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Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Twenty-ninth meeting

Geneva, 21–24 September 2010

## Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2010

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## I. Background

1. On 2 December 2008, ClientEarth, the Marine Conservation Society and Mr. Robert Latimer (hereinafter collectively “the communicants”) submitted a communication to the Compliance Committee, alleging non-compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under article 9, paragraphs 2, 3, 4 and 5 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter “the Aarhus Convention” or “the Convention”).

2. ClientEarth is a non-profit environmental law, science and policy group working in the European Union (EU) and beyond. It is registered as a company limited by guarantee in England and Wales and a registered charity in England and Wales. The Marine Conservation Society (MCS) is a charity dedicated to the protection of United Kingdom seas, shores and marine wildlife. It is registered as a company limited by guarantee in England and Wales, and a registered charity in England, Wales and Scotland. Robert Latimer is a private citizen.

3. The communicants allege that the Party concerned, in respect of the law of England and Wales, has failed to comply with article 9 of the Convention both generally and in relation to a specific case. The general allegations of non-compliance relate to the lack of substantive review in procedures for judicial review, the prohibitively expensive costs of judicial review proceedings, the lack of rights of action against private individuals for breaches of environmental laws and the restrictive time limits for judicial review. The allegation of non-compliance in the specific case relates to the alleged failure of the Party concerned to provide access to justice to challenge a Government licence issued to the Port of Tyne in northern England that allows for the disposal and protective capping of highly contaminated port dredge materials at an existing marine disposal site called “Souter Point”, approximately four miles off the coast.

4. Following a preliminary determination that it was admissible by the Committee at its twenty-second meeting (17–19 December 2008), the communication was forwarded to the Party concerned on 24 December 2008.

5. On 16 January 2009, the Committee wrote to each of the parties with questions seeking clarification on certain issues.

6. By letter dated 12 May 2009, the Party concerned sought an extension of the usual five-month time frame for its response for an additional two months, until 24 July 2009. By letter dated 21 May 2009, the communicants indicated that they did not oppose the two-month extension sought by the Party concerned for filing its response to the communication. The communicants asked if they could have a similar two-month extension in which to respond to the Committee’s questions of 16 January 2009.

7. On 22 May 2009, the Committee received written submissions in respect of three communications concerning the United Kingdom — ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 — from an observer, the Coalition for Access to Justice for the Environment (CAJE), a coalition of six environmental non-governmental organizations from the United Kingdom.<sup>1</sup>

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<sup>1</sup> Friends of the Earth, WWF-UK, Greenpeace, the Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation.

8. By letter dated 27 May 2009, the communicants asked that the costs-related aspects of its communication, in particular, paragraphs 32–36 and paragraphs 92–149 and annexes III, IV and V of the communication, be considered as additional background by the Committee when considering two other current communications against the Party concerned (ACCC/C/2008/23 and ACCC/C/2008/27).
9. By letter dated 27 May 2009, the parties were informed that the hearing of the communication would be held at the Committee's twenty-fifth meeting on 22–25 September 2009.
10. By letter dated 9 June 2009, the communicants responded to the questions raised by the Committee on 16 January 2009.
11. By letter dated 16 July 2009, CAJE wrote to the Committee enclosing the recent judgement of the European Court of Justice in Case C-427/07, *Commission v. Ireland*.
12. By letter dated 28 July 2009, the Party concerned provided written submissions responding to the communication and to the correspondence from the communicants dated 9 June 2009. On 19 August 2009, the Party concerned provided an annex of highlighted excerpts of court judgements in support of its position.
13. On 9 September 2009, the communicants provided additional written submissions for consideration by the Committee seeking to clarify certain aspects of the Party concerned's response of 28 July 2009.
14. The Committee discussed the communication at its twenty-fifth meeting, with participation of representatives of both the Party concerned and the communicants, who answered questions, clarified issues and presented new information. Observers were also given the opportunity to speak.
15. By letter of 20 January 2010, CAJE wrote to the Committee providing its comments on the final report by Lord Justice Jackson entitled "Review of Civil Litigation Costs", published in January 2010, and the Report of the Scottish Civil Courts Review by the Right Honourable Lord Gill, published in September 2009. On 29 January 2010, the communicants wrote to the Committee providing their comments on the final report by Lord Justice Jackson.
16. By letter of 18 March 2010, CAJE wrote to the Committee enclosing a press release issued that day by the European Commission indicating that it had issued the United Kingdom with a Reasoned Opinion due to its concerns that legal proceedings in the United Kingdom were too costly and that the potential financial consequences of losing challenges was preventing non-governmental organizations (NGOs) and individuals from bringing cases against public bodies.
17. On 20 May 2010, CAJE wrote to the Committee to inform it of some recently released judgements relevant to the issue of the cost of access to justice for members of the public in the Party concerned. On the same day, the Environmental Law Foundation, one of the six NGO members of CAJE, wrote to inform the Committee of a recent report it had published entitled "Costs Barriers to Environmental Justice", which included examples of cases of environmental litigation that had not proceeded because of prohibitive costs. On 2 June 2010, the communicants provided their comments on the judgements provided by CAJE on 20 May 2010.
18. During the proceedings, the Party concerned alleged that a member of the Committee had a conflict of interest with respect to two other communications then ongoing regarding the United Kingdom, ACCC/C/2008/23 and ACCC/C/2008/27. The Committee member concerned did not participate in the deliberations on the findings in those cases, nor in the deliberations on the findings in the present communication. Further

details are set out in paragraphs 6–11 of the report of the twenty-fifth meeting of the Committee (ECE/MP.PP/C.1/2009/6).

19. The Committee began to prepare draft findings at its twenty-fifth meeting and completed the preparation of draft findings following its twenty-eighth meeting (15–18 June 2010). In accordance with paragraph 34 of the annex to decision 1/7 of the Meeting of the Parties to the Convention, the draft findings were then forwarded for comments to the Party concerned and to the communicants on 25 August 2010. Both were invited to provide any comments by 22 September 2010.

20. By letter of 14 September 2010, CAJE forwarded an August 2010 update of the May 2008 report “Ensuring Access to Environmental Justice in England and Wales” (the Sullivan Report) together with its comments on the draft findings.

21. The communicants and the Party concerned both provided their comments on the draft findings on 22 September 2010.

22. At its twenty-ninth meeting (21–24 September 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

## **II. Summary of facts, evidence and issues<sup>2</sup>**

23. The communication alleges non-compliance by the Party concerned, in respect of the law of England and Wales, with its obligations under article 9, paragraphs 2, 3, 4 and 5, of the Convention. The communication concerns four submissions. These are (1) that in practice, courts in England and Wales do not allow judicial review regarding the substantive legality of decisions, acts or omissions within the scope of the Convention; (2) that access to justice is prohibitively expensive, in particular with regard to the costs awarded against losing claimants and the requirement for claimants to undertake to cover defendants’ losses to qualify for injunctive relief; (3) the lack of rights of action against private individuals for breaches of environmental laws; and (4) the time limits for bringing an application for judicial review, which the communicants submit are uncertain, unfair and overly restrictive. All submissions are raised in general and submissions (1), (2) and (4) are also raised in relation to the Port of Tyne situation.

### **A. Review of substantive legality in judicial review proceedings — article 9, paragraphs 2 and 3**

24. The communicants submit that in England and Wales the courts apply very restrictive rules regarding judicial review, allowing judicial review of public authority acts and decisions only in cases of procedural impropriety, illegality or irrationality. The communicants allege that the Party concerned, therefore, does not properly comply with article 9, paragraph 2, of the Convention, which requires members of the public to have access to a review procedure to challenge the substantive legality of any decision subject to the provisions of article 6 of the Convention. They also allege that the Party concerned fails to properly comply with the general right set out in article 9, paragraph 3, of the

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<sup>2</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance as presented to and considered by the Committee.

Convention for members of the public to challenge acts and omissions of public authorities which contravene national environmental law.

25. The communicants submit that while, in theory, the courts in England and Wales enjoy a broad discretion to allow appropriate review actions in relation to reviewing the substantive legality, including the material facts, of a public authority act or decision, this broad discretion is exercised in very limited circumstances and not generally in environmental cases. For example, the communicants note that there are judicial review cases before the courts where it has been held acceptable to review the facts of a case where the public authority has reached a decision on a “material error of fact”.<sup>3</sup> Moreover, human rights law, through the European Convention on Human Rights and Fundamental Freedoms 1950 and the United Kingdom Human Rights Act 1998, as well as EU law in general, have introduced the principle of proportionality into English law. The communicants note that the principle of proportionality is now an established ground for judicial review in relation to human rights and EU law cases, and permits an appropriate review of the substance of the case. The communicants submit, however, that these broad principles are not generally applied by the courts and not in environmental cases in which judicial review is sought. Rather, the courts’ jurisprudence applies very restrictive rules and only allows judicial review of public authority acts and decisions in cases of procedural impropriety, illegality or irrationality.

26. The communicants allege that the Port of Tyne case provides an example of the above-mentioned allegations. The communicants submit that in this case there would be no opportunity to challenge various aspects relating to the substantive merits of the case, including the lack of a full environmental impact assessment throughout; the failure to observe a precautionary approach; the failure to provide evidence to support the elected disposal method as following best available techniques or best environmental practice; the failure to provide evidence which properly discounts the practical availability of alternative methods; the potentially misleading statements made in relation to the physical nature of the disposal site and frequency of additional capping actions and capping materials; and the consequent danger posed to the marine environment, should contaminated material escape from the site and affect the marine environment surrounding the site (including potentially valuable habitats protected by Biodiversity Action Plans).

27. The communicants submit that the most obvious way to make the law compliant with article 9, paragraphs 2 and 3, of the Convention would be to apply the existing more flexible approaches in relation to material mistake of fact and the use of the proportionality principle as in cases concerning human rights and EU law. The communicants suggest that cases that fall within the Convention be added to human rights cases, providing a separate ground for judicial review and the general law on judicial review would remain unchanged. Alternatively, communicants suggest that a new enactment, an “Aarhus Act”, akin to the Human Rights Act 1998, could be passed to clearly enshrine in legislation the specific rights of the public under the Convention and reinforce environmental cases that fall within the Convention as a separate ground for judicial review.

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<sup>3</sup> The communicants refer to the following judicial decisions and authorities: Judgement of Lord Slynn of Hadley in *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at 52–54, citing his own judgement in *R v. Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, at 344, as well as *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014, at 1030, and Wade & Forsyth *Administrative Law*, 7th ed. (1994), pp. 316–318 (discussing “mere factual mistake” as a ground for judicial review) and de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed. (1995), p. 288 (discussing judicial review where mistaken facts have been taken into account).

28. The Party concerned submits that the plain wording of article 9, paragraphs 2 and 3, of the Convention does not suggest that a full merits review is required. Nor does the *Aarhus Convention Implementation Guide* suggest that a full merits review is required. The Party concerned points to page 128 of the *Implementation Guide* (2000 edition) which, with respect to article 9, paragraph 2, states:<sup>4</sup> “The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions *if the substance of the law* has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality)...” (emphasis added by Party concerned).

29. Regarding article 9, paragraph 2, of the Convention, the Party concerned submits that a right to challenge the “substantive and procedural legality” of a decision appears precisely to reflect the scope of judicial review in the law of England and Wales. The Party concerned submits that it is elementary that judicial review in England and Wales encompass substantive legality. Thus, if a decision-making body has acted beyond its powers, or taken an irrelevant matter into consideration, or acted irrationally, then that decision is susceptible to challenge by judicial review. The Party concerned furthermore points out that more recently a ground for judicial review of “material error of fact” has emerged, which concerns matters of substantive legality.

30. The Party concerned distinguishes between the rights provided under article 9, paragraph 2, and article 9, paragraph 3, of the Convention. It submits that article 9, paragraph 2, of the Convention envisages a specific right to challenge (a) decisions subject to article 6 of the Convention; and (b) other relevant provisions of the Convention “where so provided for under national law”. Only in respect of decisions under article 9, paragraph 2, is there a specific right to challenge “the substantive and procedural legality of any decision”.

31. In contrast, article 9, paragraph 3, of the Convention, according to the Party concerned, envisages a much more general right. Inter alia, it is a right to have access to procedures, which may or may not be judicial (by contrast with article 9, paragraph 2, of the Convention, which requires a right of access specifically to a court or equivalent independent body); it does not necessarily require a direct right to challenge the legality of an act or omission: instead, it requires a right of access to procedures to challenge acts or omissions. Moreover, article 9, paragraph 3, of the Convention does not necessarily or expressly include any right to challenge the substantive legality of an act or omission.

32. Regarding the Port of Tyne case, the Party concerned submits that the communicants’ complaints (summarized in para. 26 above) can be grouped into two categories:

(a) Complaints that would be capable of founding a claim for judicial review, if valid. Thus, for example, if a full environmental impact assessment was required by law, yet not performed, there is no reason why that could not constitute a proper ground for initiating judicial review. Similarly, if the decision maker failed to adopt an approach which it was required to adopt (e.g., the precautionary approach) that would constitute a proper ground for instituting judicial review; and

(b) Complaints relating to failures in the provision of information (both in the original communication and in paras. 26 to 28 of the communicants’ further response of 9 June 2009) in respect of which there are established mechanisms in domestic law to address such failures. The Party concerned notes that the communication does not include a complaint that such mechanisms are ineffective or inadequate.

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<sup>4</sup> *The Aarhus Convention: An Implementation Guide* (United Nations publication, Sales No. E.00.II.E.3). Available from <http://www.unece.org/env/pp/acig.pdf>.

33. Moreover, the Party concerned submits that the communicants have not demonstrated, or even sought to demonstrate, that the Port of Tyne case falls within the scope of article 9, paragraph 2, of the Convention as they have failed to identify any “decision, act or omission subject to the provisions of Article 6”, as would be necessary to invoke article 9, paragraph 2, in this case.

## **B. Costs prohibitively expensive — article 9, paragraphs 4 and 5**

*General rule “Costs follow the event”*

34. The communicants submit that the two single biggest cost problems that parties face in England and Wales arise out of:

(a) The rule set out in rule 44.3 (2) of the Civil Procedure Rules (CPR) that “costs follow the event”; and

(b) The fact that claimants are at risk of having to compensate defendants for any damage they suffer through the granting of interim relief, should the defendant succeed at trial (see para. 68 below).

35. The communicants submit that, as a result of these problems, the Party concerned has failed to meet its obligations under article 9, paragraph 4, of the Convention to ensure that access to justice procedures provide adequate and effective remedies, including injunctive relief as appropriate, and are fair, equitable, timely and not prohibitively expensive. They also claim that the Party concerned has failed to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice, as required under article 9, paragraph 5.

36. The communicants submit that the Port of Tyne situation is illustrative of the above-mentioned problems regarding the law of England and Wales. They submit that the MSC and the individual claimant in this case could not have afforded the costs of the defendant, had they lost the case, and most likely would have had to rely on pro bono legal representation. Moreover, the MSC and the individual claimant could not have provided a cross-undertaking in damages, which would probably have been required in that case.

37. The Party concerned contends that the presently operated costs regime is compliant with the Convention. It contends that compliance is achieved through a variety of measures, the most important of which are:

- (a) Legal aid — i.e., public funding by the Legal Services Commission;
- (b) Conditional fee agreements (CFAs);
- (c) Protective costs orders (PCOs);
- (d) Judicial discretion.

The Party concerned notes that it is not contended that each measure, individually, would necessarily be adequate to achieve compliance with article 9, paragraph 4, but rather that, together, they prevent costs from being prohibitively expensive.

38. The Party concerned submits that the “loser pays” principle is not inherently objectionable under the Convention. It suggests that this is clear from both the terms of article 3, paragraph 8, of the Convention, as well as the use of the word “prohibitively” in article 9, paragraph 4, of the Convention. It furthermore contends that, provided that the costs to the losing party are not prohibitively expensive, the “loser pays” principle does not lead to an infringement of the Convention.

39. The Party concerned notes that there is no definition of “prohibitively expensive” in the Convention, and it is apparent that Parties are afforded a wide degree of latitude in the manner in which compliance with article 9, paragraph 4, may be achieved. The Party concerned submits that it is clear from both the terms of article 3, paragraph 8, as well as the use of the word “prohibitively” in article 9, paragraph 4, that it is not inherently objectionable that a losing party should be required to pay the winning party’s costs. Furthermore, costs that are merely “expensive” are permissible; providing the costs to the losing party are not *prohibitively* expensive, they do not lead to infringement of the Convention. Moreover, what is “prohibitive” will vary widely between prospective claimants and claims. Any system which imposes rigid criteria (such as a rule setting a cap at a standard level as to the liability for the costs of the opposing party of a claimant in an environmental challenge) is liable to risk prohibiting some claims. It is inherently desirable that there should be discretion to form a judgement on a case-by-case basis in the operation of measures to avoid prohibitively expensive costs.

40. The Party concerned submits that it is important to recognize that the provision of a fair and just system of law involves treating all parties to litigation fairly. The resources applied by public authorities in defending judicial review proceedings stem ultimately from the taxpayer, and it is therefore proper that the cost implications for both parties in an individual case should be taken into account. The Party concerned further submits that the Convention’s provisions in relation to court proceedings must be considered in the context of the system of environmental law, and access to it, as a whole. This is because redress through the courts is only one of the many routes open to the public in their search for environmental justice.

41. The Party concerned submits that it is not apparent that the potential costs in the Port of Tyne situation would have been prohibitively expensive and suggests that a PCO might have been granted in this case if a meritorious claim had been presented to the court.

42. CAJE, in its amicus curiae brief, which is confined to submissions on the issue of prohibitive expense in the public law context, submits that the “costs follow the event” rule is the most significant obstacle to access to justice in environmental matters under the law of England and Wales because, although a claimant in an environmental case can control its own legal costs, it has no control over the costs of the other parties. As such, its liability is potentially open ended.

43. CAJE submits that the effect of the costs regime is that even the largest environmental NGOs are reluctant to take legal action against the Party concerned, and it is thus extremely rare for small environmental NGOs (such as the co-communicant, MCS) to take such action. CAJE points to the case of *R (Buglife) v. Thurrock Gateway Development Corp and another*,<sup>5</sup> in which the claimant was granted a PCO<sup>6</sup> limiting its liability for the costs of the other side to £10,000, but in which the costs recoverable by Buglife from the local authority were capped at the same level, both by the High Court and the Court of Appeal. CAJE notes that the 2008 Sullivan Report pointed out that an arrangement of this type (referred to as reciprocal costs capping) does little to encourage lawyers to represent individuals or organizations in environmental cases.<sup>7</sup>

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<sup>5</sup> *R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd* [2008] EWCA Civ 1209.

<sup>6</sup> See paragraphs 99–103 below for an overview of the law in England and Wales relating to PCOs.

<sup>7</sup> “Ensuring access to environmental justice in England and Wales”, Report of the Working Group on Access to Environmental Justice (chaired by Sullivan, J.), May 2009 (hereafter the “Sullivan Report”), appendix 3, p. 41, para. 7.

*Legal aid*

44. The communicants submit that legal aid is only available to a limited number of persons because of its stringent economic means test. Moreover, it is only available to individuals, whereas most environmental cases are brought by community groups or NGOs which cannot qualify for aid. In addition, although it is now theoretically available in public interest cases, it is difficult to obtain in such cases, because funding will be refused “if there are other persons or bodies who might benefit from the proceedings who can reasonably be expected to bring or fund the case”.<sup>8</sup> Parties applying for funding in such circumstances have to “provide an explanation for why the proceedings cannot be funded privately by other means”.<sup>9</sup> This means that in examining what alternative funding may be available, the Legal Services Commission “will need to consider whether any funding should be provided by those members of the public who stand to benefit from the outcome of the case, for example by all those affected getting together a fighting fund to finance the litigation”.<sup>10</sup>

45. The Party concerned emphasizes a number of points regarding its legal aid regime. It submits that the scheme is one of the most comprehensive and expensive schemes in the world and, for an eligible applicant, it provides access to justice at little or no cost to that person even if he/she loses the case. The Legal Services Commission Funding Code Decision-making Guidance<sup>11</sup> allows funding in litigation cases which have only a “borderline” chance of success but which have a “significant wider public interest”.<sup>12</sup> In practice, this has led to public funding of a significant number of environmental challenges. In many cases, a claimant eligible for legal aid can be identified to bring a claim. For example, in *Edwards v. Environment Agency* (No. 1)<sup>13</sup> the Court accepted an eligible claimant who was put up to act as a representative of a community group, others of whom were ineligible for legal aid. The Legal Services Commission has made explicit reference to the requirements of the Aarhus Convention in its Funding Code Guidance, recognizing the various combinations of funding that may be possible within an individual case (e.g., a partnership approach between legally aided and non-governmental organizations).<sup>14</sup> The Funding Code Guidance also states that environmental cases may be less likely to require significant private contributions.<sup>15</sup> The Party concerned states that the Funding Code Guidance provides that in all cases the contribution will be fixed so as not to be prohibitively expensive.

46. CAJE observes that the financial limits for legal aid eligibility are extremely low. In respect of the suggestion by the Party concerned that potential claimants should find a person who qualifies for legal aid to act as the representative claimant for the wider group, and its citation of *Edwards v. Environment Agency* in this regard, CAJE notes that in that case, due to health reasons, Mr. Edwards, the legally aided person, withdrew his instructions on the final day of the subsequent appeal before the Court of Appeal and a non-legally aided person, a Mrs. Pallikaropoulos, took over. Following unsuccessful appeals before the Court of Appeal and House of Lords, Mrs. Pallikaropoulos is currently seeking

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<sup>8</sup> Sullivan Report, appendix 2, p. 38, para. 5.5 (1).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid, para. 5.5 (5).

<sup>11</sup> Legal Services Commission Funding Code Decision-Making Guidance, [http://www.legalservices.gov.uk/docs/cls\\_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples\(Sections1-14\)Sept07.pdf](http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf).

<sup>12</sup> Ibid, part C, sect. 5.1, para. 4.

<sup>13</sup> *Edwards v. Environment Agency* (No. 1) [2004] EWHC 736; [2004] 3 All ER 21.

<sup>14</sup> Legal Services Commission Funding Code Decision-Making Guidance, part C, sect. 5.5.

<sup>15</sup> Ibid, part C, sect. 5.5, para. 5 (e).

to challenge a claim by the Environment Agency and other respondents for £88,000 costs.<sup>16</sup> CAJE also comments on the reference by the Party concerned to the suggestion in the Legal Services Commission Funding Code Guidance that a legally aided person and an NGO act as co-claimants. CAJE points out that, if the claimants lose at trial, the court is likely to make them jointly liable for the defendant's costs and, given the legally aided person's modest circumstances, the NGO may be left to carry the full sum of the defendant's costs after all.

47. The Party concerned recognizes that, notwithstanding the substantial contribution of the legal aid system towards achieving compliance with article 9, paragraph 4, of the Convention, on its own, the system might not be sufficient to achieve complete compliance with this article of the Convention. It submits, however, that the legal aid system is to be assessed together with CFAs, PCOs and judicial discretion, discussed below.

#### *Conditional fee agreements*

48. The communicants allege that a CFA<sup>17</sup> is of limited value in judicial review proceedings because damages are not awarded in judicial review cases, meaning that, contrary to private nuisance cases where damages may be awarded, lawyers' costs cannot be paid out of such damages. Lawyers' costs in judicial review proceedings thus can only be paid if the defendant is ordered to pay the claimant's costs. With reference to the Sullivan Report and Lord Justice Jackson's preliminary report,<sup>18</sup> the communicants allege that a CFA thus is not viable if a PCO is in place which caps the costs of both parties, which is what courts usually do, courts being reluctant to cap only the defendant's costs. The communicants further allege, with reference to Lord Justice Jackson's preliminary report,<sup>19</sup> that after-the-event (ATE) insurance does not provide a solution because it either is not available in environmental judicial review cases or is "expensive, complex and potentially unfair".

49. The Party concerned accepts that there are potential limitations in the use of CFAs in environmental cases (as, for example, recognized in Lord Justice Jackson's preliminary report, chapter 36), which prevent them from constituting a complete solution to the

<sup>16</sup> R (Edwards and Pallikaropoulos) v. Environment Agency [2006] EWCA Civ 1138. The Court of Appeal dismissed the appeal. Due to the limited nature of her involvement, Mrs. Pallikaropoulos was ordered to pay £2,000 costs. She appealed the Court of Appeal's judicial review decision to the House of Lords and sought a PCO in respect of her appeal. In making the application she did not provide detailed evidence of her means, taking the view that it should be sufficient to "give a broad indication as to means". Her application for a PCO was refused, with the Appeals Committee stating that "information about the applicant's means, about the identity and means of any who she represents" was relevant and that the Appeals Committee "do not consider the suggested protective costs orders regarding costs appear proportionate on the information which is before them and in the light of the nature of the issues involved; and they do not consider that any case has been made for saying that the proposed appeal would be 'prohibitively expensive' or that Directive 2003/35/EC would be breached without a special order" (Letter of Judicial Office dated 22 March 2007, cited in the Respondents' Grounds of Application for a Cost Assessment, 11 February 2010, paras. 12–13). Mrs. Pallikaropoulos ultimately lost the judicial review appeal in the House of Lords. R (Edwards and Pallikaropoulos) v. Environment Agency [2008] UKHL 22. She is currently seeking to challenge £88,000 costs claimed by the Environment Agency and other respondents.

<sup>17</sup> See paragraph 98 below for an overview of CFAs in the law of England and Wales.

<sup>18</sup> *Review of Civil Litigation Costs*, Preliminary Report by Lord Justice Jackson, May 2009 (hereafter the Jackson preliminary report), part 7, chapter 36, p. 336, para. 4.5, which refers to chapter 10 of the Sullivan Report.

<sup>19</sup> Jackson preliminary report, part 7, chapter 36, p. 336, para 4.4 and (on private nuisance cases) p. 333 paras. 3.2–3.8.

problem of costs. The Party concerned contends that nevertheless, in a range of cases, they facilitate access to justice. It submits that a good example was *Morgan v. Hinton Organics*,<sup>20</sup> which was put before the Committee in communication ACCC/2008/C/23. In that litigation, the claimants had entered into a CFA with their solicitors, with the protection of ATE insurance to meet any liability for the defendants' costs arising from the litigation.

*Protective costs orders*

50. The communicants and CAJE submit that PCOs<sup>21</sup> represent a significant development and, if sufficiently modified, would be capable of forming the basis of a costs system which would comply with the Convention. In theory, they submit, a PCO can provide early certainty on the limits of a claimant's costs liability and, by controlling the level involved, ensure that costs exposure will not be prohibitively expensive in line with the Convention. However, as the law currently stands they consider that PCOs do not sufficiently support access to justice to ensure that the Party concerned is in compliance with article 9, paragraph 4, of the Convention.

51. The communicants furthermore submit that the costs of an application for a PCO can themselves be prohibitive for many organizations.

52. CAJE submits that the Convention recognizes the existence of a general public importance in allowing members of the public to vindicate the rule of law in environmental matters and that PCOs should (subject to issues of fairness/equity) be available in all environmental cases at a level that is capable of ensuring that access to justice is not prohibitively expensive. It furthermore submits that any concern that, if PCOs were to become more readily available, it might "open the floodgates" is unwarranted, because in judicial review proceedings it is necessary to obtain the court's permission to bring a case and the court will not grant permission if a case is frivolous or vexatious or is not properly arguable or unmeritorious.

53. CAJE also submits that the inclusion of pro bono representation as a factor in whether to grant a PCO is of concern. CAJE does not consider it appropriate that in litigation expressly recognized by the courts to be of public importance, NGOs (and their lawyers) are expected to work for free.

54. CAJE also submits that in the rare cases in which a PCO is granted, the level of costs imposed on the claimant is too high. For example, in *R (on the application of the British Union for the Abolition of Vivisection) v. Secretary of State for the Home Office*,<sup>22</sup> the Court capped the claimant's liability at £40,000 (as opposed to the £20,000 it had asked for) on the basis of the financial resources of the parties and the likely costs involved in the case. CAJE also refers to the costs cap of £20,000 in *Buglife*, referred to above in paragraph 43, which represented nearly 5 per cent of the charity's income for the previous year.

55. In addition, CAJE submits that the courts' decisions to impose cross-caps on defendants' costs liability make litigation even more difficult for NGOs, particularly when their solicitors are working on a CFA (see para. 48 above).

56. CAJE submits that the rules concerning individual liability mean that community groups are often obliged to incorporate themselves (i.e., become a limited company) in order to limit the personal liability of their members for legal costs, a process that involves additional time, bureaucracy and expense.

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<sup>20</sup> *R (Francis Morgan) v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107.

<sup>21</sup> See paras. 99–104 below for an overview of the law in England and Wales relating to PCOs.

<sup>22</sup> *R (on the application of the British Union for the Abolition of Vivisection) v. Secretary of State for the Home Office* [2005] EWHC 530 (Admin).

57. CAJE notes that even with the relaxation of the *Corner House*<sup>23</sup> criteria, they remain those that must be satisfied before the court *may* grant a PCO. They do not determine whether a court *should* make such an order. The latter remains a discretionary matter for the judge.

58. The Party concerned points to the relatively recent development of PCOs, and to the evolution of practice regarding PCOs since *Corner House*. With reference to decisions in *R (Compton) v. Wiltshire Primary Care Trust*<sup>24</sup> and *Buglife*<sup>25</sup>, the Party concerned submits that the *Corner House* criteria are applied in a flexible manner; that “exceptionality” is a criterion that need not be met before granting a PCO; that a narrow public interest is sufficient to grant a PCO; that reciprocal cost caps do not need to be of the same amount; and that the requirement that there be no private interest is not strictly applied. It furthermore points out that the pro bono factor is merely a favourable indicator, not a requirement for obtaining a PCO.

59. The Party concerned submits that PCOs offer certainty from an early stage, and the level of the cap, and any cap on the claimants’ entitlement to recovery, may be tailored appropriately so as to avoid any meritorious claim being stifled.

60. The Party concerned furthermore submits that although PCOs are subject to the public interest requirement, this requirement is apt to embrace environmental cases and that claimants in environmental cases have increasingly availed themselves of PCOs.

#### *Judicial discretion*

61. The communicants and CAJE submit that by relying on judicial discretion to determine cost issues, the Party concerned fails to comply with its obligation to ensure that access to justice is not prohibitively expensive for claimants in accordance with article 9, paragraph 4, of the Convention. CAJE submits that no matter how widespread a discretionary practice may be, there is always risk and lack of certainty unless there are binding rules to ensure that claimants’ costs in environmental cases are not prohibitively expensive.

62. The communicants and CAJE contend that the ruling by the Court of Appeal in *Morgan v. Hinton Organics*<sup>26</sup> illustrates that courts enjoy considerable discretion in the application of the Convention. In *Morgan*, the Court of Appeal held that the principles of the Convention are “at most” a factor which it “may” (not must) take into account, “along with a number of other factors, such as fairness to the defendant”. In the view of the communicants and CAJE, the critical point is that there is no rule of court or practice in the law of England and Wales which says the courts must ensure compliance with the Convention, it at best being one of many factors that must be taken into account, a position reiterated in *Wiltshire v. Swindon Borough Council*.<sup>27</sup> CAJE also refers to the decision of the Court of Appeal in *Littlewood v. Bassetlaw District Council*.<sup>28</sup> In that case, the Court of Appeal, when considering expenses, looked at the defendant’s position, including the expense it had been put to. CAJE submits that this is not what the Convention means. What these cases illustrate, according to the communicants and CAJE, is that while it is evident

<sup>23</sup> R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600.

<sup>24</sup> R (Compton) v. Wiltshire Primary Care Trust [2008] EWCA Civ 749.

<sup>25</sup> R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd [2008] EWCA Civ 1209.

<sup>26</sup> R (Francis Morgan) v. Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107.

<sup>27</sup> R (on the Application of Wiltshire Branch of the Campaign to Protect Rural England, Geoff Yates) v. Swindon Borough Council [2009] EWHC 1586.

<sup>28</sup> R (on the Application of Littlewood) v. Bassetlaw District Council [2008] EWHC 1812 (Admin).

that the Convention is a matter which may be taken into account, it is one of a number of factors, and is not mandatory. CAJE contends that such discretion is insufficient to ensure compliance with the Convention.

63. CAJE accepts the Party concerned's submission that there needs to be some discretion when dealing with costs in litigation. It accepts that there may, for example, need to be some discretion in evaluating what in a particular case would be prohibitive expense. It submits, however, that absolute and total discretion, as recognized by the House of Lords in *Bolton*<sup>29</sup> ("the fundamental rule is that there are no rules") is not acceptable.

64. CAJE contends that the Party concerned (and indeed the Court of Appeal in *Morgan and Littlewood*) suggests that "prohibitive expense" somehow includes a notion of fairness to the defendant. CAJE contends that this is a misreading of article 9, paragraph 4, of the Convention and submits that the word "fairness" in article 9, paragraph 4, of the Convention refers to prohibitive expense to the claimant.

65. In this regard, CAJE refers to the July 2009 decision by the European Court of Justice (ECJ) in *EC v. Ireland*<sup>30</sup> holding that, in the absence of a binding legal provision requiring procedures not to be prohibitively expensive, discretionary practice on the part of the courts does not adequately implement the equivalent provision to article 9, paragraph 4, of the Convention contained in Directive 2003/35/EC on Access to Justice.<sup>31</sup>

66. The Party concerned contends that the discretion the judiciary has in determining costs issues is a further factor in ensuring that costs are not prohibitively expensive in accordance with article 9, paragraph 4, of the Convention. The Party concerned also contends that as a matter of law, the courts are required to take into account the obligations under the Convention in exercising their discretion as to costs.

67. The Party concerned distinguishes reliance on judicial discretion in the United Kingdom from the judicial discretion at stake in the judgement of the ECJ in *EC v. Ireland*.<sup>32</sup> It submits that the test applied by the ECJ for the adequacy of transposition of a Directive is not that which the Committee should apply in assessing a Party's compliance with the Convention. The Party concerned furthermore points out that:

[i]t would be wholly inappropriate, and beyond the jurisdiction of this Committee, to seek to decide or to give an opinion on questions of EU law — including specifically, the question whether as a matter of EU law the Convention has become directly effective in [United Kingdom] law. In any event, even to the extent that the Convention has become part of EU law, EU law cannot affect the approach that

<sup>29</sup> *Bolton MDC v. Secretary of State for the Environment* [1995] 1 WLR 1176, 1178.

<sup>30</sup> *Commission of the European Communities v. Ireland* (Case C-427/07), Judgement of the Court (Second Chamber) of 16 July 2009, para. 94.

<sup>31</sup> CAJE informed the Committee that in 2005 it had submitted a complaint to the European Commission regarding the United Kingdom's compliance with the Environmental Impact Assessment Directive and the Integrated Pollution Prevention and Control Directive (which apply the "not prohibitively expensive" requirement in article 9, paragraph 4, of the Convention to legal review procedures in respect of environmental impact assessment and integrated pollution prevention and control). On 18 March 2010, the European Commission issued the United Kingdom a Reasoned Opinion in respect of CAJE's complaint.

<sup>32</sup> *Commission of the European Communities v. Ireland* (Case C-427/07), para. 94.

Committee should take in its consideration of compliance of an international treaty (many of whose signatories are of course not even members of the EU).<sup>33</sup>

68. In its submissions dated 28 July 2009, the Party concerned submitted that the communicants had not brought before the Committee any recent environmental cases in which a PCO has been refused, in breach of article 9, paragraph 4, involving a claimant who was not otherwise eligible for legal aid or a CFA. Subsequently, by letter of 20 May 2010, CAJE informed the Committee of recent developments in *R (Edwards and Pallikaropoulos) v. Environment Agency* whereby Mrs. Pallikaropoulos, who had sought a PCO in respect of her appeal to the House of Lords but had been refused, was currently seeking to challenge £88,000 costs claimed by the Environment Agency and other respondents.<sup>34</sup>

*Cross-undertakings for damages regarding interim injunctions*

69. The communicants contend that courts in England and Wales generally require claimants seeking an interim injunction to protect the relevant environmental interest pending the substantive trial to provide a “cross-undertaking” in damages before an injunction will be granted. The communicants and CAJE submit that the potential requirement to give a cross-undertaking for damages means that injunctive relief may not be available without risking prohibitive expense to claimants as required under article 9, paragraph 4, of the Convention.

70. The Party concerned submits that the manner in which its courts approach the granting of interim relief does not give rise to non-compliance with article 9, paragraph 4, of the Convention. It submits that there are very good reasons why, in general, a cross-undertaking in damages is required. It points to the fact that granting interim relief can have severely adverse consequences for individuals and other private parties who have the benefit of the measure under challenge. Moreover, it points out that there is no set rule requiring a cross-undertaking and that its courts have wide discretion to adopt the course which seems most likely to minimize the risk of an unjust result. The courts have jurisdiction to, and do, grant interim relief despite the absence of a cross-undertaking in damages, having regard to the public importance of the issues raised.

71. The Party concerned also submits that in the typical case of a challenge to a planning permission, the mere bringing of proceedings (even without seeking interim relief) in the majority of cases acts as a stay on the proposed development. This is because if the developer builds in the face of a challenge to his permit, he does so at his own risk of having to later remove it.

**C. Challenging acts of private individuals that breach environmental law — article 9, paragraph 3**

72. The communicants claim that the Party concerned fails to provide sufficient access for members of the public to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention.

<sup>33</sup> See oral submissions by the Party concerned on 24 September 2009, available at: <http://www.unece.org/env/pp/compliance/C200833/correspondence/FrUKReC33openingpresentationhearing.doc>.

<sup>34</sup> See footnote 16 above.

73. The communicants note that it is possible under the law of the Party concerned to bring a private criminal prosecution. They submit, however, that there are limitations on the use and the usefulness of this right. First, not all breaches of environmental laws amount to a criminal offence. Second, the State prosecutor can take over the private prosecution and then subsequently decide to drop the case. Third, in some cases consent to proceed with a criminal prosecution must be obtained. Fourth, for a private person or organization to prepare a criminal prosecution is not easy, among other reasons, because private individuals and organizations lack the powers to gather evidence which public prosecutors and State authorities have. Finally, the burden of proof in criminal prosecutions is high (proof beyond reasonable doubt, rather than on the balance of probability). As a result of these factors, the communicants submit, private criminal prosecutions are not very common.

74. The communicants point out that in many cases a breach of an environmental law is not a criminal offence; rather it leads to further administrative processes, such as enforcement notices. Failure to comply with such notices may eventually lead to a criminal offence being committed, but if the relevant authority does not issue such notices, there is generally no mechanism by which a member of the public can bring any kind of action directly against the perpetrator of the breach.

75. The communicants refer to *The Handbook on Access to Justice under the Aarhus Convention*, which states that article 9, paragraph 3: “does not state that members of the public can file lawsuits if permitted by national law. Instead, it grants the right to sue or complain and then permits parties to lay down ‘criteria’ if they wish to do so. If specific criteria are not laid down in national law, the logical interpretation would be that members of the public should be deemed to have the right to go to court or to an administrative body.”<sup>35</sup> The communicants submit, given that no specific “criteria” have been laid down by the Party concerned, according to the *Handbook*, the public should be deemed to have a right to go to court or to an administrative body.

76. The communicants, with reference to *The Aarhus Convention: An Implementation Guide*<sup>36</sup> and the *Simplified Guide to the Aarhus Convention*,<sup>37</sup> note that the rights of action against private individuals under article 9, paragraph 3, of the Convention may be administrative or judicial procedures, i.e., they do not necessarily have to be a court process and can be in the form of direct or indirect enforcement. However, “for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be said that the member of the public has access to such procedures.”<sup>38</sup>

77. The communicants submit that in other EU member States it is quite common to allow the acts and omissions of private persons to be challenged. For example, in France, registered environmental organizations may act as plaintiffs in criminal proceedings and also bring civil claims against private persons where environmental laws have been violated, on the condition that the action brought is to protect collective interests which are

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<sup>35</sup> Stephen Stec, ed., *The Handbook on Access to Justice under the Aarhus Convention*, the Regional Environmental Center for Central and Eastern Europe (Hungary: March 2003). Available at <http://www.unece.org/env/pp/a.to.j/handbook.final.pdf>.

<sup>36</sup> See footnote 4.

<sup>37</sup> *Your Right to a Healthy Environment: A Simplified Guide to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (United Nations publication, Sales No. E.06.II.E.9). Available at [http://www.unece.org/env/documents/2006/pp/ece%20mp%20pp%205\\_E.pdf](http://www.unece.org/env/documents/2006/pp/ece%20mp%20pp%205_E.pdf).

<sup>38</sup> *The Aarhus Convention: An Implementation Guide*, p. 130.

protected in the organization's statutory objectives.<sup>39</sup> The communicants submit that the Party concerned should follow this approach and that this could be done by amending the law on judicial review or by extending the new Regulatory Enforcement and Sanctions Act 2008 to include NGO rights of enforcement in public interest cases.

78. The Party concerned submits that article 9, paragraph 3, of the Convention does not require Parties to provide individuals with an unqualified right to bring a claim against a private person for breach of environmental law, but rather recognizes that national law may provide for criteria which need to be satisfied for such claims to be brought. The Aarhus Convention *Implementation Guide* also recognizes that while standing should be provided for certain members of the public to enforce environmental law, such enforcement can be "direct or indirect".

79. The Party concerned points to the availability of various administrative and judicial procedures. These include reporting potential breaches of environmental legislation to the appropriate authorities, submitting a complaint to the Parliamentary Commissioner for Administration (Parliamentary Ombudsman), criminal proceedings under section 82 of the Environmental Protection Act, pressing relevant authorities to initiate criminal proceedings under various environmental acts, bringing a claim in the civil courts for private or public nuisance, under the rule in *Rylands v. Fletcher*,<sup>40</sup> for breach of specific statutory provisions, or a claim for negligence.

#### **D. Rules on timing in judicial review procedures — article 9, paragraph 4**

80. The communicants claim that the requirement in CPR 54.5 to file an application for judicial review "promptly and in any event no later than three months" does not meet the obligation under article 9, paragraph 4, of the Convention to ensure that all access to justice procedures which fall within the Convention are fair, equitable and timely and to provide adequate and effective remedies.

81. The communicants claim that the current time limits set by the CPRs in England and Wales are overly restrictive. Firstly, three months is a very short time within which to apply for judicial review (compared, for example, with one year in human rights cases). Secondly, the rules are unfair in imposing an almost arbitrary requirement for "promptness", which could mean almost anything, and which a claimant has no way of actually knowing and planning for before he/she makes the application, by which time it could be too late. Thirdly, the time limit starts running from the time of the act or decision that the complaint is made against, not from the time of the subjective knowledge of the complainant of that act or decision.

82. The communicants submit that CPR 54.5 should be changed to allow for longer, fairer and more equitable time limits by introducing a right to bring an action for judicial review by the end of a longer, clearly specified time period during which the potential claimant should reasonably have found out about the act or omission giving rise to the action. The communicants suggest that the timing rules of the Human Rights Act 1998 could be followed, and a general time limit of one year for bringing environmental review actions could be introduced, with a shorter time limit of, say, six months for matters which are predominantly of a planning nature and need to be dealt with more quickly in the public interest. However, as in the Human Rights Act 1998, in both cases there should be judicial discretion to extend the time limit if that is equitable having regard to all the circumstances.

<sup>39</sup> Case of the Court Cass., SCI Les Chênes, 26 September 2007.

<sup>40</sup> *Rylands v. Fletcher* (1865–1866) L.R. 1 Ex. 265.

Time limits for judicial review claims should allow for claimants to first follow rules on the exhaustion of all other remedies or to comply with necessary pre-action protocols. The communicants furthermore submit that if an Aarhus Act was introduced, then that act could codify the timing rules in the same way as it would codify extended grounds for judicial review and different costs rules.

83. The communicants submit that the Port of Tyne case illustrates that the time limits applicable in the law of England and Wales are unfair. It is now too late to bring an action for judicial review in that case even though the communicants were in constant contact with the relevant authorities with regard to the licence issued in 2004, the deposit of dredged material and capping layers placed in 2005 and the sand and silt deposited in 2006; nevertheless, for practical and evidential reasons they were unable to bring a claim within the time limits stipulated for judicial review actions.

84. The Party concerned does not accept that the requirement for bringing a judicial review claim “promptly” causes uncertainty or unfairness for a claimant. It submits that the rule is well understood in practice and points to the public interest, which requires speed and certainty regarding the outcome of judicial review applications, particularly where third parties may be affected. It submits that the timing rules strike a reasonable balance between administrative expediency and fairness to litigants. It furthermore points out that the rules on timing are not applied inflexibly — time limits may be extended if there is good reason for the delay. The Party concerned notes that CPR 54.5 (1) was considered by the European Court of Human Rights in *Lam v. United Kingdom*, and the United Kingdom was not held to be in breach of article 6 of the European Convention on Human Rights and Fundamental Freedoms.<sup>41</sup>

85. The Party concerned submits that the Port of Tyne situation does not provide any indication that the rules on timing are unfair. It also submits that if there is ongoing illegality on the part of a public body, such illegality would be subject to judicial review. Moreover, it submits that it is not inherently unfair not to allow a challenge now to a decision taken in 2004.

### **III. National legal framework**

#### **A. Review of substantive legality in judicial review proceedings — article 9, paragraphs 2 and 3**

86. In England and Wales, the standard of review applicable in judicial review procedures is largely governed by common law. Three grounds are generally recognized as providing the standards for judicial review: illegality, irrationality (*Wednesbury* test)<sup>42</sup> and procedural impropriety.<sup>43</sup> These grounds are neither exhaustive nor mutually exclusive.<sup>44</sup>

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<sup>41</sup> *Chung Tak Lam v. United Kingdom*, Application No. 41671/98, Decision of Fourth Chamber, 5 July 2001.

<sup>42</sup> *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223.

<sup>43</sup> *Council of Civil Services Unions v. Minister for Civil Services* [1985] AC 374.

<sup>44</sup> *Wheeler v. Leicester City Council* [1985] AC 1054, 1078 B-C.

87. What requires consideration in the present communication is if and to what extent the courts will consider substantive legality, “material errors of fact” having been recognized as a ground for judicial review by the courts of England and Wales.<sup>45</sup>

88. The *Judicial Review Handbook*<sup>46</sup> specifies a number of grounds for review falling under the two “substantive” heads of illegality and irrationality, including for error of law,<sup>47</sup> for regard to irrelevant considerations and failure to have regard to relevant considerations,<sup>48</sup> for jurisdictional error<sup>49</sup> and so on.

89. In respect of substantive legality, the so-called *Wednesbury* test and subsequent developments regarding that test are relevant. The *Wednesbury* test entails that the courts examine whether public authorities “have taken into account matters which they ought not to have taken into account or conversely have refused [...] or neglected to take into account matters which they ought to have taken into account” while thereafter “it may still be possible to say that [...] they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case I think the court can interfere.”<sup>50</sup>

90. The *Wednesbury* test has been criticized, including by the House of Lords, then the United Kingdom’s highest court,<sup>51</sup> for providing too limited a standard of review in judicial review cases.<sup>52</sup> It was also criticized by the European Court of Human Rights in *Smith and Grady v. the United Kingdom*<sup>53</sup> because:

[T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention.

91. Since the adoption of the Human Rights Act 1998, it has been suggested that, at least for cases involving fundamental human rights, the proportionality test might be the proper test to apply. This approach was advocated, among others, by Lord Steyn in *R v. Secretary of State for the Home Department, Ex Parte Daly*.<sup>54</sup>

<sup>45</sup> A leading case is *E v. Home Secretary* [2004] QB 1044, in which the Court of Appeal in paragraph 66 held: “In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result.”

<sup>46</sup> Michael Fordham, *Judicial Review Handbook* (5th edition, 2008).

<sup>47</sup> *R v. Hull University Visitor, ex p Page* [1993] AC 682.

<sup>48</sup> *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014.

<sup>49</sup> *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147.

<sup>50</sup> *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223.

<sup>51</sup> Since 1 October 2009, the Supreme Court is the Party concerned’s highest court.

<sup>52</sup> For example, Lord Cooke in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 held: “And I think that the day will come when it will be more widely recognised that [Wednesbury] was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.” (para. 32)

<sup>53</sup> *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493, para. 138.

<sup>54</sup> *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26, para. 27.

## B. Costs prohibitively expensive — article 9, paragraphs 4 and 5

92. In England and Wales, the general rule applicable to the allocation of costs, including in judicial review proceedings, is the “costs follow the event” rule. It entails that the losing party pay both its own costs as well as those of the successful party. Several measures, however, are in place to soften the effects of this rule. These include a system of legal aid, conditional fee arrangements, PCOs and judicial discretion. These four measures, as well as cross-undertakings in damages, will be addressed below.

### *General rule “costs follow the event”*

93. The general rule that “costs follow the event” is contained in CPR rule 44.3, which states:

1. The court has discretion as to —
  - (a) whether costs are payable by one party to another;
  - (b) the amount of those costs; and
  - (c) when they are to be paid.
2. If the court decides to make an order about costs —
  - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
  - (b) the court may make a different order.

### *Legal aid*

94. Part C.5 of the Legal Services Commission Funding Code Decision-making Guidance<sup>55</sup> provides guidance regarding the availability of legal aid for cases involving the public interest. Applicants in such cases must still satisfy the financial eligibility test, which examines an applicant’s income and capital. Provided the financial eligibility test is met, the Funding Code Guidance advises that:

Different types of case may exhibit a public interest in different ways. For the purpose of the Funding Code, an important distinction must be made between two separate forms of public interest case:

- (a) there are certain types of case which by their nature always exhibit a degree of public interest. For example, this could be said of all applications for judicial review because it is in the general public interest for public authorities to act lawfully [...];
- (b) there are also individual cases which, on their own particular facts, can be said to bring benefits to a section of the public, i.e. persons other than the individual bringing the proceedings.<sup>56</sup>

95. In respect of judicial review cases, the Funding Code Guidance states that such cases are “treated as priority areas in the Code. Therefore, the Criteria for judicial review cases

<sup>55</sup> Legal Services Commission, *Funding Code: Decision Making Guidance*, [http://www.legalservices.gov.uk/docs/cls\\_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples\(Sections1-14\)Sept07.pdf](http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf)

<sup>56</sup> Ibid, Part C.5.1.2.

and claims against public authorities are less stringent in some respects than the Criteria in the General Funding Code.”<sup>57</sup>

96. In respect of other types of public interest case, the Funding Code Guidance states that funding may be available for individuals who satisfy the financial eligibility test provided the case has a “significant wider public interest”. A case with a significant wider public interest may be funded even if prospects of success are in the borderline merits category or if the individual case in question would not, by itself, be cost effective.<sup>58</sup> “Wider public interest” is defined as “the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question).”<sup>59</sup> Public interest carries with it a sense that large numbers of people must be affected. The Funding Code Guidance states that, as a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome.<sup>60</sup>

97. The Public Interest Advisory Panel of the Legal Services Commission, composed mainly of independent members with a strong interest in public interest litigation, interprets and applies the Funding Code Guidance and provides advice to the Legal Services Commission on which cases are eligible for judicial aid.<sup>61</sup>

#### *Conditional fee agreements*

98. Under the law of England and Wales, all legal proceedings (apart from family and criminal proceedings) can potentially be funded by a CFA.<sup>62</sup> CFAs take the form of an agreement between the solicitor and his or her client, under which the solicitor agrees to take the case on the basis that if the case is lost he/she will not charge or only charge a lower rate for the work carried out. However, if the case is successful, the solicitor can charge a success fee on top of his/her normal fee to compensate for the risk of losing the case and not being paid. The success fee can be added to the quantum of costs to be paid by the losing party, i.e., they are not deducted from any damages that may be awarded. It is open to a party to take out insurance against the possibility of being ordered to pay the other party’s costs and the success fee.

#### *Protective cost orders*

99. A PCO is an order of the court by which the potential costs liability of one or more parties in the event that they lose the case is fixed in advance of the hearing. Such costs can be fixed at any level and may be eliminated entirely — i.e., so there is no liability for costs at all. PCOs are judge-made law, created using the broad control over matters of costs that is conferred on the judges by section 51 of the Supreme Court Act 1981.<sup>63</sup>

<sup>57</sup> Ibid, Part C.5.1.3.

<sup>58</sup> Ibid, Part C.5.1.4.

<sup>59</sup> Ibid, Part C.5.2.1.

<sup>60</sup> Ibid, Part C.5.3.2.

<sup>61</sup> Milieu Ltd., *Measures on access to justice in environmental matters (Article 9 (3))*: Country report for United Kingdom, April 2007, p. 17.

<sup>62</sup> Response to the communication by the Party concerned, 30 July 2009.

<sup>63</sup> As noted by the Court of Appeal in *R (Compton) v. Wiltshire Primary Care Trust*, [2008] EWCA Civ 749.

100. The leading case on PCOs is *R (Corner House Research) v. Secretary of State for Trade and Industry*.<sup>64</sup> In that case, the Court of Appeal set out the following principles for PCOs:

- (a) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
  - (i) the issues raised are of general public importance;
  - (ii) the public interest requires that those issues should be resolved;
  - (iii) the applicant has no private interest in the outcome of the case;
  - (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
  - (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
- (b) If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.
- (c) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.<sup>65</sup>

101. The Court in *Corner House* held that a PCO should only be granted in the most exceptional circumstances.<sup>66</sup> It also held that “[t]he purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor, the liability of the defendant for the applicant’s costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors’ fees and a fee for a single advocate of junior counsel status that are no more than modest.”<sup>67</sup>

102. The criteria set out in *Corner House* have been further defined in subsequent case law and commented on in relation to environmental cases. These developments include the finding that environmental cases do not require special treatment under the *Corner House* criteria, regardless of the Convention.<sup>68</sup>

103. The criteria, especially the criteria cited in paragraph 100 (a) (i)–(iii) above and the “exceptional circumstances” criterion noted in paragraph 101, have been commented on by judges in both the case law<sup>69</sup> and in reports<sup>70</sup> as being problematic, also in the light of the Convention. Moreover, both in the case law and the reports, judges have urged the Civil Procedure Rules Committee to codify the procedure, also in the light of the Convention.

<sup>64</sup> *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

<sup>65</sup> *Ibid.*, para. 74.

<sup>66</sup> *Ibid.*, para. 72.

<sup>67</sup> *Ibid.*, para. 76 (ii).

<sup>68</sup> *R (Compton) v. Wiltshire Primary Care Trust*, [2008] EWCA Civ 749, para 24.

<sup>69</sup> E.g., in *R (Compton) v. Wiltshire Primary Care Trust* para 43, *R (Francis Morgan) v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, paras. 29 and 36, *R (Derek England) v. LB Tower Hamlets and others* [2006] EWCA Civ 1742, para. 14.

<sup>70</sup> E.g., the Sullivan report, the Jackson Report and the Report of the Working Group on Facilitating Public Interest Litigation chaired by Lord Justice Kay, “Litigating the Public Interest”, July 2006 (hereafter the Kay Report).

104. The judiciary has advocated the adoption of a flexible approach to the *Corner House* criteria in the meantime,<sup>71</sup> an approach that met with the approval of the Master of the Rolls in *Buglife*<sup>72</sup> and by the Court of Appeal in *Hinton Organics*.<sup>73</sup> This includes a flexible approach to the issuing of cross-caps. In *Buglife*, the Court of Appeal, referring to the Sullivan Report,<sup>74</sup> held:

We would certainly accept that there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases in which it would be unjust to do so. However, in *Corner House* this court laid down guidance which, subject to the facts of a particular case and unless and until there is a rule which has statutory force to the contrary, we must follow, albeit in a flexible way. That was the unanimous view of the court in *Compton*. It follows that, as the court put it in *Corner House*, the costs should in general be reasonably modest and the claimant should expect the costs to be capped as set out in [76 (ii) and (iii)] of the judgement in that case.<sup>75</sup>

The judiciary, however, has also referred to the limits of this flexible approach, indicating that “further development or refinement is a matter for legislation or the Rules Committee”.<sup>76</sup>

105. The Sullivan Report also points to the possible chilling effect that the cost of seeking a PCO (in the order of £2,500–£7,500 plus VAT) may have on claimants, given the risk that the PCO may be refused.<sup>77</sup> It questions whether such costs are compatible with the Convention.<sup>78</sup> The Sullivan Report moreover suggests that “a mechanism is required for claimants who could not face such a level of costs exposure to seek a preliminary PCO right at the beginning of the proceedings, limiting its costs exposure of applying for a PCO to an affordable figure (possibly zero). It would then have an opportunity to withdraw (if a PCO is refused) before it becomes exposed to costs.”<sup>79</sup>

#### *Judicial discretion*

106. In *Morgan v. Hinton Organics*, the Court of Appeal considered the role of judicial discretion in relation to costs, commenting on the judgement given by the Master of the Rolls in *Buglife*:

<sup>71</sup> E.g., *R (Compton) v. Wiltshire Primary Care Trust*, para. 23, and *R (Derek England) v. LB Tower Hamlets and others* [2006] EWCA Civ 1742, paras. 14–15.

<sup>72</sup> *R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd* [2008] EWCA Civ 1209, para. 17. The Master of the Rolls is the presiding officer of the Civil Division of the Court of Appeal and the second most senior judge in England and Wales.

<sup>73</sup> *R (Francis Morgan) v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107.

<sup>74</sup> Sullivan Report, appendix 3, paras. 4 and 5.

<sup>75</sup> *R (on the application of Buglife — the Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd* [2008] EWCA Civ 1209, paras. 24 and 25. *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600, in paragraph 76 (ii), held that the claimant should expect “the capping order to restrict it to solicitors’ fees and a fee for a single advocate of junior counsel status that are no more than modest” and in paragraph 76 (iii), “[t]he beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly”.

<sup>76</sup> E.g., the Court of Appeal in *R (Francis Morgan) v. Hinton Organics (Wessex) Ltd*, [2009] EWCA Civ 107, para. 47 (iv).

<sup>77</sup> Sullivan Report, appendix 3, paras. 11–14.

<sup>78</sup> *Ibid.*, para 14.

<sup>79</sup> *Ibid.*

He also indicated that the principles stated in *Corner House* were to be regarded as binding on the court, and were to be applied “as explained by Waller LJ and Smith LJ” (para. 19). We take the last words to be a reference to the comments of Waller and Smith LJ respectively that the *Corner House* guidelines were “not ... to be read as statutory provisions, nor to be read in an over-restrictive way” (*Compton* para. 23); and were “not part of the statute and ... should not be read as if they were” (para. 74). These comments reflect the familiar principle that: “As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule.” (per Lord Lloyd of Berwick, *Bolton MDC v. Secretary of State for the Environment* [1995] 1 WLR 1176, 1178; cited in *Corner House* at para. 27).<sup>80</sup>

107. The Court of Appeal in *Compton* noted that while PCOs were a discretionary order, it was unlikely that an applicant that fulfilled all the requirements would be refused.<sup>81</sup>

*Cross-undertaking as to damages regarding interim injunctions*

108. The general rule that the giving of a cross-undertaking for damages by the claimant is a prerequisite for the grant of an interim injunction was noted by the House of Lords in the 1975 decision of *American Cyanamid Co v. Ethicon Ltd.*<sup>82</sup> The House of Lords recognized, however, that when deciding whether to grant an interim injunction in an individual case, there may be special factors that should be taken into account.<sup>83</sup>

109. Courts in England and Wales have granted interim injunctions without a cross-undertaking for damages having been given;<sup>84</sup> there have also been cases in which the injunctive relief was refused due to the fact that the claimant was not in a position to provide a cross-undertaking in damages.<sup>85</sup> Judges enjoy a considerable amount of discretion as to whether a cross-undertaking for damages is required for the grant of an interim injunction.

### C. Challenging acts of private individuals that breach environmental law — article 9, paragraph 3

110. On the basis of the information put before it by the communicants and the Party concerned, the Committee understands that the ways in which a member of the public in England and Wales can challenge acts and omissions by private persons which contravene national environmental law include:

(a) Members of the public can report potential or alleged breaches of environmental legislation to the appropriate regulator. For example, in England and Wales, the Environment Agency will consider whether there is a need to investigate or take

<sup>80</sup> *R (Francis Morgan) v. Hinton Organics (Wessex) Ltd*, [2009] EWCA Civ 107, para. 33.

<sup>81</sup> *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749, para. 70.

<sup>82</sup> *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396.

<sup>83</sup> *Ibid*, judgement of Lord Diplock.

<sup>84</sup> *R v. London Borough of Lambeth, ex p Sybyll Walter*, 2 February 1989 unrep. Other cases put before the Committee in which the United Kingdom courts granted an interim injunction without a cross-undertaking as to damages include: *R v. Durham CC, ex p Huddleston* [2000] Env LR D21, *R v. Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 1 WLR 570, *R v. Secretary of State for the Environment, ex p Rose Theatre Trust Company* (1990) COD 47.

<sup>85</sup> *R v. Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds* (1997) Env. L.R. 431, *R v. Inspectorate of Pollution, Ex p Greenpeace Ltd* [1994] 1 WLR 570.

enforcement action against any person not found to be complying with legislation. There is no charge for this, but the member of the public cannot force the regulator to take action. Examples of this option include:

- (i) Section 80 of the Environmental Protection Act 1990 enables the local authority to serve an abatement notice where it is satisfied that a statutory nuisance exists or is likely to occur or recur. If a person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, they commit a criminal offence;
- (ii) A member of the public can complain to the local authority and informally request criminal proceedings to be brought under the Clean Air Act 1993<sup>86</sup> or the Noise Act 1996;<sup>87</sup>
- (b) Under section 82 of the Environmental Protection Act, a person aggrieved by a statutory nuisance can themselves bring proceedings in the magistrates' court against the person alleged to be responsible;
- (c) A claim may be brought in the civil courts for either public or private nuisance. Public nuisance is a criminal offence, but it can be an actionable civil matter where the claimant has suffered particular or special damage over and above the general inconvenience suffered by the public. A claim in private nuisance may be brought where there has been an interference with the claimant's enjoyment of their land, including damage or encroachment on their land;
- (d) A claim may be brought under the rule in *Rylands v. Fletcher*,<sup>88</sup> in which the court stated: "we think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape";
- (e) A claim for negligence exists (i.e., a breach of duty which has caused some reasonably foreseeable harm) if it can be established that the member of the public was owed a duty of care by the third party contravening environmental law;
- (f) Citizens may bring a private prosecution when a criminal offence has been committed. Examples of environmental criminal offences include breaches of water discharge permits or waste licences, or intentionally or recklessly killing or disturbing protected animals (see for example *R v. Anglian Water Services Ltd*).<sup>89</sup> Not all environmental laws amount to a criminal offence if they are broken, however. Moreover, the burden of proof in criminal prosecutions is a high one (proof beyond reasonable doubt, rather than on the balance of probability), and public authorities have powers to gather evidence that private individuals do not have;
- (g) In addition, a member of the public may bring a claim for damages for breach of certain specific statutory provisions. Examples include: sections 153 and 154 of the Merchant Shipping Act 1995 and section 73 of the Environmental Protection Act 1990;
- (h) Besides bringing a claim directly against a private party, a member of the public may also take action against a public authority who failed to act to stop a third party contravening national environmental law. Possible actions include:

<sup>86</sup> Clean Air Act 1993, section 55(2).

<sup>87</sup> Noises Act 1996, article 2(4).

<sup>88</sup> *Rylands v. Fletcher* (1865-1866) L.R. 1 Ex. 265.

<sup>89</sup> *R v Anglian Water Services Ltd* [2003]EWCA Crim 2243

- (i) An action against the public authority under article 7 of the Human Rights Act alleging that the authority has breached article 8 of the Convention by failing to respect private and family life;
- (ii) An application for judicial review of the authority's decision not to take action (e.g. *Lam v. United Kingdom*);<sup>90</sup>
- (iii) A complaint to the Parliamentary Commissioner for Administration (also known as the Parliamentary Ombudsman) who investigates complaints that injustice has been caused by maladministration on the part of Government departments or other public bodies. Cases concerning enforcement in relation to environmental requirements have been dealt with by the Parliamentary Ombudsman, including where a member of the public has complained that no enforcement action has been taken. The Parliamentary Ombudsman's decisions have persuasive force, but it would be extremely unusual for a public authority not to comply. Alternatively, a complaint could be made to the local authority ombudsman.

#### **D. Rules on timing in judicial review procedures — article 9, paragraph 4**

111. The procedural rules regarding timing in case of judicial review are set out in CPR Rule 54.<sup>91</sup> CPR 54.5 (1) states that an application for judicial review must be filed: “(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose”.<sup>92</sup>

112. CPR 54.5 (3) states that this rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review. For example, under sections 13 and 118 of the Planning Act 2008, applications for judicial review of decisions within the purview of that Act are to be made within six weeks of the decision.

113. An application for judicial review filed under CPR 54.5 may be refused even if filed within three months if the Court determines that in view of all the circumstances it was not made “promptly”. In *Andrew Finn–Kelcey v. Milton Keynes Council and Others*, the applicant had filed his application for judicial review four days prior to the end of the three month period. In its October 2008 judgement, the Court of Appeal upheld the lower court's finding that the claim had not been lodged promptly and so did not comply with CPR 54.5.<sup>93</sup> The Court of Appeal in *Finn–Kelcey* held:

As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraph (a) and (b) of that rule [CPR 54.5] are separate and independent of each other, and it is not to be assumed that filing within

<sup>90</sup> *Chung Tak Lam and Others v. United Kingdom*, Application No. 41671/98, Decision of Fourth Chamber, 5 July 2001.

<sup>91</sup> Civil Procedure Rules, Part 54, [http://www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part54.htm#IDAFFQZ](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part54.htm#IDAFFQZ).

<sup>92</sup> The House of Lords, in *Caswell v. Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738 held that, where the application for permission to seek judicial review is not made in compliance with CPR 54.5 (1), the delay is to be regarded as “undue delay” within section 31 (6) of the Supreme Court Act 1981. Under section 31 (6) of the Supreme Court Act 1981, where the Court considers that there has been undue delay in making an application for judicial review, it may refuse to grant permission for the making of the application or any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. (Supreme Court Act, 1981 [http://www.opsi.gov.uk/Acts/acts1981/PDF/ukpga\\_19810054\\_en.pdf](http://www.opsi.gov.uk/Acts/acts1981/PDF/ukpga_19810054_en.pdf))

<sup>93</sup> *Andrew Finn–Kelcey v. Milton Keynes Council and Another* [2008] EWCA Civ 1067, para. 29.

three months necessarily amounts to filing promptly.... The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker.<sup>94</sup>

114. When considering whether planning decisions not covered by the Planning Act or other similar legislation statutorily imposing a six-week limit for judicial review should nevertheless be held to a similar time limit, the Court of Appeal in the same case stated: “while there is no ‘six weeks rule’ in judicial review challenges to planning permissions, the existence of that statutory limit is not to be seen as necessarily wholly irrelevant to the decision as to what is ‘prompt’ in an individual case. It emphasises the need for swiftness of action.”<sup>95</sup>

115. The Court of Appeal concluded that the High Court:

... was correct in finding that this claim had not been lodged promptly and so did not comply with CPR 54.5. That, of course, is not necessarily the end of the matter. There may be considerations which mean that it is in the public interest that the claim should be allowed to proceed, despite the delay and the absence of any explanation for that delay. If there is a strong case for saying that the permission was ultra vires, then this court might in the circumstances be willing to grant permission to proceed. But, given the delay, it requires a much clearer-cut case than would otherwise have been necessary. I turn therefore to consider the substantive merits of the claim, which asserts a breach of both domestic and European law.<sup>96</sup>

116. After considering the substantive merits of the claim, the Court of Appeal concluded: “Even had there been the necessary promptness in lodging this claim for judicial review, I would not have granted permission to proceed on the substantive merits of the claim. It follows from that that the Appellant falls far short of establishing the sort of clear-cut case which would be necessary to persuade the court to override the breach of CPR 54.5 (1), given that this was a claim not filed promptly.”<sup>97</sup>

117. CPR 54.5 (1) was considered by the European Court of Human Rights in *Lam v. United Kingdom*.<sup>98</sup> Mr. and Mrs. Lam had sought leave to make an application for judicial review of a decision by the local authority not to take enforcement action against noises and smells from a neighbouring warehouse. The Lams had applied for judicial review four days less than three months after the decision and fifteen days after receiving official notice of the decision. In that case, the European Human Rights Court was asked to determine whether the fact that the Lams had been denied leave for judicial review on the grounds of delay despite applying within three months denied them legal certainty and was a breach of article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms. The Court held:

In so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the Court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court *ab initio*. They failed to satisfy a strict procedural requirement which served a public interest purpose, namely the

<sup>94</sup> Ibid, para. 21.

<sup>95</sup> Ibid, para 24.

<sup>96</sup> Ibid, para 29.

<sup>97</sup> Ibid. para 47.

<sup>98</sup> *Chung Tak Lam and Others v. United Kingdom*, Application No. 41671/98, Decision of Fourth Chamber, 5 July 2001.

need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions.”

## **IV. Consideration and evaluation by the Compliance Committee**

### **A. Legal basis and scope of considerations by the Compliance Committee**

118. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

### **B. Admissibility and exhaustion of local remedies**

119. The Committee finds the communication to be admissible.

120. With respect to those aspects of the communicants' submissions which relate to the legal system in England and Wales in general, the Committee finds that the general nature of those submissions means that considerations regarding the exhaustion of local remedies are not material.

121. The Committee notes the submissions made by the communicants with respect to the Port of Tyne situation. However, given the wide-ranging and systemic issues raised by the other more general aspects of the communication, the Committee decides to address its findings to the communicant's submissions which relate to the legal system in England and Wales in general. The Committee accordingly decides not to develop findings in respect of the Port of Tyne case.

### **C. Substantive issues**

122. The Committee is tasked with examining whether the Party concerned meets its obligations as a Party to the Convention. The Committee accordingly does not address the point raised by the communicants as to whether the Convention is directly applicable in the law of England and Wales by virtue of EU law and the ratification by the EU of the Convention (see annex I to the communication).<sup>99</sup> The Party concerned is bound through its own ratification of the Convention to ensure full compliance of its legal system with the Convention's provisions, even if, as noted by the Committee, applicable EU law relating to the environment should be considered to be part of the domestic, national law of a member State (ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 27).

#### **1. Review of substantive legality in judicial review proceedings — article 9, paragraphs 2 and 3**

123. Article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases.

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<sup>99</sup> Since the Treaty of Lisbon entered into force on 1 December 2009, the EU has superseded the European Community as Party to the Aarhus Convention.

124. Article 9, paragraph 3, of the Convention, as opposed to article 9, paragraph 2, of the Convention, does not explicitly refer to either substantive or procedural legality. Instead it refers to “acts or omissions [...] which contravene its national law relating to the environment”. Clearly, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision — be it substantive or procedural — in national law relating to the environment.

125. The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraphs 2 and 3, of the Convention, including, inter alia, for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of *Wednesbury* unreasonableness (see paras. 87–89 above). The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords,<sup>100</sup> and the European Court of Human Rights,<sup>101</sup> of the very high threshold for review imposed by the *Wednesbury* test.

126. The Committee considers that the application of a “proportionality principle” by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may go a long way towards providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review.

127. Given its findings in paragraphs 125 and 126 above, the Committee expresses concern regarding the availability of appropriate judicial or administrative procedures, as required by article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of England and Wales. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in non-compliance with article 9, paragraphs 2 or 3, of the Convention.

## 2. Costs prohibitively expensive — article 9, paragraphs 4 and 5

128. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner.

129. The Committee considers that the “costs follow the event rule”, contained in CPR rule 44.3 (2), is not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures. In this context, the Committee considers whether the effects of “costs follow the event rule” can be softened by legal aid, CFAs and PCOs, as well as by the considerable discretionary powers

<sup>100</sup> For example, Lord Cooke in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 para. 32.

<sup>101</sup> *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493, para. 138.

that the courts have in interpreting and applying the relevant law. At this stage, however, at least four potential problems emerge with regard to the legal system of England and Wales. First, the “general public importance”, “no private interest” and “in exceptional circumstances” criteria applied when considering the granting of PCOs. Second, the limiting effects of (i) the costs for a claimant if a PCO is applied for and not granted and (ii) PCOs that cap the costs of both parties. Third, the potential effect of cross-undertakings in damages on the costs incurred by a claimant. Fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration is not in and of itself given sufficient consideration.

130. While the courts in England and Wales have applied a flexible approach to *Corner House* criteria when considering the granting of PCOs, including the “general public importance”, “no private interest” and “exceptional circumstances” criteria, they have also indicated that, given the ruling in *Corner House*, there are limits to this flexible approach. The Committee notes the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action in respect of PCOs, also in view of the Convention (see para. 102 above). These calls have to date not resulted in amendment of the Civil Procedure Rules so as to ensure that all cases within the scope of article 9 of the Aarhus Convention are accorded the standards set by the Convention. The Convention, among other things, requires its Parties to “provide adequate and effective remedies” which shall be “fair, equitable [...] and not prohibitively expensive”. The Committee endorses the calls by the judiciary and suggests that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.

131. Within such considerations the Committee finds that the Party concerned should also consider the cost that may be incurred by a claimant in those cases where a PCO is applied for but not granted, as suggested in appendix 3 to the Sullivan Report.<sup>102</sup> The Committee endorses this recommendation.

132. The Committee also notes the limiting effect of reciprocal cost caps which, as noted in *Corner House*, in practice entail that “when their lawyers are not willing to act pro bono” successful claimants are entitled to recover only solicitor’s fees and fees for one junior counsel “that are no more than modest”.<sup>103</sup> The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.

133. A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of England and Wales, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds.<sup>104</sup> This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4.

134. Moreover, in accordance with its findings in ACCC/C/2008/23 (United Kingdom) and ACCC/C/2008/27 (United Kingdom), the Committee considers that in legal proceedings within the scope of article 9 of the Convention the public interest nature of the

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<sup>102</sup> Sullivan Report, appendix 3, para. 14.

<sup>103</sup> R (*Corner House Research*) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600, para. 76 (ii) and (iii).

<sup>104</sup> Sullivan Report, para. 73.

environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.

135. The Committee concludes that, despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. The Committee also notes the Court of Appeal's judgement in *Morgan v. Hinton Organics*, which held that the principles of the Convention are "at most" a factor which it "may" (not must) "have regard to in exercising its discretion",<sup>105</sup> "along with a number of other factors, such as fairness to the defendant".<sup>106</sup> The Committee in this respect notes that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.

136. In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial [...] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.

### **3. Challenging acts of private persons that breach environmental law — article 9, paragraph 3**

137. The Committee finds that, within the context of the present communication, it has not been sufficiently substantiated that within the legal system of England and Wales insufficient procedures are available to challenge acts of private individuals that breach the rights enshrined in the Convention. The Committee thus finds that, in the context of the present proceedings, the Party concerned is not in non-compliance with article 9, paragraph 3, of the Convention.

### **4. Rules on timing in judicial review procedures — article 9, paragraph 4**

138. The Committee finds that the three-month requirement specified in CPR rule 54.5 (1) is not as such problematic under the Convention, also in comparison with the time limits applicable in other Parties to the Convention. However, the Committee considers that the courts in England and Wales have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed "promptly" (see paras. 113–116). This may result in a claim for judicial review not being lodged promptly even if brought within the three-month period. The Committee also considers that the courts in England and Wales, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see para. 117). The justification for discretion regarding time limits for judicial review, the Party concerned submits, is constituted by the public interest considerations which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit

<sup>105</sup> Para. 47 (iv).

<sup>106</sup> Para. 44.

within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.

139. As was pointed out with regard to the costs of procedures (see para. 134 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e., the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable.

#### **5. Clear, transparent and consistent legal framework — article 3, paragraph 1**

140. Having concluded that the Party concerned fails to comply with article 9, paragraph 4, with respect to costs as well as time limits by essentially relying on the discretion of the judiciary, the Committee also concludes that the Party concerned fails to comply with article 3, paragraph 1, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement the provisions of the Convention.

## **V. Conclusion**

### **A. Main findings with regard to non-compliance**

141. The Committee finds that by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (see paras. 128–135).

142. The Committee also finds that the system as a whole is not such as “to remove or reduce financial [...] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider (see para. 136).

143. In addition, the Committee finds that by not ensuring clear time limits for the filing of an application for judicial review and by not ensuring a clear date from when the time limit starts to run, the Party concerned fails to comply with article 9, paragraph 4 (see para/139).

144. Finally, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4 of the Convention, the Party concerned also fails to comply with article 3, paragraph 1 (see para. 140).

### **B. Recommendations**

145. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned:

(a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 128–136 above to ensure that such procedures:

- (i) Are fair and equitable and not prohibitively expensive; and
- (ii) Provide a clear and transparent framework;

(b) Review its rules regarding the time frame for the bringing of applications for judicial review identified in paragraph 139 above to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.

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