



March 25th 2008

Dear Mr Turner

**UK Implementation Report – Aarhus Convention**

1. We write on behalf of the UK Environmental Law Association (UKELA) working party on environmental litigation, in response to the invitation by Defra to comment on the UK's National Implementation report for the third Meeting of the Parties, which the UK is required to have prepared as a signatory to the Convention. The report sets out the necessary legislative, regulatory or other measures that the UK has taken to implement the provisions of the Convention; and their practical implementation.
2. UKELA is the UK forum which aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non lawyers and has a broad membership.
3. We welcome the Government's acknowledgement of the importance of improved access to information and wider participation of the public in decision-making processes in building trust within communities, increasing public authority accountability and advancing environmental policy. UKELA also welcome the Government's view that, backed by access to justice, this access will create greater transparency and openness in environmental matters and contribute towards the goal of sustainable development.<sup>1</sup>
4. The focus of this response falls on the implementation of the 3rd Pillar – Access to Justice and has considered only its impact on the legal framework in England and Wales.
5. Our general comments follow.

Yours Sincerely

Justine Thornton/James Kennedy

(Convenors of the UKELA Working Party on Environmental Litigation)

Postal address for working party:

c/o The Brambles, Cliftonville, Dorking, RH4 2JF

---

<sup>1</sup> Paraphrased from the DEFRA website, <http://www.defra.gov.uk/environment/internat/aarhus/index.htm>

**Key issues arising from the  
UK Government Aarhus Convention Implementation Report**

**SUMMARY OF MAIN POINTS**

***Right of substantive Appeal***

- ***The report does not consider how the UK has implemented Article 9(2) pursuant to which the public should have access to a review procedure to challenge the substantive legality of any decision (as opposed to judicial review) . The report makes a rather vague reference to planning inquiries and statutory environmental appeals but omits to mention that third party members of the public have no right of appeal in the planning or statutory environmental appeals system.***

***Protective Costs Orders***

- ***UKELA supports CAJE<sup>2</sup> in its position that the UK Report misrepresents the position with respect to Protective Costs Orders. PCOs only provide a partial solution to the problem of prohibitive costs and the present UK position on costs is not in compliance with the Aarhus Convention.***

***Public Funding***

- ***UKELA considers the report should be amended to include recognition that there are some significant barriers to public funding for environmental cases including:***
  - ***a lack of guidance on funding for environmental cases;***
  - ***a lack of clarity as to whether environmental protection of itself amounts to a public interest or whether more is required;***
  - ***the fact that the financial threshold for obtaining public funding excludes all those above the very lowest income levels when experience suggests that it is often those with more money who are more able to concern themselves with protecting the environment.***
  - ***there is no public funding for NGOs although these organisations can, as the Courts have recognised, have the skills and expertise to present an environmental case more effectively than lay members of the public***
  - ***Where public funding is available, it can require the local community to raise funds of its own which can be unachievable within the time limits of judicial review proceedings.***

***Injunctive Relief***

- ***UKELA supports CAJE in its position that the report should be amended to clarify the position with respect to injunctive relief. An applicant may be required to provide a cross undertaking in damages which can make litigation ‘prohibitively expensive’ yet injunctions can be a valuable tool to prevent irreversible environmental damage.***

***Standing***

- ***UKELA supports CAJE’s position that the liberal position on standing evidenced in the caselaw should be reflected and incorporated into the Civil Procedure Rules.***

---

<sup>2</sup> Coalition for Access to Justice for the Environment (See its response to the consultation)

## 1. SUBSTANTIVE REVIEW

### 1.1 Absence of third party rights to appeal in relation to administrative appeals

- 1.1.1 The main 'right' to challenge the legality of administrative decisions in the UK courts comes through the mechanism of judicial review. While judicial review is increasingly utilised in environmental law cases, it is limited to the review of the legality of the decision making process, and cannot assess the merits of the decision. Article 9(2) of the Convention refers to measures available to ensure that the public have access to a review process to challenge the 'substantive and procedural legality' of any decision...'. Applying a purposive interpretation of the Convention must mean this extends to a merits review.
- 1.1.2 The report at p. 26 gives the example of the planning system as one of the ways in which administrative review also plays an important part in the UK system of environmental law. While UKELA recognises the importance of the planning law system as a facet of UK environmental law, it should also be highlighted, that there is currently very little scope for access to environmental justice in the planning system beyond the application of judicial review proceedings. While there is opportunity for interested parties and statutory and non-statutory consultees to express their views on the merits of a planning application prior to a decision being made, there remains no third party right to challenge the decision to grant planning permission on the grounds of its merits.
- 1.1.3 Furthermore, once planning permission has been granted, there is no guarantee of redress, if any of the conditions of the permission are breached. The enforcement of a breach of planning conditions is at the discretion of the local planning authority, and individuals do not have the right to ensure enforcement of any breaches, regardless of the environmental consequences.

## 2 PROHIBITIVE COSTS

- 2.1 Article 9 (4) of the Convention highlights the need for the courts to be "*fair, equitable, timely and not prohibitively expensive*". This is further enforced by Article 9 (5) which provides that the government "*shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*"
- 2.2 The report portrays the UK as complying with these requirements. However, for the reasons outlined below, UKELA does not concur with this position.
- 2.3 Narrow focus of the report
- 2.3.1 In considering financial restraints associated with bringing a case, the report (p. 27) focuses mainly on court fees. However, these are only a minor part of the overall cost associated with legal action (which is likely to include instructing solicitors and counsel and may extend to obtaining expert scientific evidence). Whilst we welcome the Government's view that adverse costs liability is a relevant issue for the purposes of considering prohibitive expense we do not think that the report sufficiently recognises the seriousness of the problem in the context of access to justice. These already substantial costs may be further amplified by the general principle in civil cases that costs fall to the losing party to pay in full. As such, an unsuccessful applicant is likely to be obliged to cover their own legal fees, at least a proportion of the defendant's, and potentially the costs of an interested third party.
- 2.3.2 Unlike court fees, which will be a matter of hundreds of pounds at most, this overall cost of a civil action has potential to be tenfold this. UKELA endorse the statement made by Lord Justice Carnwath (then Sir Robert Carnwath) in the context of environmental litigation (quoted in 1999, but

with enduring relevance): “*Litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid or rich enough to be able to undertake an openended commitment to expenditure running into tens or hundreds of thousands of pounds.*”

2.3.3 Such figures not only make the process of seeking justice unfair, but also have a chilling effect in deterring individual applicants and NGOs from pursuing cases. This results in those with an otherwise legitimate grievance being denied redress, while those who have undermined environmental legislation or the decision making process, go unchallenged.

## 2.4 Provisions within the Civil Procedure Rules

2.4.1 The report (p.28) indicates that any inequities under the current cost rules are tempered by the flexibility available under the Civil Procedure Rules (CPR) and judicial discretion. It is recognised that together these tools can provide a relatively equitable allocation of costs when applied to traditional civil law matters. However, in the majority of public environmental law cases, the claimant and defendant are not equally matched as the defendant is likely to be a public body, with public funding. The practical reality is that the majority of applicants may risk (and lose) a sum equivalent to the equity of their homes, in order to bring a matter to court, where the cost to the defendant is likely to be absorbed by the state.

2.4.2 Likewise, however broad the range of discretionary orders are under the CPR, combined with case management controls (described by the report at p. 28), these do not necessarily aid environmental justice if they are not or cannot be applied by the courts to provide relief to those bringing or seeking to bring environmental cases. At present there is no specific provision within the CPR to address the unique issues associated with environmental litigation. As such, current guidelines offer little genuine flexibility to cushion those bringing environmental cases from the potential costs. Without the suggested amendments to the CPR, this discretion of itself does not aid in the service of environmental justice, nor ensures UK compliance with the Aarhus Convention.

## 2.5 Community legal services (CLS)

2.5.1 The report indicates at p. 29 that public funding is available for environmental cases and judicial review, subject to the statutory tests of the applicant’s means and merits of the case and where no alternative source of funding is available. However, there are two major problems associated with this form of funding:

- *No specific criteria for environmental cases*

2.5.2 CLS funding has been awarded in a number of environmental cases which are considered to have sufficient public interest. However, although it provides specific guidelines for other categories of case (e.g. family, housing and immigration) the Legal Services Commission (LSC) does not currently provide any guidance for high-value (over £25,000) environmental cases. Furthermore, as the current test remains one of public interest, in cases where the principle aim is environmental protection, if applicants cannot frame their case in terms of a public interest, they will be excluded from funding, regardless of the merits of the case.

- *Threshold for obtaining CLS funding*

2.5.3 Even if an environmental case is considered to constitute a public interest, the financial threshold for obtaining CLS funding is so high as to exclude those above the very lowest income levels. This is illustrated by *R (Edwards) v Environment Agency* [2004] J.P.L 1691. Here, judicial review proceedings regarding the grant of an IPPC permit were brought in the name of a temporarily homeless man from the local area. During the case, it was argued that bringing the case in Mr. Edward’s name was an abuse of process, as he was a front for the interests of a wider group of local

people, selected only because his limited financial resources placed him in a position to secure funding from the LSC. While the abuse of process argument was ultimately unsuccessful, the case serves to highlight the perverse incentives that claimants could potentially be driven to, in response to current funding provisions.

2.5.4 Another example of how applicants are driven to avoid the onerous cost implications associated with bringing legitimate environmental proceedings can be seen in the recent trend towards forming companies for the purpose of bringing cases, for example *R (Community Against Pollution) v London Borough of Hillingdon*. As well as offering administrative convenience, bringing an action in the form of a company can provide individuals with a tool to avoid personal liability for costs. The legal status of such actions currently remains unresolved, but the practice highlights the innovative methods applicants are forced to adopt in order to gain access to the courts in cases of potentially serious environmental matters.

- *Unavailability to NGOs*

2.5.5 At present, many environmental judicial review cases are brought by NGOs. While some organisations are well funded, many smaller action groups and charities are not, and struggle to meet the costs associated with even the initial stages of a judicial review hearing. However, CLS funding is not available to any of these organisations, and as such they remain reliant on charitable donations, which are often diverted from the main work of these organisations towards funding legal action.

2.6 In summary, it is UKELA's position that without introducing prescribed guidelines, based on the Aarhus Convention, into the funding process, current public funding fails to adequately fulfil the requirements of the Convention because of the high financial threshold and a restrictive criteria unable to respond to the specifics of environmental cases.

## 2.7 Protective Cost Orders

2.7.1 In describing how the courts can take action to ensure that costs are proportionately and fairly allocated, the report (p. 28) refers to Protective Costs Orders (PCOs) as a tool to help provide certainty to a party as to their potential exposure to an adverse costs order if they are ultimately unsuccessful.

2.7.2 However, it is UKELA's view that the report misrepresents the value of PCOs in this context. Current case law on PCOs was formulated in the recent Court of Appeal "Corner House" judgment.<sup>3</sup> The strict criterion laid down in the judgment<sup>4</sup> provides a generic test for PCOs in administrative law cases. However, the case was not an environmental law matter and the criteria are ill suited to environmental cases. Furthermore, they do not accord with the relevant legal test under the Convention, which is whether the costs situation prevents access to justice in environmental matters from being 'fair', 'equitable' and 'not prohibitively expensive'.

2.7.3 Corner House has been valuable in highlighting the issue of prohibitive costs in public law cases generally. However, as currently applied, PCOs are too restrictive to provide any meaningful tool for overcoming the cost implications for the vast majority of applicants approaching environmental law cases. Furthermore, they are not particularly valuable in providing certainty as to potential costs exposure faced by applicants (even before the decision to grant a PCO is granted). The criteria laid

---

<sup>3</sup> *R (Corner House Research v Secretary of State for Trade and Industry)* [2005] 1W.L.R. 2600

<sup>4</sup> a) the issues raised are of general public importance; b) the public interest requires that those issues should be resolved; c) the claimant has no private interest in the outcome of the case; d) having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair, just and reasonable to make the order; and e) if the order is not made the claimant will probably discontinue the proceedings and will be acting reasonably in so doing. In addition to these conditions, the Court of Appeal said that if those acting for the applicant were doing so *pro bono*, this would be likely to enhance the merits of the application for a PCO. The judgment also held that PCOs should only, in any event, be awarded in exceptional circumstances.

down in the judgment are only a first step towards a creating a viable framework for managing costs in environmental cases.

- 2.7.4 Instead of relying on the criteria set out in *Corner House* to comply with the Convention, costs protection should be available to both individuals and NGOs bringing environmental public law cases, where those cases satisfy a public interest and merits test. Where a claimant can demonstrate, to the satisfaction of the judiciary, that the issues raised in an application have a significant wider importance to the environment and the court has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to order costs protection, there should be a presumption in favour of providing costs certainty and protection to individuals and NGO claimants the nature of which can vary according to the individual circumstances of the case.

### 3 STANDING

- 3.1 Under Article 9 (2) of the Aarhus Convention (“the Convention”), both individuals and environmental non-governmental organisations (NGOs) should be considered to have the requisite standing to engage in judicial review procedures. The UK government’s implementation report (“the report”) recognises this (p. 27) and, in support of UK’s implementation, highlights the increasingly expansive interpretation which English jurisprudence has given to the criterion of ‘sufficient interest’ (p. 26). However, notwithstanding this development, it is UKELA’s view that the current situation in the UK still fails to provide a sufficiently clear implementation of Article 9 (2).
- 3.2 While it is recognised that the case law continues to broaden of the rules of standing, the existing rules<sup>5</sup> have yet to be amended to integrate these changes. Furthermore, the law remains partially fragmented due to its case by case development, resulting in enduring uncertainty for potential applicants. This is reflected in the case of *R v North West Leicestershire District Council ex parte Moses* [2000] J.P.L. 733. Here an applicant sought to challenge various decisions to extend the runway at East Midlands International Airport. At the time of the decision and application for judicial review the applicant lived close to the end of the runway, but subsequently moved six miles away from the airport. The Court held that, despite the small distance, since moving the applicant no longer met the criteria for having sufficient interest in the proceedings.<sup>6</sup> This uncertainty is also reflected in examples where cases with closely related facts, have resulted in contrasting decisions on standing (for example, *R v North Somerset District Council, ex parte Garnett* [1998] Env. L.R. 91 and *R v Somerset County Council, ex parte Dixon* [1998] Env. L.R. 111).
- 3.3 As such, the current situation in the UK represents only a partial and unsatisfactory integration of Article 9 (2) of the Convention. In order to give full recognition to the importance which the Convention places on giving interested individuals and organisation the opportunity to seek environmental justice in the context of judicial review, UKELA would support a formal amendment to the Civil Procedure Rules (CPR) to make explicit reference to the Aarhus Convention and clarify standing in relation to individuals in environmental cases.

---

<sup>5</sup> Section 31 (3) Supreme Court Act 1981

<sup>6</sup> Taken from *Environmental Law*, Stuart Bell & Donald McGillivray, p. 342 6<sup>th</sup> edition. 2006. It should also be noted that, on appeal to the Court of Appeal, the decision was made on different grounds.

## 4 OTHER ASPECTS OF UK ENVIRONMENTAL LAW

### 4.1 Challenges to the acts or omissions of private persons

4.2 Article 9 (3) of the Convention provides that members of the public should have access to administrative or judicial procedure to challenge acts or omissions, not only of public but also private persons. However, the only mechanism currently available to challenge such acts and omissions is the civil courts in the form of a claim for nuisance/ negligence (and through statutory nuisance). However, neither of these mechanisms offer the claimant any opportunity for public funding or PCOs. Furthermore, as cases such as *Cambridge Water Company Ltd v Eastern Counties Leather Plc* [1994] 2 A.C. 264, have shown, there are significant inadequacies in the ability of traditional common law remedies to provide redress for the actions of private persons, even when clear environmental damage has been caused.

### 4.3 Criminal law and environmental justice

4.3.1 The report at p. 28 – 29 indicates that the public can report potential breaches of environmental legislation to the appropriate regulator. While the report rightly highlights that such actions do not result in expense on behalf of individuals, making a report does not necessarily lead to the appropriate action being taken. A number of problems have been identified with the current prosecution policy; both in terms of failure to prosecute when appropriate (e.g. fly tipping) and discrepancies between local authorities. Similar problems are also apparent in the various appeal procedures relating to the environmental regulatory regimes and there is significant evidence that local communities seeking to challenge regulators and other environmental decision makers have faced significant problems in achieving redress.<sup>7</sup>

4.3.2 Finally, the pursuit of environmental justice in both the criminal and civil courts remains hampered by a systemic lack of specialist understanding within the judiciary. Even when matters reach the criminal courts, they frequently fail to produce results that adequately protect the environment or serve the public interest, because of insufficient understanding of the technical context, the application of the available sentences or an appreciation of the gravity of environmental offences, which can sometimes be perceived as little more than administrative breaches. Without the implementation of environmental legal training and the development of a specialist environmental court or tribunal, UKELA is not of the view that this situation is likely to improve.

---

<sup>7</sup> EJP Report; “Civil law aspects of environmental justice” Paul Stookes Environmental Law Foundation 2003