Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the scope of judicial review, costs, timing and other issues related to access to justice (ACCC/C/2008/33)

ClientEarth Outline Speaking Note for Hearing, Geneva, 24th September 2009

Claims relating to the scope of UK procedures

Claims relating to substantive legality – Article 9(2) and 9(3)

Article 9(2) gives a right to challenge substantive legality.

Article 9(3) gives the same right, but expressed as the right to have access to procedures to challenge acts and omissions which contravene national law relating to the environment.

To comply fully with these requirements, it must be possible for a court or other body to make a judgement as to whether the decision, act or omission in question was within the law. This means that the court must be able to establish the facts of the case and then apply the relevant law to those facts. Only if it does this, will it be able to decide a challenge to substantive legality and/or a challenge as to a contravention of national law relating to the environment.

Under UK judicial review procedures, the court cannot investigate or make findings on disputed evidence, nor can it visit the location to which the case relates. Its powers in relation to the facts of the case are limited to deciding whether in assessing them the decision-making body acted in an absurd or otherwise irrational way. Only in those cases where the evidence is undisputed and the substantive law was clearly contravened, will the court consider making a judgement as to substantive legality. Yet in many, if not most, environmental cases (such as the many cases in which there is a dispute as to the significance of the effect of a project for the purposes of determining whether an EIA is required), the evidence is far from undisputed and the court can make no judgment as to substantive legality.

Accordingly, to comply fully with the Convention, the UK judicial review procedures need to be enlarged to allow the court to judge the substantive, as well as the procedural, legality of what has occurred.

Challenges against individuals – Article 9(3)

Article 9(3) gives the right to have access to procedures to challenge acts and omissions, which contravene national law relating to the environment. However, these must include acts and omissions by private persons (including companies).

There are limited specific procedures, which enable such acts and omissions to be brought before the courts, for example proceedings for so-called statutory nuisance, but this is narrowly defined and among its limitations is the requirement to prove that

a ‘nuisance’ has occurred, i.e. a substantial interference with the enjoyment of his land by a specific landholder.

There are however many provisions of national law relating to the environment which do not require proof of nuisance, for example the contravention by a private individual (including a company) of any form of environmental permit is a criminal offence, irrespective of whether a nuisance is caused, but no general procedures are available to members of the public to challenge such a contravention, and if the enforcing authority, whether because of lack of resources or otherwise, gives a low priority to the prosecution of such a contravention, it will remain unchallenged. Even if such a procedure were available, it would be very difficult for a member of the public to obtain the necessary evidence.

Moreover, under UK judicial review procedures, the acts or omission of private persons cannot be challenged. Accordingly, to comply fully with the Convention, the UK judicial review procedures need to be enlarged to allow the court to judge the legality of acts or omission by private persons.

Costs and remedies – Article 9(4)

Costs

Article 9(4) provides that the above procedures must not be prohibitively expensive.

The Committee is invited to consider all the information before it and draw a conclusion as to whether or not UK procedures are or can be prohibitively expensive. Of necessity, this involves looking not just at those cases, which (sometimes at great risk to the claimant) have been brought, but also at more general information about the costs of UK procedures.

There is overwhelming evidence that UK procedures are or can be prohibitively expensive, for example:

- The Milieu Study demonstrated that the UK has the highest costs barriers to access to environmental justice in the EU.
- The Sullivan Report concluded that the current UK position does not meet the requirement that procedures must not be prohibitively expensive.
- A claimant must generally pay the fees of his own lawyers at market rates (financial assistance is available, if at all, to a very limited class of persons on particularly low incomes and in no circumstances to NGOs), and even if the claimant is successful only a proportion of those costs will generally be recoverable from the defendant.
- A claimant must normally be prepared to pay the fees of the defendants’ lawyers (also at market rates and often very substantial indeed), if he loses the case or even if he loses on some of the issues, producing a total costs risk which can amount to £100,000 or more.
- In other fields of litigation (e.g. personal injury claims where a lawyer can generate volume business), a claimant can sometimes be represented under a conditional fee agreement, which relieves him of the need to pay the fees of his own lawyers. Such cases involve a form of insurance called ‘after the event

insurance' to cover the risk of paying the fees of the defendants' lawyers, but such arrangements are rare in environmental cases, in which there is no volume business.

It is precisely to address the kind of unfairness described above that in a limited number of individual cases certain judges in the higher courts have begun to evolve the so-called 'protective costs order' under which the court may impose a limit or cap on the costs payable by the losing party to the winning party. Though well-intentioned, these initiatives do no more than scratch the surface of the problem because:

- They do nothing to alleviate the costs of the claimants' own lawyers.
- The claimant's liability in respect of the fees of the defendant's lawyers still stands and the cap can be set at a level which takes no adequate account of the claimant's means, and which may still, for example, put his home or savings at risk.
- There is no general right to a protective costs order, and on the contrary the claimant must overcome a series of defined hurdles before he is even entitled to ask for such an order.
- To make a formal application to the court for such an order involves an additional and expensive legal process, and if the claimant applies unsuccessfully, he may well have to pay the fees of both sides' lawyers in respect of the unsuccessful application.

In view of the above risks and uncertainties it cannot be said that there is compliance with Article 9(4) of the Convention.

As the ECJ held in *Commission v Ireland* (Case C-427/07) at paragraph 94, a discretionary practice on the part of the courts (by definition uncertain in its application) cannot be regarded as a valid implementation of obligations under European law. The obligations of the UK under Article 9(4) of the Convention are precisely obligations under European law, since:

- Article 300(7) of the EC Treaty provides that agreements such as the Aarhus Convention are binding on Member States.
- Insofar as Article 9(4) relates to procedures under Article 9(2) these procedures are subject to Directive 2003/35 on public participation.

Remedies – Article 9(4)

Injunctive relief

A serious example of the UK's non-compliance with Article 9(4) arises in a typical environmental case in which a claimant seeks to challenge the decision of a public body involving the grant of a permit or licence to a third party. Assuming that there appear to be good grounds for the challenge, a fair procedure would either enable the challenge to be resolved very swiftly and/or (if pending the challenge it was necessary to suspend the permit) would protect the claimant against any later claim by the recipient of the permit. UK procedure achieves exactly the opposite result. It does not generally allow such claims to be resolved swiftly enough to avoid suspension of

the permit, and suspension therefore becomes inevitable if the claim is to proceed. At the same time, it generally places on the claimant alone (he having raised an issue of public concern) the risk that the third party may at some point seek to make a substantial claim in respect of the consequences of the suspension of the permit. This is achieved by requiring the claimant (as a condition of being allowed to proceed with the claim and of suspending the permit) to undertake that if (despite there appearing to be good grounds for the challenge) he loses the case, he will agree to compensate the third party for losses sustained as a result of the permit being suspended. Thus the claimant has to shoulder the risk of making a payment in respect of trial delay for which he bears no responsibility, and in a sum in respect of which he has no control. This is the opposite of a fair procedure. Self-evidently, if the claimant is not prepared to bear this risk and if implementation of the permit is allowed to proceed, then it will generally be too late for the claimant's challenge to be investigated/adjudicated on.

Rules on timing

Under UK procedures the maximum time normally allowed to initiate a judicial review claim is three months and a court may dismiss the claim on grounds of lack of promptness even if it is made within the three month period. In cases involving a challenge to the grant of planning permission there is a general, though not invariable, rule that the time limit is six weeks and this time limit is now imposed by legislation (the Planning Act 2008) in the case of permits for major infrastructure projects to be granted by the new Infrastructure Planning Commission.

Particularly in the context of the formidable costs issues outlined above, these time limits once again give rise to non-compliance. It is note-worthy that UK procedures impose no obligation on the courts to bring cases to hearing within a specified time, let alone within six weeks or three months, and a claimant may well wait much longer than this for a hearing.

The three-month time limit has remained unchanged for many years and applies to all forms of judicial review of which environmental cases represent only a very limited number. In the Human Rights Act 1998 (which incorporated into English law the European Convention on Human Rights) the UK Parliament recognised that in cases involving human rights, a time period of up to a year should be allowed, and given the potentially greater complexity and human impact of a typical environmental challenge, this should be the period in a case under the Aarhus Convention.

Further points

Please note that the fact that points made by the Communicant in its written submissions are not dealt with in this outline speaking note does not mean that they are not being vigorously pursued! The Committee is invited to consider the case in its entirety, but the oral presentation must necessarily be selective.

If the Committee wishes to make recommendations to address the issues of non-compliance raised, then a summary of suggested recommendations is to be found on page 14 of the original Communication.

The Port of Tyne case

The Communicant has referred to this case for illustrative purposes and not as the sole specific basis of the complaint of non-compliance which rests on much wider and more general grounds. However, in brief, this was a case in which the grant of a licence to dispose of contaminated material on the seabed was subject to a requirement that the material be sealed from the surrounding marine environment. The MCS were concerned to ensure that this requirement was fulfilled, but were faced by the following obstacles, among others:

- No procedure was available to challenge the Port of Tyne Authority in respect of a breach of the permit.
- A legal challenge to the licensing authority alleging a breach of the requirement to maintain the seal would have been met by a denial that the seal was inadequate and hence the judicial review procedure would have been unable to adjudicate upon the issue of substantive legality.
- Since the MCS attempted unsuccessfully in correspondence over a long period of time to verify the continuing integrity of the seal, it would have been impossible for them to judge at what point the time for a legal challenge began, let alone to initiate such a challenge within a three month period.
- A judicial review challenge would in any event have been prohibitively expensive.