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## COUNTRY REPORT: UNITED KINGDOM

### OPI OUTHWAITE\*

A number of separate but related threads have, over the past year, drawn attention to questions about accountability, transparency and accessibility of environmental law in the UK. This country report on the UK provides a summary of some of these issues focusing on: changes to judicial review procedures, complaints about the failure of the UK government to fulfil its obligations under *the Aarhus Convention*<sup>1</sup> and, more generally, some of the assessments being carried out on the state and future of UK environmental law.

#### **Judicial Review Procedures and Access to Environmental Justice**

The 2011 edition of this country report discussed a report by the Aarhus Convention Compliance Committee (ACCC) regarding alleged non-compliance by the UK with provisions of the Aarhus Convention, in particular Article 9 (access to justice). The complainants, ClientEarth, the Marine Conservation Society and an individual; Robert Lattimer, argued that the applicable judicial review procedures precluded their challenge of a licence allowing the disposal and protective capping of dredge materials from Port Tyne to an existing offshore disposal site.<sup>2</sup>

It was noted in that update that access to environmental justice is central to the attainment of the precautionary principle and sustainable decision making. In the UK, judicial review is one of the most significant means by which governmental decision making can be challenged and scrutinised. It is, or can be, a crucial mechanism for ensuring that environmental legislation and objectives are respected and is one of the key tools by which environmental justice can be pursued.

The ACCC found in that case that by failing to provide defined timeframes for judicial review applications and also failing to ensure that costs were not prohibitively expensive, the UK

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<sup>1</sup> The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25th June 1998 2161 UNTS 447.

<sup>2</sup> Bates, Rebecca, (2011), 'Country Report: United Kingdom', *IUCN Academy of Environmental Law e-Journal*, 2011: 1.

had breached its obligation to provide 'adequate and effective remedies, including injunctive relief as appropriate, and that these be fair, equitable, timely and not prohibitively expensive' under Art 9(4). The UK's arrangements for judicial review led to further breaches of Art 9(3) and (5).<sup>3</sup>

Recommendations were made to the effect that the UK overcome these barriers and create a clear and transparent framework. The government response that followed asserted that the Civil Procedure Rules (CPRs) were already being addressed and that those reforms would address some of the issues identified by the ACCC.<sup>4</sup> It also contended that the requirement to file applications 'promptly' was not in breach of Art 9 (4) and was not inherently unfair.

In 2013 further developments to securing access to justice in environmental law have been seen both in terms of the Aarhus Convention and in relation to Judicial Review.

#### *Changes to the Civil Procedure Rules and Questions of Cost*

As per the Department for Environment, Food & Rural Affairs' (DEFRA) response, a number of reforms to judicial review have now been introduced. New codified rules on Protective Costs Orders – cost capping orders - took effect as of 1<sup>st</sup> April 2013.<sup>5</sup> These arrangements apply where the applicant, in the 'letter before claim' identifies the claim as falling within the scope of *the Aarhus Convention*.<sup>6</sup> The new rules mean that challenges can be brought without fear of indeterminate costs because rather than an unsuccessful applicant being

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid and see *UK Response to Draft Compliance Committee Findings in Cases 2008/27 and 2008/27*, dated 22 September 2010 available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/27TableUK.html>. The Sullivan Report addressed access to environmental justice specifically. Later, the Jackson Report addressed the cost of civil litigation more widely, including recommendations for cost shifting in judicial review to ensure compliance with the Aarhus Convention. See, respectively, Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (May 2008) [the *Sullivan Report*]; Right Honourable Lord Justice Jackson (2010) *Review of Civil Litigation Costs: Final Report [the Jackson Report]*.

<sup>5</sup> *The Civil Procedure (Amendment) Rules 2013* 3.19.—(1) *a costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.*

<sup>6</sup> Rule 45.41 provides:

'(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) 'In this Section, "Aarhus Convention claim" means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.'

ordered to pay the costs of the successful party, upper limits to those costs will now apply. The new rules apply a limit of £5000 to individuals or £10000 to organisations.<sup>7</sup> These reforms change the position of the parties with the aim of ensuring that the procedure is not 'prohibitively expensive'. In principle, this should improve access to environmental justice by reducing the potential financial barriers to applicants. Although rules on PCOs address an important criticism of the ACCC, a number of issues remain with respect to the UK's compliance with *the Aarhus Convention*.

Costs recoverable from an unsuccessful defendant are now capped at £35,000 (the 'reciprocal cap' arrangement).<sup>8</sup> This again provides a level of certainty and protection (for the other party) from awards that could be financially much more significant, addressing another problem with costs. Whether this achieves the aims of the Convention is not as straight forward as it may seem however. In her opinion regarding *Commission v. UK*,<sup>9</sup> Attorney General Kokott was critical of reciprocal caps:

*The Commission criticises the fact that in certain cases protective costs orders may be structured on a reciprocal basis such that, in addition to capping the applicant's risk in relation to the costs of the opposing party in the event that he is unsuccessful, they also cap the risk for the opposing party, in the event that the action is successful, of an order to pay the applicant's costs.*<sup>10</sup>

*...Either the applicant's lawyers agree to accept this capped level of fees or, in the event that the applicant's action is successful, he must top-up these fees at his own expense. Such additional costs may also have a dissuasive effect. Consequently, reciprocal protective costs orders have the potential to undermine the objective of costs protection.*<sup>11</sup>

AG Kokott noted that in judicial review cases – as distinguished from those involving only private parties – one-way protective costs (where only the upper limit of exposure for the applicant is capped) could be an initial protective step towards equality of arms. A reciprocal arrangement, on the other hand, could exploit a defendant authority's advantage: 'the Order could constitute an incentive for the Public Body to widen unnecessarily the subject-matter

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<sup>7</sup> Rule 45.43 and Practice Direction 45, Section VII 5.1.

<sup>8</sup> Practice Direction 45, Section VII 5.2.

<sup>9</sup> Part of a series of decisions concerning judicial review proceedings, cost orders and their compatibility with Art 9 of the Convention. See *Edwards v Environment Agency* [2008] UKHL 22; *Edwards v Environment Agency (No 2)* (Case C-260/11) [2013] 1 WLR 2914; *Commission of the European Communities v Ireland* (Case C-427/07) [2010] Env LR 123; Opinion of Advocate General Kokott delivered on 12 September 2013, Case C-530/11: *European Commission v United Kingdom of Great Britain and Northern Ireland; R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2)*, [2013] UKSC 78.

<sup>10</sup> Opinion of Advocate General Kokott, 12 September 2013, *supra*, n 9 at 66.

<sup>11</sup> *Ibid* at para 70.

of the dispute such as to increase the applicant's own legal costs to the point that they exceed considerably the level at which costs have been capped'.<sup>12</sup>

The consequence of this position was that, in the opinion of the Attorney General, the UK failed to fulfil its obligations under Articles 3(7) and 4(4) [of *Directive 2003/35/EC*]<sup>13</sup> regarding the application of reciprocal costs protection. Although the opinion considered the rules pre-April 2013, as noted, arrangements for a reciprocal cap apply in the revised rules. This therefore continues to be a cause for concern in terms of costs and access to environmental justice.

The new statutory rules on costs – though not without critics, including environmental lawyers – clearly do limit the exposure of applicants to very high and uncertain costs and so address some of the problems identified by the ACCC.<sup>14</sup> The rules on PCOs have however been introduced within a wider political landscape which has as an objective the 'streamlining' of judicial review and a reduction of the impact of JR including on development and in relation to planning applications.<sup>15</sup> Some further specific changes to the CPRs are relevant to this discussion.<sup>16</sup> Under rule 54.5 the time limit for filing a claim has been reduced from three months to six weeks where the application relates to 'the planning acts'. Since it pertains to planning rules, this will clearly apply to many applications with an environmental dimension. The opportunity to have an application heard orally has been restricted. Where an application for permission to bring a judicial review claim is refused and is considered by the court to be "totally without merit" the claimant may not request the decision be reconsidered at a hearing.<sup>17</sup> A small increase in application fees was also applied.

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<sup>12</sup> AG Kokott, *supra*, n 9 at para 79.

<sup>13</sup> Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice. Council Directives 85/337/EEC and 96/61/EC. Art 3(7) and Art 4(4) include amendments to existing Directives to include access to a review procedure, which is fair equitable, timely and not prohibitively expensive.

<sup>14</sup> See for instance Copithorne, Adrienne, 'Update: Environment: Amendments to the civil procedure rules and the Aarhus Convention', *Solicitors Journal*, Vol 157 no 29 23-07-13.

<sup>15</sup> The full text of the speech is available through the CBI website:

[http://www.cbi.org.uk/media/1849566/prime\\_minister\\_speech\\_to\\_cbi\\_annual\\_conference\\_2012.pdf](http://www.cbi.org.uk/media/1849566/prime_minister_speech_to_cbi_annual_conference_2012.pdf)  
Prime Minister Cameron's speech, was also widely reported in the news media for example, Wintour P and Bowcott O, 'David Cameron plans broad clampdown on judicial review rights', *The Guardian* (London) 19 November 2012 available at <http://www.theguardian.com/politics/2012/nov/19/david-cameron-clampdown-judicial-review>.

<sup>16</sup> For a more in-depth analysis see Stech, Radoslaw (2013) 'A Carrot and Stick Approach? An Analysis of the UK Government's Proposals on Environmental Judicial Review' *Environmental Law Review* 15 2 (139).

<sup>17</sup> Rule 54.12.

On the one hand, these changes were justified as being necessary to speed up the judicial review process, increasing its effectiveness, and to reduce 'time-wasters' and weak claims.<sup>18</sup> On the other hand it might be argued that access to environmental justice has been limited in other ways, on the basis of the changes described. The overall impact on the number and nature of claims remains to be seen. A key issue here will be whether the impact of the reforms when taken as a whole are seen to serve as a further barrier to environmental justice. It will be interesting to see whether new complaints about the compatibility of the judicial review process with the *Aarhus Convention* are made.

DEFRA is due to publish its report on the UK's implementation of the *Aarhus Convention* for 2013 in December 2013. A consultation ran from September – October 2013.<sup>19</sup> Further reform of Judicial Review is also being considered, in light of the government's position that its use has expanded to too great an extent and that the system is open to abuse.<sup>20</sup> Three particular issues are noted as the focus of the proposals: (i) the impact of judicial review on economic recovery and growth, (ii) the inappropriate use of judicial review as a campaign tactic, and (iii) the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.<sup>21</sup> Of particular relevance here are plans to further streamline planning challenges.<sup>22</sup> These proposals build on arrangements put in place in 2013 to enable planning challenges to be 'fast tracked', in order to avoid delays and uncertainty for major infrastructure projects. The proposals suggest taking these developments further by introducing a Specialist Planning Chamber in the Upper Tribunal. The Chamber would hear statutory appeals and judicial review challenges related to planning and would be overseen by specialist planning judges. Consideration of whether further restrictions on the ability of local authorities to challenge decisions on nationally significant planning projects are also put forward as well as suggestions to reduce State funding for statutory challenges to decisions under particular sections of *the Town and Country Planning Act 1990* (in this case a statutory appeal rather than judicial review). The proposals also raise government concerns about the test for standing, noting that 'judicial review should not be used to undermine this [public interest] role by putting cases before the courts from individuals with no direct interest in the outcome'. In previous cases, NGOs and other organisations have been found to have standing even though its members were not

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<sup>18</sup> See Prime Minister Cameron, *supra* n 15.

<sup>19</sup> See <https://www.gov.uk/government/consultations/aarhus-convention-national-implementation-report>.

<sup>20</sup> See Ministry of Justice, *Judicial Review Proposals for further reform*, Cm 8703, September 2013 available at <http://www.official-documents.gov.uk/document/cm87/8703/8703.pdf>.

<sup>21</sup> *Ibid* at 6-7.

<sup>22</sup> Ministry of Justice at section 3, *supra*, n 20.

directly affected by the decision in question.<sup>23</sup> However, the implications of such restrictions on Aarhus compliance are expressly recognised:

*'The Government accepts that the requirements of EU law and the Aarhus Convention would mean that cases which raised environmental issues would need to be approached differently. NGOs which campaign for environmental protection are guaranteed rights of standing under the Convention and EU law, even if they are not directly affected.'*<sup>24</sup>

## Public Participation

Judicial review procedures and the issue of costs are not the only areas in which the UK has recently been found to be lacking with respect to compliance with *the Aarhus Convention*. The ACCC has recently considered two complaints about the alleged failure of the UK to meet its obligations under the Convention.

The draft findings with regard to communication ACCC/C/2012/68 were adopted in September 2013.<sup>25</sup> The Communication was made by an individual who argued that the UK and EU had failed to comply with their obligations in relation to UK's renewable energy plan and two specific projects, Carriag Gheal wind farm and the West Loch Awe Timber Haul Route. The access route is close to a nesting site of Golden Eagles, a protected species. The communicant was a Community Councillor in the Avich and Kilchrenan area of Argyll, where the two projects have been undertaken.

She argued that, in relation to the projects and implementation of the plan, the UK had failed to provide information, contrary to Arts 4 and 5 of the Convention; that effective public participation was effectively impeded by lack of transparency, in breach of Arts 6 and 7; that there were no adequate procedures to allow members of the public to challenge the decisions contrary to Art 9(1) and (2) and that the costs of engaging with those procedures were prohibitively high contrary to Art 9(4) (para 2). The ACCC did not find a failure to comply with respect to most issues but they did find a failure to comply with Article 7 (Public Participation Concerning Plans, Programmes and Policies Relating to the Environment).

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<sup>23</sup> Including landmark cases such as *Ex p World Development Movement Ltd* [1995] 1 WLR 386 (as recognised in the Ministry of Justice report).

<sup>24</sup> Ministry of Justice at para 81, *supra*, n 20.

<sup>25</sup> Draft findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the United Kingdom and the European Union, Adopted by the Compliance Committee on 24 September 2013.

EU law required Member States to increase the use of energy from renewable sources and requires them to develop *National Renewable Energy Plans (NREAPs)*.<sup>26</sup> *The NREAP* was based on *the UK Renewable Energy Strategy (RES)*. It outlines the objectives and implementation mechanism in the renewable action plans in the different parts of the UK, and the measures that the UK is taking to meet the renewables targets set by the Directive.<sup>27</sup>

The communicant alleged that the consultation prior to adoption of *the NREAP* did not meet the standards required by the Convention because (a) it was subject to a 'fast-track' procedure which precluded effective and open participation and (b) the authorities had failed to take due account of public participation. The UK contended that *the NREAP* does not set the framework for the determination of consent applications for renewable energy projects and an SEA was not required but that anyway, *the NREAP* used content and analysis from the RES which had involved consultation. The ACCC referred to ACCC/10/54 where it was held that an NREAP

*'constitutes a plan or programme relating to the environment subject to Article 7 of the Convention because it sets the framework for activities by which Ireland [in that case] aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions.'*<sup>28</sup> *Having determined that the complaint could be considered as a communication*<sup>29</sup> *the ACCC determined that NREAPs are plans or programmes under Article 7 of the Convention and are therefore subject to public participation. It concluded that 'the fact that the UK's Renewable Energy Strategy, which informed the NREAP, was subject to public participation does not affect this conclusion, given their different legal status and functions in the EU and UK legal framework respectively.'*<sup>30</sup>

Since *the NREAP* was not subject to public participation, the UK had failed to comply with Article 7. The ACCC recommended that public participation be incorporated.

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<sup>26</sup> See para 16, *ibid.*

<sup>27</sup> See para 30, *ibid.*

<sup>28</sup> Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, Adopted by the Compliance Committee on 29 June 2012 at para 75.

<sup>29</sup> Based on the decision that since Community Councils in Scotland did not exercise any regulatory decision-making function and were essentially voluntary bodies and therefore qualified as 'the public' (see paras 81-83, *ibid.*).

<sup>30</sup> Para 100, *supra*, n 26.



Although suggestions that these findings question the legality of many wind farm developments that had proceeded under the NREAP<sup>31</sup> are probably stretching their likely implications, the report is significant in highlighting another area in which the UK is seen to be failing in its requirement to provide access to environmental justice. Public participation is one of the foundations of the Convention and a failure to enable such participation in relation to developments which will have clear and significant relevance to local communities is problematic. The complaint does also highlight once again the complexities of environmental law, where in this case conservation and renewable energy concerns are in some sense competing.

Additionally, ACCC/C/10/45<sup>32</sup> involved a further complaint about a number of alleged failures of the UK to comply with the Convention, including with regard to Art 7. In this case the issue concerned Local Investment Plans (LIP) and Local Development Plans (LDP). In this instance the ACCC was more equivocal in its conclusions, stating that 'LIPs, and possibly also LSPs or LEPs, may well be part of the decision on plans or programmes within the purview of Article 7 of the Convention.' This was because, as it is explained in the findings, there is no statutory requirement for authorities to prepare LIPs and LIPs are not part of a statutory development plan. Although there is a 'growing trend' for their use, this is an area in which authorities have some discretion about whether to engage stakeholders.<sup>33</sup> This leaves something of a grey area whereby LDPs and LIPs are widely used including for issues that may have considerable environmental implications but unless they are formalised as a statutory requirement they might not be subject to requirements for public participation.

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<sup>31</sup> For instance, Pagano, Margareta, Tuesday 27 August 2013, 'UN ruling puts future of UK wind farms in jeopardy', London: *The Independent*, <http://www.independent.co.uk/news/uk/politics/exclusive-un-ruling-puts-future-of-uk-wind-farms-in-jeopardy-8786831.html>.

<sup>32</sup> Findings and recommendations with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, Adopted by the Compliance Committee on 28 June 2013.

<sup>33</sup> Para 79, *ibid.* The findings continue, at para 80

'Therefore, in order to ensure investment flow for future projects, there is a risk that in preparing the LIPs, authorities consult only with potential developers and do not involve other members of the public. In addition, although LIPs are not material to the actual planning decisions and they *may* be included in the LDF documentation, they seem to be evolving into a de facto element of planning. It is thus highly unlikely that LIPs have no effect at all on subsequent planning decisions, if consultations have already been carried out with prospective investors.'

## Assessing UK Environmental Law

These issues and other developments in UK environmental law are taking place against the backdrop of a period of legislative reflection and review which, overall, recognises a need to improve coherence and accessibility.

The UK Environmental Law Association published its assessment of UK environmental law in May 2012. The report, *'The State of UK Environmental Law in 2011-2012: Is there a case for legislative reform?'* highlighted problems relating to coherence, integration and transparency.<sup>34</sup> Particular concerns included the complex and often fragmented nature of environmental law, leading to a lack of clarity in environmental regulation including: problems with overlapping legislation and lack of certainty about the relationship between particular statutory regimes; the implications of frequent modifications and amendments and lack of consolidation; problems with accessibility and transparency, not only because of the aforementioned issues but also arising from problematic approaches to transposition of EU legislation; and a lack of supporting infrastructure to enable access to up to date information, including through DEFRA's website. Accountability was also a problem with respect to the extensive use of secondary legislation and guidance.

Two major government legislative exercises have also been taking place that will shape the direction of environmental law and which also tie in with the themes of the UKELA assessment. One is the 'red tape challenge' which ran from April 2011 – April 2013 seeking to reduce regulatory burdens and 'cut red tape'.<sup>35</sup> All aspects of the environment have been included in the challenge including air quality, biodiversity and land management, energy labelling and sustainable products, industrial emissions and carbon reductions, noise and nuisance, waste, environmental permits, waste and damage, chemicals and other regulations including those relating to agriculture and animal and plant health. One of the outcomes to date is a proposal for simplified wildlife guidance. This is the first in a list of several environmental areas in which 'smarter guidance' will be pursued.<sup>36</sup>

The other is the 'Balance of EU Competencies' review. The review considers the boundaries of domestic and EU legislative competence and in the case of the environment and climate

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<sup>34</sup> *The State of UK Environmental Law in 2011-2012: Is there a case for legislative reform?* UK Environmental Law Association, King's College London and Cardiff University ESRC Centre for Business Relationships, Accountability, Sustainability & Society, May 2012.

<sup>35</sup> <http://www.redtapechallenge.cabinetoffice.gov.uk/about/>.

<sup>36</sup> This programme runs from May 2013 – spring 2014, see <http://guidanceanddata.defra.gov.uk/smarter-guidance/>.

change theme recognises also the tension that can arise in balancing protection of natural resources and economic development. The task of the review is to

*'provide an analysis of what membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. We have not been tasked to produce specific recommendations or to look at alternative models for the UK's overall relationship with the EU'.*

A call for evidence in relation to environment and climate change was issued in May 2013.<sup>37</sup> A very large majority of UK environmental law stems from EU requirements or directly transposes them and shifts in the balance of competencies could potentially be very influential in shaping future developments in this field.

There is broad agreement on the need to address the problem of complexity, coherence and accessibility in UK environmental law. Disagreement is likely to arise in terms of the outcomes that should follow this assessment. The development of clearer, consolidated legislation and guidance is to be welcomed. Changes which seek to pursue planning and development or other economic objectives at the expense of environmental protection may not be. The balance that will be struck here remains to be seen.

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<sup>37</sup> <https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>.