Working Group of the Parties to the Aarhus Convention
28-29 October 2020

Access to Environmental Justice in the UK

By Lord Carnwath CVO (UK and EUFJE)

Public participation in environmental and planning decisions is deeply entrenched in the UK system. Major decisions are subject to environmental assessment procedure, and are also usually preceded by a public inquiry, at which local groups and individuals can listen to the promoter's case, examine the supporting material, and make their views known to an independent inspector. The decision itself can be challenged on legal grounds in the High Court. Standing is never an issue in practice provided that there is serious case to be made. Perhaps for that reason we have not so far found it necessary to accord standing to non-human entities such as trees or rivers, as some jurisdictions have done.

Cost has been more of a problem. Article 9.4 of the Aarhus Convention[1] provides that the procedures must provide "adequate and effective remedies" and be "fair, equitable, timely and not prohibitively expensive". Legal proceedings in the UK are expensive as compared to many other jurisdictions, particularly because of the normal rule that an unsuccessful claimant will have to pay the costs of the other party. This led the European court to hold that the UK had failed adequately to transpose article 9.4. The applicable rules did not require the court to apply an appropriate limit and further failed to -

> "ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees." [2]

These problems are now addressed by a specific set of rules[3]. In summary the Claimant has to state in the claim form whether the case involves an "environmental claim" to which Convention applies. That results in a cap

---

[1] Signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005

[2] *European Commission v United Kingdom (C-530/11)* EU:C:2014:67 para 58

[3] Civil Procedure Rules r 45-41 *Costs Limits in Aarhus Convention Claims*

on costs set at £5,000 for an individual claimant and £10,000 for others, and £35,000 for a defendant, subject to an application by either party to the court to vary the default position. An application to challenge or vary the cap must be determined at the earliest opportunity, and is considered applying the "prohibitively expensive for the claimant" test, in accordance with the principles laid down by the European court. For that purpose provision is made for the claimant to make a statement of financial means.

On the whole these principles seem to be working well. Generally the parties are able to agree in advance how the cap will apply in a particular case. The courts have accepted that a broad interpretation of "environment" must be applied in accordance with the objectives of the Convention.[4] The most important feature probably is the certainty provided to the claimant as to the limit of potential liability. This is particularly important for campaigning organisations, which need to rely on public subscriptions to fund their test cases. Although the rules do not apply directly to appeals to the Supreme Court, similar principles are adopted by the court.

A good example of how effective such public interest cases can be was the recent *ClientEarth* case, decided by the Supreme Court in 2015.[5] *ClientEarth*, as its name implies, is an environmental NGO with an impressive record of court successes in different countries. This case was brought against the government for its failure to comply with European air pollution limits. The limits prescribed by the European legislation were clear. The problem was that when they were drawn up over-optimistic assumptions had been made about future improvements in engine efficiency, particularly for diesel engines, but the limits were unchanged. This was a problem not just for the UK.

The High Court had refused a mandatory order because it would, in the judge's words, "impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made". The main legal dispute in the appeal first on what was meant by compliance "as soon as practicable", and on whether the national court could properly leave to the European Commission to enforce the limits. A reference to the European court made clear that it was for the national courts to take action. The case came back to the Supreme Court. We decided that as soon as practicable meant what it said, and that it required the Secretary of State to prepare plans to remedy a real and continuing danger to public health as

---

[4] *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539, [2015] 1 CMLR 52

[5] *R(ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (29 April 2015)

soon as possible, and that we should make a mandatory order to that effect. We laid down a time-limit of nine months. In order to avoid the cost of new proceedings to enforce that limit, we allowed ClientEarth to apply to the High Court to review the adequacy of the new plans. When the new plans were published, ClientEarth again challenged their adequacy before the High Court. They argued that the plans gave disproportionate weight to considerations of cost, political sensitivity and administrative difficulties. The High Court agreed with ClientEarth, and laid down a timetable for new plans.

I understand from ClientEarth that our order has been valuable not only in securing real improvements in air quality in UK cities, but has also become a precedent which they have used successfully in other European countries.

Public participation and access to justice under the Aarhus Convention are powerful forces for environmental protection. In conclusion I will quote from my former colleague Lord Hope in our Supreme Court, explaining why standing could not be confined to those defending purely personal interests:

> "Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf. Environmental law proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone."[6]

RC London 17.10.20

[6] *Walton v The Scottish Ministers* [2012] UKSC 44, [2013] 1 CMLR 28