ENSURING ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES

UKELA's RESPONSE TO THE AUGUST 2010 UPDATE REPORT OF THE WORKING GROUP ON ACCESS TO ENVIRONMENTAL JUSTICE

INTRODUCTION

1. This is the response of the United Kingdom Environmental Law Association to the Update Report of the Working Group on Access to Environmental Justice[1].

2. UKELA is a registered charity the principal objects of which include the promotion, for the benefit of the public generally, of the enhancement and conservation of the environment in the UK, and, in particular, the advancement of the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment.

3. The Rt Hon Lord Justice Carnwath is UKELA's current President, having taken over the role in 2006 from the late Rt Hon Lord Slynn of Hadley. In addition to Lord Justice Carnwath, the Association's patrons are Baroness Young of Old Scone (former Chief Executive, the Environment Agency), Professor Sir Francis Jacobs KCMG, QC (Kings College London), Professor Richard Macrory (University College London) and Tom Burke CBE (Visiting Professor, Imperial and University Colleges, London).

4. Current membership (lawyers and non-lawyers) is in excess of 1,200.

[1] Contacts are: Richard Kimblin (Convenor of the Environmental Litigation Working Part) rk@no5.com; Vicki Elcoate (Executive Director) Vicki.elcoate@ntlworld.com

THE UPDATE REPORT

5. The Update Report addresses key changes which have occurred since the Working Party reported in May 2008, namely:

- the judgment in Commission v Ireland[2], in which discretionary judicial approaches to ensuring compliance with the Aarhus Convention were held to be insufficiently certain;
- criticism of the UK position by the European Commission[3];
- draft finding from the Aarhus Compliance Committee which are adverse to the UK position in this regard[4];
- the Jackson Review of Costs in Civil Litigation

6. We note, further, that since drafting the Update Report, the Court of Appeal has had to deal with the approach to what is and is not prohibitively expensive in the PCO regime[5].

7. The Update Report adopts the conclusions of the Jackson Review, save that it proposes a costs rule as follows[6]:

> An unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings.

8. In respect of the Jackson Review, UKELA attended & contributed to Lord Justice Jackson's seminar on costs in judicial review. UKELA also contributed in writing.

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[2] Case C-427/07
[3] See the press release of the Environment Minister dated 18 March 2010
[4] The final recommendations made by the Aarhus Compliance Committee have since been published on 18 October 2010 with minimal changes to the earlier draft recommendations referred to in the Update Report (Findings and Recommendations of the Aarhus Compliance Committee with regard to Communication ACCC/C/2008/33 brought by ClientEarth, the Marine Conservation Society and Mr Robert Latimer concerning compliance by the United Kingdom).
[5] R (oao) Garner v Elmbridge Borough Council [2010] EWCA Civ 1006
[6] See para 30 of the Update Report

Since that time, UKELA has not revisited the issue of access to justice in pubic law proceedings. It does so now.

RESPONSE

9. UKELA considers that it has now been established that a clear and effective costs system for public law litigants is needed. The requirements of the Convention, as now incorporated in both the EIA Directive and the IPPC Directive, are matters of European law which must be properly transposed to the domestic situation. It is quite obvious that adaption of the Corner House[7] principles is inadequate, having regard to:

- the PCO regime's lacks certainty;
- the difficulty that the PCO regime answers the question as to potential liabilities at a point in the proceedings which is too late;
- the costs or costs risks associated with the PCO regime themselves restrict access to justice and increase costs for all parties;
- the findings of the Jackson Review;
- the final findings and recommendations of the Aarhus Compliance Committee;
- the absence of a requirement of a 'public interest' issue in EIA cases (see Garner).

10. For these reasons, UKELA considers that there is substantial evidence that there is both a failure to comply with the Convention and European law. The approaches which are presently available to parties and the courts now require a clean break and clear resolution.

[7] R (oao) Corner House Research v Secretary of State for Trade and Industry [2005] EWCA 192

11. UKELA notes that the Update Report makes express reference to the use of the permission stage to filter claims[8]. Further, and as was suggested by UKELA during the Jackson Review, there is a need to provide for a permission stage in statutory review, principally via s288 Town and Country Planning Act 1990. Helpfully, the Update Report supports that change[9].

12. To these points, we would add and draw attention to the existence of an effective means of addressing alleged unlawfulness, namely the pre-action protocol procedure. In UKELA's view, this is an important balancing factor in JR in England and Wales in addressing:

- the question of conduct of the parties;
- a means of resolving cases without prohibitive expense.

13. Having regard to these factors, UKELA considers that one way cost shifting of the nature identified in the proposed rule would provide a clear and effective means of complying with the UK's obligations and would do so in a manner which would filter out unmeritorious cases and penalise those who do not conduct their litigation reasonably.

14. In conclusion, UKELA supports the approach proposed by the Working Party.

17 November 2010

[8] Para 37
[9] Paras 38-40