are satisfied:

i. The intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;

ii. The intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;

iii. A significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or

iv. The intervener has behaved unreasonably.

In late 2015, the MOJ consulted on amendments to the ECPR on the basis that the existing regime had led to a proliferation of 'unmeritorious' environmental litigation.[53]Despite widespread opposition the Civil Procedure (Amendment) Rules 2017[54] entered into force on 28 February 2017. The main changes introduced were:

- The inclusion of statutory review within the definition of Aarhus claims if brought under s.289 of the Town and Country Planning Act 1990 or s.65 of the Planning Act 1990.[55]
- The Claimant must be a 'member of the public'. The term was not defined, but CPR 45.41(1)(b) stated that 'references to a member or members of the public are to be construed in accordance with the Aarhus Convention'.
- The Claimant must file and serve with the claim form a schedule of their financial resources, which includes any financial support a person has provided or is likely to provide to the Claimant. This must be verified by a statement of truth.
- The Claimant must state in the claim form that the claim is an 'Aarhus Convention Claim'.
- The sanction for Defendants unsuccessfully challenging the status of a claim as an Aarhus Convention claim was relaxed from an indemnity costs assessment basis to the far less onerous (from the position of the paying party) standard costs assessment.[56]

Although the default cost caps levels still apply, the SI introduced a power for the court to vary the caps, or to remove them completely, if it was satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the Claimant. For the purpose of this new rule, proceedings are considered 'prohibitively expensive' if their likely costs (including any court fees which are payable by the Claimant) either "exceed the financial resources of the Claimant" (having regard to any financial support provided) or are "objectively unreasonable" having regard to "the situation of the parties, whether the Claimant has a reasonable prospect of success, the importance of what is at stake for the Claimant, the importance of what is at stake for the environment, the complexity of the relevant law and procedure, and whether the claim is frivolous".

Certain aspects of the 2017 regime were successfully challenged by The RSPB, Friends of the Earth and ClientEarth in the High Court.[57] The case achieved important clarification as to how the new costs regime should operate, and increased certainty for claimants. As part of the above legal challenge, the Hon. Mr Justice Dove clarified that any variation to the costs cap should be done at the earliest possible time, and that a Claimant's own legal costs should be included in the calculation as to what is 'prohibitively expensive'. A rule change was required to ensure the privacy of Claimants' financial information. This issue was subsequently considered by the Civil Procedure Rules Committee (CPRC) as part of a review of 'open justice' and an amendment effected to CPR Part 39 the following year. Subsequent amendments to the CPR in 2018 clarified the following issues:

- The Claimant must provide financial information in order to benefit from the costs cap. In the case of third-party financial support, the information required extends to the aggregate amount available (or expected to be made available) and does not

include the identity of those providing donations and/or a breakdown of donations.

- The court may vary the costs cap only on an application made by the Claimant or Defendant (rather than on its own motion as originally proposed).

- An application to vary the costs cap must be made at the outset of the proceedings – either in the claim form (if made by a Claimant) or in the Acknowledgment of Service (if made by a Defendant). It must be determined by the court at the earliest opportunity and an application to vary the cap may only be made at a later stage in the process if there has been a significant change in the Claimant's circumstances, or it can be shown that the claimant materially misled the court as to their financial position.

CPR Part 39 was amended in April 2019 in light of Dove J's judgment. The changes made reinforced the fundamental principle of 'open justice' as a priority such that private hearings will be had only if one or more of certain criteria were fulfilled. The premise that conditions must be met for hearings in private fails to make private hearings the default position for environmental Claimants when costs are being set.

Finally, in October 2019, the UK announced further amendments to the definition of an Aarhus Convention claim. It is now defined as 'a claim brought by one or more members of the public by JR or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) 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 ("the Aarhus Convention")'.

The assumption that the above legislative reforms[58] intended to dissuade JR applications introduced over the last decade are indeed having that effect on both environmental and other civil claims is reinforced by the ELF case studies which, whilst not comprehensive, illustrate that cases with good prospects of success are not being brought, in some cases for fear of adverse costs.

7.2.2 Recommendations

In order to address the continuing decline in the number of Aarhus claims being issued, we recommend that ongoing and piecemeal attacks on JR and the Aarhus costs regime are reversed. This includes matters previously identified by the Compliance Committee as contributing to non-compliance with Article 9(4) of the Convention in a Report submitted to the seventh Meeting of the Parties on Decision VI/8k in August 2021:[59]

- **Type and eligibility of claims covered by the Aarhus costs regime** – in 2015, the Compliance Committee concluded the UK is not in compliance with Article 9(4) of the Convention because some environmental claims (including private law claims such as private nuisance) are not covered by the ECPR.[60] The Committee also noted that the position regarding the application of costs caps to Unincorporated Associations ('UA') and individuals representing them is unclear.[61]

  All environmental claims (civil and private) should be brought within the scope of the ECPR. The regime should also clarify that Unincorporated Associations and those representing them benefit from the cap applying to individuals (subject to any revisions made to the ECPR regarding the Aarhus caps – see below).

- **Variation of costs caps** – whilst there have been cases where Claimants' cost caps have been increased (*Bertoncini* is one example, and another is *R (ClientEarth) v Secretary of State for Business Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) when ClientEarth had their cost cap increased by the High Court from £10,000 to £25,000), the authors are not aware of any case in which a public authority Defendant's cost cap has been increased (in the aforementioned ClientEarth case, the High Court declined to increase the Defendant's cost cap, which remained at the default of £35,000). The Compliance Committee has expressed concern about the lack of examples in which the Claimants' default costs caps have been varied downwards and noted that the levels of the default costs caps of £5,000 (individuals) and £10,000 (other) can only be acceptable if variation

downwards is not only theoretically available but can be predictably relied upon in practice. The Committee has observed that the relatively high proportion of cases in which Defendants sought an increase in the costs cap may create a chilling effect to potential Claimants and, as such, the UK fails to demonstrate that the rules and practice relating to variation of costs caps provide a clear and consistent framework guaranteeing that costs will be fair, equitable and not prohibitively expensive.[62]

  The original (2013) ECPR fixed the default caps for the duration of the first instance proceedings. While this provided clarity and certainty, we recommend the adoption of the Northern Ireland approach – in which default caps for Claimants can only be varied downwards and the reciprocal cap for Defendants can only be varied upwards. The Northern Ireland approach represents a significant improvement on the regime as compared to other parts of the UK, and should be replicated in England and Wales.

  We also recommend an amendment to CPR 45.44 to prevent variations of the Claimant's cap on the instigation of Interested Parties, who (following *Bertoncini*) may be encouraged to apply for the cap to be varied upwards to accommodate excessive costs estimates or simply as a litigation tactic for the deterrent effect.

- **Position on Appeal** – the Compliance Committee has concluded that the lack of any cost caps in CPR 52.19A fails to ensure sufficient clarity or costs protection for Claimants in appeals regarding Aarhus claims. The Committee recommended that costs ordered on appeal, including any possible costs caps that may be introduced into CPR 52.19A, must recognise that the requirement not to be prohibitively expensive applies to the proceedings as a whole, encompassing all stages of the procedure.[63]

  We recommend an appropriate amendment to CPR Part 45 to confirm the default cap expressly covers the adverse costs of all proceedings with necessary amendments to CPR 52.19A and the Supreme Court Rules to reflect this position also (subject to any other helpful suggestions that may arise from consultation).

- **Schedule of claimant's financial resources and hearings on applications to vary costs caps** – the Compliance Committee concluded there is a risk potential Claimants will be dissuaded from bringing a JR because their financial circumstances will be provided to the Defendant and may be discussed in open court.[64] It is also a practical burden that makes filing a claim harder, and in certain cases can prove to be entirely unnecessary. This includes situations in which a Defendant has indicated it will not so apply or where the objective factors all point to a variation being prohibitively expensive due to the importance of the case for the environment and there being no personal interest for the Claimant in its outcome.

  We recommend an appropriate amendment to CPR 45.44 to remove the requirement on Claimants to provide a schedule of financial resources when making an application for JR, unless the Claimant is applying for a reduction in the level of the default cap.

- **Costs for procedures with multiple claimants** – the Compliance Committee has concluded there is no basis for the rule requiring separate costs caps for each Claimant (particularly where Claimants make the same legal arguments on the same factual basis) and that it is not undesirable for Claimants to be able to share the costs burden for challenges within the scope of the Convention.[65]

  We recommend an appropriate amendment to CPR 45.43(4) to reinstate the original (2013) rule that there is one cap per claim, not one cap per Claimant. In situations where claims are joined, Claimants should each be able to recover their costs under a separate reciprocal cost cap where successful, bearing in mind the Aarhus Convention requirements on ensuring against prohibitive expense are directed in favour of Claimants.

- **Cross-undertakings for damages** - the Compliance Committee has observed the 2017 CPR amendments do not provide clarity to applicants seeking interim

injunctions as to: (a) whether a cross-undertaking will be required, and (b) if a cross-undertaking is required, what its level will be, and that this fails to meet the requirement in Article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.[66]

We await data from the forthcoming review of the ECPR on: (a) the number of Aarhus claims in which an interim injunction was sought; (b) whether a cross-undertaking was required; and (c) if so, the amount required in order to determine whether the requirements of the Convention are being fulfilled. Our initial view on this issue (subject to further information as above) is that where a default cap is already in place or will be set (i.e. prohibitive expense has already been delineated), there should be no requirement for a cross-undertaking in damages.

- **Costs orders against or in favour of interveners** – the Compliance Committee has found that the UK has met the requirements of paragraphs 2(a), (b) and (d) and 4 of Decision VI/8k with respect to interveners who intervene against the Claimant in England and Wales. The Committee has also recommended that members of the public who join proceedings as interveners in support of the Claimant are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive.[67]

We recommend appropriate amendments to section 87 of the CJCA 2015 and CPR Part 45 in order to ensure that members of the public who join proceedings as interveners in support of the Claimant are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive. This is necessary to ensure parity on this issue, which is currently lacking.

- **Costs for procedures with multiple defendants** – following *CPRE Kent*, a Claimant may now be liable to pay the costs of more than one Defendant and/or Interested Party to prepare and file an Acknowledgement of Service and summary grounds of resistance. It is not necessary to show 'exceptional' or 'special' circumstances apply, although costs must be reasonable and proportionate. The immediate effect of the Supreme Court judgment in *CPRE Kent* is that Interested Parties may be emboldened to submit excessive estimates of costs at an early stage in the proceedings and the court could, in such cases, routinely order costs up to the full level of the default Aarhus caps at the permission stage (and that's assuming that Claimant's default costs caps are not varied upwards).

We recommend an appropriate amendment to the CPR to clarify that a Claimant is not liable for multiple sets of costs of the Acknowledgement of Service/ Summary Grounds of Resistance at the permission stage in judicial and statutory review cases, and that such costs must in all the circumstances be reasonable and proportionate, bearing in mind the preliminary nature of the permission stage, as was previously the position in *Mount Cook*.[68]

- **Reciprocal caps** – the adverse impact of the reciprocal cap (or cross cap) on the Claimant was not covered in the Communications giving rise to Decision VI/8k and was therefore not considered by the Compliance Committee in any detail. In POJ I, the authors referred to anecdotal evidence to suggest that the reciprocal cap of £35,000 is a problem in complex environmental cases. For example, whilst successful in their challenge to the lawfulness of certain aspects of amendments to the Aarhus costs regime in 2017,[69] the Claimants were unable to recover their full legal costs because of the impact of the cross-cap. There is no basis for the cross-cap in the Convention – the Compliance Committee has clarified that fairness in Article 9(4) of the Convention refers to what is fair for the Claimant, not the Defendant public body.[70] In a recent case that went all the way to the Supreme Court, *R (on the application of Day) (Appellant) v Shropshire Council (Respondent)*,[71] the Respondent agreed to pay the successful Claimant's costs of the Administrative Court, Court of Appeal and Supreme Court, totalling £105,000. However, the position on costs is not set out in the judgment, nor is it covered in the CPR.

There is no basis in the Aarhus Convention for the imposition of a reciprocal cap on a successful Claimant. We recommend an appropriate amendment to CPR 45.43 to remove it. As things stand, either Claimants may find themselves unable to bring challenges as it is not possible to recover their own costs in full from the Defendant even if they win, or there is a reliance (given, generally speaking, the comparative limits to Claimants' financial resources) on legal professionals being willing (and able) to act for environmental Claimants on the basis that they (unlike their counterparts acting for public authority Defendants and/or commercial entity Interested Parties) will have to act at heavily discounted rates (see the ELF case studies referred in section 4 of the Report). Either way, there is a clear risk that the reciprocal cap, particularly when set at the level that it is, can make cases "too expensive to win".

7.3 Number of applications successfully challenged by Defendants as Aarhus Convention claims

7.3.1 Consistent decrease in successful challenges

The POJ II datasets suggest that, apart from one single case in dataset 1 (May 2019 – March 2020), no claims were successfully challenged by the Defendant as not being AC claims (Graph 2A). On the contrary, a significant number of cases (27 in total) were unsuccessfully challenged by the Defendant in the different time periods: 8 cases in dataset 1 (May 2019 to March 2020), 11 cases in dataset 2 (March 2020 to December), 7 cases in dataset 3 (December 2020 to October 2021) and 1 case in dataset 4 (October 2021 to July 2022).

Graph 2B combines the POJ I and POJ II data. While the authors of POJ I were hesitant to draw conclusions about the apparent decline in the success of claims being challenged as AC claims, the combined data suggests a continuing and consistent decrease in the number of successful challenges since the peak between February 2017 - May 2018. However, as recalled in section 6 of this Report, the MOJ clarified that, due to different court forms in use, in some of these cases (they did not identify which ones or how many of them) the Defendant in fact only applied to vary the amount of the cap, while agreeing that the case in question was an Aarhus case. This limitation makes it difficult to fully understand the extent to which Defendants are challenging the status of claims as AC claims but, on its face, it suggests that Defendants may be using this provision of the CPR disproportionately. For example, in *R (oao Friends of the Earth) v UKEF & Others*,[72] the Defendant sought to convince the High Court that the claim challenging its decision to provide over 1 billion US$ in tax-payers' money to contribute to financing a gas project off the coast of Mozambique was not an Aarhus Case, on the basis that it was a financial decision. This was despite the fact that the Defendant had concluded that the decision was aligned with the UK's obligations under the Paris Agreement. The Defendant's secondary position was that if it was an Aarhus claim, then the Claimant's cost cap should be increased from £10,000 to £35,000 (making it equal to its own cost cap). These arguments were rejected by Thornton J in the order of 14 May 2021, and the Claimant's cost cap was set at £10,000. This, in the authors' view, is an example of an ill-conceived and unmeritorious attempt to apply an unduly restrictive lens to the operation of the Aarhus cost provisions.

To understand what may be motivating Defendants to pursue such challenges, one needs to examine the regime of costs associated with challenging the status of AC claims. In 2013, a regime was introduced whereby Defendants unsuccessfully challenging the status of claims as AC claims were subject to indemnity costs. Between April 2013 and May 2018 there was a modest and continuing increase in such challenges, perhaps reflective of the fact that challenging the status of claims as AC claims did not happen before 2013 (there was no specific recognition of AC claims under the court rules before 2013).

Amendments to the CPR in 2017 relaxed the sanction for Defendants unsuccessfully challenging the status of AC claims from indemnity costs to a standard cost assessment. In its report on Decision V/9n to the sixth session,[73] the Aarhus Convention Compliance Committee expressed concern that, following the 2017 amendments, Defendants who unsuccessfully challenged the status of the claim as an Aarhus claim would now normally be ordered to pay the costs of those satellite proceedings on the standard basis only. The Committee had observed that by decreasing Defendants' potential cost exposure, this amendment would increase the likelihood of such challenges and, as a result, increase rather than decrease the potential costs and uncertainty for Claimants in proceedings subject to Article 9 of the Convention.[74]

Graph 2A in POJ I showed a significant increase of 58% in the number of successful status challenges after dataset 4 (i.e. February 2017, the date from which the CPR Amendments took effect) followed by a significant fall in challenges in dataset 6 (June 2018 – May 2019), which the authors highlighted as requiring further data to confirm any trend regarding the proportion of total challenges made to the status of AC claims that were successful.

Notwithstanding the confusion about the precise nature of the challenges made by Defendants in the POJ II period, Graph 2B suggests a continuing and consistent decrease in the number of successful challenges to the status of claims as AC claims since May 2018. Since February 2017, those unsuccessful Defendants will have only been ordered to pay costs on a standard basis, which may have been one factor in emboldening them to bring what appear to be unmeritorious challenges. Moreover, as pointed out in POJ I, the costs associated with defeating such applications are not recoverable in full by Claimants, thus unfairly increasing the overall cost burden for Claimants, depleting available funds at an early stage in the JR and providing the opportunity for challenges to be used tactically against Claimants of lesser means.

In light of the above, there appears to be a highly questionable basis for retaining a regime in which Defendants who unsuccessfully challenge the status of claims as AC claims are ordered to pay costs on a standard basis only. It would appear that while challenges continue to be brought (albeit at a reduced rate than previously[75]) they are not being upheld by the courts. This could be unfairly exacerbating the overall costs burden for Claimants, and is creating satellite litigation on costs, which is precisely what the rules on cost protection were intended to prevent.

7.3.2 Recommendation

We recommend an amendment to CPR 45.45(3)(b) to reinstate the pre-2017 indemnity costs regime in respect of unsuccessful challenges to the status of a claim as an Aarhus claim. We also recommend an amendment to CPR 45.44 to instate indemnity costs against Defendants who pursue unsuccessful applications to vary Claimants' cost caps.

7.4 Number of cases in which permission was granted

7.4.1 No significant change in success rates at permission stage between POJ I and POJ II

Graph 3A shows a significant decrease in the number of applications for which permission was granted after dataset 3 (December 2020 – October 2021). Graph 3B shows the percentage of total AC applications where permission to proceed was granted following a broadly parallel trend.

Graph 3C combines the POJ I and POJ II data. Despite some fluctuations, it suggests that the percentage of cases where permission to proceed is granted has remained relatively stable between April 2013 and July 2022.

Graph 3D shows the proportion of JR applications and environmental JR applications that are granted permission to proceed out of the total number of applications made. The data indicates that environmental JRs are approximately twice as likely to be granted permission to proceed than JR applications overall. This shows that there are meritorious cases being brought by environmental claimants as they pass this key procedural hurdle of whether or not they are arguable (and so fit for further consideration at a substantive hearing, as opposed to hopeless, frivolous or vexatious) more frequently than the average from JR claims as a whole. This is also pertinent in the context of claims criticized by Defendants, Interested Parties and even the Government in consultation exercises that environmental claims are politically motivated, or far-fetched or unrealistic.[76]

Interestingly, while the current (POJ II) trend is a decrease in the percentage of total environmental JRs being granted permission since 2020 (see above graph 3A), the percentage of general JRs being granted permission has been slowly increasing since 2019. There seems to be a decrease in 2022, but it is not possible to draw final conclusions on that number, as it is likely to be updated as remaining cases progress.

These trends reflect the findings of POJ I. This also found that environmental JRs were approximately twice as likely to be granted permission when compared to the total number of JRs. The decreasing success rates for environmental cases (in terms of cases obtaining permission), and the increasing success rates for judicial review cases in general (in terms of cases obtaining permission) became evident from 2016 and has continued throughout the period of POJ II. The authors note that this timeframe fits with when the "no substantial difference in outcome" test came was introduced.

The decline in success rates for environmental JRs being granted permission to proceed since December 2020 – October 2021 has also been reported anecdotally. The authors have noted that obtaining permission in the High Court has felt more challenging throughout the POJ II period, with more cases having to be pursued to a renewal hearing. For example, Friends of the Earth's case against UKEF[77] was granted permission to proceed at a renewal hearing having been refused on the papers (the subsequent substantive hearing in the Divisional Court resulted in a split judgment; Friends of the Earth is now seeking an appeal to the Supreme Court). Both Friends of the Earth's and South Lakes Action on Climate Change's claims challenging the legality of the decision to grant planning permission for the Whitehaven coal mine were refused on the papers by Cranston J. Both NGOs sought reconsideration at a renewal hearing, but rather unusually, that hearing was vacated by Thornton J, who has ordered that the cases be listed for a rolled-up hearing instead. Furthermore, in *R (oao Sarah Finch on behalf of the Weald Action Group) v Surrey County Council & Others*[78], permission was refused on the papers, refused again at a renewal hearing in the High Court, and then granted permission to proceed by Lewison LJ in the Court of Appeal.[79] Finally, in *R (Wild Justice) v Water Services Regulation Authority* [2023] EWCA Civ 28 permission for JR – in which the Court is simply determining arguability - was refused following a full day renewal hearing in the High Court and a full day hearing in the Court of Appeal. To conclude, while it is difficult to draw any firm conclusion from the limited data, anecdotal experience suggests this may be the beginning of a worrying trend.

7.4.2 Recommendation

We recommend the forthcoming ECPR review specifically invites views on the apparent decline in success rates at the permission stage and what measures can be taken to address such concerns.

7.5 Number of cases ultimately successful for the Claimant

7.5.1 Modest increase in success rates at first instance

Graph 4A shows that between dataset 1 (May 2019 – March 2020) and dataset 3 (December 2020 – October 2021), the number of applications that were ultimately successful for the claimant was slowly increasing. The number of successful cases fell between dataset 3 and dataset 4 (October 2021 – July 2022), although the actual success rate (of the total cases actually brought) increased between those datasets.

Graph 4B shows the percentage of applications that were ultimately successful throughout the same period as Graph 4A and shows the success rate remains relatively stable, fluctuating around 10%. Compared to the figures for total JR applications, where the success rate has remained consistently around 3% since 2019, it can be seen that AC applications perform comparatively well in terms of ultimate success.

Graph 4D combines the POJ I and POJ II data and shows that since 1 June 2018 there has been a modest but overall increase in the success rate at first instance.

Graph 4E shows the main trajectory (green line) of successful AC judicial review applications since the POJ I datasets. Again, it can be seen that the success rate of environmental JRs has remained relatively stable, with a slight increasing trend.

At first blush, it would appear that while fewer cases are being brought, and fewer cases are being granted permission to proceed, those that get to a substantive hearing are more likely to be successful. One possibility is that Claimants are increasingly bringing cases for which they are advised they have high (or higher) prospects of success.

7.5.2 Recommendation

We recommend the imminent ECPR review invites views on this issue. It is also plainly important to keep monitoring this issue and that the MOJ has systems in place which allow for as clear comparison as possible.

REFERENCES

1 Friends of the Earth and the RSPB. (2019). A pillar of justice: The impact of legislative reform on access to justice in England and Wales under the Aarhus Convention. Available here.

2 As referred to in the Plan of action for Decision VII/8s (United Kingdom) available here.

3 The reforms are discussed in section 7 of the Report.

4 See Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I dated 2 September 2021 available here.

5 The authors make this recommendation in relation to environmental JRs and statutory reviews, but also highlight there may be other environmental claims in which individuals, community groups and/or NGOs may be acting in the public interest to which this recommendation may apply.

6 The authors acknowledge also the lack of precision in the MOJ's records as to what is a challenge to the status of a claim and what is an application to vary a cost cap, as set out in section 6.

7 Environmental Law Foundation and the Business Centre for Relationships, Accountability, Sustainability and Society, 'Costs Barriers to Environmental Justice' (2009). Available here.

8 Information about the UNECE Aarhus Convention is available here.

9 The UK Action Plan (published 1 July 2022) can be found on the UNECE Aarhus Convention website here.

10 It is important to recognise that at present, the protection available under the Aarhus court rules does not cover all environmental cases. For example, private nuisance claims, and cases concerning civil law injunctions relating to environmental protest are not covered. This seriously impedes access to justice. For example, in 2019, Friends of the Earth was forced to withdraw from a case challenging the scope of an injunction obtained by Cuadrilla Bowland Ltd which severely restricted protest in connection with its fracking operations, because the High Court held there was no cost protection available given these were private law proceedings, and Cuadrilla was threatening Friends of the Earth with £85,000 of costs in the event that the case did not succeed. The authors consider that the scope of the cost rules should be widened to incorporate all environmental claims, as found by the Aarhus Convention Compliance Committee in Communications ACCC/C/2013/85 and ACCC/C/2013/86 available here. This report is focussed on the efficacy of cost protection in environmental JRs, given that is primarily what is covered.

11 United Nations, Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992).

12 Note the Ratification of the Convention by Guinea-Bissau on 4 April 2023.

13 United Nations Treaty Collection, Depositary: Status of Treaties [Online]. Available here. On 26 July 2022, the Government of Belarus notified the Secretary-General of its decision to withdraw from the Convention with effect from 24 October 2022 in accordance with article 21 of the Convention.

14 Maguelonne Dejeant-Pons et al. 'Human Rights and the Environment: Compendium of Instruments and Other International Texts on Individual and Collective Rights Relating to the Environment in the International and European Framework' (Council of Europe, 2002) 18.

15 Although it is by no means the only form of environmental legal action or only form covered by the Convention.

16 *R (Wild Justice) v Water Services Regulation Authority* [2023] EWCA Civ 28.

17 See here and here.

18 Environmental Law Foundation, 'Civil law aspects of environmental justice' (ELF, 2003) 98. Available here.

19 See, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

20 See, Directive 2003/35/ EC of the European Parliament and Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

21 UNECE (n 1) Article 9.

22 Report of the Working Group on Access to Environmental Justice 'Ensuring access to environmental justice in England and Wales' (May 2008) (the "Sullivan Report 2008") 108. Available here.

23 Paul Stookes, 'A Practical Approach to Environmental Law' (OUP, 2005) 2.32.

24 In addition to the submission of Communications to the Aarhus Convention Compliance Committee, individuals and NGOs also submitted complaints (pre-Brexit) to the European Commission. A complaint submitted by WWF-UK in 2005 resulted in infringement proceedings in respect of the UK's non-compliance with provisions relating to prohibitive expense of the EC Directive 2003/35/ EC of the European Parliament and Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. The European Commission referred the complaint to the Court of Justice of the European Union, which held the UK in breach of the EC Public Participation Directive in 2013 – see *Commission v UK*, Case C-530/11, ECLI:EU:C:2014:67 here.

25 See Communications C23, C27 and C33, the findings for which can be found here.

26 Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, available here.

27 Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland (2014) – available here.

28 Decision VI/8k Compliance by United Kingdom with its obligations under the Convention (2017) – confirmed by the Meeting of the Parties in Montenegro – available here.

29 Decision VII/8s on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, available here.

30 Letter from The RSPB, Friends of the Earth, Friends of the Earth Scotland and the Environmental Rights Centre for Scotland dated 24 March 2022 available here.

31 See paragraph 13 of the UK's 1st Progress Report on Decision VI/8k concerning compliance by the UK with its obligations under the Aarhus Convention dated 1 October 2018 here.

32 Findings for Communications ACCC/C/2013/85 and ACCC/C/2013/86 available here.

33 See Communication ACCC/C/2017/156 United Kingdom available here.

34 The Communication concerns a general failure by the UK to provide an adequate review of the "substantive legality" of certain decisions, acts and omissions in accordance with Articles 3(1) and 9(2), (3) and (4) of the Aarhus Convention.

35 See Communications C23, C27 and C33, the findings for which can be found here.

36 See Communication ACCC/C/2017/150 United Kingdom available here.

37 See Communication ACCC/C/2022/194 United Kingdom available here.

38 See page 48 of the Conservative Party Manifesto here.

39 The Terms of Reference can be found here.

40 The IRAL Report can be found here.

41 Judicial Review Reform: The Government Response to the Independent Review of Administrative Law available here.

42 Judicial Review Reform Consultation – The Government Response (July 2021) available here.

43 The authors note that at both the permission stage and at the time of granting a remedy, the court must already consider the "no substantial difference test" established under s.84(1-3) of the Criminal Justice and Courts Act 2015. The CJCA 2015 amended the Senior Courts Act 1981 to introduce a broader test at both permission and relief stage, under section 31. This in itself, has already made it harder for Claimants to obtain permission, and even if they win at trial and establish that a public authority has acted unlawfully, to secure a remedy. The amendments require that where the Court considers/predicts (and this may simply be due to legal submissions from a public authority and not due to clear evidence establishing the point) that it is highly likely that the outcome for the applicant would not have been substantially different if the complained of conduct had not occurred, then the Court must refuse to grant permission or relief, except on the limited basis of "exceptional public interest".

44 CO/3213/2019 [2020] EWHC.

45 See for further information: The Supreme Court, Press Summary of '*CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36 (30 July 2021)'. Available here.

46 Friends of the Earth, The RSPB, 'A pillar of justice – The impact of legislative reform on access to justice in England and Wales under the Aarhus Convention' (November 2019). Available here.

47 Ministry of Justice responses to EIR, dated 10 July 2019 and 25 August 2022. Available upon request.

48 Similarly, the authors recognise there can be cases that "lose" at trial, but do nevertheless contribute to positive changes for the environment.

49 Ministry of Justice, 'Civil Justice Statistics Quarterly' (gov.uk, 22 December 2014). Available here.

50 Ibid

51 Letter from Martin J Lee (Administrative Court Lawyer (Leeds Office)) to Carol Day dated 25 Aug 2021 (but sent on 25 August 2022) stating: "Column G relates to where a defendant (only) has indicated a denial that the case is an Aarhus case. However, there are different court forms in use and completion of the forms is not always consistent and it is clear, in some of these cases the defendant in fact only requests to vary the amount of the cap (while actually agreeing it is an Aarhus case, or would be if the financial details had been supplied). Hopefully, this, together with the information in column H, should make this clear".

52 See Friends of the Earth, The RSPB (n 1 above), p. 25: "Even so, it is clear the number of successful challenges has increased, and then (inexplicably) dropped off. This dropping off in dataset 6 (1 June 2018 – 13 May 2019) may well be an anomaly in the data provided".

53 Ministry of Justice (2015) Costs Protection in Environmental Claims. Consultation accessible here.

54 Available here.

55 While the authors welcomed the inclusion of appeals under s.289 TCPA 1990 within the definition of Aarhus claims, it was reiterated at the time that the definition of Aarhus claims should be extended to include all environmental claims

56 Indemnity costs awards are, unlike standard cost awards, not restricted to costs which are considered proportionate. In practice, a party who obtains such an award in their favour is more likely to recover their actual costs.

57 *RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor* [2017] EWHC 2309.

58 With the exception of the extension of the definition of an Aarhus claim to include appeals under s.289 TCPA 1990 and those secured through the JR application in *RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor* [2017] EWHC 2309.

59 See Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I dated 2 September 2021 available here.

60 Ibid, paragraph 11 and Communications ACCC/C/2013/85 and ACCC/C/2013/86.

61 Supra, n.59, paragraphs 12-13.

62 Supra, n.59, paragraphs 14-33.

63 Supra, n.59, paragraphs 56-62.

64 Supra, n.59, paragraphs 34-44.

65 Supra, n.59, paragraphs 45-47.

66 Supra, n.59, paragraphs 63-67.

67 Supra, n.59, paragraphs 70-78.

68 *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2017] PTSR 1166

69 *RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor* [2017] EWHC 2309 (admin).

70 See the Compliance Committee's Findings in Communication ACCC/C/2008/33 (UK), paragraph 135, available here.

71 [2023] UKSC 8.

72 [2022] EWHC 568 (Admin).

73 Decision V/9n (n 20).

74 Decision V/9n (n 20) 68.

75 The authors acknowledge also the lack of precision in the MOJ's records as to what is a challenge to the status of a claim and what is an application to vary a cost cap, as set out in section 6.

76 See, for example, the 2017 consultation on changes to the ECPR referred to in section 7 and the IRAL Consultation referred to in section 3. These views can, and do, filter through to the legal proceedings themselves. For example, the court appears to afford a different standard of review to decisions of a "macro political" nature. In *Packham v The Secretary of State for Transport & Anor* [2020] EWHC 829 (Admin) (06 April 2020), the Divisional Court held that the only realistic way in which the decision to proceed with the HS2 project could be impugned was by way of JR "on *Wednesbury* grounds, namely that it was irrational for the First Defendant not to take into account something that was "obviously material". That is a 'light touch' review, for the reasons noted above" – see *Packham v The Secretary of State for Transport & Anor* [2020] EWHC 829 (Admin) (06 April 2020), paragraph 57. Similarly, in *Spurrier and others v Secretary of State for Transport* [2020] PTSR 240 at [141] – [184], the

Supreme Court held that "when dealing with matters depending essentially upon political judgment, matters of national economic policy and the like, the court will only intervene on grounds of bad faith, improper motive and manifest absurdity: see [147], [149], [153]". Friends of the Earth also observes that Defendants often robustly submit that claims are unarguable. For example, in Friends of the Earth's legal challenge against the adoption of the Net Zero Strategy (referred to above), the Defendant submitted that the claim was unarguable (and in relation to some of the grounds that they were "wholly unarguable") in its summary grounds of resistance, though the claim was subsequently granted permission to proceed on all grounds and ultimately succeeded in full. Concerns about the appropriate intensity of review in JR have been raised by some of the authors in a Communication that is currently before the Aarhus Convention Compliance Committee (see page 10 of the Report).

77 [2022] EWHC 568 (Admin).

78 [2020] EWHC 3566 (Admin).

79 This case went to the Court of Appeal, where there was a split judgment, and is now on appeal to the Supreme Court.

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